



IARMJ report

The quarterly newsletter of the
INTERNATIONAL ASSOCIATION OF REFUGEE AND MIGRATION JUDGES

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Sir John Grant McKenzie Laws

10 May 1945 – 5 April 2020

**Founding member of the first conference of the International Association of
Refugee Law Judges. London, November - December 1995**

Founder Judge Friend

"The Conference has been an important contribution to the maintenance of the rule of law, and to what is surely an international order concerning the status of persons claiming to be displaced through persecution. It is of the greatest importance that the initiative should be carried forward; into further conferences, further co-operation. That is what the Steering Committee intends to do."

Foreword – "Asylum Law" London 1995

From the Editors,

The first year of the 12th term of the Association has certainly been a dramatic one. It began with a wonderful World Conference in San José, Costa Rica – a country every bit as magical and alluring as its promise. Your first sight of a quetzal teaches you what the expression “a riot of colours” really means.

The excitement of the conference was still lingering when the worst pandemic in a hundred years began. Since then, every jurisdiction has been faced with breakouts, lock-downs, waves and second waves, and the unrelenting pressures on health services and the physical and mental health of millions of people all round the world. Things that we knew and took for granted, such as travel and touching people, have evaporated for most of us. We can only hope for their speedy return.



Martin Treadwell
Co-Editor

If there is a good side to COVID-19, it is that we have had time to take stock and reflect on what improvements the Association needs. One issue has been the long-standing question of a single, Association-wide, newsletter.



The Inter-American Court of Human Rights, San Jose, February 2020
President Katelijne De Clerk and President-Elect Isaac Lenaola at centre

Until now, two of the four chapters have produced their own quarterly newsletters and there has been a roughly-six monthly ‘global’ newsletter. It has been a duplication of resources and too much important information in each newsletter has not been reaching the entire membership. It needed to change and it has been the enforced breathing space of lockdowns which has given us the chance to address it.

Over recent months, with the mandate of the President and the Executive, the editors of the three newsletters (Catherine Koutsopoulou, Judith Gleeson and Martin Treadwell) have worked through the mechanics of creating a single, membership-

wide newsletter. You are holding in your hands (if reading online, do treat this figuratively) the first such newsletter to issue. We plan to issue the newsletter three times a year, in February, June and October. There will be regular reports from all four chapters, space for occasional articles by other interested parties and updates on conferences, workshops and other aspects of professional development.

It is a key driver of the newsletter (and, indeed, the Association) that we respect the independence of member judges. Our role is to support and inform, never to browbeat or direct. To the extent that information is placed on this shared table of knowledge, be assured that picking it up will always be optional.

We hope you enjoy the newsletter. As always, it will need your contributions and support. If you feel you can help in any way, please do contact your chapter president.

Martin Treadwell

Co-Editor

HABARI KUTOKA NAIROBI

Update from the President...

The unprecedented events of the past year are well known to you all. Every member of the Association will have experienced the impact of the global pandemic, both in their personal lives and in their professional work. We have had to quickly learn new ways of working, new ways of socialising and to care for and support those of us who have experienced COVID-19 personally. My thoughts, and the thoughts of all of the Executive, are with those who have suffered loss among their family and friends. We know that there are many of you.



Justice Isaac Lenaola
President
IARMJ

The work of the Association has been put back considerably this year, because of our inability to gather together and to work in commune. Conferences, working parties, meetings and many other interactions have been delayed or cancelled as a result of the limitations on travel and the need for social distancing. It is fair to say that it has been, and continues to be, challenging. We continue to explore new ways to meet and to progress our work, both as judges and decision-makers and as members of the Association.

At the forefront of our work, at present, are the preparations for the next World Conference, in 2022. Our plan is to hold the conference in The Hague, in May 2022, with the theme:

*Enhancing Judicial Acumen in International Refugee and Migration
Law: From the Courtroom to the People*

We will need to make a decision on the date of the conference closer in time, when the ongoing impact of the pandemic can be better assessed. The practical side of a conference takes about a year to implement and so will need to make a firm decision in about May 2021. We will confer with the membership at that time.

In recent days, there has been the prospect of a vaccine – a much welcomed breakthrough which may prevent the suffering of many millions around the world. It is to be hoped that it bears fruit as it undergoes trials, testing and release.

In the meantime, let us hope that 2021 helps us to find that path forward, back to a world in which we can meet together in safety and in good health. Take care of yourselves and each other.

Isaac Lenaola

President, IARMJ

NEWS FROM THE CHAPTERS

In each issue, we report on developments and issues affecting the four chapters of the IARMJ

AFRICA CHAPTER

This brief report highlights some developments in the refugees environment in Africa.

COVID-19 AND THE NEW NORMAL

We have all witnessed the disruption occasioned by the Covid 19 pandemic globally. Our continent was not spared in this regard. In their efforts to curb the spread of the virus, Governments introduced wide ranging measures including closing borders and, in so doing, also closed their refugee processing operations and centers.



Justice Mlambo
President, Africa Chapter

The consequence of this is that those who intended to apply for refugee status and those with pending applications were stuck in limbo in the countries they found themselves in prior to the introduction of these so-called lockdown measures. Fortunately, I am aware of no reports in this continent where those seeking refugee status were expelled or were returned to their countries of origin.

Slowly, functionaries in government departments in particular woke up to the reality of working remotely and using virtual platforms. This, in a way, became a new normal but unfortunately this development did not extend to refugee processing centers in terms of processing refugee related matters.

While courts adapted to using virtual platforms for the hearing of matters, government departments responsible for processing refugee applications did not follow suit which resulted in the collapse of the processing of asylum applications. This situation persists in the continent even though some countries have recently opened their borders but refugee status determination processes remain in limbo. I have separately provided a write-up on one case in South Africa in which a Court ruled in favour of refugees receiving Covid 19 relief.

CHAPTER COUNCIL MEETING AND KEY RESOLUTIONS

I took advantage of the new normal and convened the first African Chapter virtual meeting under my Presidency, on 20 August 2020. The council meeting took a number of important resolutions, the main one being the division of the Chapter in terms of regional blocks being the East, South, West and North. This decision was subsequently raised at the Global Executive Committee meeting and was approved.

The setting up of the regional blocks in the South and in the North has found traction, but it remains work in progress in the other regions. An issue that still has to go back to the Chapter Council in its next meeting is to consider the arrangement of these regional blocks in line with the African Union resolution which recognises five regional blocks. The main reason for this is that we need to find a way of having a

Francophone, and possibly Lusophone, region because language is a barrier, in my experience, in terms of how the chapter has functioned. I say this because there is very little, if any Francophone and Lusophone participation in Chapter activities.

ENGAGEMENTS WITH UNHCR AND OTHER ENTITIES

As Chapter President, I have engaged in a number of meetings with UNHCR in the region as well as other key role players in the refugee sector, regarding envisioned Chapter programmes. UNHCR is relevant in particular in terms of cooperating and partnering with us in the training of Judges and other legal professionals in refugee law and refugee issues in general.

I have also engaged with the Judicial Institute for Africa (JIFA) because they are active in sixteen Southern African countries and their main objective is training in courses for professional development as well as jurisprudence collation in these sixteen member countries. I have engaged JIFA in line with the African Chapter resolution to create a reliable and accessible source of refugee law jurisprudence. JIFA is chiefly reliant on the AfricanLII (African Legal Information Institute) platform in terms of case-law from the sixteen member countries and regional courts, but they have not focused on refugee law in particular. This is an issue that was raised for JIFA to seriously consider. JIFA has undertaken to take this on board and that, in formalising our mooted cooperative relationship, they will start focusing on refugee law jurisprudence as well.

Another engagement was with the South African Judicial Education Institute (SAJEI) chiefly for the training of South African based Judges and other Judicial officials as well as legal professionals. This is SAJEI's mandate and, in this regard, the first refugee law training webinar is scheduled to take place, at the time of writing, on 9 December 2020, when UNHCR will share their platform with us.

AFRICAN UNION WEBINARS

The African Union has convened two webinars to which I was invited as a guest. The first webinar was on 11 November 2020, with the theme "Implementing the Outcomes of the AU 2019 Theme – Year of the Refugees, Returnees and IDPs, Towards Solutions re Forced Displacements". The second AU webinar was held on 30 November, also virtually and titled "Continental Forum on the Impact of Covid 19 on Free Movement of Persons in Africa". These webinars were addressed by various Government representatives as well as AU functionaries and provided valuable information around refugees in particular. Discussions also touched on the implementation of the 1969 OAU Convention as well as IDP protocols and instruments on the continent.

CONCLUSION

In terms of the outlook there are a number of issues on the horizon that still require attention, especially the issue of finalising the regional blocks on the continent as well as conducting training in earnest in fulfilment of the pledges made at the 2019 Global Refugee Forum in Geneva, Switzerland.

Mlambo JP
African Chapter President

AMERICAS CHAPTER

Dear Friends:

For the American Chapter it was an honor to host in our continent the World Conference of the Association in February 2020, where we had the joy of receiving many of you who are now reading this letter.

The idea of making this event in the Americas, was given at Georgetown University in Washington DC, during the conference of our chapter in August 2018, later it was suggested to the Association that Costa Rica would be the host country.

Costa Rica surprised us all by being one of the smallest countries in the world, but huge in global examples such as not having an army, its biodiversity and its contributions to democracy, peace and rights. But above all, we were surprised by the capacity to organize an event of this nature with an extraordinary level of detail and quality. We thank the judges of the Administrative Migration Tribunal (TAM) and their support staff for this magnificent event.



Judge Esteban Laporte
President,
Americas Chapter



Members of the IARMJ Executive at Costa Rica

The conference in San José also allowed our chapter to attract the attention of judges coming from Spanish-speaking countries. Our Chapter historically had members from the United States and Canada, so a conference in Central America was a great opportunity to introduce the Association to the countries of the region, the Caribbean, and South America.

During the Conference, we had our Chapter meeting that is now integrated by Costa Rica, Canada, United States, Dominican Republic, Peru and Brazil. Our gratitude and recognition goes to the Honorable Judge Russel Zinn for having led our chapter in recent years and for his generous dream of fully incorporating all the legal and linguistic diversity of the Americas. In the Americas Chapter today we speak in English, French, Spanish and Portuguese.

We never imagined that, only a few days after the end of the conference, the COVID 19 pandemic would strike the entire world, with the devastating consequences that we have experienced in recent months and which has represented an enormous personal and professional challenge for all of us in dealing with the issue of migration and refuge in times of pandemic. It is likely that the issue of the pandemic, but above all the approach we have taken in our countries, will be a topic of the forthcoming conferences, as it has demonstrated the common fears and challenges of a planetary society that is increasingly interconnected in its weaknesses and challenges.

It has been precisely the pandemic that has prevented many of the activities that we were thinking of developing for this 2020 from being carried out, but I am pleased to report that we have held important meetings this year. One was in August, in conjunction with the rest of the Association's Executive and the UNHCR, of which my colleagues have also informed you in this letter. The second was in September with the UNHCR specifically for the Americas Chapter. The third was with the UNHCR Legal Bureau for the Americas on the occasion of the first meeting of the Chapter.

With the UNHCR, we have outlined important lines of work for 2021, such as technical assistance, training via webinars, and future meetings on a bilateral basis to share experiences of Association members, which we will report on in due course. If pandemic conditions permit, in terms of flight restrictions, border closures and meeting capacity, we will have our regional Chapter conference in 2021, either face-to-face or virtual.

We congratulate the Global Executive for its decision to re-launch this Newsletter. Through it, we will make our activities known and it will be a very useful tool to present the work of outstanding jurisprudence, opinion and thought from this part of the world. We invite all the members of the Americas Chapter to take advantage of this tool of communication, information and feedback among the most prestigious colleagues in the field of migration and refuge throughout the world.

Our best wishes for the year 2021!

Esteban Lemus Laporte
President, Americas Chapter



The Costa Rica conference, February 2020 (a digital copy of this photo can be obtained from the IARMJ website)

ASIA PACIFIC CHAPTER

It has been a challenging and difficult year for all of us in the Asia Pacific region. With international travel all but impossible since shortly after the conference in Costa Rica, we have had to adjourn the regional conference which had been planned for November 2020. It will now (all things being well) take place in late November 2021. A final decision on that will be made in March 2021, because of the time needed to prepare and the commitment which must be made to a venue, and to speakers and presenters. Asia Pacific members should look out for an announcement from the Chapter Council in about March. As I write, a new cluster of COVID cases has broken out in Sydney, which does not bode well. However, the safety of all of us must take priority and, if we need to make the hard decision to push the conference out further, we must do that.



Martin Treadwell
President,
Asia Pacific Chapter



One of the great joys of conferences is side trips to places unknown. Sometimes you are just lucky and find a sloth in a tree...

The COVID-19 pandemic has also had a significant impact on migration around the Asia Pacific region, with many people stranded unexpectedly in other countries and the papers full of stories of anguished families kept apart in an endless limbo. Mariners are still trapped at sea after many months. With Cyclone Yasa having just struck Vanua Levu in Fiji, with 350 km/h winds, it is clear that our region is going to continue to suffer natural disasters on top of the myriad other displacement issues.

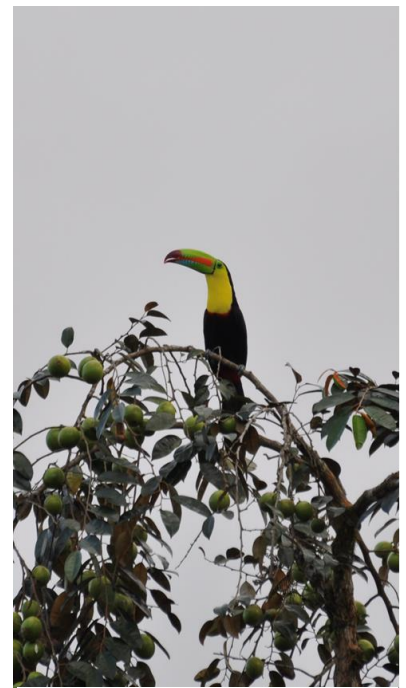
In spite of the challenges, migration and protection issues remain very much alive. Recently, IARMJ members gave training to Taiwanese judges via Zoom, at the request and instigation of the Taiwanese Association for Human Rights, with a focus on the role of judges in cases involving difficult

issues such as injunctions to prevent the deportation of asylum claimants, the requirements of fair determination processes and the impact of detention on the ability to properly present claims. The interest and engagement of the attendees was heartening to see.

Training was also given this September to the Norwegian Tribunal, UNE, by way of an online workshop on credibility. It was fascinating to have decision-makers from opposite sides of the world discover how their work and their concerns so neatly parallel those of their counterpart.

We are currently in the course of preparing a webinar for IARMJ members in early March 2021, on the theme of "The Child in Refugee Law". This will be available at no charge to paid-up members. Details to follow but the work being put in indicates to me that it will be a session well worth attending.

In the meantime, have a joyous and restful end-of-year.



Toucan play at that game...

Martin

EUROPEAN CHAPTER

In memory of Sir John Laws and the First International Conference on Asylum in London 1995



Judge Bostjan Zalar
President,
European Chapter

In early April 2020, we read that Sir John Laws, aged 74, died after contracting coronavirus. Sir John Laws was a retired senior judge of the Court of Appeal of UK and a visiting professor of legal science at Cambridge University. Before the start of his judicial career in 1992 he was a Treasury Devil for about seven and a half years - litigating public law cases for the Government both before the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). In late 1995, Sir John Laws was the Chair of the First International Conference on Asylum, where a Steering Committee was established as a predecessor of the IARMJ.

Commentators say that Sir John Laws was one of the UK's leading authorities in public law and democracy, one of the greatest lawyers and advocates of his generation: his jurisprudential philosophy "*set him on a collision course with government.*"¹

The reasoning in Lord Justice Laws' (as he then was) judgment in *Thoburn v Sunderland City Council* (2002, EWHC 195 Admin) was a significant influence in the shift from parliamentary sovereignty towards constitutional sovereignty, in the context of the status of EU law within the UK Constitution. His extra-judicial publications range from *Dictionary of Medical Ethics* (1977), *Law and Democracy* (1995), *The First Amendment and Free Speech in English Law* (1998), *Religion and Law* (2011) to titles such as: *Judicial Review: the Ghost in the Machine* (1989), *Judicial Remedies and Constitution* (1994), *Human Rights and Citizenship* (2004), *The Rule of Law: Form or Substance* (2007,) *The Common Law Constitution* (2014), to mention just a few of his broad published opus.

Sir John Laws' understanding of law and democracy reflects Kant's categorical imperative "Act so that you treat humanity, whether in your person or that of another, always as an end and never as a means only". In his judgment, the unwritten British constitution should be considered as a "higher-order law" in which fundamental human rights can be protected against the abuses of government, by unelected judges upholding apolitical values and that this counter-majoritarian element of democracy is necessary, because it protects those who are vulnerable and least advantaged in a society.

Commentators writing about Sir John Laws' jurisprudential approach used titles like "*The Brave New World of Sir John Laws.*"² However, if the essential aim of democracy, with freedom and justice at its heart, is that a political community should treat its individual members as equals and that they should have equal opportunities, as much as possible, enabling them to participate in the way that their community is governed, then Sir John Laws' Kantian "New World", was so much more than just "Brave".

Certainly, under the chairmanship of Sir John Laws and the vision of Geoffrey Care (later, the first President of the IARLJ), it was more than just "brave" to organise in London the "First International Judicial Conference" on asylum law.³ At that first meeting, 53 delegates discussed the challenges of asylum adjudication in jurisdictions around the world. Among those first delegates were 38 judges, 4 academics and 11 other experts from NGOs, UNHCR,

¹ *Guardian* obituary, 5 April 2020.

² J A G Griffith, *the Modern Law Review*, 2000.

³ Inner Temple, 30 November - 3 December 1995.

and Council of Europe. Judges came from 21 EU Countries, from Scandinavia, Eastern Europe (including Russia), Australia, New Zealand, Canada and the USA. The London Conference was financially supported by the Council of Europe, UNHCR, the Joseph Rowntree Charitable Trust, Soros Foundation and The Immigration Law and Practitioners Association in the UK.

In his report of the London Conference in 1995, Sir John Laws wrote that the overriding theme of the conference concerned the potential for continuing judicial cooperation across the world regarding the administration of refugee law, because unlike the ECHR, the 1951 *Geneva Convention Relating to the Status of Refugees* does not provide for an international body charged with its enforcement. Subjects that appeared in the programme and questions discussed at this first international conference on asylum included:

- particular social group (may it in some circumstances include “women” as such a group);⁴
- how national judiciaries should treat what became known as the Internal Flight Alternative;⁵
- the impact on asylum law of international law relating to fundamental rights, and in particular the ECHR, (Article 3 of the ECHR);⁶
- the proper legal test in relation to the ‘safe third country’ policy, deployed generally by states, where an applicant is removed to what the host country regards as a safe third country, through which he travelled before arriving in the host state and claiming asylum;⁷
- who is to take responsibility for an asylum claimant (Dublin and Schengen Agreements);⁸
- whether the state has any responsibility to facilitate the making of asylum claims to it, when the claimant is still in his country of origin;⁹
- the legal concepts involved in the notion that a claim may be rejected as manifestly ill-founded;¹⁰
- legal difficulties arising from the powers of detention,¹¹ or denial of social benefits or the right to work to claimants pending the resolution of their claims;¹²

During the London Conference, two sessions were devoted to the right to effective legal judicial remedy (remedies on the merits and higher judicial remedies),¹³ and there was also a session on the importance of sharing

⁴ In 2019 and 2020 there were two international workshops organised by European Asylum Support Office (EASO) and UNHCR in collaboration with IARMJ-Europe on the issue of membership of a particular social group at the Supreme Court in Finland and at EASO in Valletta.

⁵ See pending case before the CJEU: C-255/19, AO.

⁶ Since December 1995, when the London Conference took place, there has been an enormous expansion of case law of the ECtHR, which is relevant in cases of asylum seekers not only in relation to Article 3, but also to Article 1, 5, 6, 8, 13, Article 4 Protocol 4 of the ECHR.

⁷ See the recent judgment of the CJEU in the case C-564/18, LH from 19 March 2020.

⁸ From 2009 until April 2019, the CJEU conducted 29 procedures on preliminary rulings where courts and tribunals of the member states asked many questions concerning the rules and criteria for determining a Member State responsible for examination of asylum application.

⁹ See the Grand Chamber's judgment in C-638/16 PPU, *X and X v Belgium*, 7 March 2017 (in particular: para. 51).

¹⁰ See, for example, C-404/17, *A v Sweden*, 25 July 2018; C-175/11, *HID*, 31 January 2013.

¹¹ See, for example, C-534/11, *Arslan*, 30 May 2013; C-601/15 PPU, *J.N.*, 15 February 2017; C-269/18 PPU, *C and others v Netherlands*, 5 July 2018; C-704/17, *D H v Czech Republic*, 8 March 2019.

¹² See: C-179/11, *CIMADE*, 27 September 2012; C-79/13, *Saciri*, 27 February 2014; C-233/18, *Haqbin v Belgium*, 12 November 2019.

¹³ So far the CJEU has issued 13 preliminary rulings on the interpretation of the right to effective legal remedy.

jurisprudence emerging from different judiciaries dealing with the same difficult issues regarding the interpretation of the Geneva Convention and the procedural law which affects the administration of such claims (including a conclusion by the conference that judges should not allow the problem of numbers to determine the proper judicial approach to an individual claimant)¹⁴ and the value of information technology in this respect. The IARMJ subsequently sought to collate a database of factual and legal information concerning refugee issues across the world.¹⁵

This was, indeed, an astonishingly broad and relevant list of subjects, all of which were considered at the first international conference of the founding fathers of what is now the IARMJ. It remains a core list of concerns, even now, having regard to the present challenges in the field of international protection.

Sir John Laws concluded his report of the London Conference by saying:

“this Conference is about the rule of law.... The overriding theme of the Conference was the need for greater judicial co-operation... and also a need for a better basis upon which factual information, affecting refugee claims, can be made available to this international judiciary....

It is of great importance that the initiative should be carried forward; into further conferences, further cooperation. That is what the Steering Committee intends to do.”¹⁶

In the Closing Statement of the Conference (2 December 1995), it recorded that the Conference had resolved that a Steering Committee should working beyond the initiative of the 1995 London Conference and particularly, that links with the judiciaries in Central and Eastern Europe were to be furthered and strengthened.

This was the first step in the constitution of the International Association of Refugee Law Judges, which was formally established in Warsaw two years later. Our (ethical) responsibility, particularly as members of the Council of the IARMJ-Europe which is now a mature international association of judges, is that we keep this legacy in our memory and in our conversations and that we build our cooperation and professional solidarity further for the benefit of all those who are affected by law and democracy.

As Sir John Laws once said: *“Without democracy, law is the puppet of tyrants while, without law, democracy is mob rule.”¹⁷*

Bostjan Zalar

¹⁴ See in this respect recent judgments of the CJEU in cases: C-564/18, LH and C-406/18, PG from 19 March 2020.

¹⁵ Members of the IARMJ may remember that the first database of national case-law was developed and managed by our colleague Judge Paul Tiedemann. In recent years, EASO has collected some leading judgments of courts & tribunals from judges who are members of the EASO Network of Courts & Tribunals; the IARMJ-Europe integrates national case law in the Professional Development Series (judicial analyses) on some core issues on EU law and ECHR in relation to international protection; the IARMJ has initiated the project “Newsletter on European Asylum Issues”, which is managed by Radboud University, University of Essex, Aarhus University and the IARMJ.

¹⁶ The Hon. Justice John Laws, 1996, Report, in: Care., G., Storey, H., (eds.). Asylum Law: First International Judicial Conference, London 1995, Conference Papers Series no. 1 – 1996, published by the Steering Committee of the Judicial Conference on Asylum law, Thanet House 231 Strand, London.

¹⁷ John Laws, Good Constitution, Cambridge Law Journal, 2012, p. 582.

IN THE LIBRARY

The following recent texts and reports are noted:

Freedom on the Net 2020: The Pandemic's Digital Shadow

Freedom House, October 2020

Annual report assessing internet freedom in 65 countries around the world. Global internet freedom has declined for the 10th consecutive year. The largest declines occurred in Myanmar and Kyrgyzstan, followed by India, Ecuador, and Nigeria. A record number of countries featured deliberate disruptions to internet service. Authorities have cited COVID-19 to justify expanded surveillance powers and the deployment of new technologies that were once seen as too intrusive.

Populations at Risk: Implications of COVID-19 for hunger, migration and displacement

International Organization for Migration (IOM) / World Food Programme (WFP) (November 2020)

This joint study explores the impacts of COVID-19 and related containment measures on migrant workers, remittance-dependent households and the forcibly displaced. It assesses the implications of the pandemic for people's mobility, food security and other livelihood outcomes in major migration and hunger hotspots around the world.

Also out: The third annual *Mixed Migration Review* (2020) offers updates on global mixed migration trends, focusing this year on urban migration. It also addresses the effects of COVID-19 on migration.

Pakistan Security Situation

European Asylum Support Office (EASO) (October 2020)

A general overview of the security situation in the country, followed by a province-by-province breakdown. Topics include: actors in the conflict, recent security incidents, the impact of the violence on the civilian population, and state ability to secure law and order.

In October, EASO also published several country reports on Iraq – see its full list [here](#).

Sri Lanka Women's Wellbeing Survey – 2019

Sri Lanka Department of Census and Statistics, October 2020

Sri Lanka's first national survey on violence against women and girls, using an internationally recognized standardised methodology. It found that one in five ever-partnered women have experienced physical and/or sexual violence by an intimate partner. The report looks at perceptions about gender and partner violence, its impact on women, and their responses and coping strategies.

State of Surveillance: Government documents reveal new evidence on China's efforts to monitor its people *ChinaFile, October 2020*

A report based on analysis of a database of 76,000 publicly available Chinese government procurement notices related to the purchases of surveillance technology and services across China between 2004 and 2020, the most comprehensive accounting of China's surveillance build-up to date. It finds that while purchases of surveillance technology and services have grown rapidly across China, and officials view surveillance as a critical element of governance, surveillance in China relies on a still fragmented and limited system.

Related: The Lowy Institute's analysis of *Digital Authoritarianism, China and COVID*, and a World Politics Review article on *China's New Data Protection Law*.

The Pacific COVID-19 Infodemic: Challenges and opportunities in the Pacific's response to an online information crisis

The Asia Foundation, November 2020

“Despite noteworthy initiatives by the region’s governments and civil societies to communicate with citizens about COVID-19 through the internet and social media, a spate of false and harmful information online has led to public confusion around how the virus spreads, who has been infected, and what is being done to maintain public safety”. Based on independent research, this paper describes the present state of online “information ecosystems” in the Pacific, the risks and harms faced during the COVID-19 pandemic and the actions by government, the private sector, and civil society to respond. See also Transparency International U4 Anti-Corruption Helpdesk in ***Overview of Corruption and Anti-Corruption in Pacific Island Countries*** (August 2020).

Exclusion: Articles 12 and 17 Qualification Directive 2011/95: Judicial Analysis

Updated by the IARMJ-Europe under the contract with the European Asylum Support Office (EASO) (2nd Edition)

Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU): Judicial Analysis

EASO Professional Development Series for members of courts and tribunals; working party group co-ordinator: Aikaterini Koutsopoulou, Vice-President of the IARMJ-Europe (2020)

Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union

Ed. M Moraru, G Cornelisse, P de Bruyker (Hart Publishing, 2020); several authors, among them judges: Harald Dörig (retired, Germany, Vice-President of the IARMJ-Europe), Irmantas Jarukatis (Court of Justice of the European Union), Stergios Kofinis and Angeliki Papapanagiotou-Leza (Greece), Aniel Pahladsingh (the Netherlands), Boštjan Zalar (Slovenia)

Newsletter on European Asylum Issues for Judges (NEAIS), 2020/4, and Newsletter on European Migration Issues for Judges (NEMIS), 2020/4

Centre for Migration Law, Radboud University, Nijmegen

Handbook on European Law Relating to Asylum, Borders and Immigration

Fundamental Rights Agency (FRA), Council of Europe (updated, 2020 Edition)

Does an asylum seeker have a right to be confronted with inconsistencies or implausibilities in his submissions before a decision is taken? A methodological approach

Boštjan Zalar, ERA Forum, Springer, 2020, 21(4), 605-624

Due soon:

- “Vulnerability in the context of application for international protection: judicial analysis” IARMJ-Europe under the contract with EASO.
 - “Ending International Protection: Judicial Analysis” (2nd Ed), “Qualification for International Protection: Judicial Analysis” (2nd Ed), “Introduction to Common European Asylum System” (2nd Ed) Professional Development Series.
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UPCOMING EVENTS

Upcoming events, workshops, projects in Europe:

- In collaboration with the UNHCR, the European Chapter is preparing a transnational workshop for judges from Czech Republic, Slovakia, Romania, Croatia, Poland, Slovenia on practical resources and different subjects related to questions for preliminary rulings of the Court of Justice of the EU in the field of international protection. The date of the on-line is not set yet.

Upcoming events, workshops, projects in Asia Pacific:

- “The Rights of Children in Refugee Law” (on-line): Workshop convened by Bruce Burson (NZ), Sean Baker (Au) and Joy Torres (Phil). Due date will be advised to all Chapter members but will be early March 2021.

The European Chapter also reports that the following recent events took place:

- The European Chapter Council has established a drafting committee to prepare a proposal for amendments of the Constitution of the European Chapter in order to be fully in line with the Constitution of the global IARMJ. The chair of the drafting Committee is Katelijne Declerck, Immediate Past-President of the IARMJ.
- “Vulnerability in the context of application for international protection: judicial analysis”, 2020, produced by the European Chapter under the contract with EASO; the publication will be soon available on the EASO website.
- Brussels, 7 September 2020 (on-line): Annual bilateral meeting on future cooperation between the European Chapter and UNHCR Office in Brussels.
- Croatia, 1 October 2020, (on-line): a workshop for judges from Croatia: “Expert Evidence in International Protection Cases: Perspectives from EU Law and Experiences of Member States” organised by HPC (an NGO) and the Judicial Academy.
- Sweden, 12 November 2020, (on-line): a regional seminar for asylum judges and members of Appeal Boards in of Nordic and Baltic States “Credibility Assessment and Best Interests of a Child / Assessing Credibility in Disputes on Religious Conversion”, organised by UNHCR and the European Chapter.
- Ukraine, 2 December 2020, (on-line): a workshop for judges from Ukraine “Ensuring the Right to Asylum in Forced Return and Expulsion Procedures” on the interplay between non-refoulement and prohibition of collective expulsion from the perspective of case law of the European Court of Human Rights. Organised by the Judicial Academy and Tenth of April (NGO).
- Vienna & Strasbourg, 17 December 2020: Book Launch on the occasion of the publication of the Updated FRA & Council of *Europe Handbook on European Law Relating to Asylum, Borders and Immigration* (2020 Edition); co-organised by the FRA, Council of Europe, EASO and the European Chapter.

THE WORKING PARTIES

IARMJ Working Parties Process Continues to Fulfill its Mission of Striving to Harmonize and Advance International Refugee and Migration Law

The IARMJ Inter-Conference Working Party Process is as old as the Association itself. When the Association was first founded, the largest international professional association dedicated to international refugee and migration law, it established the Inter-Conference Working Party Process. The idea was simple. To bring together small groups of refugee and migration law decision-makers, UNHCR officials, and legal scholars, where the latter two were warranted, across several different jurisdictions to work on the apparent divergencies in the application and interpretation of 1951 Convention and related international refugee and migration law instruments and to assist Association members with their onerous responsibilities as refugee and migration law decision-makers. The intention being, of course, to fulfill the Association's Constitution and Articles of Association¹⁸ under Objects and more specifically, Part I, Section 1.2.2 (a) and (g):

- a. within the judiciary and quasi-judicial officers *world-wide a common, consistent understanding and application* of international law, practices and principles relating to refugee, complementary protection, statelessness, and related migration issues;¹⁹
- g. amongst judges mutually beneficial professional development, training, and research initiatives, timely, issued based, decision writing and publications and projects that further the attainment of the objects of the Association;²⁰

The Association's Inter-Conference Working Party Process has advanced these objectives through its various conference papers, reports, issuance of guidelines, and its symposia, workshops, and meetings. Many of these having been published in the Association's biennial World Conference Proceedings publications²¹ as well as other venues such as academic legal journals. Further, Working Parties have sponsored resolutions that have been passed at the Association's General Meetings held at its World Conferences. Working Parties have also played an important role at the Association's World Conferences affording those who were in attendance with an opportunity to discuss the various Working Party Conference papers and reports. In sum, the Inter-Conference Working Party Process has played a constructive role within the Association in furthering the Association's principal Objects.

Since the Association's founding in 1997 as the International Association of Refugee Law Judges (IARLJ), the Inter-Conference Working Party Process has played an integral role in the Association with its highly dynamic and productive Working Parties. It has given Association members an opportunity to directly affect the development of international refugee and migration laws and practices.

¹⁸ Constitution of the International Association of Refugee and Migration Judges (IARMJ), Articles of Association, https://www.iarmj.org/images/2019/constitution_2019/IARMJConstitution_English_Final_19March2019.pdf. (accessed December 22, 2020)

¹⁹ Ibid, Part I, Name and Objects of the Association, 1.2 Objects [Emphasis added]

²⁰ Ibid

²¹ IARMJ website, Publications, World Conference Publications, <https://www.iarmj.org/publications>. (accessed December 22, 2020)

There have been various Working Parties over the last more than two decades. The current iteration that coalesced during and after the last IARMJ World Conference in San Jose, Costa Rica, is as follows:

1. Human Rights Nexus Working Party

Rapporteur: Judge Judith Gleeson, Upper Tribunal, Immigration and Asylum Chambers, United Kingdom

Associate Rapporteur: Laurent Dufour, Senior Legal Counsel at the National Asylum Court of France (CNDA)

2. Membership in a Particular Social Group

Rapporteur: Hilka C. Becker, International Protection Appeals Tribunal, Ireland

Associate Rapporteur: Nigel Holmes, Chairperson, Refugee Appeals Authority of South Africa

3. Extraterritorial Processing

Rapporteur: Linda Kirk, Refugee Review Tribunal, Australia

4. Vulnerable Persons

Rapporteur: Kyrie James, Judge, First-Tier Tribunal (Immigration and Asylum Chamber), United Kingdom

5. Asylum Procedures

Rapporteur: Michael Hoppe, Judge Higher Administrative Court of Baden-Wuerttemberg, Mannheim, Germany

Associate Rapporteur: Professor Amor Boubakri, Faculty of Law, Economics and Politics, University of Soussa, Tunisia.

6. Country of Origin Information, Expert Evidence and Social Media

Rapporteur: Judge Isabelle Dely, President of the 4th Section, National Court of Asylum, cour Nationale du Droit D'Asile, Head of the Documentation and Research Centre, Paris, France.

Associate Rapporteur: Mark Symes, Part-Time Member, First-Tier Tribunal Immigration and Asylum Chamber, United Kingdom; Barrister, Garden Court Chambers; Fellow of Refugee Law Initiative, School of Advanced Study, University of London.

7. Exclusion Clauses, Cessation, Deprivation of Citizenship

Rapporteur: Johan Berg, Board Leader, The Norwegian Immigration Appeals Board (UNE).

Associate Rapporteur: Professor Satvinder Juss, School of Law, King's College London, Part-Time Member Asylum and Immigration Tribunal, United Kingdom.

8. Deportation

Rapporteur: Martin Treadwell, Deputy Chair, Immigration and Protection Tribunal, New Zealand.

9. Detention

Rapporteur: Judge Julian Phillips, Designated Judge and Training Judge of the First-tier Tribunal Immigration and Asylum Chamber, United Kingdom.

Associate Rapporteur: Yukari Ando, Guest Associate Professor, Osaka School of International Public Policy, Osaka University, Japan.

10. Artificial Intelligence, Information Technology and Judicial Decision-Making

Rapporteur: Judge John Keith, Upper Tribunal, Immigration and Asylum Chamber, United Kingdom.

Associate Rapporteur: Justice Clara da Mota Santos Pimenta Alves, Federal Court of Brazil.

Associate Rapporteur: Christine Cody, Migration and Refugee Division, Administrative Appeals Tribunal, Australia.

11. Judicial Resilience and Well-Being

Rapporteur: Martha Roche, Member, Immigration and Protection Tribunal, Auckland, New Zealand.

Associate Rapporteur: John Cipolla, Senior Member, Migration and Refugee Division, Administrative Appeals Tribunal of Australia.

It is worth noting the following salient points. We have a robust slate of Working Parties that are undertaking fascinating work on their specific area of international refugee and migration law. Membership on a Working Party is open to all members of the Association. All Working Parties would welcome your active participation. Those Working Parties without an Associate Rapporteur are currently recruiting new members to fill these positions within their respective Working Party. Working Parties meet generally once a quarter to plan, organize, and execute their legal research over the period leading up to the next IARMJ World Conference where they will report on the fruits of their labours through either a report or a conference paper. The Working Parties allow all members of the Association to stay engaged with their international colleagues on a regular and ongoing basis while also assisting in shaping the course of international refugee and migration law.

If you would like to join one of our Inter-Conference Working Parties please either contact the Rapporteur of the Working Party directly or myself, James C. Simeon, IARMJ Inter-Conference Working Party Process Coordinator at jcsimeon@yorku.ca. We look forward to hearing from you!

RECENT CASE-LAW OF INTEREST FROM AROUND THE WORLD

AFRICA

ACCESS TO COVID-19 RELIEF FOR REFUGEE CLAIMANTS

Scalabrini Centre of Cape Town & Anor v Minister of Social Development & Ors

(22808/2020) [2020] ZAGPPHC 308 (18 June 2020)

Access to Social assistance in terms of Section 27 of the Constitution - Covid-19 Social Relief of Distress Grant - Asylum seekers and social permit holders – whether lawfully excluded from receiving social assistance and whether such exclusion is constitutional. Held - Misdirection by Minister in relying on Regulation 9 without having regard to the provision of Regulation 9 (5) which allows for widening of eligibility requirements and which interpretation is consistent with the Bill of Rights.

Background:

A nationwide lockdown was announced by the President on 23 March 2020 which came into effect on midnight 26 March 2020. The national lockdown was subsequently extended and a new social relief grant for affected persons was announced by the President on 21 April 2020 (“the Covid-19 grant”). The purpose of the Covid-19 grant was aimed at redressing the “*deepening [of] poverty and increase [of] hunger as well as devastating...and catastrophic human and social effects*” of the pandemic. The Minister of Social Development (“the Minister”), in a media release, stated that the grant would be available to “*South African citizens, permanent residence and refugees*” impacted by the disaster.

The Court was asked to determine whether asylum seekers and special permit holders had been unlawfully excluded from receiving social assistance in terms of the Covid 19 grant for those affected by the Covid-19 pandemic and whether such exclusion was unconstitutional.

Case for the applicants:

The applicants, acting in the public interest, submitted that the announcement by the Minister in relation to the persons eligible to receive the Covid-19 grant, meant that special permit holders and asylum seekers having valid permits and / or visas were excluded from benefiting despite being entitled to such benefits in terms of Section 27 of the Constitution making provision for access to social assistance for “*everyone*”. The applicants relied on what was decided in *Khosa & ors v Minister of Social Development & ors; Mahlaule & ors v Minister of Social Development & ors*²² (“*Khosa*”) in which Mokgoro J emphasised the meaning of “*everyone*” in terms of Section 27(1) of the Constitution. In that case, the Constitutional Court held that the exclusion of permanent residents from the benefit of old age grant and the child support grant was unreasonable for the purpose of Section 27(2) of the Constitution. In the case under discussion, the applicants submitted that the case was similar to *Khosa* and therefore that it was necessary for the Court to examine the purpose of the Covid-19 grant, being social assistance following the national lockdown and the untold suffering it has brought on. It was submitted further that asylum seekers and special permit holders had not escaped the negative consequences of the lockdown, that they were unable to work and secure basic necessities for their families and that they were effectively

²² 2004 (6) SA 505 (CC).

“locked in” in South Africa due to closed borders during the lockdown. The applicants ultimately submitted that a person’s immigration status, especially bearing in mind what was held in *Khosa* had become irrelevant and that for this reason it was irrational and unreasonable to utilise such status as a criteria for eligibility for the Covid-19 grant. The Constitutional Court in *Khosa* had further directly and unequivocally linked the right to social assistance to the right to equality, as provided for in Section 9 of the Constitution.²³

Analysis and conclusions of the Court:

Baqwa J, sitting in the Gauteng Division, reasoned amongst others, that in the context of social assistance for asylum seekers and special permit holders, the interrelatedness of the rights of equality, human dignity and access to social assistance was self-evident and that the conditions created by Covid-19 and the subsequent lockdown serve to highlight the need for State authorities to bear this interrelationship in mind when formulating and implementing relevant regulations.

The Judge further reasoned that the right to human dignity, provided for in Section 10 of the Constitution, of qualifying asylum seekers and special permit holders with valid permits were violated when they were denied Covid-19 assistance despite the desperate circumstances in which they found themselves.

The Judge ultimately held the Minister’s exclusion from the Covid 19 grant, of asylum seekers and special permit holders, was a misdirection as the Minister had failed to have regard to Regulation 9 (5) which widens the eligibility requirements for access to social relief during the national disaster. The Judge held that on a proper reading of Section 9 (1) and 9 (5) of the Regulations the persons who qualify ought to include asylum seekers and special permit holders which interpretation is consistent with the Bill of Rights in protecting the equality, dignity and the right to social assistance.

Order:

In the final analysis, Judge Baqwa ordered that the directions issued by the Minister excluding special permit holders and asylum seekers whose asylum seeker permits or visas (as the case may be) are valid or were valid on 15 March 2020 from eligibility for the Covid-19 Social Relief and Distress grant was unlawful and unconstitutional.

²³ “Equality in respect of access to socioeconomic rights is implicit in the reference to ‘everyone’ being entitled to have access to such rights in Section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance” – *Khosa* para 42.

ASIA PACIFIC

COMPENSATION FOR UNREASONABLE DETENTION PENDING DEPORTATION

Okoro v Attorney General [2020] FJHC 96 (a decision of the Fiji High Court, at Lautoka)

Mr Okoro, a Nigerian citizen, arrived in Fiji in July 2018, to take part in the Suva Marathon. He missed his flight out on 6 August 2018. He again attempted to leave on 29 September 2018 but, for unknown reasons, was unable to board the flight. Each time, he reported promptly to the Immigration Service to update it. On going to the Office on 1 October 2018, it seized his phone and travel documents (passport etc) and kept them.

On 8 October 2018, a detention warrant directed that Mr Okoro be detained until he could be removed. On 16 November 2018, he was detained and, on 23 November 2018, taken to prison. The Immigration Service then, “in a fairly desultory way” sent emails to Fiji Airways in mid-March 2019. None showed any urgency. Nothing was then done until May 2019, when emails were sent to the Fiji High Commission in Canberra, then to the Ministry of Foreign Affairs in June 2019 and the Nigerian High Commission in August and September 2019.

On 19 November 2019, Mr Okoro filed an application for constitutional redress for unlawful detention. The High Court held that his rights under ss 9, 13 and 21 of the Fiji Constitution had been breached by the state in:

- (a) detaining him for more than 15 months in circumstances that were not reasonably necessary for the purpose of effecting his lawful removal from Fiji;
- (b) failing to bring him before the Court within 48 hours of his detention; and
- (c) restricting his freedom of movement.

Mr Okoro was found to be entitled to redress and to be released unless there was some need for his continuing detention. In settling on FJ\$20,000 compensation, the Court took into account:

- (a) damages are to be compensatory, not punitive, but that does not mean that they cannot reflect the degree to which the complainant’s rights have been infringed;
- (b) the conduct of the complainant is largely irrelevant. Rights arising under a Bill of Rights are of universal application. They are not reserved for upright citizens alone;
- (c) the Permanent Secretary was entitled to detain Mr Okoro for a reasonable period necessary to deport him but 15 months was much more than reasonable. If it had to, the Court would have measured it in weeks rather than months;
- (d) it must not be excessive, but restrained and moderate or prudent, and harnessed against the socio-economic conditions of Fiji, not some universal standards, or comparison with awards in economically advanced countries. The minimum wage in Fiji is \$100 per week, or \$5,000 per year;
- (e) on the other hand, an award should not be too low, because that would diminish the respect for the essential policies which underpin the legislation;
- (f) the removal of Mr Okoro would cost the State a significant sum, but this was taken into account in deciding the figure. The Court would not, therefore, expect the State to attempt to recover this from him, or try to offset it against what is payable to him as a result of the decision; and
- (g) the absence of any apology or acknowledgement by the Immigration Office that it is in any way at fault, or even that it could have done better.

EUROPE

RECENT DECISIONS FROM FRANCE AND GERMANY ON SUBSIDIARY PROTECTION AND 'INDISCRIMINATE VIOLENCE'

In two recent judgments from 19 November 2020 ([Case no 18054661](#) and [Case No 19009476](#) – click the links to the judgments at the foot of the article, *mais en Français seulement*), the Grand Chamber of the Cour Nationale du Droit d'Asile (CNDA) has defined the approach to be taken in appraising the level of indiscriminate violence needed to establish serious risk for the applicant in case of return to his/her country of origin, where there is the so-called 'generalised violence' for the purpose of subsidiary protection, which is regulated in Article 15c of the European Union Qualification Directive 2011/95. In both cases, the applicants had not established a risk of persecution under the Geneva Convention and the CNDA judgments were focused on the principals to be followed in the use of COI for the appraisal of the level of indiscriminate violence.

After explaining the interpretation of the Court of Justice of the European Union in such cases, as regards the law relating to the standard of evidence (no 18054661: para 9; no 19009476: para 10), and methodological issues of using country of origin information under EU secondary law (no. 18054661; para 11; no 19009476: para 12), the CNDA then explained that what it means for the appraisal of the level of violence (the cases concerned provinces of Panshjer and Herat in Afghanistan) is that both quantitative and qualitative indicators need to be taken into account (no 18054661: paras 9, 12; no 19009476: paras 11, 13). The CNDA also considered the situation in Kabul (the current point of entry into the country for both applicants, and the way for them to reach their respective provinces). In every appraisal, the applicants must demonstrate elements specific to their situation to be granted subsidiary protection.

It is worth comparing the approach of the CNDA to this evaluation (assessing the level of generalised violence on both quantitative and qualitative indicators) with the approach of the German Federal Supreme Administrative Court in [BVerwG 1 C 11.19](#) (text in German, but [here](#) in English) from 20 May 2020 (paras 17, 20-22, 26), which concerned the situation in Somalia. To understand the judgment of the Federal Supreme Administrative Court, it needs to be pointed out that findings of facts by the lower administrative court - the so-called 'judge of fact' – are binding on the Federal Supreme Administrative Court. In addition to the identification of indicators for the appraisal of the level of indiscriminate violence, the judgment of the German Supreme Administrative Court also explained the difference between protection against serious harm (subsidiary protection) in the case of acts of inhuman or degrading treatment under Article 15b of the EU Qualification Directive (paras 10-15) and in the case of indiscriminate (generalised) violence under Article 15c of the Qualification Directive (paras 16-22).

WHO WE ARE AND WHAT WE DO

THE INTERNATIONAL ASSOCIATION OF REFUGEE AND MIGRATION JUDGES

The IARMJ is an organisation for judges and decision-makers interested in refugee law and migration law. In particular, it fosters recognition that refugee status is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law.

THE EXECUTIVE

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Immediate Past President	Judge Katelijne Declerck, Belgium
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Europe Chapter President	Judge Bostjan Zalar, Slovenia

Membership is open to judges and appellate decision-makers, and Associate Membership to interested academics by invitation.

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	Rigobert Zeba, Ivory Coast	

THE ASSOCIATION'S WORKING PARTIES

The Association maintains a number of Working Parties, for the advancement and exploration of developments in refugee and migration law. The Convenor of the Working Parties is **James Simeon**, who can be contacted at jcsimeon@yorku.ca. The Working Parties' Rapporteurs are:

Rapporteurs

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