

THE EVOLUTION OF HUMANITARIAN PROTECTION IN EUROPEAN LAW AND PRACTICE

The last couple of years have witnessed an unprecedented battle within Europe between values and pragmatism, and between states' interests and individuals' rights. This book examines humanitarian considerations and immigration control from two perspectives; one broader and more philosophical, the other from a legal point of view. The impetus to show compassion for certain categories of persons with vulnerabilities can depend on religious, philosophical and political thought. Manifestation of this compassion can vary from the notion of a charitable act to aid 'the wretched' in their home country, to humanitarian assistance for the 'distant needy' in foreign lands and, finally, to immigration policies deciding who to admit or expel from the country. The domestic practice of humanitarian protection has increasingly drawn in transnational law through the expansion of the EU *acquis* on asylum, and the interpretation of the European Court of Human Rights.

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The Evolution of Humanitarian Protection in European Law and Practice

Liv Feijen

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LIV FEIJEN



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PREFACE

This book is an adaption of my 2016 PhD dissertation defended at the Graduate Institute of International and Development Studies in Geneva on the relationship between humanitarian considerations and immigration control in Europe. I originally got the inspiration to do research in this area when I worked in the asylum field in the Nordic countries from 2009 to 2012, which is a region where the law and practice pertaining to residence permits on humanitarian grounds is quite developed. I found it fascinating how notions of humanitarianism affected public opinion, but also in some cases, prompted legislative changes, in cases of planned deportations of people who had stayed for a long time in the host country, unaccompanied children without caregivers and sick persons whose condition would obviously deteriorate if they were sent back.

The so-called refugee crisis, that occurred in Europe between 2015 and 2016, even more strikingly brought forward the complexity of the relationship between humanitarian considerations and immigration control, the complementarity and interdependence of the two notions, but also the inherent contradictions. Following the increase in the numbers of applicants for international protection, the practice of granting residence permits on humanitarian grounds was restricted or temporarily suspended in many countries. However, the discussion has again started on the relevance and necessity of retaining humanitarian considerations in domestic and regional immigration policies, including the granting of residence permits on humanitarian grounds. I hope this book can in some small way contribute to that discussion.

I would like to thank my academic supervisor, Professor Vincent Chetail and the readers of my PhD dissertation, Professor Andrew Clapham and Professor Elspeth Guild, for their support and helpful comments on my initial dissertation. I would also like to thank Professor James Hathaway for having the faith of publishing this work in his eminent series of asylum and migration studies and his constructive advice throughout the process.

This book is, in a way, a homage to the Nordic school of refugee law, which originated with Atle Grahl-Madsen and was brought forward by Professors Göran

Melander, Gregor Noll, Jens Vedsted-Hansen, Terje Einarsen and others, whose work has often focused on de facto refugees and an expansion of the refugee definition.

I have to emphasize that all opinions and conclusions expressed in this book belong to me in my academic capacity and do not necessarily reflect the official position of my employer, the United Nations.

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ABBREVIATIONS

| | |
|---------|---|
| ACHR | American Convention on Human Rights |
| AU | African Union |
| CAT | UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment |
| CEDAW | UN Convention on the Elimination of Discrimination against Women |
| CERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| CRC | UN Convention on the Rights of the Child |
| CRPD | UN Convention on the Rights of Persons with Disabilities |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECOWAS | Economic Community of West African States |
| ECtHR | European Court of Human Rights |
| EHRR | European Human Rights Reports |
| EU | European Union |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICPRAMW | International Convention on the Protection of the Rights of All Migrant Workers |
| ICRC | International Committee of the Red Cross |
| ICJ | International Court of Justice |
| ILC | International Law Commission |
| MSF | Médecins sans Frontières |
| NGO | Non-Governmental Organization |
| OAU | Organization of African Unity |
| UDHR | Universal Declaration of Human Rights |
| UNHCR | United Nations High Commissioner for Refugees |
| UNICEF | United Nations Children's Fund |
| YB | Yearbook |