Looking to Human Rights and Humanitarian Law to Determine Refugee Status

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movement is sorely needed, and the Cancun Adaptation Framework perhaps provides a first step toward this, I want to caution against squeezing all forms of “forced” movement into a protection paradigm, since this may not best address the patterns or needs of those who move.

CONCLUSION

Some may argue that not focusing squarely on climate change in the context of human movement, given its special ethical and political sway, misses an opportunity to leverage funding and assistance. In contrast to general poverty or disadvantage, responsibility for climate change can be more easily attributed to the actions of a wide range of states (morally, if not legally). Furthermore, the countries likely to be most severely affected by its impacts are those which have contributed among the least to global carbon emissions. The sense of injustice this invokes makes it a powerful focal point for activism and social change.

However, in my view, the most effective responses will approach climate change-related movement from a broader human rights matrix. An approach which views climate change as one of a multitude of possible drivers of movement—and which advocates for solutions to those wider problems—opens up more opportunities for solutions and institutional knowledge and capacity.

Finally, we need to think about interventions that can be put in place now, rather than focusing on reactive approaches once displacement occurs. Communities that are given the resources to put adaptation measures in place, including disaster risk reduction and management policies and sustainable development practices, may have less need to move permanently if disaster strikes. Similarly, the extent to which relief and rehabilitation are available to those displaced by a sudden-onset disaster, for example, will affect whether and how quickly they can return home and rebuild. This is why the availability and timing of policy interventions can play a major role in determining whether migration is a form of adaptation, or a sign of a failure to adapt.

LOOKING TO HUMAN RIGHTS AND HUMANITARIAN LAW TO DETERMINE REFUGEE STATUS

By Kate Jastram

The definition of a refugee in international law is famously vague. Two particularly challenging elements are the nature of “persecution” and the scope of involvement in “a crime against peace, a war crime, or a crime against humanity, as defined in […] international law.”

7 The UN High Commissioner for Refugees suggests that “[a] development-oriented approach is now required in response to displacement, emphasizing the inclusion of the most vulnerable and marginalized sections of society in efforts to ensure that they benefit from the livelihoods, services and security to which they are entitled.” Antonio Guterres, Bracing for the Flood, N.Y. Times (Dec. 10, 2009), available at http://www.nytimes.com/2009/12/11/opinion/11iht-edguterres.html?_r=1&emc=eta1. See Hurwitz remarks, supra at 2.

8 As the UN High Commissioner for Refugees has noted, given that most displacement is predicted to be internal, primary legal responsibility for ensuring people’s rights will lie with the states concerned. Id. See generally Jane McAdam, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW (2012).

instruments\(^1\) such that an otherwise eligible refugee would be excluded from international protection.

Given that asylum adjudicators have had over sixty years of experience in interpreting the 1951 Refugee Convention definition, now governing in the 148 states parties to the Convention and/or its 1967 Protocol, there should be ample opportunities for comparative analysis and judicial conversation. Outside the confines of the Convention itself, the evolution of human rights law since 1951 and the explosive growth in international humanitarian law and international criminal law since the mid-1990s have created a rich environment for situating the refugee definition in a more comprehensive international law context.

Some jurisdictions have interpreted persecution using the language of human rights, while others have developed what might be characterized as a more inward-looking, refugee-specific, sense of the word. Similarly, some jurisdictions have indeed looked to ‘international instruments’ to inform their understanding of exclusion for war crimes and related offenses, while others have based their exclusion analysis on other factors. The United States has taken a different direction, by excluding those who persecute others, with the result that persecution for the purposes of exclusion is a mirror image of persecution as defined for the purposes of inclusion.

My work looks at the use, or lack thereof, of international and comparative law in refugee status determination, and explores the consequences for coherence and consistency in international protection. To the extent that international law is taken into account in refugee status determination, it is generally regarded as a positive development. It may feel intuitively correct that this is so, and some scholars have argued that an external legal framework provides analytical rigor to refugee status determination, but it does not empirically appear to be the case.

My intention is to raise questions about these links. I am a skeptic when it comes to the utility, or even the usage, of international law norms in refugee status determination. I question the significance of finding citations to external sources of law in domestic asylum jurisprudence. To the extent that these citations reveal serious engagement with an analytic framework, and not just boilerplate language, there is a risk of making a refugee definition that is famously vague and difficult to apply consistently even more unwieldy by interpreting it with the often indeterminate norms of international law.

With respect to inclusion, is it helpful to say, as the Office of the United Nations High Commissioner for Refugees (UNHCR) has done, that persecution is a serious violation of human rights?\(^2\) Or in the European Union formulation, that it is a severe violation of basic human rights?\(^3\) Human rights law does not recognize a division of basic and non-basic rights. To the contrary, human rights are interrelated, interdependent, and indivisible. With respect to exclusion, is it useful to know that an asylum seeker may be excluded under Article 1F(a) of the Refugee Convention for a war crime as defined under international law? Would that refer to all violations of the 1949 Geneva Conventions, which do not themselves use the terminology of war crimes, or perhaps just grave breaches?

I have looked at the use of human rights law in refugee status determination in the context of claims of persecution based on economic harm, comparing Canada, New Zealand, and the United Kingdom, which interpret persecution in human rights terms, with Australia and

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1. 1951 Convention Relating to the Status of Refugees, arts. 1A(2) & 1F(a), respectively.
the United States, which do not.\textsuperscript{4} I found that despite de jure differences in the legal standard employed, all five countries applied a de facto similar, strict, standard. The human rights-based countries did not have noticeably different outcomes in similar cases. These findings call into question the assertion that a human rights framework provides more rigor than the subjectivity of simply identifying “persecution.”\textsuperscript{5} It appears that inconsistent outcomes be-devil all asylum systems. It is well-documented in the United States,\textsuperscript{5} and just last week, on March 20, 2012, the High Commissioner for Refugees called the European asylum system “extremely dysfunctional,” illustrating his point by noting that acceptance rates for Afghan asylum seekers varied last year from eight percent to ninety-one percent depending on the country in which the claim was lodged.\textsuperscript{6}

A more positive example of the contours of coherence across the countries I studied is the acceptance of theories of gender-related claims, including those based on sexual orientation and identity. These arguments have essentially been won in all five countries, some using a human rights approach, and some not. This seems to indicate that the progressive development of refugee law does not necessarily require a human rights approach.

My work in progress is with exclusion cases, primarily thus far those adjudicated in the United States. Article 1F(a)’s open-ended citation to external sources of law creates an explicit link between refugee law, international humanitarian law, and international criminal law. The Refugee Convention authorizes decisionmakers to use international criminal norms and creates the possibility of a coherent approach to preserving asylum for the deserving while harmonizing interpretations of the enumerated crimes across states, international criminal tribunals, and companion bodies of law. It might therefore be expected that asylum adjudicators would be cognizant of and indeed would consult, if not rely upon, international humanitarian law and international criminal law norms when analyzing exclusion from refugee status, an assumption tested in the study.

This is not the case, at least in the United States. It should be noted that there is a preliminary problem with doing comparative Article 1F(a) jurisprudence. The United States has codified the ground of exclusion as “persecution of others” rather than using the treaty language. This is one obvious case where it would not be desirable to use international criminal law to inform refugee status determination, since the Rome Statute’s definition of persecution as a crime against humanity is much more limited than the understanding in refugee law.

In analyzing all refugee claims decided in the United States involving the persecution of others, I found references to external sources of law—which I define as international law, comparative law, and/or UNHCR guidance—in twenty percent of the cases (20/102 opinions).\textsuperscript{7} It is revealing to see just how venerable these external sources are. With respect to international law, and taking out pro forma references to the Refugee Convention or Protocol, there are two references each to the 1945 Charter of the International Military Tribunal at Nuremberg, the 1946 Constitution of the International Refugee Organization, and the 1948 Universal Declaration of Human Rights. There was one reference to the Third Geneva

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\textsuperscript{7} The study counts opinions, allowing for multiple opinions in one case, rather than cases. Cases covered the period from 1984 to the present.
Convention of 1949, and one to the 1949 Geneva Conventions generally. The only post-1949 international law referenced was the Erdemovic decision of the International Criminal Tribunal for the former Yugoslavia. This is hardly the picture of an up-to-date, outward-looking judiciary engaged with international law.

As for comparative law, these 102 opinions from the United States cited a total of three cases from the United Kingdom, two each from Canada and New Zealand, and one from Australia. Most noticeable perhaps was the paucity of references to UNHCR guidance. Since the U.S. exclusion statute does not mention international instruments, it is perhaps understandable that few are cited in these cases. And since our judges do not often look to other jurisdictions, it is perhaps not surprising that few foreign cases are mentioned. But UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status has been recognized multiple times by the U.S. Supreme Court as a useful interpretive aid, yet it was mentioned in only four opinions out of 102, while one opinion cited a letter from UNHCR’s then-Representative in Washington. Not one opinion cited UNHCR’s 2003 detailed and comprehensive Exclusion Guidelines.8

I am not suggesting that the United States’ refugee exclusion jurisprudence that has developed, and that continues to evolve in isolation from developments in international law, is correct as a matter of international law or responsive to the object and purpose of the Refugee Convention and Protocol. It quite demonstrably is not. I am suggesting rather that the relationship between refugee law, human rights law, humanitarian law, and criminal law needs to be interrogated more rigorously. What does it mean, and in particular what do states mean, when they cast persecution in human rights language and exclusion in international criminal law terms?

I raise two potential implications of this approach. First, it presupposes greater demands on under-resourced refugee status determination systems if decisionmakers need expertise in human rights, international humanitarian law, and international criminal law, as well as refugee law.

Second, concepts from the other bodies of law do not necessarily travel well and may need to be adapted or simply set aside. One example of this was mentioned earlier, in that persecution in international criminal law is not relevant to persecution in the refugee definition. A related issue is the differing legal consequences of a decision in the various areas of law. Refugee protection is an absolute—you are either recognized or you are not. In contrast, there is a greater spectrum of responses available to victims of human rights or humanitarian law violations in their country of origin. They might be released from jail, or receive compensation or rehabilitation, or be able to regain their employment or access to education. Similarly, on the exclusion side, international criminal law violators may get mitigation in sentencing if, for example, they acted under duress.

CONFRONTING COMPLEXITY: INTERPRETATION OR OVER-INTERPRETATION?

By Guy S. Goodwin-Gill*8

The interpretation and application of the 1951 Convention Relating to the Status of Refugees demands an approach which is consistent with general international law, whether it involves implementation through domestic legislation or in the judgments of courts and tribunals.

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