

פיקציה של (ה)ה תורה שירד

Tel Aviv University, Buchmann Faculty of Law
Examination in Refugee Law and Policy
(Answer guidelines for take-home Examination)

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Group I (Answer ONE of the following two questions, 50 points):

1. Israel has received over 13,000 asylum seekers during the past few years who have come from Egypt through the Sinai into Israel. The vast majority come from Sudan and Eritrea. What international legal obligations does Israel have to these asylum seekers? Can Israel return them to Egypt? Carefully examine the relevant provisions of applicable international instruments in setting forth your analysis.

ANSWER:

Both the Refugee Convention and the Torture Convention should be analyzed, in particular with regard to their respective and different non-refoulement obligations.

Article 33 sets out the non-return obligation with respect to refugees. The analysis should discuss each paragraph. Non-refoulement in the refugee context is also a matter of customary international law, and it is the core obligation undertaken by states that ratify the 1951 Refugee Convention and/or 1967 Refugee Protocol. Israel ratified both the Convention and the Treaty (in fact was among the early ratifiers and played an important role, through their negotiator, Nehemiah Robinson, in the drafting of the 1951 Convention). (5 pts.)

What is the scope of Article 33 with respect to the asylum seekers who have come through the Sinai from Egypt? Whether they are inside Israel's borders or present themselves at a port of entry (the latter is not the way these asylum seekers generally enter, but may be discussed), Israel has committed itself to complying with Article 33. The first paragraph sets out the broad non-refoulement obligation not to return a refugee "in any manner whatsoever." The second paragraph provides for two exceptions, where there are reasonable grounds for regarding a refugee as "a danger to the security" of the host country or is a "danger to the community" of that country having been convicted there of a "particularly serious crime." (15 pts.)

Since Article 33 obliges states not to return "refugees," the first determination that Israel must make is whether these asylum seekers are refugees. If Israel establishes a fair and effective refugee status determination procedure, then its determinations will lead to two outcomes: those determined to be refugees will be protected against return; those who are not determined to be refugees will not be so protected. (7 pts.)

Article 31 should be analyzed and discussed with regards to Israel's ability to impose penalties on refugees who entered the country unlawfully through its southern border. This article refers to those coming directly from a territory where their life or freedom was threatened. In this could the state claim that Egypt is not such a territory? The "good cause" requirement in this article should also be examined. (3 pts.)

In the very least, students should raise issues connected to Article 3 of the Torture Convention and they should set out the differences between the torture and refugee non-refoulement obligations.

2. Prepare a memo to your NGO, clinical or law firm supervisor outlining possible grounds on which the client whose case is discussed below might qualify as a refugee. You should make sure that you parse the relevant elements of the refugee definition and apply them to the facts of this case. There is no required format. One common format starts with three very brief sections (Issues or Questions Presented; Brief Answers; and a Brief Statement of Facts or Factual Background) followed by a well-developed analysis of the major legal issues. The analysis is the most critical part of the memo, as it explains why certain legal issues exist, what they are, and how they impact various forms of relief. It's helpful to guide your reader through that analysis with subheadings of the major elements you analyze. A legal memo generally ends with a very brief conclusion that follows from the analysis. Again, these are suggestions rather than directions; you should feel free to be creative in your approach.

In 2000 your client, along with several other taxi drivers, founded COTAXI, a cooperative organization of taxi drivers of about 150 members. COTAXI was designed to enable its members to contribute the money they earned toward the purchase of their taxis. It was one of five taxi cooperatives in the capital city of Ruritania. Between 2001 and 2008, your client held three management positions with COTAXI; his last position with the cooperative was that of general manager. During the time he was the general manager of COTAXI, he continued on the weekends to work as a taxi driver.

Starting around 2005, COTAXI and its drivers began receiving phone calls and notes requesting them to participate in work stoppages. The requests were anonymous, but your client and the other members of COTAXI believed them to be from anti-government guerrillas who had targeted small businesses in the transportation industry for work stoppages, in hopes of damaging Ruritania's economy. COTAXI's board of directors refused to comply with the requests because its members wished to keep working, and as a result COTAXI received threats of retaliation. Over the course of several years, COTAXI was threatened about 15 times. The other taxi cooperatives in the city also received similar threats.

Beginning in 2007, taxis were seized and burned, or used as barricades, and COTAXI drivers were assaulted or killed. Ultimately, five members of COTAXI were killed in their taxis by unknown persons. Three of the COTAXI drivers who were killed were friends of your client and, like him, had been founders and officers of COTAXI. Each was killed after receiving an anonymous note threatening his life. One of these drivers, who died from injuries he sustained when he crashed his cab in order to avoid being shot by his passengers, told his friends before he died that three men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him.

4. State protection – the answer should discuss whether the persecutor is a state or non-state actor (if non-state, is the state able or willing to protect client? How do the peace talks affect the state’s ability to protect client? According to the question the attacks have only “largely ceased” and no peace agreements were signed. What is the likelihood of future persecution? The answer should also examine and apply article 1(c)(5) of the refugee convention: have the circumstances that lead to client’s persecution ceased to exist? Would client be able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality? (10 pts.)
5. Structure of memo, presentation of facts and analysis (10 pts.)

Group II (Answer ONE of the following three questions, 50 points):

1. UNHCR celebrated the 40th anniversary of the 1967 Refugee Protocol last year. Analyze the significance of the Protocol as well as its limitations, particularly with respect to the protection needs of today’s forced migrants.

The main issues that students should address include:

The universalizing of protection by eliminating the temporal (events as of 1951) and geographic (Europe) limitations contained in the 1951 Refugee Convention. A discussion of why this happened is also useful. After UNHCR proved itself by ably handling protection issues in connection with the Hungarian refugees in 1956, the General Assembly asked HCR to use its “good offices” to provide assistance to refugee-like situations around the world, particularly in Asia and Africa. By the time that the Protocol is adopted by the General Assembly in 1967, UNHCR is responsible for almost one million refugees in Africa alone. When the 1951 Refugee Convention was adopted, hopes and expectations were that this would address a regional, time limited problem, and that refugee flows would come to an end. Eliminating the temporal and geographic limitations was a recognition of the reality that the displacement of forced migrants across international borders was an ongoing international phenomenon (25 pts).

With respect to limitations, the Protocol maintains the persecution definition of a refugee, even though the nature of refugee movements had evolved to include very large numbers of people fleeing conflict. By 1969, the Organization of African Unity (now the African Union) has adopted their own regional treaty that expanded the persecution definition to include those fleeing conflict and other forms of serious violence. In the early 1980’s, the Cartagena Declaration is announced to address the need to protect conflict refugees in Central America. Although the declaration is non-binding, many Latin American states go on to adopt the expanded definition in their national laws. The answer should recognize that the need for supplementary instruments revolves around the fact that the protocol does not help “forced migrants” such as victims of generalized violence, natural disasters or internal conflicts, nor was it ever intended to help them. An additional relevant limitation is that countries that originally

3. The African Union Convention Governing the Specific Aspects of Refugee Problems in Africa is the only treaty to extend protection to refugees beyond that provided in the global refugee convention and protocol. Discuss and assess how other states have addressed the protection of refugees who are not covered by global treaties. What recommendations, if any, would you make to a developed state to improve its policies towards this expanded group of refugees? Be sure to consider the problems that might arise under any such reforms. If you propose a more generous policy, explicitly address the magnet concerns that trouble policymakers. If you argue for the status quo, address any major protection problems in the current policy.

The Cartagena Declaration, and its adoption by a number of Latin American states may be discussed. The policies of developed states should be examined and compared. The United States offers Temporary Protected Status, while European Union states offer temporary or subsidiary protection both through individual and group determinations (the latter in emergencies only). These approaches expand the definition of a person in need of protection differently (the U.S., for example, includes those who cannot be returned temporarily in connection with a natural disaster). All such protection is discretionary. The U.S. TPS program is heavily influenced by politics. TPS also only protects citizens of designated nationalities who are already in the U.S. at the time of designation or re-designation. This is to control the magnet effects of such a legal status. TPS does not encourage any permanent status being awarded to TPS beneficiaries. The EU also provides temporary status initially. But what happens if the conflict lasts many years and individuals cannot return? (25 pts.)

Students should discuss the pros and cons of any options. Recommendations should flow from the logic of their analysis of the pros and cons. The presence of magnet concerns needs to be addressed, but it does not mean that states should not provide protection. Those states, for example, who have been able to ensure return at the end of the period when temporary protection is needed have demonstrated that the program can be viable on a temporary basis. States have also recognized that at a certain point it is in their own society's interests to provide a permanent status to those who cannot return after many years due to protracted crises. (25 pts.)

END OF EXAM