

George Mason University School of Law
Refugee & Asylum Law
Thursdays, 4:00 – 6:00 p.m.
Instructors: Elizabeth Schmelzel
Spring 2022

Overview

This course will cover U.S. asylum law regime (as informed by U.S. obligations under international law). The course will trace the history and development of the United Nations 1951 Refugee Convention, the 1967 Protocol, and the U.S. Refugee Act of 1980 and their implementation in the United States. Students will become familiar with the key actors in the asylum law arena, including intergovernmental and non-governmental organizations, the U.S. Congress, the Departments of Homeland Security and Justice, and the federal courts. Students will gain an understanding of the refugee definition as interpreted in the U.S.

The course will address the limits of refugee law and will assess the current asylum system in the United States from both a practitioner's and a policy perspective – contextualizing asylum law within the need for policymakers to meet obligations under international conventions and domestic law while maintaining national security, including addressing the challenges of terrorism and transnational crime. The course objectives are: (1) to leave students with an understanding of asylum law and procedures in the United States; and, (2) to prepare students for clinical work, employment and internship opportunities within the U.S. government and the NGO community and/or the representation of asylum seekers as future attorneys.

PLEASE NOTE THAT YOU ARE REQUIRED TO READ A REFUGEE NARRATIVE (BOOK) NO LATER THAN THE SECOND CLASS (AND EMAIL ME YOUR CHOICE).

See the details below under Class 1, but I like to flag this up front to avoid confusion and/or surprises. It is best if you can complete this reading by the first class, but it is not required until the second class.

Also, please note that this is an *incredibly* dynamic area of law. As a result, please anticipate that the assignments will very likely change over the course of the semester as the courts and executive branch issue new decisions. I will update assignments via email or in-class announcements and will try to give as much notice as possible. Moreover, if I add some reading assignments, I will do my best to remove others. This will not always be possible, however. Because assignments may sometimes change quickly, please be sure that I have your accurate and frequently used email.

You will notice that some of the assignments on the syllabus are marked as “tentative.” This is because the law and policy contained in those readings were still changing as of the creation of this syllabus. If the law changes again before that a class session, I will likely (though not necessarily) eliminate or amend the reading assignment.

Learning Outcome Statements:

Students who successfully engage in this class can expect the following learning outcomes:

- Understand the refugee definition and the required elements of establishing or determining that an individual is a refugee under the law;
- Develop a nuanced understanding of the challenges to proving refugee and/or asylee status for individuals who have experienced violence;
- Engage critically with questions of legal reform and/or other policies affecting individuals fleeing persecution and countries where they seek refuge, especially in the United States.

Class Attendance and Preparation:

GMUSL academic regulations require regular and punctual class preparation and attendance for academic credit to be earned.¹ Unexcused absences from class will significantly limit the benefits you gain from the course and will diminish your ability to succeed in the course. The syllabus contains required reading as well as optional reading. I also try to note which readings can be skimmed, meaning students should be familiar with the content and conclusions of those readings, but that a detailed understanding of the ideas and arguments is not required. Where cases are assigned for reading, rather than skimming, we will discuss the facts, procedural posture, holding, and key take-away points from each case. You should come to class prepared to discuss each case in the assigned reading.

I hope that students will volunteer participation, but I will also call on you sporadically as necessary to achieve full participation. My goal is to push you to think and engage critically with the material, one another, and me – questions and disagreements are always welcome. Once per semester, each student may, without penalty, notify me by email no later than one hour prior to class to request a “pass” for that week without explanation. A pass means you will attend but will not be called upon unless you volunteer to participate. It is not an excuse for an otherwise unexcused absence; it is simply a “get out of jail free card” that prevents you from being called upon without volunteering during that class.

Methods of Evaluation:

Exam: The examination will count for 100% of your grade in this class. The examination will be an in-class, limited open-book exercise (you may access your casebook, optional readings, your class notes, and any materials you and your classmates together prepare – you will not be permitted access to the internet or pre-produced outlines or any other sources). The exam will

¹ The academic regulations further state: “If a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course. A student who is not present for at least 75 percent of a session of the course is absent for that session.” The academic regulations also provide that in cases having merit, substitution of work equivalent to class attendance is permissible at the instructor’s sole discretion and within certain parameters. If you miss more than 3 sessions of our course, which meets once a week, you will be ineligible to receive credit for the course. Please contact the instructors if you need to be absent.

consist of issue-spotting fact patterns that require you to demonstrate strategic judgment in addition to clear understanding of the law. Note that the exam may also cover policy questions.

Grade adjustments: I reserve the right to raise or lower a grade based on class performance. Students who show exceptional insight and attention to detail may have their final grades bumped, whereas students who are frequently tardy, unprepared, distracted or distracting, may have their grades lowered.

Laptop Policy: I do not allow the use of laptops during in-person class sessions. There are certain limited exceptions, which I will explain on the first day of class.

Contacting the Instructors:

Please feel free to contact me with any questions or concerns about class and/or your professional development and interests at: schmelzel@gmail.com.

Course Materials

- Casebook: Martin, Aleinikoff, Motomura & Fullerton, *Forced Migration: Law and Policy* (2013) (referred to throughout this syllabus as “FM”).
- Supplementary materials assigned with a hyperlink in the syllabus below or a citation to pull from legal databases as necessary.
- Immigration law is a complex network of statutes, regulations, case law, and international treaties. You will be expected to develop familiarity with 8 U.S.C. §§ 1157-1158 and 8 C.F.R. §§ 207-208, the primary statutes and regulations regarding asylum and refugee status, along with other statutes and regulations. Keep in mind that the immigration statutes can be cited either as part of the INA (Immigration and Nationality Act) or to the codification of that Act in the U.S. Code. I will use both citations in class, because the nature of immigration law is that you need to be able to go back and forth depending on the venue in which you find yourself (or, sometimes, the preferences of an individual adjudicator).

COVID Protocols:

- Please follow all GMU COVID guidelines, including wearing a mask in class at all times.

Class Sessions (by week)

**Schedule subject to change as world events and class interests dictate!

Class 1, January 20: Introduction to Forced Migration -- Concept, History, and International Institutions

Required:

- 1951 Convention and 1967 Protocol Relating to the Status of Refugees, available at: <http://www.unhcr.org/3b66c2aa10.html>.
- 8 U.S.C. §§ 1157-1158.
- *Please skim* UNHCR's 2021 mid-year report, available at: <https://www.unhcr.org/statistics/unhcrstats/618ae4694/mid-year-trends-2021.html>
- FM, pp. 7–11 (What is forced migration?), pp. 43-59 (The law applicable to forced migrants), 70-82 (Who should be considered a refugee?).
- FM, pp. 90-97 (Nonrefoulement in the United States).

By the *second class*, please read one of the following narrative accounts of the refugee journey or another narrative of your choosing and be prepared to discuss the book by giving a basic summary of the plot and discussing some element of the narrative you found surprising, disturbing, or particularly salient:

- Adamczyk, *When God Looked the Other Way: An Odyssey of War, Exile and Redemption* (2004).
- Eggers and Deng, *What is the What* (2006).
- Kassindja and Bashir, *Do They Hear You When You Cry* (1998).
- Kenney and Schrag, *Asylum Denied: A Refugee's Struggle for Safety in America* (2008).
- Thwe, *From the Land of Green Ghosts: A Burmese Odyssey* (2002).
- Ung, *Lucky Child: A Daughter of Cambodia Reunites with the Sister She Left Behind* (2005).
- Mbue, *Behold the Dreamers* (2016). Please note that this is the only piece of fiction on the list. While its description of the asylum process is excellent, it is not a true story.

*Please email the instructors the title of the book that you will be reading no later than 5:00 p.m. on **Friday, January 21**. Reviewing a refugee narrative that you have previously read is fine, but please do take a second look at the book to refresh your memory – we will draw on these narratives throughout the semester.*

Class 2, January 27: Protection in the US -- *Non-Refoulement*, Asylum, & Procedures

Required:

- Refugee narrative (see above).
- 8 U.S.C. §1158 (INA § 208); 8 C.F.R. § 208.13.
- FM, pp. 97-111 (US Procedures for Seeking Protection & Trends and Statistics).
- Department of Homeland Security, Annual Flow Report: Refugees and Asylees 2019, available at: https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf
- Please review the I-589 form available at www.uscis.gov, under “Forms.”
- *Chevron U.S.A. v. National Resources Defense Council*, available at: <https://www.law.cornell.edu/supremecourt/text/467/837>.

Class 3, February 3: Introduction to Persecution – How much harm is persecution

Required:

- FM, pp. 131-175 (What is persecution?)
- Rempell S., *Defining Persecution*, 2013 Utah L. Rev. 283 (2013).
 - *Please note that this is an article I will likely refer to throughout the semester.*

Class 4, February 10: Past Persecution, Humanitarian Asylum, Future Persecution, and Degrees of Risk

Required:

- FM, pp. 176-203, including all notes (Past Persecution and Internal Flight – including humanitarian asylum and past persecution as continuing persecution and evidence of likelihood of future persecution)
- FM 215-235 (Level of Risk)

Class 5, February 17: Nexus; Grounds of Persecution – Political Opinion, Religion, Race & Nationality; Mixed Motives

Required:

- US Asylum Officer Basic Training Manual: Nexus and the Five Protected Characteristics, available at: https://www.uscis.gov/sites/default/files/files/natedocuments/Nexus_minus_PSG_RAI_O_Lesson_Plan.pdf (skim pages 11-49)
- FM, pp. 249-275 (Political Opinion & Imputed Political Opinion).
- FM, pp. 275-301 (Nexus and Mixed Motives).
- FM, pp. 301-325 (Race, Nationality, and Religion).

Class 6, February 24: Grounds of Persecution (continued) – Membership in a Particular Social Group

Required:

- FM, pp. 326-375 (Particular Social Group)
 - Skip note 2 on page 350
- *Crespin-Valladares*, 632 F.3d 117 (4th Cir. 2011)
- *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021), available at: <https://www.justice.gov/eoir/page/file/1404791/download>
 - Note that this case has multiple iterations. Please be sure that you read the version published in 2021, and I will provide an overview of its history in class.
- Please skim *Matter of W-Y-C & H-O-B-* 27 I&N Dec. 189 (BIA 2018), available at: <https://www.justice.gov/eoir/page/file/1027451/download>

Optional:

- *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3795.pdf>

Class 7, March 3: Gender-Based Asylum Claims

Required:

- FM, pp. 379-446 (Gender-Related Persecution)
 - From pages 379-422, you may skim anything that is not a case (including the notes after the cases), but you should read all of the cases.
 - Skip bottom of page 396-top of page 400 (and start reading again at **b. FGM as Past Persecution**)
 - You can skim pages 424-446, including the cases, provided you are able to address the following question:
 - How has the US asylum system treated claims of DV and forced marriage prior to 2014?
- *Matter of A-R-C-G-*, 26 I. & N. Dec. 288 (BIA 2014) (available online or in FM Supplement pp. 53-57)
- *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) available at: <https://www.justice.gov/eoir/page/file/1070866/download>
- *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) available at: <https://www.justice.gov/eoir/page/file/1354636/download>
- *Matter of A-B-*, 28 I&N Dec 307 (A.G. 2021) available at: <https://www.justice.gov/eoir/page/file/1404796/download>

Class 8, March 10: Limitations on Protection –Exclusionary Grounds (One-Year Filing Deadline, Safe Third Country, and Firm Resettlement) & The Persecutor Bar

Required:

- Prohibitions on Filing:
 - 8 U.S.C. 1101(a)(42)
 - 8 C.F.R. 1208.4(a)
- Timing and Transit
 - FM, pp. 467-478
 - USCIS Updated Service Center Operations Procedures for Accepting Forms I-589 filed by Unaccompanied Alien Children (aka Kim Memo) available at: <https://www.uscis.gov/sites/default/files/document/memos/Memo-Updated-UAC-Procedures.pdf>
 - *Matter of M-A-C-O* 27 I&N Dec. 477 (BIA 2018), available at: <https://www.justice.gov/eoir/page/file/1101226/download>
 - USCIS memo on Updated Procedures for Asylum Applications filed by UACs (aka Lafferty Memo) https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27I%20Ops/Asylum/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf
 - Note: after reading these assignments, consider the following question: what is the effect of the Lafferty Memo being enjoined?
- Exclusion from Protections: Persecutors
 - FM, pp. 483-493
 - *Matter of Negussie*, 28 I&N (A.G. 2020), available at: <https://www.justice.gov/eoir/page/file/1334881/download>

Optional:

- FM pp. 479 to top of 483

March 17: SPRING BREAK!

Class 9, March 24: Exclusion, Continued as Necessary; Security and Crime

Required:

- Particularly Serious Crime Bar
 - FM, pp. 518-519; pp. 522-525 (starting with *Matter of Y-L-*)
- Serious Nonpolitical Crime Bar (and the use of Red Notices)
 - 8 C.F.R. 1240.8(d)
 - *Matter of E-A-* 26 I&N (BIA 2012), available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3766.pdf>
 - *Matter of W-E-R-B-*, 27 I&N 795 (BIA 2020), available at: <https://www.justice.gov/eoir/page/file/1256481/download>
- Terrorist Activity
 - FM pp. 527-541
 - *Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018), available at: <https://www.justice.gov/eoir/page/file/1068811/download>

Optional:

- FM pp. 541-548
- *Barahona v. Holder*, 691 F.3d 349 (4th Cir. 2012)
- Tyler Anne Lee, *When “Material” Loses Meaning: Matter of A-C-M- and the Material Support Bar to Asylum* available at: <http://hrlr.law.columbia.edu/files/2019/11/6-Lee.pdf>
- Human Rights First, *Denial and Delay: The Impact of Immigration Law’s Terrorism Bars on Asylum Seekers and Refugees in the United States*, Nov. 2009, available at: <http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>. Read Summary & Recommendations, pp 1-13.
- UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses*, 4 Sept 2003, available at: <http://www.unhcr.org/3f7d48514.html>.
- UNHCR Alternatives to Detention of Asylum Seekers and Refugees, April 2006, available at: <http://www.unhcr.org/refworld/pdfid/4472e8b84.pdf>.
- Human Rights First, “*Jails and Jumpsuits: Transforming the U.S. Immigration Detention System, A Two Year Review*,” 2011, available at: <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>. Read Executive Summary i-vii.

Class 10, March 31: Procedural Exclusions and Impediments

We are tentatively scheduled to have a former client visit class on this day to talk about detention, and so the readings for this class are subject to change.

Required:

- Expedited Removal:
 - FM, pp. 816-832
 - *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019)
- Deterrence and Detention: US Practices:
 - FM, pp. 833-36; 846-858
 - FM, pp. 778-786 (*Sale v. Haitian Centers Council*)
 - Denise Gilman, “Immigration Detention, Inc.,” *Journal on Migration and Human Security*, May 2018, available online through GMU Law Library

Optional:

- FM, pp. 836-45

Class 11, April 7: Procedural Exclusions and Impediments, Continued as Necessary; Discretionary Denials: CAT Relief and Withholding

We are tentatively scheduled to have a guest speaker from CAIR Coalition during this class, who has litigated several difficult CAT claims in the past year. Our guest may have different readings to assign, but I will update the syllabus in advance. Please come prepared with questions for the speaker.

Required:

- FM, pp. 236-246 (Discretion to Grant or Deny Protection).
- *Skim* Asylum and Withholding of Removal Relief Convention Against Torture Protections (Fact Sheet), available at: <http://www.justice.gov/eoir/press/09/AsylumWithholdingCATProtections.pdf>.
- FM: 587-594 (Definition of Torture; Nonrefoulement and US Implementation).
 - Please focus on the standard for “acquiescence” in this section.
- *Matter of O-F-A-S*, 27 I&N Dec. 709 (BIA 2019), available at: <https://www.justice.gov/eoir/page/file/1294101/download>
- *Rodriguez-Arias v. Whittaker*, No. 17-2211 (4th Cir., 2019), available at: <https://law.justia.com/cases/federal/appellate-courts/ca4/17-2211/17-2211-2019-02-12.html>

Class 12, April 14: Discretionary Denials, Continued as Necessary; Adjudication of Asylum Claims – Who Decides and How?

Required:

- FM, pp. 673-751 (Communication Challenges, Evidentiary Requirements & The Asylum System Under Stress).
 - *Readings for this week are longer than usual, please feel free to skim or skip the exercises in FM this week.*
- Ramji-Nogales et al., “Refugee Roulette : Disparities in Asylum Adjudication,” 60 *Stanford L. Rev.* 2 (Nov. 2007) 295. Read Intro 295-305 and VI. Key Findings and VII. Policy Implications 372-389.
- *Please skim* Tae-Hyun Kim, “Rethinking Review Standards in Asylum,” 55 *Wm. & Mary L. Rev.* 581 (2013).

Optional:

- ABA Commission on Immigration, *Reforming the Immigration System Executive Summary*, Feb. 2010, pp. ES-5 to ES-15, available at: http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf.
- S. Lustig, et al., “Burnout and Stress Among US Immigration Judges,” *Bender’s Immigration Bulletin* vol. 13, no. 1 (Jan. 1, 2008) pp. 22-30.
- Marks, “Still a Legal Cinderella? Why the Immigration Courts Remain an Ill-Treated Stepchild Today” Federal Bar Association, March 2012.

Class 13, April 21: Adjudication of Asylum Claims, Continued as Necessary; Final Exam Review

There is no required reading for this class. However, we may need to spend some time during this session reviewing or catching up on material that we were not able to cover in prior sessions. We will aim to leave at least one full hour for exam review during this class session.

Please submit questions to the instructors by e-mail prior to the final review session by 5:00 p.m. on Monday, April 18. Any questions received after the deadline are unlikely to be incorporated into the final review – although I will still happily address them as time permits during the review session.

Your exam will be an in-class, limited open-book exam. You may use your casebook, class notes, and articles you have downloaded for class. You may not use outlines prepared by any other person or entity. Your own outlines or outlines you have created with a study group are permitted. You may not use the internet, including Lexis/Westlaw. Keep in mind, part of the challenge of an open-book exam is timing – it may feel like you do not have enough time, so be sure to organize your materials strategically.