Introduction

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This collection had its origins in a conference entitled *Refugee Rights and Realities: Approaches to Law and Policy Reform* which was held at the University of Nottingham in November 1996 and was organised by the Human Rights Law Centre as part of a research project funded by the Airey Neave Trust. The conference considered the rights of refugees and asylum seekers and the often contrasting reality of the practice of states and other actors in this area. It brought together some 200 people from over a dozen countries, representing a cross-section of refugee expertise, for an inter-disciplinary dialogue on strategies to address various legal and social aspects of refugee matters.

Papers presented at the conference plenary sessions and the ten workshops were revised in light of debate at the conference, culminating in the seventeen chapters presented in this collection. Other papers, with a more specific United Kingdom focus, were revised and published as *Current Issues of UK Asylum Law and Policy* (Ashgate, 1998). The primarily UK and European focus of the conference was determined by budget and logistical factors rather than any lack of appreciation that the issue of refugees is a global concern (particularly as only a small percentage of the world's refugees actually seeks or finds protection in Europe). While this specific geographical scope is reflected in this collection, the individual chapters nevertheless have an application beyond any national or regional context.

The collection is divided into four sections. Part 1 concerns the evolving refugee definition and some of its key conceptual elements, with chapters variously considering matters of theory as well as jurisprudential and treaty law developments, both historical and current. Parts 2, 3 and 4 are concerned with asylum regimes, in particular the roles of key actors in the refugee discourse, the Office of the United Nations High Commissioner for Refugees (UNHCR), nation states, and the embryonic regional asylum regime of the European Union. Permeating the latter three parts is the relationship, and sometimes the gulf, between the reality of institutional and state action and the rights of refugees. The contributions are as

diverse as the authors themselves and in this they reflect the conference debate and refugee discourse generally. The authors come from a variety of disciplines (including law, international relations and philosophy), backgrounds (academic, practitioners or *fonctionnaire*) and ideological standpoints (classical liberal, feminist etc.).

At the end of the twentieth century, with the global map studded with localised conflicts, internecine strife, fractured states and associated forced migration, the upward trend in refugee numbers has produced a tangible sense of compassion fatigue on the part of many states. Hence the language speaks of refugees as a 'tide' or 'burden' to be passed on by or, at best, shared between states, and as including the 'bogus' who 'abuse the system'. All the while, states insist they wish to keep this system free for the 'genuine' refugee. Yet, before we hark back to some supposed halcyon days of refugee protection, sight should not be lost of the long-standing, intrinsically statist nature of the international refugee protection regime, as perpetuated in its regional and national derivatives. With its emphasis on territory, jurisdiction, admission/departure etc., asylum has been inextricably linked, from its inception through the era of the Cold War and the latter's proxy conflicts, to general principles of public international law, with ultimate control over decision-making resting with individual states.

Thus, state concerns not to write 'blank cheques' or forfeit control over entry to territory saw them withdraw by the middle of the century from a proposed *right of asylum* in favour of a right to *seek and enjoy* it. In contrast, the language of general human rights obligations, at least the rights of the so-called first generation, emphatically provides that 'everyone has the right to . . .' and 'states shall' etc. It is this primary control over the recognition of the status, linked to the absence of an accompanying international judicial supervisory body, which impairs the 1951 Geneva Convention Relating to the Status of Refugees as a human rights document and, in a sense, isolates refugee rights from their general human rights foundation. Yet, refugees, no less than prisoners, women, minorities etc., are a category of human rights bearers, the uniqueness of whose situation requires particular solutions.

That the Convention is a human rights document is incontestably borne out by its contents. Taking as its starting point the Universal Declaration of Human Rights, it details extensive rights concerning non-discrimination, religion, property, association, court access, employment, welfare, housing, education, free movement, documentation etc. In essence it is a catalogue of rights assured to the successful claimant of the status of refugee though the tenor of their formulation might be unfortunate. For example, the term 'human rights' only finds explicit expression

in the preamble, while some substantive rights are included under the heading 'administrative measures'. More fundamentally, so long as state concerns about control of entry and sovereignty prevail, and required solutions are premised on defining the refugee and identifying an offending and responsible state, the refugee phenomenon, while indisputably a matter of individual rights, continues to be viewed in political and security terms.

As the sovereignty–human rights scales slowly tip in favour of the latter, with the revolution in international law that recognises rights as deriving from the individual's humanity as opposed to their citizenship or nationality, the refugee remains problematic. Real or imagined threats to states of origin and receiving states (which are reflected in the prominence afforded in article 2 of the Geneva Convention to refugee duties towards the receiving country) remain the dominant refrain in refugee discourse, whether in terms of altering political balances or ethnic/racial homogeneity, depleting financial and skills resources, or otherwise destabilising state and societal infrastructures.

Contrary to twentieth-century trends in human rights protection generally, the principal obligation of states to refugees is framed in negative, as opposed to positive, terms, that is, as an obligation not to return (*refouler*) an individual to persecution rather than as a duty to admit those fearing persecution. A combination of this narrowly drawn obligation and the legal and ideological malleability discovered within the refugee definition allows ample scope for states to select and prioritise their 'favourite refugees', who are often protected for the political capital gained by affording the refugee label to those fleeing the territory of ideological foes. The level of refugee rights protection has owed as much to the vagaries of the ideological posturing of states as to any sense of individual dignity or of asylum seekers or refugees as bearers of rights *per se*. At the same time, the primacy of the economic interests of states has seen refugees being subsumed within general migration at times when labour is needed. In large part refugees have been consigned to a passive role in the relationship between states.

Nevertheless, it goes without saying that the 'reality' of the refugees' experiences is a tale of individual human rights. This extends from the rights abuses and failures which first prompt movement, the human rights obligations of states in light of such movement, experiences in receiving states and refugee camps (often the scene of new and continued violations of rights), to the rights necessary to establish themselves in countries of asylum or, on return, in their country of origin.

Tapping the wider human rights structures and theoretical analysis does not offer an absolute panacea for the refugee predicament. Indeed

there are inherent dangers for refugees in 'rights talk'. For instance, when the right to return/remain is not voluntarily assumed, return or containment can be to, or within, 'areas' which prove to be anything but safe. Resort to the underlying rights base does, however, provide an escape route from the sometimes tautological, but nevertheless critically important, debates which have developed around the refugee definition, particularly on the meaning of persecution, the recognised grounds, and social group membership. Equally, the fundamental quandary remains in that it presupposes the identification of a rights hierarchy that would activate the duty of states to uphold the principle of *non-refoulement* and other obligations of protection. In part this involves no more than a rephrasing of the question, 'Is this persecution?' Yet, as some commentators, notably James Hathaway, have illustrated, there is a pre-existing international human rights law foundation upon which such an exercise can draw, notably non-derogable rights, where, in the words of UNHCR's training manual, 'their violation is of such a character as to render the person's continued stay in the home country intolerable'.

Such an approach still presupposes the crossing of frontiers and that refugees can reach a point where they can activate such rights. Once again human rights obligations offer a more useful framework, within which practices and mechanisms such as interdiction, carrier sanctions and 'buffer zones' might be challenged.

An associated advantage of a wider human rights perspective is that it allows domestic courts and tribunals to tap the vast resource of international human rights instruments, most of which post-date the Geneva Convention, and the resulting jurisprudence in their deliberations. More generally, it offers the appeal of moving the parameters of the refugee debate so that the language of 'cost' and 'burden' less readily provides states with a political escape route from what would clearly be understood as their international human rights obligations.

The refugee definition

Much energy has been invested in analysis of the refugee definition. It is unlikely that the Convention drafters envisaged the extent to which it would become a standard feature of courtroom dispute or generate so prolific a body of work amongst legal academics. In the absence of expansive *travaux préparatoires* accompanying the Convention, this analysis is an exercise deeply rooted both in the social and political thinking of the time of its formulation and the time and circumstances of its interpretation. The chapters in Part 1 of this collection reflect the scope and diversity of this exercise.

In chapter 1, in a classical legal analysis of the Convention refugee definition, both in terms of how it has and ought to be interpreted, Daniel Steinbock considers the definition's 'ordinary meaning', a more purposive approach and the more recent moves towards a wider human rights perspective. His endorsement of the purposive approach is qualified by the acknowledgment that the utility of such an approach is nevertheless dependent on the purpose actually inferred. Subsequent chapters echo this dilemma.

Jean-Yves Carlier offers in chapter 2 an analytical model, based on a teleological analysis of case law concerning the Convention definition, in his 'Theory of the Three Scales'. This comprises an assessment of risk (in terms of fear being well founded), persecution (according to a test based on what the author identifies as 'basic' human rights) and proof (of risk of mistreatment). Through such a model and the reasoned, interpretative judicial function, he argues that the Convention definition can have a continuing relevance. Most fundamentally, the author notes that such a model can only meet the protective intent of the Convention when 'appropriate' presumptions underpin the questions posed.

The question of contemporaneous relevance also permeates chapter 3 by Jerzy Sztucki, a contemporary of the drafting process. Tracing the historical and regional development of the definition he notes the underlying tension within the quest for precision and universality of application, which has variously produced 'Convention fundamentalism' and more 'comprehensive' approaches towards the refugee definition. Ultimately, the author opines that the refugee cannot be authoritatively defined and that the reality of the refugee situation can only be addressed through a purposive reading of the Convention.

Chapter 4 by Richard Plender and Nuala Mole moves from the 1951 Convention to the wider panoply of international human rights instruments, reflecting the authors' practical involvement in some of the seminal asylum decisions before both UK and European courts. These instruments have in many respects widened the protection available to asylum seekers and refugees. Analysing the various rights involved in the quest for protection, from return to persecution, they concentrate on the prohibition of torture, rights relating to detention, due process and family life through which the Human Rights Committee and the European Commission and Court of Human Rights have, against a backdrop of a restrictive definitional approach, established a web of protection not dependent on the question, 'Who is a refugee?'

In chapter 5 Patricia Tuitt returns to the question, 'Who is a refugee?' She contends that the reality of refugee discourse, with its focus on space, mobility and a classic conceptualisation of the refugee as political

dissident or religious leader, means that it is fundamentally premised on a socio-political construct which is intrinsically adult and male.

Echoing one of the key definitional elements identified in Steinbock's opening chapter and acknowledging one of Tuitt's central theses, the critical issue of the 'political' refugee is explored in chapter 6 by Prakash Shah. The pliant refugee definition as used by Western states during the Cold War to open their arms to their ideological kin has, in more recent times, continued to reflect the political reality behind the grant or refusal of refugee status. Related to the age-old freedom fighter–terrorist dilemma, the desire not to alienate certain countries of origin, whether political ally or economic benefactor, by affording protection to those they persecute, increasingly means that the 'political' is redefined as 'criminal' and legitimate voices are placed in peril or admitted at the price of being muzzled.

In the 1990s the European refugee paradigm changed forever as the clear East–West political polarity disintegrated and, with the falling of the Berlin Wall, millions long-presumed persecuted were redefined as undeserving of protection. Equally, the redrawing of the European political map involved the fracturing of old states, creating new boundaries and new refugees. Claire Messina's final chapter in this part focuses on a much under-researched general migration situation, that of the countries of the Commonwealth of Independent States (CIS). The range of motivations for population movement in this region, variously part of a legacy of historic, forced and voluntary migration as well as more recent conflicts and human rights abuses, has seen a variety of labels applied. These include internally displaced persons, repatriants and formerly deported persons. Moreover, the narrower label of 'refugee' is 'politically loaded' for the CIS states, in some respects in the inverse of the Western states' Cold War refugee construct, in that the archetypal Soviet bloc refugee was the communist activist fleeing right-wing regimes. As Messina observes, this categorisation exercise is a vivid illustration, both of the inadequacy of the central international refugee definition in complex migratory situations and of the difficulties associated with finding consensus on the creation of broader categories, notably that of 'forced migrant'.

The role of UNHCR

Part 2 of the collection, which addresses a central institutional aspect of the refugee debate, opens with chapter 8 by Volker Türk. UNHCR, from its mandate extending beyond concern for the Convention refugee to the elucidation offered by its *Handbook* guidelines and involvement in the drafting of national asylum legislation, has played a central role in matters

of definition. Equally, despite problems stemming from some interpretations of UNHCR's 'humanitarian' role and 'non-political character', UNHCR's broader human rights obligations permeate its mandate even in the context of the shifting sands of the refugee debate.

Türk advances both an historical and current analysis of UNHCR's legal mandate and competence, extended beyond the Convention to encompass refugees, asylum seekers, returnees, internally displaced persons and persons threatened with displacement or otherwise at risk. Acknowledging abortive attempts to codify the law relating to the right of asylum, he details UNHCR's input into regional and other legal developments concerning refugees, stressing its fundamental importance in any future quest for consolidation of necessarily diverse developments and trends.

In chapter 9 Alex Cunliffe and Michael Pugh focus on a distinct aspect of UNHCR's extended mandate, its humanitarian co-ordination role in the former Yugoslavia, which they identify as representing 'a triumph of politics over law'. Raising questions that have arisen prior and subsequent to the Balkan conflagration, the 'lead agency' role is criticised as being but a cover for impotency in other quarters. Moreover, it is identified as an example of the consequences of an inappropriate institutional response and the absence of a clear mandate or, worse, the allocation of an inappropriate one.

In chapter 10, Erin Mooney elaborates on this issue in an analysis of the phenomenon of 'in-country' protection, both in terms of UNHCR's role in the former Yugoslavia and in other regions such as the Caucasus. This shift, from the primarily exilic orthodoxy of the international refugee protection regime to one variously described as one of security, containment, pre-emptive or palliative protection, has drawn withering criticism. Such arguments, which are based on mandate, donor influence and an inability to deliver such protection, are accepted in part, but challenged in detail in this chapter.

Guy Goodwin-Gill returns to the issue of UNHCR's mandate in chapter 11, which criticises the drift from 'protection' towards 'humanitarian action' and situates this development in the context of institutional reform, both of the United Nations and UNHCR, and of the specific failures in the former Yugoslavia, Rwanda and the Great Lakes. He argues that a combination of pragmatic solutions and the growth in 'negative responsibility', whereby doing nothing is construed as the greatest wrong, ultimately means that the principle of protection and the humanitarian 'ideal' of return not only deny refugees their rights, but their very identity. Yet, rather like rights and realities, the author concludes that pragmatism and protection are not by definition irreconcilable.

State responses and individual rights

After the question of institutional responsibility, the three chapters in Part 3 of this collection focus on state responses and responsibilities. In traditional refugee law terms, responsibility has meant the obligations of potential asylum states towards asylum seekers who reach their frontiers. As outlined above, the situation of the refugee within a general rights paradigm, however, fundamentally expands this. State responsibility comes to be viewed as encompassing inaction as well as action and applying to the refugee-generating state and the refugee-receiving state alike. This part of the collection addresses some of these issues, offering a theoretical approach to examining the state–individual relationship and, more specifically, an account of state actions to exclude potential claimants from the asylum process and the individual and collective inaction of states in the lead-up to the 1994 genocide in Rwanda.

Daniel Warner draws upon social, anthropological, international relations and legal theory to seek to reconcile schools of thought that variously see the state as the problem and the solution to the refugee's predicament. From the primacy of citizenship in the state–individual relationship and what the author labels the 'state–territory–citizenship trinity' stem the marginalisation of the refugee whereby the refugee is constituted, not simply as victimised or unprotected, but as subversive of the established primacy of the nation-state. It is this complexity, of the refugee as the *inter* in international, which leads Warner to contend that human rights and state responsibility alone are an inadequate basis on which to examine the relationship between the refugee and the state.

Jens Vedsted-Hansen follows with a more classical legal perspective that explores the advent of substantive and procedural barriers to accessing the asylum process against the backdrop of the international human rights obligations of states and the asserted 'right' of refugees to choose their country of asylum. The distortion of the reference to 'coming *directly* from a territory where [the refugee's] life or freedom [is] threatened' in article 31 of the Convention into an insistence by states on direct flight and the use of constructs such as that of safe third country, stand in the way of the proposed right to choose one's country of asylum. Acknowledging that the Convention is unclear on both counts, the author draws upon its text, on various Conclusions of UNHCR's Executive Committee and on general human rights principles to question the legitimacy of such trends in state practice.

In chapter 14 Howard Adelman is concerned with the reality of collective, in the sense of the UN and otherwise, state failure in the context of the Rwandan genocide. In a forceful critique of institutional structural

weaknesses and, most fundamentally, of the absence of political resolve and rationality, the author offers a reality check to the sometimes facile assumptions made about early warning and preventive action. Ultimately, Rwanda and the Great Lakes were not about the weaknesses of legal definitions, mandates or applicable norms, but about the refusal of states to honour pledges of 'never again' and to convert 'paper' rights into protective reality.

The European regime

Sovereignty concerns might mean that European Union member states baulk at the use of the word 'regime' to describe asylum developments within the EU and other European mechanisms, such as the Schengen Convention on the abolition of checks at common borders, yet in this final part a legal practitioner, an ethnic relations academic and a diplomat clearly identify such a developing regime. If it can be described as a regime then it is certainly one in flux. Treaty revision, the planned expansion of EU membership, the modalities of an ever-changing refugee phenomenon and perennial sovereignty concerns mean that the quest for an EU asylum policy has proved, and remains, a fraught exercise.

In chapter 15, in her analysis of the trend towards asylum harmonisation, Elspeth Guild takes as her starting point the fundamental divergence of opinion, traceable back to the Treaty of Rome and its goal of economic integration, as to the intent lying behind the expression, an 'ever closer union'. In addition to criticisms of EU asylum issues, such as institutional deficiencies and the use of soft law, her more fundamental objection relates to the downward harmonisation trend which, she contends, amounts to a quasi-territorial limitation on member states' obligations and a deviation from the accepted interpretation of the Geneva Convention.

Equally critical, Danièle Joly examines in chapter 16 a fundamental shift in approach to asylum on the part of western European states which is linked to the economic downturn of the 1970s and the demise of the ideological enemy in the form of the Soviet bloc. The new regime, according to the author, represents a change of culture and norms marked by features such as restriction, non-integration, selective harmonisation and the introduction of the concept of temporary protection.

In a more positive assessment than the preceding two chapters, the collection's final chapter by Cornelis de Jong traces the historical evolution of European harmonisation in this area, from the adoption of the European Commission's 1991 work programme on asylum and immigration to the new asylum and immigration provisions of the Amsterdam

Treaty. He identifies the merits and weaknesses of developments under this programme, in terms of rights protection, but generally refutes the assertion that harmonisation is downward in direction. He nevertheless exposes the slow pace of progress, as well as the dilution of the emphasis on harmonisation, the resort to non-binding instruments and so on, in the quest for a European asylum policy.