



# States, the Law and Access to Refugee Protection

Fortresses and Fairness

— STUDIES IN INTERNATIONAL LAW —

Edited by

Maria O'Sullivan  
and Dallal Stevens

B L O O M S B U R Y

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# Preface

This book brings together a number of commissioned contributions by leading commentators in the field of asylum law, including a selection of the best papers presented at an international conference organised by Maria O'Sullivan and Susan Kneebone on refugee law and policy at the Monash Prato Centre in Italy in 2014 entitled 'Access to Asylum: Current Challenges and Future Directions'. The volume examines what we consider to be two of the most pertinent current challenges faced by asylum seekers in gaining access to international refugee protection: first, the obstacles to physical access to territory and, second, the barriers to accessing a fair and effective asylum procedure—which we have termed 'access to asylum justice'. In doing so, we have attempted to give readers a broad perspective on these issues. Thus, we chose contributors from a range of backgrounds, including academics from the fields of law, sociology and political science. We also sought the invaluable practical insight of non-governmental organisation (NGO) practitioners. Furthermore, while there is analysis of European legal and policy developments, the book also addresses law and practice in different regions including South Africa, the Middle East (Lebanon), Australia and the United States (US). Within Europe, we have included practical insights from the important border states of Hungary, Bosnia and Herzegovina and Croatia.

Refugee law and policy is a fast-moving area of law. We have made every attempt to provide an up-to-date analysis of the issues. To that end, the book deals with recent jurisprudence and developments that have not yet been analysed to any significant extent in the literature, such as the new asylum legislation in Turkey (the Law on Foreigners and International Protection 2014); the decision of the UK Supreme Court on fast track procedures (*Detention Action v Secretary of State for the Home Department* 2014); the decision of the High Court of Australia on the applicability of procedural fairness to the detention of asylum seekers at sea (*CPCF v Minister for Immigration and Border Protection* 2015), and the fluctuating legal approach to asylum seekers in the Levant countries of the Middle East. The information contained herein is accurate as of 30 June 2016.

We take this opportunity to thank a number of people for their contribution. We are grateful to Hart Publishing for commissioning the book and to Hart editorial staff: Bill Asquith, Sinead Moloney and Emily Braggins for their valued work on the volume. We acknowledge the contributors for their excellent chapters in this book. Particular recognition is given

to those working in small NGOs who devoted their personal time to this endeavour when, in some cases, confronting extremely difficult circumstances of increased migration to Europe in 2015–16. We also thank Susan Kneebone for her role in organising the conference, which was the springboard to this volume, and Natalie Kyneswood, who worked closely with us for several months undertaking the final formatting and style guide checks. Her assistance was invaluable.

Finally, we express our gratitude to our institutions—Faculty of Law, Monash University and the School of Law, University of Warwick—for their ongoing support of our research and work in the areas of asylum and refugee law and policy.

**Maria O’Sullivan**

Faculty of Law, Monash University  
Melbourne, Australia

**Dallal Stevens**

School of Law, University of Warwick  
Coventry, United Kingdom

July 2016

# List of Editors and Contributors

## *The Editors*

**Dr Maria O’Sullivan** is a Senior Lecturer in the Faculty of Law and an Associate of the Castan Centre for Human Rights Law at Monash University, Australia. She teaches Administrative Law, International Refugee Law and the Law of Armed Conflict. Prior to commencing her academic career, Maria worked as a Legal Adviser to the Australian Refugee Review Tribunal and is an Associate Member of the International Association for Refugee Law Judges. Her research focuses on a comparative analysis of Australian and European refugee law and practice. Maria’s publications include ‘The Ethics of Resettlement: Australia and the Asia-Pacific Region’ (2016) 20(2) *International Journal of Human Rights* and ‘Non-state Actors of Protection in Refugee law’ (2012) 24(1) *International Journal of Refugee Law*. Her work has been cited by the High Court of Australia and in various reports of the Australian Parliament on refugee legislation. She is also a regular contributor to media commentary and community debate on asylum in Australia.

**Dr Dallal Stevens** is a Reader and Director of Research at the School of Law, University of Warwick. Her research interests focus on refugee and asylum law and policy. She has published numerous books, peer reviewed journal articles, book chapters and reports, including *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell, 2004) and *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge, 2014) edited with Susan Kneebone and Loretta Baldassar. Recently, she has been considering the impact of globalisation on asylum and her current research is concerned with the protection of refugees and forced migrants in the Middle East, and the movement of people across the Mediterranean to Europe. Stevens’ work has been supported by external grants from the British Academy, the Arts and Humanities Research Board, and the ESRC. She has acted as an adviser to a number of national bodies, including the Home Office and Parliament and has served as a trustee for the former immigration law advisory agency in the UK—the Immigration Advisory Service—and for the Electronic Immigration Network. Stevens is on the editorial board of the *Journal of Immigration, Asylum and Nationality Law* and *Law and Humanities*.



*The Contributors*

**Deborah Anker** is Clinical Professor of Law and Director of the Harvard Law School Immigration and Refugee Clinical Program (HIRC). She has taught law students at Harvard for over 25 years. Author of a leading treatise, *Law of Asylum in the United States*, Anker has co-drafted groundbreaking gender asylum guidelines and *amicus curiae* briefs. Professor Anker is one of the most widely known asylum scholars and practitioners in the United States; she is cited frequently by international and domestic courts and tribunals, including the United States Supreme Court. Deborah Anker is a pioneer in the development of clinical legal education in the immigration field, training students in direct representation of refugees and creating a foundation for clinics at law schools around the country.

**Sergio Carciotto** has been the Director of the Scalabrini Institute for Human Mobility in Africa (SIHMA), a research centre based in Cape Town, since its establishment in April 2014. Sergio previously worked in South Africa for local NGOs and in Italy for the United Nations High Commissioner for Refugees. He holds an MA Degree in Development Studies from the University of the Western Cape in South Africa and an MA Degree in Refugee Rights and Migration Studies from La Sapienza University in Rome.

**Nadine El-Enany** is Senior Lecturer at Birkbeck School of Law, University of London, where she co-directs the Centre for Research on Law and Race. Nadine teaches and researches in the fields of migration law, European Union law and criminal justice. She has published widely in the field of EU asylum and immigration law. Her current research focuses on questions of race and criminal and social justice in migration, protest and death in custody cases. Nadine is Chair of the Runnymede Trust Emerging Scholars Race Forum. She has written for *Media Diversified*, the *Guardian*, *London Review of Books*, *Truthout*, *Left Foot Forward* and *Critical Legal Thinking*.

**Nula Frei** is working as a research associate at the Centre for Migration Law and the Swiss Centre of Expertise in Human Rights at the University of Bern, Switzerland. She has studied law and political science at the Universities of Bern, Fribourg, Zurich and Lille and is currently working on a PhD thesis on Identification and Protection of Victims of Human Trafficking in Asylum Procedures from a Human Rights Perspective.

**Constantin Hruschka** studied law, history and philosophy in Würzburg, Poitiers and Paris. Subsequently he worked as a scientific researcher at the Universities of Würzburg and Munich. After his bar exam in 2002, he also started working as a lawyer in Munich. Constantin is currently on special leave from the UNHCR where he worked as Associate Protection Officer

in the UNHCR Office in Nuremberg (2004–09) and thereafter as Legal Officer in the Office for Switzerland and Liechtenstein prior to joining the Policy Development and Evaluation Service (PDES) of UNHCR in Geneva (2013–14). Currently he works as the Head of the Protection department at the Swiss Refugee Council (OSAR) and is a Member of the Swiss Federal Commission on Migration (FCM). He is also a lecturer for European Law and European Asylum Law at the Universities of Fribourg (Switzerland) and Bielefeld (Germany).

**Júlia Iván** holds a Masters in Law and Political Sciences in 2006 at the Eötvös Lóránd University in Budapest. She worked at the Hungarian Helsinki Committee (HHC) for nine years (2007–16) as a legal officer in the refugee programme. She was in charge of co-ordinating the lawyers' network of the HHC, which deals with several hundreds of asylum applicants each year. As a co-ordinator she was responsible for providing strategic guidance and updates on international legal developments for practitioners. Her main areas of work were drafting human rights reports on Hungary, on access to protection in the UNHCR-funded border monitoring programme and the protection of unaccompanied minor refugees. Besides individual case management and project co-ordination she also regularly delivered training to border guards, lawyers and judges with the HHC. She continues to work as an independent legal expert and researcher on migration.

**Corey R Johnson** holds a BSc in Political Science from the University of Wyoming, an MA in International Policy from La Trobe University and an LL.M. in Human Rights Law from Monash University. He currently works in the Advocacy Programme at the Scalabrini Centre of Cape Town and has worked with refugees and migrants in Australia and South Africa.

**Linda Kirk** is the Deputy Director and Sub-Dean of the Migration Law Program at the ANU College of Law, Australian National University, and a Visiting Fellow of the Refugee Law Initiative, School of Advanced Study, University of London. She was a Senior Member of the Australian Migration Review Tribunal and the Refugee Review Tribunal from 2009–14. From 2002–08 she was a Senator for South Australia and the Deputy Chair of the Joint Standing Committee on Migration of the Australian Parliament. Linda was the Chair of the Australasian Chapter of the International Association of Refugee Law Judges (IARLJ) from October 2011 to July 2016, and is now a member of the Committee of the Asia-Pacific Chapter of the IARLJ. She is currently enrolled on the Doctor of Juridical Science degree at Monash University, and is writing her dissertation on consistency in refugee status determination.

**Maggie Morgan** is the Albert M Sacks Clinical & Advocacy Fellow at the Harvard Immigration and Refugee Clinic (HIRC). She previously worked

as a Clinical Fellow in the Health Law & Policy Clinic at Harvard Law School and clerked for the Honourable Nanette K Laughrey of the Western District of Missouri. She is a 2011 graduate of Harvard Law School, where she was a clinical student in HIRC and the Human Rights Clinic and interned at several international organisations including Asylum Access in Tanzania and the Supreme Court of Rwanda. Before law school, she earned an MA in International Relations at the University of Chicago, conducted research on the plight of migrant labourers in Jalisco, Mexico, and taught in Korea and Spain. She earned her AB from Harvard College, specialising in Government.

**Kris Pollet** is a senior legal and policy officer at the European Council on Refugees and Exiles (ECRE); a pan-European network of 82 organisations assisting asylum seekers and refugees in 37 European countries. Before joining ECRE he worked as a legal officer at Amnesty International's EU Office and the Flemish Refugee Council and as a research assistant at the European Institute, Faculty of Law, University of Gent. He is currently coordinating ECRE's legal and policy work on the Common European Asylum System as well as with regard to the activities of EASO and Frontex.

**Selma Porobić** holds a double MD and a PhD degree in Migration Studies focusing on forced migration from Lund University, Sweden, and is a Director of Centre for Refugee and IDP studies at the Faculty of Political Sciences, University of Sarajevo, Bosnia and Herzegovina. She has over 10 years' academic experience in the field and has produced a number of papers, books and educational events focusing on refugee experiences, psychological impacts of forced migration, forced migration research methods and refugee protection. Her current research interests range from return migration to Bosnia and other post-conflict areas, to asylum and refugee integration policies and practices in the Western Balkans region.

**Cavidan Soykan** works in the Faculty of Political Science Human Rights Centre at Ankara University. She has completed a PhD in Sociology at the University of Essex and holds a Bachelor and a Master's degree in Politics from Ankara University as well as certificates in International Human Rights Law from the European University Institute and the International Institute of Human Rights. The focus of her doctoral research is on Turkey's asylum system, exploring how it works and how asylum applicants experience it. Through the in-depth interviews with asylum applicants mainly from Iran, Iraq, Afghanistan, Somalia and Sudan, her study aims to explore people's asylum trajectories and the lived experiences of asylum and migration law in Turkey.

**Drago Župarić-Iljić** holds an MA degree in Sociology and Social Anthropology from the Central European University in Budapest, Hungary. He is currently a PhD candidate in Sociology at the Faculty of Humanities and

Social Sciences, University of Zagreb (Croatia). He works at the Institute for Migration and Ethnic Studies in Zagreb as a junior research assistant. He has published articles, books and reports in the field of forced migration, asylum and refugee studies, as well as on the topics of ethno-national minorities and foreigners' integration policies and implemented practices in Croatia.

# *Abbreviations*

AAT	Administrative Appeal Tribunal (Australia)
AATA	Administrative Appeals Tribunal Act 1975 (Australia)
AIDA	Asylum Information Database
AITP	Act on International and Temporary Protection (Croatia)
ANC	African National Congress
BiH	Bosnia and Herzegovina
CAT	Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CBP	Customs and Border Patrol (US)
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CJ	Chief Justice
CJEU	Court of Justice of the European Union
COI	Country of Origin Information
CoE	Council of Europe
CPT	Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CTRRO	Cape Town Refugee Reception Office
DFT	Detained Fast Track (UK)
DFID	Department for International Development (UK)
DGMM	Directorate General of Migration Management (Turkey)
DIBP	Department of Immigration and Border Protection (Australia)
DNSA	Detained Non-Suspensive Appeals (UK)
DPA	Dayton Peace Accords
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EMN	European Migration Network

EPIM	European Program for Integration and Migration
EU	European Union
Ex Comm	Executive Committee of the High Commissioner's Programme
FCC	Federal Circuit Court (Australia)
FRA	Fundamental Rights Agency
FTP	Fast Track Procedure (Australia)
FTR	Asylum and Immigration Tribunal Fast Track Procedure Rules 2005 (UK)
FTT	First Tier Tribunal (Immigration and Asylum Chamber) (UK)
GDP	Gross Domestic Product
GPS	Global Positioning System
HCA	High Court of Australia
HHC	Hungarian Helsinki Committee
IAA	Immigration Assessment Authority (Australia)
IAAAS	Immigration Advice and Application Assistance Scheme (Australia)
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Persons
ILO	International Labour Office
IMF	International Monetary Fund
IOM	International Organisation for Migration
NAAU	National Asylum Allocation Unit (UK)
NIA	Nationality Immigration and Asylum Act 2002 (UK)
NGO	Non-Governmental Organisation
MA	Migration Act 1958 (Australia)
MHRR	Ministry of Human Rights and Refugees (BiH)
MoI	Ministry of Interior (Croatia)
MoS	Ministry of Security (BiH)
MP	Member of Parliament
MPA	Maritime Powers Act 2013 (Australia)
MRD	Migration and Refugee Division of the AAT (Australia)
MSAAA	Movement and Stay of Aliens and Asylum Act (BiH)
OAU	Organisation of African Unity
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OFPPA	<i>L'Office français de protection des réfugiés et apatrides</i>

OHCHR	Office of the United Nations High Commissioner for Human Rights
OIN	Office of Immigration and Nationality (Hungary)
OSCE	Organisation for Security and Cooperation in Europe
PAIG	Protection Application Information and Guides (Australia)
PJCHR	Parliamentary Joint Committee on Human Rights (Australia)
PSO	Protection Screening Officer (US)
RMA	Registered Migration Agent (Australia)
RRO	Refugee Reception Offices (South Africa)
RRT	Refugee Review Tribunal (Australia)
RRO	Refugee Reception Offices (South Africa)
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer (South Africa)
SCA	Supreme Court of Appeal (South Africa)
SSHJ	Secretary of State for the Home Department (UK)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPC	Tribunal Procedure Committee
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UMAs	Unlawful Maritime Arrivals (Australia)
UNODC	United Nations Office on Drugs and Crime
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
US	United States
USAID	United States Agency for International Development
WB	Western Balkans

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Faculty of Law and an Associate of the  
Castan Centre for Human Rights Law  
at Monash University.

Dallal Stevens is Associate Professor  
(Reader) of Law at the University  
of Warwick.