

LIENEKE SLINGENBERG, *THE RECEPTION OF ASYLUM SEEKERS IN INTERNATIONAL LAW: BETWEEN SOVEREIGNTY AND EQUALITY*, VOL 51 STUDIES IN INTL L, (OXFORD AND PORTLAND: HART PUBLISHING, 2014)

*Katharina Dolezalek**

Currently, Europe in particular is dealing with a great influx of asylum seekers. Those foreign citizens may have access to social and material benefits such as social security and labour market access in their host country. In the book *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality*, Lieneke Slingenberg recites the obligations of the European Union (EU) Member States, and the means which are to be provided to the asylum seekers in order to abide by a common European minimum standard to aliens by linking them to international standards and obligations arising from international treaties.¹

This monograph was published in 2014 as volume 51 in the Series International Law Studies by Hart Publishing and is the result of the *Cross-Border Welfare State* research project, funded by the Dutch Gak Instituut Gak, which promotes research in the field of social security in the Dutch labour market. It is based on the author's PhD thesis at the VU University of Amsterdam where she now works as an assistant professor in migration law.

The book seeks to identify whether there is a balance between human rights/principle of equality and state sovereignty in the field of asylum seekers' social rights in the EU. It therefore questions the current European legislation by comparing the *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*² (*Directive 2003/9/EC*) and *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*,³ which has replaced *Directive 2003/9/EC* in June 2015 and is still in force, with international legal instruments such as the *Convention relating to the Status of Refugees*,⁴ relevant conventions arising from the International Labor Organization (ILO), the *International Convention on Economic, Social and Cultural Rights*,⁵ the *European Convention on*

* LL.M. candidate, University of Montreal.

¹ Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality*, vol 51 Studies in Intl L (Oxford and Portland: Hart Publishing, 2014) at 3 [Slingenberg].

² EC, *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, [2003] OJ, L 31/18 [*Directive 2003/9/EC*].

³ EU, *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, [2013] OJ, L 180/96 [*Directive 2013/33/EU*].

⁴ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [RC].

⁵ *International Convention on Economic, Social and Cultural Rights*, 12 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

Human Rights,⁶ the *European Convention on Social and Medical Assistance*⁷ and the *European Social Charter*.⁸ Relevant rights include housing, food, clothing and health care, as well as social assistance and access to the labour market.

The study is separated into three parts, in addition to an introduction and conclusion, with fourteen chapters. In the introduction, Slingenberg explains the analytical concepts underlying her work while limiting her study to a positivist, systematic approach based on the interpretation of the legal framework. She defines four possible approaches towards human rights according to lawyer and anthropologist Marie-Bénédicte Dembour. Human rights can therefore either be natural (given), deliberate (agreed on), a result of protest (fought for) or a result of discourse (talked about).⁹ Slingenberg's study is based on the deliberate approach which considers human rights as a legal instrument derived from international law that may be limited through sovereign means. Furthermore, she limits her interpretation accordingly to Articles 31, 32 and 33 of the *Vienna Convention on the Law of Treaties*.¹⁰

The first part outlines the European directives and their content. The second deals with the equality of asylum seekers and national citizens in light of international human rights documents and the case law of the European Court for Human Rights (ECTHR). In the third part, she identifies positive and negative obligations which States have to take into account regarding the treatment of asylum seekers, and she demonstrates the States' limitations justified by reference to the exercise of sovereignty over those legal instruments.

The European directives provide an increase of rights for asylum seekers over time. However, while the access to certain social security benefits has to be granted immediately when asylum seekers fall under the personal scope of *Directive 2003/9/EC*¹¹ and *Directive 2013/33/EU*,¹² the access to the labour market is far more restricted. The latter has to be granted either at the latest nine months after the asylum seeker has lodged his asylum application if no decision on the status has been issued by a court or tribunal or when the applicant obtains a positive response on his asylum request. Furthermore, Lieneke Slingenberg recognizes that notably Article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*¹³ and Article 18 of the *European Social Charter*¹⁴ provide further obligations for EU Member States in case they would not provide adequate living conditions such as health care, the entitlements to housing or social benefits to asylum

⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 221 UNTS 213 (entered into force 3 September 1953) [ECHR].

⁷ *European Convention on Social and Medical Assistance*, 11 December 1953, 218 UNTS 255 (entered into force 1 July 1954).

⁸ *European Social Charter*, 18 October 1961, 529 UNTS 89 (entered into force 30 March 1965) [ESC].

⁹ Slingenberg, *supra* note 1 art 9f.

¹⁰ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 arts 31-33 (entered into force 27 January 1980) [Vienna Convention].

¹¹ *Directive 2003/9/EC*, *supra* note 3.

¹² *Directive 2013/33/EU*, *supra* note 4.

¹³ *ECHR*, *supra* note 6 art 3.

¹⁴ *ESC*, *supra* note 8 art 18.

seekers.¹⁵

She defines the term “asylum seekers”, which she further broadens in Part 2 by applying the definition given by the *Convention relating to the Status of Refugees (RC)* on “refugees” to “nearly all asylum seekers” as they fall under the criteria for the definition of “refugee” under the *RC*.¹⁶ At the beginning she lays down two models developed by law professor Linda Bosniak (Princeton University, New Jersey)¹⁷: the “sphere convergence model” and the “sphere separation model”.¹⁸ The sphere convergence model explains that the legal status of immigrants is decisive for the application of equal rights for migrants who are in the country. In doing so, it presupposes that only immigrants legally residing in a State can benefit from material rights. According to this model, immigrants’ rights depend on their legal status within a country. As time elapse, the status of asylum seekers may change, though it is arguable if the length of stay and the degree of integration provide further social security rights to asylum seekers or if their legal status has to change.¹⁹ Hence, States may use immigration control in order to restrain or limit obligations towards asylum seekers. The sphere separation model limits immigration control to the border, i.e. the State can only control the border but cannot further limit the immigrants’ rights once they are in the country.²⁰ Her study shows that both models have overlapping aspects concerning asylum seekers’ access to the social security system and the labour market within the EU. Those rights are to be granted and increase over time when applicants for asylum entered the Member State irregularly, though the granted privileges do not have to be equal to those national citizens are endorsed to.²¹

The second part concentrates on the question as to whether it is justifiable that asylum seekers be discriminated against by comparison with national citizens. In Section 3.3 of the book, Slingenbergh discusses the term discrimination and claims that asylum seekers who are not granted the same eligibility to social benefits as nationals are discriminated against on the basis of nationality.²² As immigrants cannot immediately reach citizenship and can therefore be considered as discriminated against “on neutral grounds”,²³ it is convincing to say that a “criterion [for discrimination] is attached to the (absence of) nationality”.²⁴

¹⁵ Slingenbergh, *supra* note 1 at 352-59f.

¹⁶ *Ibid* at 105.

¹⁷ Linda Bosniak, *The Citizen and the Alien. Dilemmas of contemporary membership* (Princeton: Princeton University Press, 2006) at chapter 6.

¹⁸ Slingenbergh, *supra* note 1 at 4.

¹⁹ *Ibid* at 7.

²⁰ *Ibid* at 6-9.

²¹ *Ibid* at 374f.

²² *Ibid* at 97.

²³ Gareth Davies, *National Discrimination in the European Internal Market* (The Hague: Kluwer, 2003) at 184.

²⁴ Slingenbergh *supra* note 1 at 97.

In order to identify obligations for the State, Slingenbergh presents again two models, based on Janneke H. Gerards,²⁵ Aalt W. Heringa²⁶ and Cristina Tobler,²⁷ which have different impacts on the scope of the term “equal treatment” and therefore “discrimination”. The “open model” represents treaties which are “broadly formulated”, and therefore not proving an exhaustive list of grounds of discrimination. This model is appropriate for describing the *International Convention on Economic, Social and Cultural Rights (ICESCR)*²⁸ and the *ECHR*.²⁹ It is a task of interpretation for judicial or “treaty-monitoring bodies”³⁰ to define whether or not discrimination can be justified. Slingenbergh illustrates that in the case of the *ICESCR*, the Committee on Economic, Social and Cultural Rights has to lay out the allowed grounds of discrimination, which is “a differential treatment based on prohibited grounds [...] unless the justification for differentiation is reasonable and objective”.³¹ Considering the *ECHR*, it is the ECtHR which has to define by case law if an alien has been discriminated against as Article 1 *ECHR* offers a broad personal scope by declaring that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.³² The “closed model”, however, sets important limits to unequal treatment or discrimination by listing the criteria which allow an unequal treatment of nationals and aliens explicitly in the treaty. This model describes the ILO conventions, the *European Convention on Social and Medical Assistance* and the *ESC*.³³

The author further analyzes discrimination on the basis of legal status provided by the *RC*: “refugees lawful in the territories”, “refugees residing in the territory” and “refugees staying in the territory”.³⁴ The definition of the different terminologies is clarified by the law scholars Hemme Battjes³⁵, Atle Grahl-Madsen³⁶ and James C. Hathaway.³⁷ Asylum seekers are lawfully in the territory when they have presented themselves or are apprehended at the border and have been explicitly admitted into the country. They are considered to be residing in the territory when they are lawfully or unlawfully present in the country for at least three months. Lastly, they

²⁵ Janneke H. Gerards, *Rechterlijke toetsing aan het gelijkheidsbeginsel. Een rechtsvergelijkend onderzoek naar een algemeen toetsingsmodel* (The Hague: SDU Uitgervers, 2002).

²⁶ Aalt W. Heringa, “Standards of Review for Discrimination: The Scope of Review by the Courts” in MLP Loenen and PR Rodrigues, eds, *Non-discrimination Law: Comparative Perspectives* (The Hague: Kluwer, 1999).

²⁷ Cristina Tobler, *Indirect Discrimination: A Case Study into the development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerp/Oxford: Intersentia, 2005).

²⁸ *ICESCR*, *supra* note 5.

²⁹ *ECHR*, *supra* note 6.

³⁰ Slingenbergh, *supra* note 1 at 90.

³¹ *Ibid* at 179.

³² *Ibid* at 191f.

³³ *Ibid* at 89f.

³⁴ *RC*, *supra* note 4.

³⁵ Hemme Battjes, *European Asylum Law and International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

³⁶ Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 2 Asylum, Entry and Sojourn (Leiden: AW Sijthoff, 1972).

³⁷ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).

are considered to be staying lawfully in the territory when they obtain a residence permit in the country, but not during the time their status is not yet determined by positive law or until three years have collapsed upon arrival.³⁸ Therefore it is possible that asylum seekers who have not been explicitly admitted into the country can be considered as residing in the territory or even lawfully in the country.

The question of sovereignty versus equality is demonstrated with regard to the European directives. Slingenberg shows the differences between the proposals made by the European Commission and the text to be adapted according to the Council of Europe's revision in order to analyze the EU Member States' intentions and objectives when restricting access to social security rights to asylum seekers. The study finds out that the Council's final version of the directives aimed at the harmonization of national standards. They were therefore often more restrictive than the Commission's proposals, notably relating to the access to the labour market where the Member States wanted to maintain their right to decide on the conditions that allow asylum seekers to work in their host country. The requirements which are a result of negotiations between the different Member States clearly show that national sovereignty still plays a major role when dealing with migration in the context of the supranational organization.

Concerning the ILO conventions, only *Convention (No. 118) concerning equality of treatment of nationals and non-nationals in social security* applies,³⁹ according to Slingenberg, to all asylum seekers without regard to their legal status.⁴⁰

Under the *ECHR*, social security is covered by article 14 which applies to "everyone within [the States'] jurisdiction".⁴¹ Here, the residence permit is decisive. First, a "comparability test" is taken to decide if the asylum seeker is either "lawfully residing" in the country or "not unlawfully present" but tolerated. Secondly, a "disadvantage test" will clarify if the asylum seeker has been treated differently while being in "the same circumstances" as a national (i.e. tax payer, contributions to social security system). A State might justify this treatment by subjective objections based on "very weighty reasons", e.g. national security or the protection of an economic system, and proportionality must be given.⁴² The *ECHR*⁴³ is, according to the author, very important for asylum seekers, and rightly so as it provides under article 3⁴⁴ additional safeguard measures to asylum seekers who are under state authority or control i.e., in reception or detention centers.⁴⁵

With regard to the *ESC*, only nationals of the adhering Member States and refugees lawfully staying in the country (appendix Scope of Charter, combination with *RC* three years) fall under the personal Scope of articles 1 to 17, except 12 and 13,

³⁸ Slingenberg, *supra* note 1 at sections 4.5.4-4.9.

³⁹ *Convention (No. 118) concerning equality of treatment of nationals and non-nationals in social security*, 28 June 1962, 494 UNTS 271 (entered into force 25 April 1964) [*Convention No. 118*].

⁴⁰ Slingenberg, *supra* note 1 at 156.

⁴¹ *ECHR*, *supra* note 6 art 14.

⁴² Slingenberg, *supra* note 1 at 204-12, 361 and 379.

⁴³ *ECHR*, *supra* note 6.

⁴⁴ *Ibid* art 3.

⁴⁵ Slingenberg, *supra* note 1 at 349-52.

and 20 to 31.⁴⁶

All in all, Slingenberg explains through the sphere convergence and the sphere separation models how national sovereignty may restrict asylum seekers' social rights when not having legally entered the State but also shows that the mere fact that some applicants are not "lawfully staying" in the territory does not always justify discrimination. Nevertheless, there is a strong nexus between the legal status of an asylum seeker and his entitlement to social rights, although this difference is not addressed by the EU directives, i.e. asylum seekers are granted rights according to the sphere convergence model. The classification of the relevant international law treaties into the open and closed models demonstrate that discrimination can take place in an exhaustive way (closed model) or through open provisions (open model). Some shortcomings of the EU directives, for example the entitlement to a special protection for vulnerable groups, can be addressed by international treaties such as the *ECHR*.⁴⁷

In Canada, asylum seekers' social rights might be addressed in view of the sphere convergence and the sphere separation model, distinguishing their status from a refugee's status. The question of further protection granted by additional international treaties may be revisited in light of the *RC*⁴⁸ and the *ICESCR*.⁴⁹ The utilization of the open and closed model does not seem useful at the current state as Canada has not ratified further international documents granting specific social rights to asylum seekers but follows its national legislation in order to cope with immigration.

⁴⁶ *ESC*, *supra* note 8 arts 1-11, 14-17, 20-31.

⁴⁷ *ECHR*, *supra* note 6.

⁴⁸ *RC*, *supra* note 4.

⁴⁹ *ICESR*, *supra* note 5.