Introduction: Refugees and Asylum Seekers in the International Context – Rights and Realities[1]

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This book uses the idea of the 'Rule of Law' to illuminate how the legal systems in five industrialized countries which share a common legal heritage – namely Canada, the USA, Australia, New Zealand and the UK – have responded to issues about the rights and status of refugees[2] and asylum seekers.[3] This is a particularly important issue in its own right because, as explained in Chapter 1, the rule of law, which is the cornerstone of the concept of democracy and of modern legal systems, is challenged by its application to refugees and asylum seekers. It is also important for a second reason. The rights of refugees are defined in international law, but are subject to state discretion as to their implementation in national legal systems.[4] As the chapters in this book reveal, implementation is being done in such a way as to deny refugees the

[1] This expression is also used in the following title: Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999).

[2] In everyday parlance a 'refugee' is a person in flight, a person seeking refuge. However, in international law a 'refugee' is a person who comes within the definition in Art. 1A(2) of the Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 1989 UNTS 137 (Refugee Convention) and the Protocol relating to the Status of Refugees, New York, 31 January 1967, in force 4 October 1967, 19 UNTS 6223, 6257 (Refugee Protocol).

[3] An 'asylum seeker' is a person seeking asylum from persecution who has yet to be recognized as a 'refugee' as defined in Art. 1A(2) of the Refugee Convention. But note that the United Nations High Commissioner for Refugees (UNHCR) takes the view that a person who satisfies that definition is a 'refugee' without the need for a determination to that effect. This is known as the 'declaratory' theory – see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: UNHCR, 1979, re-edited 1992) (UNHCR Handbook), para. 28.

[4] This is known in international law as the 'margin of appreciation', the idea that national differences in interpretation of treaties must be allowed, subject to two limitations: necessity and proportionality.

rights which are due to them under the international regime of refugee protection. Thus the international rule of law is also being eroded by implementation at the national level.

This raises the issue of the interconnectedness of the national and the international rule of law. Should the rule of law be regarded only as a 'national enterprise', as Audrey Macklin queries?[5] How can coherency between the national and the international rule of law be achieved? These are issues addressed in this book.

While there is much scholarly discussion about the content of the international rule of law[6] as it applies to refugees and asylum seekers,[7] there is also a need to focus upon the national rule of law which shapes the immediate responses to the issues which refugees and asylum seekers raise. The focus upon the national rule of law is therefore important for yet another reason. As explained in Chapter 1, this focus provides a clear picture of the role of law; of how the law operates in relation to refugees and asylum seekers.

The purpose of this introductory chapter is to put the issues which are discussed in this book into context. This will be done by describing both the rights which apply under international law to refugees and asylum seekers, and the development of the international system of refugee protection in the second half of the twentieth century. It will highlight the significance of national legal responses in shaping that system. In particular it will be explained that although refugees are persons in flight, and in need of protection, and as such are exceptions

[5] See Audrey Macklin, 'Asylum and the Rule of Law in Canada: Hearing the Other (Side)', Chapter 2 in this volume.

[6] In this context it is generally accepted that the 'International Rule of Law' for refugees comprises at least the 1951 Refugee Convention and the 1967 Refugee Protocol. The issue of which other international instruments are relevant is a matter of some debate. James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), p. 8 argues that, in addition to the Refugee Convention and the Refugee Protocol, the rights regime that applies to refugee entitlements includes the two 'foundational treaties of the international human rights system', namely the International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, UN Doc. A/6316 (1966), 999 UNTS 171 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, UN Doc. A/6316 (1966), 99 UNTS 3 (ICESCR).

[7] For example, there are divergent views held on many issues by the authors of two leading texts in this area, namely: Hathaway, *The Rights of Refugees*; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn. (Oxford University Press, 2007).

to the usual rules of migration and for admission to territory,[8] the reality today is that many states view refugees as nothing other than ordinary migrants. That is, the special status which is accorded to refugees under international law is not respected.

In a nutshell, we see that the common trend of industrialized receiving states is to erode the notion of international refugee protection and state responsibility by restrictive measures aimed at deterring or deflecting asylum seekers. Such measures include denying asylum seekers access to territory to claim asylum and denying access to refugee status determination procedures.

The current policies of industrialized states towards refugees are made in the context of concerns about the high level of 'irregular' international migration, and security. Often these two concerns are conflated when it is assumed that all irregular or undocumented migrants are security risks. This leads to policies which discriminate against refugees by containing them in regions of origin and preventing 'secondary movements', or denying them entry at a destination for processing.[9] In particular, in the context of international migration, refugees are often juxtaposed with 'mere' 'economic' migrants. The 'migration–asylum nexus', which is employed in this context, concentrates upon the fact that there are 'mixed flows' of asylum seekers and irregular (economic) migrants. The effect of the migration–asylum nexus is to treat the protection needs of refugees as a secondary consideration to migration controls.

At the global level, the international system of refugee protection in the post-World War II period has mostly developed in reaction to refugee crises and mass outpourings, rather than as responses to individual refugee needs. In this context, there is an inherent tension between the rights of refugees and the political realities of refugee policy. For example, in this chapter it will be shown that one consequence of the restrictive policies of industrialized receiving states has been the 'containment' of refugees in regions of origin and an overall decline in respect for the concept of refugee rights and protection. The figures (discussed in the text below) show a decline in the number of refugees

[8] Michael Walzer, 'Membership' in *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford: Basil Blackwell, 1983), p. 31 – discussed in Chapter 1 in this volume.

[9] Matthew J. Gibney, 'Forced Migration, Engineered Regionalism and Justice Between States' in Susan Kneebone and Felicity Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead* (Oxford: Berghahn Books, 2007), Chapter 3.

seeking asylum in industrialized states, but an increase in the number of those living in 'protracted refugee situations', and an increased number of internally displaced persons (IDPs, or 'internal refugees' as they are sometimes termed). While it may be simplistic to draw a direct correlation between these three trends, there is evidence that the decline in the number of refugees seeking asylum in industrialized states is connected to the latter two trends.

Until recently, the number of persons seeking asylum in industrialized countries had fallen steadily since the beginning of the twenty-first century,[10] but at the same time the total number of people 'of concern'[11] to the United Nations High Commissioner for Refugees (UNHCR) has steadily increased. In December 2006, UNHCR calculated this category at 32.9 million,[12] which represented a 56 per cent increase during 2006 alone. Significantly, this figure includes those living in 'protracted refugee situations' and an increased number of IDPs.[13]

This chapter will first outline the development of the international system of refugee protection in the post-World War II period, and the individual rights and state responsibilities that evolved under that regime. This is followed by tracking the implementation and development of the international system of refugee protection by receiving states in response to subsequent global crises. For that purpose, the discussion will concentrate on the Cold War period and the post-Cold War period, respectively. In the discussion of the latter period, it will be

[10] UNHCR, *Statistical Yearbook 2006, Trends in Displacement, Protection and Solutions* (Geneva: UNHCR, 2007), p. 7 states that the number of refugees has increased for the first time in five years to 9.9 million. See www.unhcr.org/statistics.html (accessed 26 March 2008). See also UN High Commissioner for Refugees, *Note on International Protection: Report by the High Commissioner*, Geneva, 29 June 2007, A/AC.96/1038. The increase noted was from 8.7 million at the end of 2005 to 9.9 million at the end of 2006. This increase was attributed to new refugee populations in Jordan, Syria and Lebanon from Iraq. This correlates with the number seeking asylum in industrialized countries – UNHCR, *Asylum Levels and Trends in Industrialized Countries 2007* (Geneva: UNHCR, 18 March 2008), p. 4 points out in this study of forty-three industrialized countries that the number of asylum seekers had increased by 10 per cent in 2007 and that this is the first increase in five years. See www.unhcr.org/statistics/STATISTICS/47daae862.pdf (accessed 26 March 2008).

[11] The UNHCR mandate includes seven classes of persons: refugees, asylum seekers, and IDPs in certain states which agree to their intervention, returned refugees and IDPs, stateless persons, and 'other persons of concern'. See UNHCR, *Statistical Yearbook 2006.*

[12] UNHCR, *Basic Facts*, www.unhcr.org/basics.html (accessed 14 April 2008).

[13] UNHCR, *Statistical Yearbook 2006*, p. 7 puts the figure at 12.8 million. See www.unhcr.org/statistics.html (accessed 26 March 2008).

shown that refugees have evolved from being a protected class at the end of World War II, to being discriminated against in the context of irregular international migration. Refugees now compete for international attention with other categories of 'forced' migrants such as IDPs. The question considered in the discussion is the link between these trends and the responses of the legal systems of industrialized states. To what extent are they a product of a lack of responsibility to refugees in the developing world?[14]

Part one: development of the international system of refugee protection – rights

The 1951 Refugee Convention, which was negotiated in the aftermath of World War II, was intended to deal with the European problem of 1.25 million refugees arising out of the post-war chaos. In particular it was directed at the victims of Nazi and other fascist regimes. This is recognized by the definition which describes a refugee as a person with an individual 'well-founded fear of being persecuted' as a result of 'events occurring before 1 January 1951' (Art. 1A(2)). Signatories to the Convention could choose to interpret this as referring to events in Europe 'or elsewhere' (Art. 1B(1)) but largely, in fact, read it as being subject to geographical limits. As a result of the 1967 Protocol relating to the Status of Refugees, the temporal and geographical limits were removed.[15]

The Refugee Convention not only provided an individualized definition of a refugee but also made it clear that it was an instrument for human rights protection. The Convention which arose from European events, and which was brokered (largely) by European nations, was also a manifestation of the development of a system of international law and institutions intended to provide responses and solutions to a global problem. The importance of the establishment of the UNHCR in 1951 to administer the Convention under the United Nations General Assembly should not be underestimated. This development was part of a package of far-reaching human rights instruments and measures which were intended to recognize the universality of human rights.

[14] Of the 32.9 million 'persons of concern', 11.1 million were from Asia and 10.1 million were from Africa. See UNHCR, *Statistical Yearbook 2006, Trends in Displacement, Protection and Solutions*, p. 7, www.unhcr.org/statistics.html (accessed 26 March 2008).

[15] This development is discussed later in this chapter.

The Refugee Convention is an instrument of human rights protection which was intended to implement the basic right to flee persecution and to seek and enjoy asylum, and to enshrine the right against *refoulement* (Art. 33(2)). The refugee definition in Article 1A(2) refers to a person with a 'well-founded fear of persecution' who is outside her/his country, and who is persecuted for one of the five reasons specified in the Article. This was a significant development, as previous instruments had provided a generalized, descriptive refugee definition.[16] It is now well established that the meaning of 'persecution' should be interpreted within a human rights framework which includes reference to the standards provided by the main human rights treaties.[17] As James Hathaway has said, the Refugee Convention was 'rarely understood to be the primary point of reference' for refugee rights.[18]

It is sometimes remarked that the problem with refugee policy makers is that they cannot count from one to thirty-three. This refers to the fact that, whereas a lot of attention is given to the refugee definition in Article 1A(2) of the Refugee Convention and to the *non-refoulement* obligation in Article 33, very rarely is reference made to any of the other rights and responsibilities referred to in the Convention. In fact the Convention confers tiers of rights on 'refugees' according to the relationship or status of the refugee in the state from which asylum is sought. Those rights adhere to refugees according to a hierarchy of human rights ranging from basic rights to life and liberty to include social and economic rights. In his most recent book, Hathaway has analysed the rights recognized

[16] James C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920–1950' (1984) 33 *International and Comparative Law Quarterly* 348.

[17] Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007), Chapter 2. The main treaties which are advocated by Hathaway and Foster are Universal Declaration of Human Rights, Paris, 10 December 1948, GA Res. 217 A(III), UN Doc. A/810 (UDHR), ICCPR, ICESCR, plus Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, in force 3 September 1981, UN Doc. A/34/46, 34 UN GAOR Supp. (No. 46) at 193 (CEDAW), Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, UN Doc. A/44/49, 44 UN GAOR Supp. (No. 49) at 167 (CROC) and International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, UN Doc. A/6014 (1966), 660 UNTS 195 (CERD). The role of 'soft' law and 'customary' law are less clear. Hathaway, *The Rights of Refugees*, argues for a 'positivist' approach to international law and prefers to apply an understanding of international law as 'a system of rules agreed to by states' (p. 10). This approach is indicated by his view about the status of the *non-refoulement* principle discussed later in this chapter.

[18] Hathaway, *The Rights of Refugees*, p. 5.

by the Refugee Convention in the light of the relevant human rights instruments.[19]

In recognition of the 'declaratory' nature of refugee status,[20] some basic rights adhere under the Refugee Convention to all refugees, irrespective of status. These include the negative rights against *refoulement* (Art. 33) and discrimination as to 'race, religion or country of origin' (Art. 3).[21] To this can be added Article 31, the non-penalization provision which applies to refugees 'unlawfully' in the country; that is, those who have entered or attempted to enter the territory without permission.[22] Additionally all refugees are entitled to free access to courts of law 'on the territory of all Contracting States' (Art. 16(1)).

Generally, under the Refugee Convention, social and economic rights adhere to a refugee as the status of the person becomes more settled. Thus for example, those refugees whose presence is simply 'lawful' have a right to be self-employed, a right to freedom of movement, and the right not to be expelled except on security grounds.[23] But lawful 'stayers' are entitled to freedom of association, freedom of employment, eligibility for the 'liberal professions', housing, public relief, labour law protection and social security, and travel documents.[24] However, there are some rights in this category which apply to all refugees. These rights arise from the requirements to treat refugees on the same footing as 'aliens generally' (Art. 7) in relation to property rights and advanced education (Arts. 13, 22(2)) and on the same footing as 'nationals generally' in relation to rationing, elementary education, and taxes (Arts. 20, 22(1), 29). Hathaway says that, in drafting the Convention, a deliberate decision was taken not to require any 'attachment' or lawful status for property rights, rights in relation to tax, and free access to courts of law, because the drafters wished to ensure that asylum seekers could claim these rights even if not physically present.[25] At the other

[19] Hathaway, *The Rights of Refugees*. [20] UNHCR Handbook, para. 28.
[21] See also Refugee Convention Art. 4 – freedom of religion and Art. 8 – exemption from exceptional measures on the ground of nationality.
[22] Guy Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection' in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), pp. 185–252 explains that Art. 31 covers persons attempting to enter a territory on the basis of de facto control or jurisdiction.
[23] Refugee Convention, Arts. 18, 26, and 32 respectively.
[24] Refugee Convention, Arts. 15, 17, 19, 21, 23, 24 and 28 respectively.
[25] Hathaway, *The Rights of Refugees*, p. 162.

end of the spectrum, Article 30 of the Refugee Convention applies to resettled refugees and refers to the transfer of assets. Clearly the drafters of the Refugee Convention were alive to the need to protect the rights of all refugees in a variety of situations, including during flight.[26]

As stated above, there are some protections which apply to all refugees irrespective of their status under national law. These include freedom from detention (Art. 31(2) refers to refugees 'unlawfully' in the country of refuge), non-discrimination (Art. 3 – which is amplified by Art. 7 and Arts. 20, 22(1), 29 – the right to be treated equally to 'aliens' and 'nationals' in the areas referred to), free access to courts of law (Art. 16(1)), and the provision of adequate procedures to protect against *refoulement* (Art. 33). These provisions impose obligations upon states to respect the rights of refugees. Additionally, Article 35 of the Refugee Convention requires Contracting States to cooperate with the UNHCR – an obligation which is also recognized in the Preamble of the Convention.

The Preamble refers to the pre-1951 agreements on refugee flows, and to the fact that 'the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of [the] problem . . . cannot therefore be achieved without international cooperation'. Finally, the Preamble notes the role of the UNHCR to supervise the international refugee protection regime, with the cooperation of state parties (which is recognized as a specific state obligation in Article 35 of the 1951 Refugee Convention, as already mentioned).

Of the rights referred to above, the right to seek asylum and the right against *refoulement* are often described as the twin key precepts of refugee protection. As is well known, over the last decade and a half this protection has been weakened through a range of measures adopted at state levels as responses to the refugee 'problem', including non-entrée measures, interceptions, interdictions, offshore processing, restrictive application of the refugee definition, and application of 'safe third country' concepts which are based upon the false understanding that there is no responsibility to process an asylum seeker if protection can be sought in a safe alternative country.[27]

The legality of these measures under international law is a matter of some debate, fuelled by the fact that the 1951 Refugee Convention did

[26] Susan Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The "Safe Third Country Concept" in Jane McAdam (ed.), *Forced Migration and Human Rights* (Oxford: Hart Publishing, 2008), Chapter 5.

[27] Including safe 'country of origin'. See Kneebone, 'The Legal and Ethical Implications of Extraterritorial Processing'.

not actually spell out a 'right' to asylum. Further, there is debate over the nature and scope and status of the *non-refoulement* obligation and the extent to which states are in breach of such obligation when they carry out restrictive measures. The arguments about each of these precepts are now summarized, in order to demonstrate the gaps in the 'International Rule of Law' in these areas, and the opportunities for states to exploit them.

The 'right' to seek asylum

The Refugee Convention defines persons who are 'refugees' in international law, prescribes the rights which flow from that status, and describes the obligations of State Parties to the Convention. While it does not prescribe a 'right' to asylum as such, it arguably presupposes it. The Preamble, for example, assumes that refugees will be accorded the fundamental rights and freedoms of the Universal Declaration of Human Rights (UDHR),[28] which include Article 14, the 'right to seek and to enjoy in other countries asylum from persecution'. Importantly, Article 14 is preceded by the provision about freedom of movement in Article 13 of the UDHR. Article 13(2) of the UDHR (which is replicated in the International Covenant on Civil and Political Rights (ICCPR)[29] Arts. 12(2) and 12(4)) describes a right to leave and to return to one's own country.[30] Notably, the right to be free from persecution, which is implicit in the Refugee Convention, is reinforced by UDHR Article 5: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment' (see also ICCPR Art. 7). This right to be free from persecution arguably forms the basis of the right not to be 'refouled' in the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)[31] Article 3[32] and in Article 33 of the

[28] Universal Declaration of Human Rights, Paris, 10 December 1948, GA Res. 217 A (III), UN Doc. A/810.

[29] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, UN Doc. A/6316 (1966), 999 UNTS 171.

[30] Note that this presupposes that a person has a nationality. The problem of stateless people is of great concern to the UNHCR – see UNHCR, *Statistical Yearbook 2006*, p. 7 – by the end of 2006 there were 5.8 million stateless persons 'of concern' to UNHCR.

[31] Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, UN Doc. A/39/51 (1984), 1465 UNTS 85 (CAT).

[32] While CAT is directed at freedom from 'torture' defined as 'severe pain or suffering, whether physical or mental . . . intentionally inflicted', the meaning of 'persecution' under the Refugee Convention is arguably broader.

Refugee Convention. Self-evidently, in order not to be refouled, a person must be granted an opportunity to seek asylum.

Despite these efforts to state that people should be able to flee persecution, and not returned to places where they face persecution, Article 14 of the UDHR is said to contain an empty right without a corresponding duty.[33] As the provisions of the international instruments discussed demonstrate, while there is freedom to leave one's country and to flee persecution, there is no corresponding duty upon a state to admit a refugee. The Refugee Convention does not contain a specific right to seek asylum and is similarly silent on the matter of refugee status determination procedures.

The issue of asylum thus becomes one of state responsibility and of characterization of that responsibility. Hathaway says: 'In pith and substance, refugee law is not immigration law . . . but rather a system for the surrogate or substitute protection of human rights'.[34] Hathaway explains: 'Refugee status is a categorical designation that reflects a unique ethical and consequential legal entitlement to make claims on the international community'.[35] But states may choose to interpret such a view as an injunction to resettle refugees and point to the lack of such obligation under the Refugee Convention.[36]

This appeal to the ethical status of refugees is similarly one that has had little effect on states. Guy Goodwin-Gill and Jane McAdam have described how political attempts to enshrine a 'right' to asylum in international law in the post-World War II period foundered in the face of claims for territorial sovereignty.[37] They say that, while there is no right under international law to asylum, states have a duty under international law not to obstruct the right to seek asylum. They suggest that the legality of many non-arrival measures adopted by states can be called into question under international law.[38]

[33] Gregor Noll, 'Seeking Asylum at Embassies: A Right of Entry under International Law?' (2005) 17 *International Journal of Refugee Law* 542 at 548.
[34] Hathaway, *The Rights of Refugees,* p. 5.
[35] James C. Hathaway, 'Forced Migration Studies: Could We Agree Just to 'Date'?' (2007) 20 *Journal of Refugee Studies* 349 at 352.
[36] *Ruddock* v. *Vadarlis* [2001] FCA 1329; (2001) 110 FCR 491 at 521 (para. 126) per Beaumont J. Note that Goodwin-Gill and McAdam, *The Refugee in International Law*, p. 9, say in relation to the 'surrogate protection' theory, that 'the role of theory not always helpful'.
[37] *Ibid.*, pp. 355–64. [38] *Ibid.*, p 358.