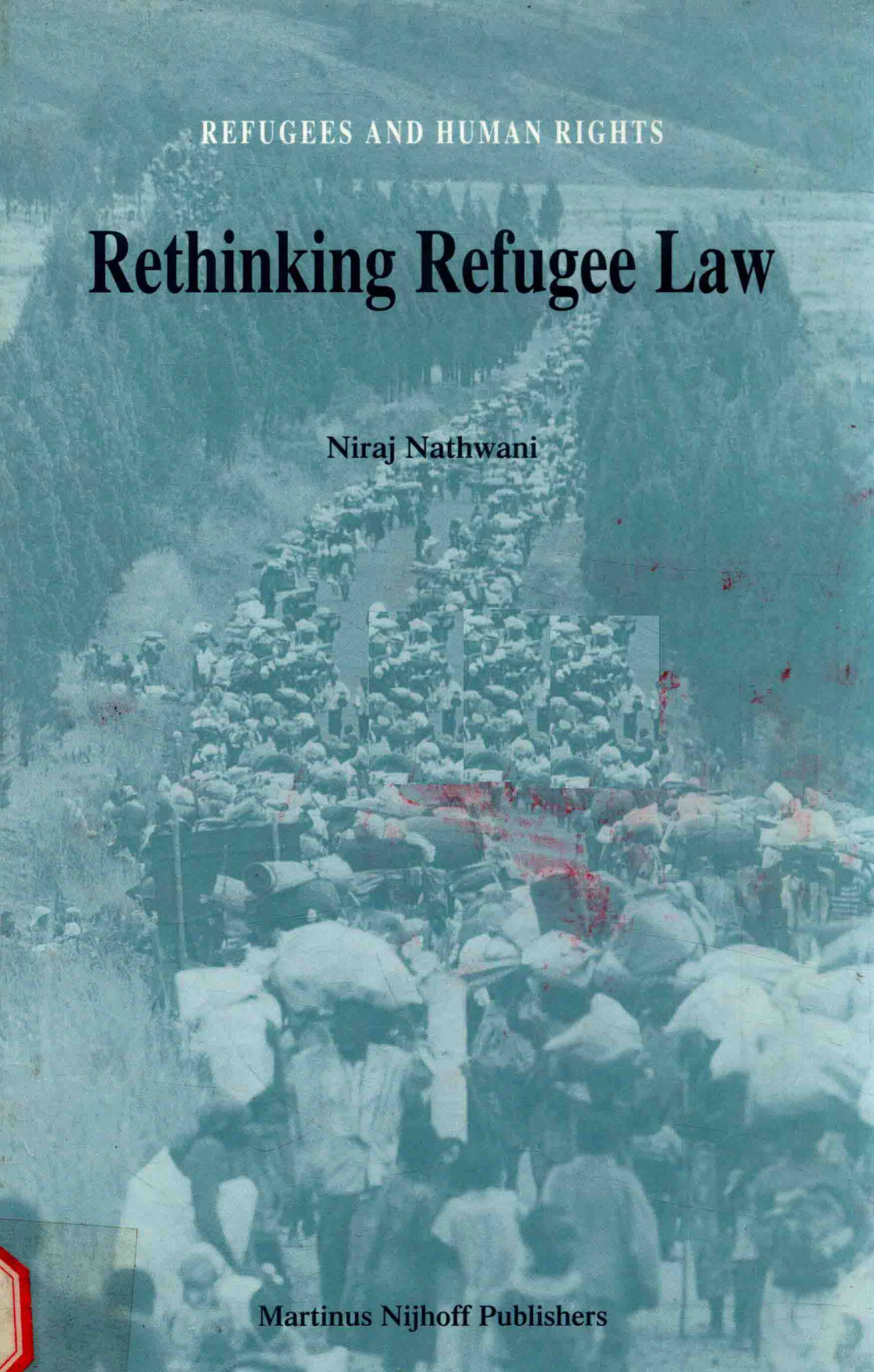
REFUGEES AND HUMAN RIGHTS

Rethinking Refugee Law

Niraj Nathwani



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RETHINKING REFUGEE LAW

By

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RETHINKING REFUGEE LAW

Refugees and Human Rights

Volume 7

The *Refugees and Human Rights* Series aims to meet the increasing need for literature which probes the nature and causes of forced migration, the modalities and procedures employed when refugees present themselves, and the manner in which the human rights of refugees are, or should be, promoted and protected.

For Sonal, Amit and my parents

PREFACE

Refugee status was bestowed on me at a very early stage in my life. At the age of two I came to Austria as a stateless refugee because my family had to flee Uganda due to the policy of General Idi Amin. I personally owe much to international refugee law. I am, therefore, concerned about current developments which, in my view, undermine its purpose. This book has been written in this spirit; my intention is to advocate a better appreciation of its purpose in the current political climate. In my opinion, a better understanding of the purpose of refugee law is a prerequisite for its effective implementation. I am confident that a better understanding of its purpose will also prove decisive in the political arena to convince fellow citizens of its value and significance.

Vienna, August 2002

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CONTENTS

CHAPTER 1

THE PURPOSE OF REFUGEE LAW

1.1 INTRODUCTION[1]

It is commonplace to state that refugee law faces a severe crisis.[2] Increasingly, refugee status is seen merely as an alternative path to immigration.[3] In this context, some tend to speak of the asylum-strategy of immigration.[4]

The asylum crisis is closely linked to the immigration debate that has, of late, forcefully entered the forefront of the political stage.[5] The immigration debate is complex and ideologically charged. According to some, the immigration debate is "obsessive, punitive, neurotic and, in its own terms, largely inexplicable"[6]. Indeed, there seem to be good arguments why immigration could be economically beneficial for the host society and hence is bound to increase in a global economy. Actually, anti-immigration propaganda does not seem to be based on sound economic argument, but on a mysterious pursuit of national homogeneity. Yet, nobody has been able to define what this homogeneity should be and how it could be defined convincingly and justifiably.[7] It is

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1 Chapter 1 was previously published as an article in the International Journal of Refugee Law, Oxford University Press. See N. Nathwani, 'The Purpose of Asylum' (2000) 12 International Journal of Refugee Law 3, pp. 354 - 379, by permission of Oxford University Press.

2 See G. Loescher (ed.), *Refugees and the Asylum Dilemma in the West*, Pennsylvania State University Press, Pennsylvania 1992, p.1 et seq.

3 The policies and practices during the 1980s and 1990s are indicative not just of a "restrictive trend", but of a fundamental change. They are largely dominated by visa requirements, restrictive admissibility criteria, safe third country removals, carrier sanctions and the emphasis on removal of failed asylum seekers. The underlying causes and responses on the basis of principles of international co-operation and solidarity do not feature prominently in the discourse. See G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Oxford University Press, Oxford 1996), p.191.

4 See C. Joppke, 'Asylum and State Sovereignty: A Comparison of the United States, Germany, and Britain', (1997) 30 Comparative Political Studies, p.263.

5 Claudena Skran notes that the climate of immigration restrictions also conditions the asylum crisis of the 1990s in Western Europe. It is no accident that the asylum crisis developed after the immigration stop in western Europe in the mid-1970s. C. M. Skran, 'The International Refugee Regime: The Historical and Contemporary Context of International Responses to Asylum Problems', in: G. Loescher (ed.), *Refugees and the Asylum Dilemma in the West* (Pennsylvania State University Press, Pennsylvania 1992), p.13.

6 Nigel Harris, *The New Untouchables - Immigration and the New World Order* (I.B.Tauris, London 1995), p.85.

7 Ibid., p. 203.

doubtful if all citizens of the host country actually fulfil the criteria, which are expected from foreigners willing to immigrate.[8] Without going into too much detail, it might be simple to acknowledge that, as a matter of fact, concern about immigration is growing rapidly, whatever the real reasons may be. This is especially true in Europe where the immigration policy has become the central issue of many election campaigns and is used by right wing political movements to gain votes and power. A restrictive immigration policy is already a political reality in the European Union (EU). Presently, no Member State of the EU is pursuing an active immigration policy.[9] The EU has merely reacted to perceived migratory pressures.[10]

The inherent tension between immigration control and refugee law can be traced back to the origins of refugee law in the 20th century.[11] People who flee their homes to seek safety elsewhere are not new to the twentieth century: this has existed earlier. According to the Oxford English Dictionary, the term "refugee" was first applied to the French Huguenots, victims of religious persecution who fled France after the revocation of the Edict of Nantes in 1695. However, refugee crises arose only in the 20th century. John Stoessinger sums up the problem in this way: "What distinguishes the refugee of the twentieth century is the immense difficulty, and often impossibility of finding a new home."[12] This difficulty has a name: restrictive immigration policy.

In legal terms, the areas of immigration law and refugee law differ in their legal structure: whereas immigration law is ruled by the principle of sovereignty, where every state is free to design and implement its own immigration policy, refugee law is characterised by various international obligations based on international law. While, under international law, a state is free to decide that it wishes no immigration, this level of discretion is not permitted under refugee law.

Does a restrictive immigration policy[13] entail an equally restrictive attitude towards the interpretation of refugee status? Or, is refugee law independent from immigration policy

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8 Harris notes the element of boasting and self-indulgence involved in characterising the national spirit. Thus, defining what constitutes the principle of the nation's homogeneity is arbitrary, given the cultural differentiation of a given population. Ibid., p.88

9 Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment, Official Journal of the European Communities C 274, 19.9.1996, p.3f.

10 See M. Baldwin-Edwards and M. A. Schain, 'The Politics of Immigration: Introduction', in: M. Baldwin-Edwards and M. A. Schain (eds.), *The Politics of Immigration in Western Europe* (Frank Cass & Co, Ilford, Essex 1994), p.9.

11 See C. M. Skran, *Refugees in Interwar Europe - The Emergence of a Regime* (Clarendon Press, Oxford 1995), p. 21ff.

12 John G. Stoessinger, *The Refugee and the World Community* (University of Minnesota Press, Minneapolis 1956), p. 6.

13 Before the recession in the early 1970s, immigration was hardly considered as problematic in Europe; see Baldwin-Edwards and Schain, The Politics of Immigration, n. 10 above, p.8f. During the 1960s and the

insofar as one is able to conceptualise a generous practice of refugee law even if one assumes the justification of a policy goal of strict immigration control[14]? In this context, it would be useful to reflect on the purpose of refugee law and how the answers provided to these questions could influence its interpretation. These are the central concerns that will be examined.

In an attempt to focus attention on these questions alone, for argument's sake, one may wish to assume that it is, indeed, justifiable to minimise immigration as a policy goal. Thus, one can avoid being trapped in a complex debate, ensuring that one does not lose sight of the forest for the trees. Ultimately, it might not be necessary to plunge into the ideologically charged immigration debate in order to defend refugee law. If refugee law can be defended under the assumption of the validity of immigration control, a possible argument in favour of immigration can only serve to strengthen the argument.[15] This might prove to be a valuable strategy, even though one might disagree with the assumption. The task is: can refugee law be immunised from the vagaries of the immigration debate?

Based on these considerations, a search will be conducted for a persuasive argument that justifies refugee law in the face of a presumably valid policy goal of immigration control. For this purpose existing theories will be analysed, which attempt to explain refugee law as it stands. If one understands the reason why it is necessary, in a moral and practical sense, to adhere to refugee law even though one is committed to a policy of immigration control, then a strategically valuable position will be gained in the debate on refugee policy and practice. It will also be easier to address and understand the conflict between immigration control and refugee law. It would also provide a better understanding of what is really at stake in refugee law, no matter what we think about immigration policy. This, in turn, can prove to be a valuable background against which to interpret refugee law.[16] Once a clearer understanding of the purpose of refugee law is

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beginning of the 1970s, different European countries actually made a conscious recruitment effort in a period of industrial expansion; see G. Brochmann, 'Migration policies of destination countries', in: G. Brochmann, *Political and demographic aspects of migration flows to Europe* (Council of Europe, Strasbourg 1993), p. 111.

14 By strict immigration control, I do not mean the policy of identity checks at borders. Rather I use the terms "policy of strict immigration control" and "restrictive immigration policy" as synonymous. In both cases, I refer to a policy which aims at restricting the immigration of aliens as much as possible.

15 Such arguments can be found for example in M. J. Trebilcock, 'The case for a liberal immigration policy', in: Warren F. Schwartz, *Justice in Immigration* (Cambridge University Press, Cambridge 1995), p.219-246.

16 This might figure as the purpose of refugee law. Art.31 of the Vienna Convention on the Law of Treaties says that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[emphasis added] UNDoc. A/CONF. 39/27, 63 AJIL 875 (1969). Given the fact that the 1951 Refugee Convention is a long term treaty, it is advisable to search for a sensible application in the present circumstances. On interpretation of human rights treaties, see H. J. Steiner and P. Alston, *International Human Rights in Context - Law, Politics, Morals* (Clarendon Press, Oxford 1996), p.35 et seq.

obtained, a teleological interpretation along these lines is possible - a method which offers solutions, especially for hard cases.[17]

An attempt is made to analyse the relationship between immigration policy and refugee law from a European perspective. While European immigration policy will serve as an example of a restrictive immigration policy, the fact is that most rich States attempt to restrict and regulate immigration. The conclusions of such an analysis could, therefore, be of relevance not only to Europe, but also to all countries wishing to pursue a restrictive immigration policy.

1.2 THE PROBLEM

As already stated, the States of Western Europe are attempting to restrict immigration. The Council of the European Union confirmed that "at present,..., no Member State is pursuing an active immigration policy. All States have, on the contrary, curtailed the possibility of permanent legal immigration for economic, social and thus political reasons."[18] If immigration were completely unregulated, there would be no need for refugee law in its present form. Every refugee could live freely like any other immigrant. It is precisely because States attempt to restrict immigration that refugee law is necessary.

The policy of the EU is a good example of how States control immigration. Under the Schengen Agreement[19], some European States agreed to gradually abolish person checks at internal borders in order to create "a free market without internal frontiers". As a compensatory measure, these States agreed to improve the checks at external frontiers in order to maintain control. The Schengen Agreement aims at ensuring a high level of control at its external borders. Here, it would be interesting to analyse the measures contained in the Schengen Agreement for improving control at external borders. The Schengen Agreement is also a good example of how a State can control its external borders.

First of all, crossing external borders is only allowed at certain points where checks can be carried out. Otherwise, border crossing is considered illegal. Art.3/1 of the

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17 Hard cases are cases about which informed people can reasonably disagree. J. W. Harris, *Legal Philosophies* (Butterworths, London 1980), p. 173.

18 Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment, Official Journal of the European Communities C 274, 19.9.1996, p. 3f.

19 Convention applying the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, 19 June 1990, published in Official Journal of the European Communities C 340, 10 November 1997, p. 96 et seq.

Schengen Agreement[20] reads: "External borders may in principle be crossed only at border crossing points during the fixed opening hours." Art. 6/1 reads: "Cross-border movement at external borders shall be subject to checks by the competent authorities."

Between crossing points, a system of surveillance should ensure that nobody manages to circumvent checks. Art. 6/3 of the Schengen Agreement reads:

> "The competent authorities shall use mobile units to exercise surveillance on external borders between crossing points; the same shall apply to border crossing points outside normal opening hours. This surveillance shall be carried out in such a way as not to encourage people to circumvent the checks at crossing points."

Art. 6/4 reads: "The Contracting Parties undertake to deploy enough appropriate officers to conduct checks and maintain surveillance along external borders." Art. 6/5 reads: "An equivalent level of control shall be exercised at external frontiers".

There is also a considerable number of illegal residents in the EU who have entered with a valid visa or residence permit, but have "overstayed". Others simply enter with valid travel documents, if their nationality is exempt from visa requirements for a short-term stay. This legal residence, however, becomes illegal, when the person concerned embarks on employment not authorised by the visa exemption or the visa obtained. In many cases, persons with a proper residence and work permit simply overstay their period of legal residence or violate residence regulations in other ways.[21]

The deterrence system attempts to discourage illegal immigration by enforcing two measures. First, every illegal immigrant is subject to punishment. Art. 3/2 reads:

> "The Contracting Parties undertake to introduce penalties for the unauthorised crossing of external borders at places other than crossing points or at times other than the fixed opening hours."

Secondly, every illegal immigrant is threatened with expulsion. Art. 23/1 reads:

> "An alien who does not fulfil or who no longer fulfils the short visit conditions applicable within the territory of a Contracting Party must in principle leave the territories of the Contracting Parties without delay."

Art. 23/3 reads:

> "Where such an alien has not left voluntarily or where it may be assumed that he will not so leave or if his immediate departure is required for reasons of national security or public policy, he must be expelled

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[20] Ibid.

[21] European Commission, COM (2001) 672 final dated 15.11.2001, p. 7.

from the territory of the Contracting Party within which he has been arrested as laid down in the national law of that Contracting Party."

It is important to note, at this point of the analysis, that the restrictive immigration policy relies essentially on a system of deterrence. To this end, mobile units patrol the borders with the purpose of detecting illegal immigrants. Within the territory, the police are expected to check the immigration status of migrants. Detected illegal immigrants are punished and expelled; thus, the threat intended to discourage illegal immigrants is maintained and made credible.[22]

Refugee law stands in direct opposition to concerns of immigration and border control. Art.31 of the 1951 Refugee Convention reads:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Art.33 of the 1951 Refugee Convention reads:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the 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."

As previously clarified, punishment and refoulement (expulsion) are the means used to discourage illegal immigration. However, the 1951 Refugee Convention prohibits exercising both measures against refugees.

The problem is that refugee law is perceived to obstruct the efficient implementation of immigration control. The need to distinguish between refugees and non-refugees before implementing any measures intended to serve as deterrents leads to the perception that refugee law is an obstacle to efficient immigration control insofar as it weakens the deterrence effects of the immigration control system. If an illegal immigrant hopes to be recognised as a refugee, this hope can be said to render the deterrence policy ineffective. This perception leads critics to demand a restrictive practice and interpretation of refugee law.[23] It is this perception that has caused the present crisis of refugee law.

These critical thoughts have taken root in a fertile political environment. Politicians have proven to be eager to cash in on populist sentiments based on envy, chauvinism and resentment. In practice, the Member States of the EU have shown in a series of political

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[22] Furthermore, states try to obstruct immigrants from arriving in their countries. Carrier sanctions and visa requirements fall into this category.

[23] For an articulate example of this reasoning, see L. J. Dietrich, 'United States Asylum Policy', in: D. A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff, Dordrecht 1988), p.67 - 73.

decisions that refugee law enjoys a much lower political priority than immigration control. In particular, procedural measures have been introduced to strengthen immigration control even where refugees might be the possible victims. Appeals to negative status determination decisions in the first instance do not enjoy a suspensive effect any longer. Claimants for asylum are kept in custody and treated as illegal immigrants until their refugee status is established. Strict visa requirements and carrier sanctions have been introduced which create legal obstacles both for refugees and illegal immigrants alike.[24] This process threatens to undermine refugee law.

The conclusions that can be drawn from the above argument are clear: it is advisable to avoid a conflict with policies of immigration control and search for an argument which can demonstrate that refugee law is compatible, even complementary, with a policy of strict immigration control. For this a convincing argument is needed to demonstrate why it is useful and desirable to receive refugees even though the policy goal of immigration control is firmly established and entrenched in political reality. It is time to reflect on a robust rationale for refugee law.

Looking at explanations of existing international refugee law by legal scholars, these "theories" of refugee law will be analysed with the aim of finding an explanation that satisfies the purpose at hand and persuasively justifies a generous refugee practice in the context of a strict policy of immigration control. What is sought here is a principle which trumps a restrictive immigration policy.

1.3 DIPLOMATIC PROTECTION

Typically, refugees lack diplomatic protection. This insight could be used to explain the importance of refugee law. According to Paul Weis, refugees are internationally unprotected persons in the sense that they do not enjoy the benefits of diplomatic protection because they are persecuted by the State. According to Weis, refugee law is designed to remedy precisely this problem: the lack of diplomatic protection because of persecution. Thus, the lack of diplomatic protection is an essential condition for the status of refugee.[25]

Weis explains developments in international law that have benefited stateless persons and refugees. He describes stateless persons and refugees as unprotected persons: stateless persons are *de iure* unprotected persons and refugees are *de facto* unprotected

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[24] See A. Cruz, *Carrier Sanctions in Five Community States: Incomptibilities Between International Civil Aviation and Human Rights Obligation* (Kirchliches Komitee für Migranten in Europa, 1991).

[25] P. Weis, 'Legal Aspects of the Convention of 28 July 1951 relating to the Status of Refugees' (1953), 30 British Yearbook of International Law, p. 480.