BOOK REVIEW*

Complementary Protection in International Refugee Law
by JANE MCADAM
(United Kingdom: Oxford University Press, 2007)
Recommended retail price hardback $A202.40
(ISBN-13: 978-0-19-920306-2)

The *Convention Relating to the Status of Refugees*[1] ('Refugee Convention') remains the 'cornerstone of the international refugee protection regime',[2] setting out the definition of a refugee and the resultant rights and obligations that attach to refugee status. Over its 50 year history, the definition of a refugee as a person who fears persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, has been interpreted in an evolutionary manner in order to accommodate contemporary refugee situations. Notwithstanding this expansive interpretation, the definition simply cannot encompass the many persons whose fundamental rights are threatened by enforced removal to another state. For this reason, the recognition that other international and regional human rights instruments afford complementary protection for victims of expulsion or deportation has been a crucial development in the international law of human rights. While express and implied *non-refoulement* obligations have been relied upon by many persons who fall outside the ambit of the Refugee Convention, the extent of the protection afforded by these other instruments remains controversial and unclear. In this light, Jane McAdam's *Complementary Protection in International Refugee Law* – the first to draw together the extensive jurisprudence and state practice on this issue – is a vitally important contribution to refugee law scholarship.

Of particular importance is the book's thorough and extensive analysis of the only attempt to codify a complementary scheme in international law to date – the European Union (EU) Qualification Directive.[3] As McAdam's illuminating analysis reveals, the EU scheme fails to fully implement the international obligations of EU members in important respects, and also institutes a

* Michelle Foster, BComm (Hons) LLB (UNSW), LLM SJD (Michigan), Senior Lecturer, University of Melbourne.

1 Opened for signature 28 July 1951, 189 UNTS 150 (entry into force 22 April 1954).

2 Executive Committee of the High Commissioner's Programme ('ExCom'), *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection* (2005) (No. 103 (LVI) – 2005) <http://www.unhcr.org/excom/EXCOM/43576e292.html> at 20/06/07.

3 Council of the European Union Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

questionable distinction in the rights entitlements of refugees and those covered under the subsidiary protection regime. Thus, while measures to codify complementary regimes are welcomed, the EU Directive is not posited by McAdam as a template for other binding regimes.

I ELIGIBILITY FOR COMPLEMENTARY PROTECTION

This book very usefully draws together the extensive jurisprudence on the question of what types of rights are protected under international and regional treaties, with chapters on the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[4] (including other treaties which protect against torture and cruel, inhuman or degrading treatment); the *European Convention on Human Rights*[5] ('ECHR') and the *Convention on the Rights of the Child* ('CRC').[6] One of the most important issues in this context is Chapter 4's consideration of the extent to which ill-treatment can warrant complementary protection. In this regard, McAdam's focus is primarily on the ECHR rather than the *International Covenant on Civil and Political Rights*[7] ('ICCPR'), although it is acknowledged that the ICCPR remains an important avenue of redress in light of the limited geographic scope of the ECHR.

McAdam grapples with the important question of whether it is only some ECHR obligations[8] or potentially all ECHR articles which could form the basis of a claim for complementary protection. While the EU Directive restricts complementary protection to a very narrow scope of ill-treatment, the jurisprudence emanating from the European Court of Human Rights, as well as some superior domestic courts such as the House of Lords, suggests that the scope is wider than protection merely from the death penalty or execution, torture or inhuman or degrading treatment or punishment, or a 'serious and individual threat to a civilian's life by reason of indiscriminate violence in situations of international or internal armed conflict'.[9] As McAdam notes, the European Court of Human Rights has held that removal may give rise to a protection issue under articles 2 and 3, and 'exceptionally under articles 5 and 6'.[10] In addition, the House of Lords held in *R v Special Adjudicator; ex parte Ullah*[11] that 'in the right factual circumstances *any* ECHR provision could give rise to a *non-refoulement* obligation'.[12] McAdam cogently argues that although it is tempting for advocates to rely only on the well established article 3 ground, it is important

4 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
5 *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11*, Rome, 4/XI/1950.
6 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
7 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
8 Article 3 is the most commonly relied upon provision.
9 Art 15 EU Directive: Jane McAdam, *Complementary Protection in International Refugee Law* (2007) 65.
10 McAdam, above n 9, 144.
11 [2004] UKHL 26 ('*Ullah*').
12 McAdam, above n 9, 144.

'not to stultify the development of jurisprudence under other ECHR provisions by neglecting their own inherent capacity for founding protection claims'.[13]

One of the main difficulties in relying upon other rights in the ECHR is that some of these rights are not framed in absolute terms (as is article 3); rather, they are subject to limitations 'necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'.[14] These limitations have been relied upon by States wishing to remove a person on the basis that such limitations 'permit a balancing test' between the interests of the individual and State concerns such as immigration control. In other words where a person is to be removed by country A to country B, and asserts that removal is prohibited because her right to religious freedom will be violated on return to country B, country A may justify the violation that will result from the removal by reference to its own need to control immigration. Accordingly, courts have concluded that 'it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach'.[15] However, one may question this on the basis that it does not suggest a sufficiently strict approach to the limitations clause which requires a State to establish that the limitations are *necessary* as opposed to merely desirable, particularly in the context of an individual case.

This issue is even less settled in the context of universal human rights instruments such as the ICCPR and CRC. In relation to these two instruments, the relevant supervisory bodies have stated that a state party may not remove a person 'where there are substantial grounds for believing that there is a real risk of irreparable harm', providing as examples of such irreparable harm the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment.[16] In each case it is clear that the *non refoulement* principle is not limited to these two obligations.[17] Nonetheless, neither the rationale for the 'irreparable harm' threshold, nor the content of that standard is clear. Significantly, the Committee on the Rights of the Child has emphasised that 'the assessment of the risk of such serious violations [enlivening the *non-refoulement* principle] should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services',[18] suggesting that the possibility of a violation of socio-economic rights could trigger a *non-refoulement* claim, particularly in light of the fact that the CRC explicitly contains a number of socio-economic rights. This can be contrasted with the ECHR jurisprudence in which McAdam notes that 'scant support' can be found

13 McAdam, above n 9, 146.
14 ECHR art 9(2).
15 McAdam, above n 9, 144.
16 See especially, UN Human Rights Committee, General Comment 31 [12]; Committee on the Rights of the Child General Comment 6, [27] (emphasis added).
17 For example, the Committee on the Rights of the Child's General Comment 6 states that the *non-refoulement* principle is 'by no means limited to' the examples provided: ibid [27]. .
18 Ibid.

'for a right to remain in a State for socio-economic reasons',[19] partly because the ECHR does not expressly guarantee socio-economic rights. However, the full scope of protection under both the regional and universal instruments remains to be developed in future jurisprudence.

II LEGAL STATUS

McAdam cogently points out that despite the relatively wide ambit of complementary international law obligations (in particular, the ability to protect a much wider range of persons in need than through the Refugee Convention alone) a fundamental limitation is that the resulting legal status of persons is unclear. By contrast to the situation of refugees whose rights and entitlements are clearly provided for in the Refugee Convention, persons protected by express and implied *non-refoulement* principles in other treaties often do not enjoy many of the basic rights – particularly of an economic and social nature – necessary to attain a basic quality of life. An important contribution of this book, therefore, is an analysis of the catalogue of rights to which persons enjoying complementary protection are entitled.

McAdam argues that it is difficult to defend the position that persons protected under complementary schemes should be granted less protection than Convention refugees. In this context, some interesting arguments are advanced. The key argument is that the Refugee Convention operates as a *lex specialis* 'for persons protected by the principle of *non-refoulement*, based on the Convention's function as "a charter of minimum rights to be guaranteed to refugees", which the drafters envisaged would extend to additional groups of refugees'.[20] Another argument is that to provide different rights to refugees vis-à-vis other persons in need of protection may well constitute discrimination in violation of Art 26 of the ICCPR, which raises the fascinating question as to whether reliance on an international treaty such as the Refugee Convention could constitute a 'justifiable legitimate aim'.

More broadly the argument that all persons in need of protection should effectively be granted refugee status raises the question whether there is any value in retaining the definition of 'refugee' at all? The logical extension of the argument that refugee rights should be conferred on a broader group of persons is that there is nothing 'special' about a refugee (as defined in the Convention) that requires or justifies a special set of rights. These questions are not merely academic. They are crucial because, as McAdam acknowledges, one of the risks of collapsing a complementary protection regime into a domestic refugee regime is that decision-makers might bypass analytically difficult refugee claims and simply decide a case on the basis of the wider human rights grounds, thus impeding the Refugee Convention's future development. But does this matter if all persons in need of protection are to be afforded the same rights? This issue is also relevant to the work of the UNHCR and raises the question whether it

19 McAdam, above n 9, 163.
20 Ibid 209.

should expand its terms of reference, particularly its supervisory responsibilities, to persons falling within complementary protection categories.

McAdam also points out that a true implementation of the non-discrimination principle would produce a curious result in that persons excluded under the Refugee Convention, and therefore not entitled to the rights regime set out in the Refugee Convention, may still be non-removable under a general human rights treaty such as the *Convention Against Torture*[21] and thus entitled to the same rights as refugees (if a state were to adopt the *lex specialis* or non-discrimination arguments). For this category of person, particularly where it is not possible to effect criminal prosecution in relation to the alleged criminal activity, McAdam distils 'the minimum status that must be afforded to all non-citizens, irrespective of their immigration status, based on international human rights law'.[22] Drawing on Hathaway's 'four-tier rights hierarchy',[23] McAdam concludes that a 'minimum human rights status' should comprise 'all first-tier rights in all circumstances; all second-tier rights, except where an emergency justifies derogation; and all third-tier rights, except where an absolute lack of State resources prevents their accrual'.[24] While this reliance on the ICCPR and ICESCR as universal human rights treaties is sound, care must be taken in engaging terms such as 'hierarchies' of rights, because references to a hierarchy of obligation as between different rights (the Hathaway meaning) has often been misinterpreted to mean a hierarchy of normative value, such that socio-economic rights are accorded less value than civil and political rights. In addition, reference to 'hierarchies' can detract from the fact that in many instances rights contained in the ICESCR cannot be derogated from 'under any circumstances whatsoever',[25] thus suggesting that the categories are not as stark and clear as may be suggested by the hierarchy analysis.

III CONCLUSION

This book grapples with some of the most important developments in international refugee protection in recent years and provides a comprehensive and thorough analysis of the history and implementation of the principle of complementary protection. It makes an outstanding contribution to the literature and is necessary reading for anyone engaged with refugee protection today.

---

21 1984, S Treaty Doc 100-20 (1988), 23 ILM1027 (1984).

22 Ibid 242.

23 Hathaway's hierarchy grapples with the question of what degree of harm amounts to persecution: James C Hathaway, *The Law of Refugee Status* (1991) 109-11.

24 McAdam, above n 9, 245.

25 See, eg, Committee on Economic, Social and Cultural Rights, General Comment 14 [47].