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The Refugee in International Law

1. Introduction

The refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law (including the purposes and principles of the United Nations) and from treaty. Refugee law nevertheless remains an incomplete legal regime of protection, imperfectly covering what ought to be a situation of exception. It goes some way to alleviate the plight of those affected by breaches of human rights standards or by the collapse of an existing social order in the wake of revolution, civil strife, or aggression; but it is incomplete so far as refugees and asylum seekers may still be denied even temporary protection, safe return to their homes, or compensation.¹

The international legal status of the refugee necessarily imports certain legal consequences, the most important of which is the obligation of States to respect the principle of *non-refoulement* through time. In practice, the (legal) obligation to respect this principle, independent and compelling as it is, may be difficult to isolate from the (political) options which govern the availability of solutions. The latter necessarily depend upon political factors, including whether anything can be done about the conditions which gave rise to the refugee's flight. For any solution to be ultimately satisfactory, however, the wishes of the individual cannot be entirely disregarded, for example the connections which he or she may have with one or another State.

The existence of the class of refugees in international law not only entails legal consequences for States, but also the entitlement and the responsibility to exercise protection on behalf of refugees. The Office of the United Nations High Commissioner for Refugees (UNHCR) is the agency presently entrusted with this function, as the representative of the international community, but States also have a protecting role, even though their material interests are not engaged, and

¹ To what extent one should seek to fill every gap is a moot point, and indeed may compromise another objective, namely, the right of everyone 'to belong—or alternatively to move in an orderly fashion to seek work, decent living conditions and freedom from strife': Sadruddin Aga Khan, *Study on Human Rights and Mass Exoduses*: UN doc. E/CN.4/1503, para. 9.

notwithstanding their common reluctance to take up the cause.² Moreover, the 'interest' of the international community is expanding, and this is raising new legal and institutional questions on issues such as internal displacement, complex humanitarian emergencies, and the 'responsibility to protect'.

The study of refugee law invites a look not only at States' obligations with regard to the admission and treatment of refugees after entry, but also at the potential responsibility in international law of the State whose conduct or omissions cause an outflow. It is easy enough to prescribe a principle of responsibility for 'creating' refugees, but considerably harder to offer a more precise formulation of the underlying rights and duties. Writing nearly seventy years ago, Jennings posited liability on the repercussions which a refugee exodus has on the material interests of third States. In his view, conduct resulting in 'the flooding of other States with refugee populations' was illegal, '... *a fortiori* where the refugees are compelled to enter the country of refuge in a destitute condition'.³

With developments since 1939, the bases for the liability of source countries now lie not so much in the doctrine of abuse of rights, as Jennings then suggested, as in the breach of original obligations regarding human rights and fundamental freedoms. Legal theory nevertheless remains imperfect, given the absence of clearly correlative rights in favour of a subject of international law competent to exercise protection, and the uncertain legal consequences which follow where breach of obligations leads to a refugee exodus.⁴ States are under a duty to co-operate with one another in accordance with the UN Charter, but the method of application of this principle in a given refugee case requires care. The promotion of 'orderly departure programmes', as an example of cooperation, supposes a degree of recognition of the right to leave one's country *and* to enter another which is not generally and currently justified by State practice.⁵ Principles of reparation for loss suffered by receiving States also remain undeveloped.

The practice of States certainly appears to permit the conclusion that States are bound by a general principle not to create refugee outflows and to cooperate with other States in the resolution of such problems as emerge. First, by analogy with

² Cf. *R (on the application of Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs (UNHCR intervening)* [2006] EWCA Civ 1279.

³ Jennings, R. Y., 'Some International Law Aspects of the Refugee Question', 20 *BYIL* 98, 111 (1939); see also at 112–13: 'Domestic rights must be subject to the principle *sic utere tuo ut alienum non laedas*. And for a State to employ these rights with the avowed purpose of saddling other States with unwanted sections of its population is as clear an abuse of right as can be imagined.'

⁴ The extent to which 'traditional' rules of State responsibility are, or can be made, relevant to refugee issues, particularly flight, is open to debate. Even with regard to the protection of those who have already left their country, theoretical and practical problems remain, as the discussion throughout this book will show.

⁵ The Director of the Intergovernmental Committee established by the 1938 Evian Conference was charged with undertaking 'negotiations to improve the present conditions of exodus (of refugees from Germany and Austria) and to replace them by orderly emigration'. Orderly departure was also proposed (and adopted, though with some slow starts), as an alternative to the departure of refugees from Vietnam by boat. See further below on Indochinese refugees and the Comprehensive Plan of Action.

the rule enunciated in the *Corfu Channel* case, responsibility may be attributed whenever a State, within whose territory substantial transboundary harm is generated, has knowledge or means of knowledge of the harm and the opportunity to act.⁶ Secondly, even if at a somewhat high level of generality, States now owe to the international community the duty to accord to their nationals a certain standard of treatment in the matter of human rights. Thirdly, a State owes to other States at large (and to particular States after entry), the duty to re-admit its nationals. Fourthly, every State is bound by the principle of international cooperation.

A *rule* to the effect that 'States shall not create refugees' is too general and incomplete. An ambulatory principle nevertheless operates, obliging States to exercise care in their domestic affairs in the light of other States' legal interests,⁷ and to cooperate in the solution of refugee problems. Such cooperation might include, as appropriate, assisting in the removal or mitigation of the causes of flight, contributing to the voluntary return of nationals abroad, and facilitating, in agreement with other States, the processes of orderly departure and family reunion. Where internal conflict or non-State actors are the primary cause of flight, the theoretical application of rules and principles may be as difficult to achieve as practical and political solutions.

Given the uncertain (and perhaps unpromising) legal situation that follows flight, increasing attention now focuses on the ways and means to *prevent* refugee outflows.⁸ The enjoyment of human rights and fundamental freedoms is conditioned, in part at least, upon the opportunity of individuals and groups to participate in and benefit from the nation and body politic, and from the sensible premise that the authority to govern derives from the will of the people as expressed in periodic and genuine elections. The responsibility of States, in turn,

⁶ Cf. Stockholm Declaration: 'States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction': *Report of the UN Conference on the Human Environment*: UN doc. A/CONF.48/14/Rev. 1 and Corr. 1, Principle 21, 5. To compare the flow of refugees with the flow of, for example, noxious fumes may appear invidious; the basic issue, however, is the responsibility which derives from the fact of control over territory, a point clearly made by the International Court of Justice in its Advisory Opinion in the *Namibia* case, *ICJ Rep.*, (1971), 16, at 54 (para. 118).

⁷ Cf. International Law Commission, 'International Liability for Injurious Consequences arising out of acts not prohibited by international law': UN doc. A/36/10, 334ff (1981).

⁸ A number of attempts have been made to devise more 'equitable' systems for dealing with the effects of refugee movements, for example, by the allocation of refugees to States in light of their relative well-being, space and capacity; see, for example, Grahl-Madsen, A., *Territorial Asylum*, (1980), 102–14; Hathaway, J., 'A Reconsideration of the Underlying Premise of Refugee Law', 31 *Harv. Int.L.J.* 129 (1990). See also State-sponsored initiatives include the United Kingdom's 2003 proposal for 'regional protection areas' (Home Office, 'New International Approaches to Asylum Processing and Protection', Mar. 2003) and Denmark's similar 1986 proposal to link a global resettlement scheme with annual quotas offered by UN Member States: 'International Procedures for the Protection of Refugees': UN doc. A/C.3/41/L.51, 12 Nov. 1986. None of these proposals has struck a responsive chord with States generally or with other actors, and it may be that this general unresponsiveness or unwillingness to cooperate in this direction is a factor in individual and 'bloc' efforts to regulate the movements of people by other means.

springs from the fact of control over territory and inhabitants. *A priori*, individuals and groups ought to be free to enjoy human rights in the territory with which they are connected by the internationally relevant social fact of attachment; and it is probably self-evident that this is most likely to be attained, not by imposition from outside, but where democratic and representative government, civil society, and the rule of law flourish locally.

Essential as it is to the preservation of life and liberty, the right to seek asylum from persecution and the threat of torture or other relevant harm is no substitute for the fullest protection of human rights at home. Population pressure is not just a matter of numbers, but also of rural-urban migration, military and social conflict, under-development, deficient or faltering democratization, and people's perception that they are not or no longer able to influence their own life-plans. Equally clearly, however, the responses of the more developed world seem frequently limited to measures at their own front or back door; hence, the concentration on adding locks and bolts, on building higher walls and stronger fences, on palliatives and not remedies.

This all adds up to a less than healthy background against which to portray the panorama of rules and principles that do comprise the international legal regime of refugee protection. The sceptic may consider the ambition entirely quixotic, finding the field of population displacement dominated by narrow national ideologies and the play of market forces. The preface to the first edition of this book in 1983 looked forward to a time when human rights and basic freedoms might be attainable, 'on behalf of every man, woman, and child who has not yet chosen flight from their homeland'. Two editions and twenty-five or so years later, this implicit optimism, premised on a profound belief in the human capacity to resolve problems, is certainly harder to sustain. No international lawyer, however, can help but be impressed by the extent to which human rights and individual welfare are now higher on the political and legal agenda, and by the commitment, particularly among non-governmental organizations and in regional supervisory mechanisms, to ensure that rules are followed and standards maintained. The legal and institutional challenges to fundamental principles should not be underestimated, however, and there is a continuing need to show both the continuing relevance of the rules and their necessity, in face of the social realities of displacement.

The community of nations is responsible in a general sense for finding solutions and in providing international protection to refugees. This special mandate was entrusted to UNHCR in relatively unambiguous terms in 1950, and as an actor on the international plane its practice has contributed greatly to the formation of legal structures and the development and consolidation of rules and standards. Since the early 1990s, however, UNHCR has often given the impression of an agency in search of a purpose, anxious to be seen to be active and to claim turf in the 'humanitarian space', particularly in relation to other international organizations. This has led at times to a loss of priority for its special responsibility for the protection of refugees, although some of the ground has been made

up recently through the Global Consultations process and other promotional work. The backing of key players, both donors and members generally of the UNHCR Executive Committee, will be essential if protection is once again to acquire primary importance, although there is a danger it may be overcome by concerns of the moment or longer, including security, migration, and globalization. In addition, the UN's capacity to respond effectively to complex and other humanitarian emergencies, including both internal and external displacement, is under review, and both UNHCR and other bodies, such as the Office of the United Nations High Commissioner for Human Rights, will need to ensure that protection principles are effectively integrated into policy planning and implementation.⁹

2. The refugee in international law and the practice of the United Nations Security Council

Cross-border movements of refugees trigger legal principles like protection and *non-refoulement*, or activate the institutional responsibilities of organizations such as the United Nations High Commissioner for Refugees. Increasingly, however, such facts are acquiring another juridical relevance in the practice of the United Nations, and may come to influence the conduct of States and the development of the law. For example, the Security Council has turned its attention not only to internal and inter-State conflict, but also to genocide, massive violations of human rights, and crimes against humanity in formulating a variety of resolutions, measures, and actions, including under Chapter VII of the UN Charter. The actual displacement of populations has also been seen as a threat to international peace and security, or as contributing to such a threat.

In resolution 688 (1991) on Iraq, the Council did not proceed to Chapter VII action, but nevertheless expressed its grave concern at events which had led 'to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region'. In resolution 841 (1993) on Haiti, it recalled that it had earlier 'noted with concern' how humanitarian crises, including mass displacements, became or aggravated threats to international peace and security. In the particular circumstances, the persistence of the situation in Haiti was contributing to a climate of fear of persecution and economic dislocation which could increase the numbers seeking refuge in the region, and 'in these unique and exceptional circumstances', its continuation threatened international peace and security in the region.

⁹ See Goodwin-Gill, G. S. 'Protection and Assistance for Refugees and the Displaced: Institutional Dimensions, Institutional Challenges', Paper presented at a Workshop on 'Refugee Protection in International Law: Contemporary Challenges', Refugee Studies Centre, University of Oxford, 24 Apr. 2006 <<http://refugeelaw.quehox.ac.uk>>.

In resolution 819 (1993) on Bosnia and Herzegovina, the Council, this time acting under Chapter VII, condemned as unlawful any taking or acquisition of territory by threat or use of force, including through the practice of 'ethnic cleansing', as well as the forced evacuation of the civilian population and all violations of international humanitarian law. The Council repeated its views in resolution 836 (1993), adding that a lasting solution must depend on reversing the consequences of 'ethnic cleansing' and on recognition of the right of all refugees to return to their homes.

In resolution 1199 (1998), the Security Council condemned the actions of police and military in Kosovo, that is, within the territory of a sovereign State. These, said the Council, 'have resulted in numerous civilian casualties and . . . the displacement of over 230,000 persons from their homes'. It expressed concern at the resulting flows of refugees into neighbouring and other European countries, 'as a result of the use of force in Kosovo, as well as by the increasing numbers of displaced persons within Kosovo'. Again, it reaffirmed the right of refugees to return,¹⁰ and the right of humanitarian organizations to access. The right of 'safe and free' return has also been emphatically repeated in later resolutions, such as resolutions 1239 and 1244 (1999), and in those adopted in respect to East Timor.

This involvement of the Security Council in forced migration, refugee flows and population displacement—as well as in the frequently related issues of genocide, war crimes, and crimes against humanity—invites attention to the nature of its role, and to whether it ought to be an actor in the field, and whether it can indeed exercise a 'responsibility to protect'. In addition, States need to consider the legal implications for themselves, both as Members of the United Nations and as directly affected by decisions and developments in these areas. It is not always clear to what extent law plays a part in Security Council deliberations and practice, and whether principles such as *non-refoulement* and asylum are given any weight when set alongside the overall goal of restoring or maintaining international peace and security. Nevertheless, a review of recent practice may identify some of the elements of an emerging international community interest—the international *ordre public* of which Judge Lauterpacht spoke, in another context, in the *Guardianship of Infants* case.

First, the right of refugees and the displaced to return to their homes has been clearly and emphatically affirmed, together with the responsibility of the State of origin to ensure the conditions which will allow such return in freedom and dignity. The obligations of the State are clearer, and presumably their non-fulfilment is now more likely to be the subject of sanctions or other appropriate measures. Secondly, the responsibility of individuals who have contributed to or caused flight by their involvement in genocide, war crimes, or crimes against humanity, has been progressively and substantially developed in principle and in the practice

¹⁰ In SC res. 1203 (1998), the Security Council also underlined the responsibility of the Federal Republic of Yugoslavia for creating the conditions which would allow refugees to return.

of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and in the adoption and entry into force of the 1998 Statute of the International Criminal Court. Thirdly, the right of access to refugees and civilian populations at risk, including the internally displaced, is now regularly insisted upon, with obvious implications for both refugee-receiving and refugee-producing countries.

3. The refugee in national and international law

Refugee protection is not only about the rules governing the relation between States, but also about how States themselves treat those in search of asylum. The substantial growth and elaboration of refugee determination procedures in the developed world, and the equally substantial body of jurisprudence that has accompanied it at various levels of appeal, have exposed the words of the 1951 Convention to close scrutiny, often apparently at one or more removes from its protection objectives. Besides questions of evidence and proof, national determination bodies have also considered the questions of attribution and causation—whether a claimant, for example, in fact fears persecution for reasons of or on account of his or her political opinion, given the motives of the persecutor, if any; whether prosecution and punishment under a law of general application can amount to persecution, in the absence of evidence of discriminatory application; whether a single act of an otherwise non-political claimant should be characterized as (sufficiently) political to qualify the resulting treatment or punishment as persecution within the meaning of the Convention; whether the refugee definition implies and requires ‘good faith’ conduct on the part of the claimant; whether conscientious objection to military service can form a sufficient basis for a refugee claim, and if so, in what circumstances; whether ‘political offenders’ are refugees; whether the notion of ‘particular social group’ is flexible enough to encompass any number of groups and categories in search of protection; and whether and to what extent human rights law contributes to or complements protection in refugee and analogous claims.

No treaty is self-applying and the meaning of words, such as ‘well-founded’, ‘persecution’, ‘expel’, ‘return’ or ‘*refouler*’, is by no means self-evident. The Vienna Convention on the Law of Treaties confirms that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.¹¹ For the 1951 Convention relating to the Status of Refugees, this means interpretation by

¹¹ Art. 31(1), 1969 Vienna Convention on the Law of Treaties: UN doc. A/CONF.39/27; Brownlie, I., *Basic Documents in International Law*, (5th edn., 2004), 270. Art. 31(2) defines ‘context’ as follows: ‘The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.’

reference to the object and purpose of extending the protection of the international community to refugees, and assuring to 'refugees the widest possible exercise of . . . fundamental rights and freedoms'.¹²

Article 31(3) of the Vienna Convention provides further that account shall also be taken of any subsequent agreement between the parties, or any subsequent practice bearing on the interpretation of the treaty, as well as 'any relevant rules of international law applicable in the relations between the parties'. This subsequent agreement and practice can be derived or inferred, amongst others, from the actions of the States parties at diplomatic level, including the adoption or promulgation of unilateral interpretative declarations; and at the national level, in the promulgation of laws and the implementation of policies and practices. The rules of treaty interpretation permit recourse to 'supplementary means of interpretation' (including the preparatory work, or *travaux préparatoires*) only where the meaning of the treaty language is ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.¹³ If the meaning of the treaty is clear from its text when viewed in light of its context, object and purpose, supplementary sources are unnecessary and inapplicable, and recourse to such sources is discouraged.¹⁴

During the Conference leading up to the Vienna Convention on the Law of Treaties, the United States and the United Kingdom adopted opposing positions on resort to preparatory works, the former favouring their use and the latter, together with France, arguing against the practice. The United Kingdom objected that:

preparation work was almost invariably confusing, unequal and partial: confusing because it commonly consisted of the summary records of statements made during the process of negotiations, and early statements on the positions of delegations might express the intention of the delegation at that stage, but bear no relation to the ultimate text of the treaty; unequal, because not all delegations spoke on any particular issue; and partial because it excluded the informal meetings between heads of delegations at which final compromises were reached and which were often the most significant feature of any negotiation.¹⁵

Or as the French put it, 'It was much less hazardous and much more equitable when ascertaining the intention of the parties to rely on what they had agreed in

¹² 1951 Convention, Preamble.

¹³ Art. 32 of the 1969 Vienna Convention, above n. 11, provides: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

¹⁴ This principle has long been established in international law; see, for example, *Interpretation of Article 3(2) of the Treaty of Lausanne*, (1925) PCIJ (Ser. B) No. 12, at 22; *The Lotus case*, 1927 PCIJ (Ser. A) No. 10, at 16; *Admission to the United Nations case*, ICJ Rep. (1950), 8. See generally, American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, (1987), vol. 1, §325; McNair, *The Law of Treaties*, (1961), Ch. XXIII.

¹⁵ Vienna Conference Records: UN doc. A/CONF.39/11, (1968), 178.

writing, rather than to seek outside the text elements of intent which were far more unreliable, scattered as they were through incomplete or unilateral documents.¹⁶

International courts occasionally resort to the preparatory works, but within fairly well defined limits. In *Interpretation of Article 3(2) of the Treaty of Lausanne*, for example, the Permanent Court of International Justice noted:

Since the Court is of opinion that Article 3 is in itself sufficiently clear to enable the nature of the decision to be reached by the Council under the terms of that article to be determined, the question does not arise whether consideration of the work done in the preparation of the Treaty of Lausanne (*les travaux préparatoires*) would also lead to the conclusions set out above.¹⁷

The International Court of Justice has adopted the same reasoning:

When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning.¹⁸

For better or worse, refugee status decision-makers (and commentators . . .) make frequent use of the *travaux préparatoires* to the 1951 Convention. Many key terms are vague, undefined and open to interpretation, but the results of inquiry into the background, as the present analysis shows, can be rather mixed. On the one hand, clear statements of drafting intentions are rare; yet on the other hand, the debates in the General Assembly, the Third Committee, the Economic and Social Council and, to a lesser extent, at the 1951 Conference itself, provide a fascinating insight into the politics of a highly sensitive and emotive issue. If some sentiments and statements seem frozen in time, others show the continuity of concern and, perhaps too rarely, confirmation of a pervasive humanitarianism.

4. Protection

The jurisprudence which has developed around the 1951 Convention in many national jurisdictions, while it has often taken the drafting history into account, has also contributed to a theoretical appreciation of the rationale for refugee law; whether the influence is always actually or potentially positive (for refugees), certainly deserves further inquiry, as the example of ‘surrogacy’ or ‘surrogate protection’ may show.

¹⁶ *Ibid.*, 176.

¹⁷ *Interpretation of Article 3(2) of the Treaty of Lausanne*, (1925) PCIJ, Ser. B, No. 12, (1925), 22. See also *The Lotus* case, (1927) PCIJ, Ser. A, No. 10, (1927), 16: ‘. . . there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.’

¹⁸ *Admission to the United Nations* case, ICJ *Rep.*, (1950), 8. See also *State of Arizona v. State of California* (1934) 292 US 341, at 359, 360, in which the US Supreme Court said that the rule permitting resort to preparatory work ‘has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body’.

Like many glosses on the meaning of words, the notion of ‘surrogacy’ can serve as a useful introduction to the system of international protection. It describes, succinctly, what happens when an international organization or a State steps in to provide the protection which the refugee’s own State, by definition, cannot or will not provide. However, ‘surrogacy’ can also be misleading. While it owes its origins, in descriptive use, to the surrogate as someone who acts for or takes the place of another, in practice in the refugee context it has tended to displace the individual and his or her well-founded fear of persecution. In one of the leading ‘social group’ cases, *Ward*, the Federal Court of Canada identified as a ‘fundamental principle’, that international protection is to serve as ‘surrogate protection’ when national protection cannot be secured.¹⁹ On appeal, the Supreme Court of Canada also noted:

Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant. This presumption, while it increases the burden on the claimant . . . reinforces the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant.²⁰

Instead of protection being driven, as it might be, by a focus on the individual at risk, the shift is to the State of origin and its capacity, actual or supposed, to provide protection; and then, in a corollary move, to the State of refuge and the extent of its obligations, if any, to provide protection instead.²¹ The object and purpose of the 1951 Convention/1967 Protocol and the regime of protection are thus one step further removed from the individual human being, considered in social and political context.

The Convention definition begins with the refugee as someone with a well-founded fear of persecution, and only secondly, as someone who is unable or unwilling, by reason of such fear, to use or take advantage of the protection of their government. In our view, the Convention’s first point of reference is the individual, particularly as a rights-holder, rather than the system of government and its efficacy or intent in relation to protection, relevant as these elements are to the well-founded dimension. Historically, the references to protection in article 1 were seen primarily as references to diplomatic and consular protection, rather than to the effectiveness of a State and its system of government to ensure rights at home. With the progressive evolution of refugee law and doctrine comes authority for the view today that such local or territorial protection has become an integral part of the refugee definition and the determination that a well-founded fear of persecution exists.²²

¹⁹ *Attorney General v. Ward* [1990] 2 FC 667, 67 DLR (4th) 1.

²⁰ *Attorney General v. Ward* [1993] 2 SCR 689.

²¹ In the words of La Forest J. in *Ward*: ‘Refugee claims were never meant to allow a claimant to seek out better protection than that from which he or she benefits already.’

²² See Lord Carswell in *Januzi and Others v. Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 WLR 297, §66, citing Fortin, A., ‘The Meaning of “Protection” in the Refugee Definition’, 12 *IJRL* 548 (2001), but finding a shift in meaning. On the ‘accountability’ and ‘protection’ approaches, see also Kälin, W., ‘Non-State Agents of Persecution and the Inability of the State to Protect’, 15 *Georgetown Immigration Law Journal* 415 (2001).

Under the influence of the notion of surrogacy, however, the balance of emphasis has shifted, and the major premise is substituted by the minor.²³ The words of article 1A(2) show that the fundamental question is that of risk of relevant harm, and in this context surrogacy is an unnecessarily distracting and complicating factor, adding yet one more burden to the applicant in an already complex process. Reading 'surrogacy' back into the refugee definition tends, as elements in the jurisprudence show, to downplay and even to trump the individual's fear of persecution, while giving preference to the State and its efforts to provide a reasonably effective and competent police and judicial system which operates compatibly with minimum international standards.²⁴ At one time, refugee advocates in the United Kingdom feared that this might indeed be the effect of the House of Lords' judgment in *Horvath*, a case arising out of minority fears of racial violence in a State newly emerging to a democratic system of representative and accountable government. Later interpretations have gone some way towards bringing the central issue of risk of relevant harm back into centre-frame,²⁵ focusing not on whether the legal and judicial system in the country of origin is doing its best and not generally inefficient or incompetent, but whether the applicant faces a reasonable likelihood of being persecuted for a Convention reason if returned to his or her country of origin.

In his recent study of the human rights obligations of non-State actors, Clapham is rightly critical of another recent UK House of Lords' judgment, *Bagdanavicius*. The Court there held (on what was argued finally as an article 3 ECHR50 appeal) that to avoid expulsion the applicant needed to establish not only that he or she would be at real risk of suffering serious harm from non-State agents, but also that the country of origin did not provide 'a reasonable level of protection against such harm' for those within its territory.²⁶ Clapham calls attention to the following 'conceptual point' in the judgment of Lord Brown,

²³ See Lord Hope's comment in *Horvath v. Secretary of State for the Home Department* on the analysis (by Lord Lloyd in *Adan v. Secretary of State for the Home Department* [1999] 1 AC 293, 304) of the refugee definition in terms of two tests, namely, the fear test and the protection test. In Lord Hope's view, 'the two tests are nevertheless linked to each other by the concepts which are to be found by looking to the purposes of the Convention. The surrogacy principle which underlies the issue of state protection is at the root of the whole matter': *Horvath* [2001] 1 AC 489, 497 (emphasis supplied). The refugee definition has been approached sequentially, whereas it perhaps ought to be approached disjunctively: a refugee is someone outside their country of origin because of a well-founded fear of persecution. It is a characteristic of the refugee's condition that he or she is unable or unwilling to avail themselves of the protection of their country of origin, but that is only a condition of recognition of status so far as the facts may show that the fear is not well-founded.

²⁴ The surrogacy approach also fits well within traditional perceptions of the nation-State/citizen relationship, where the individual is only with difficulty conceived of as a human rights holder, let alone as a subject of international law.

²⁵ See, for example, *Noune v. Secretary of State for the Home Department* [2001] INLR 526, 539–40, §28, [2000] EWCA Civ 306; *Svazas v. Secretary of State for the Home Department* [2002] 1 WLR 1891, [2002] EWCA Civ 74.

²⁶ *R. (Bagdanavicius) v. Secretary of State for the Home Department* [2005] 2 WLR 1359, [2005] UKHL 38, Lord Brown at para. 30.

which has also been employed in the determination of persecution in the refugee context:

Non-state agents do not subject people to torture or the other proscribed forms of ill-treatment, however violently they treat them; what, however, would transform such violent treatment into article 3 treatment would be the state's failure to provide reasonable protection against it.²⁷

As Clapham points out, this is not how human rights treaty bodies approach the issue, even if it dominates refugee law.

The whole ethos of humanitarian protection argues against such a judgmental approach with regard to the receiving state. . . . [T]he only criterion under human rights treaty law is whether the person will be subject to a substantial risk of harm from the non-state actor. If there is such a risk, the human rights treaty obligation on the sending state should prevent such a state from sending individuals into harm's way.²⁸

There are still many serious questions here: How does one distinguish between fear of being murdered on grounds of race and a 'well-founded fear of being persecuted unto death' for the same reason?²⁹ Why should the victim or person at risk of persecution be protected through the grant of asylum (if that is the case), but not those who face other violations of human rights? Who should provide protection in the particular case, and in what form, and for how long?

Many of these issues are open, or being reopened. The status of the refugee in international law is not quite in flux, and it has always been precarious to a point, but the aim of the following chapters is to try to indicate with some precision the fundamental interests which *must* be protected as a matter of law, if the inherent worth and dignity of the individual in flight are to be upheld.

²⁷ Ibid., para. 24.

²⁸ Clapham, A., *Human Rights Obligations of Non-State Actors*, (2006), 335–41, 340ff. Applied to the asylum context, the 'receiving State' here is the State of origin, nationality, or transit, to which the 'sending State' proposes to remove the individual.

²⁹ In *Horvath*, above n. 23, 503, Lord Lloyd thought that, 'It is the severity and persistence of the means adopted, whether by the state itself, or factions within the state, which turns discrimination into persecution; not the absence of state protection.'