Introduction

Satvinder Singh Juss and Colin Harvey

Refugee law is going through momentous times. The world is awash with refugees. Conventional standards are at risk of being eroded – even of being dismantled. We are watching dictatorships tumble, revolutions simmer, and the ‘Arab Awakening’ rage on, with ominous portents in the Sahel and Syria. Concerns over our security are beginning to replace our humanitarian concerns over the plight of others. The securitization, exclusion and internal relocation of genuine refugees has become a matter of high priority over their straightforward admission. Central idioms of protection, persecution and non-refoulement are changing at an alarming pace and are no longer what they were even 20 years ago. The way we understand the place of refugees in international law is beginning to turn. At the same time new demands are being placed on refugee law. Thoughtful commentators are asking whether there are new spheres of protection emerging, for which a clear space must be found in refugee law, if it is to continue to retain its vitality, and to remain valid and relevant in the changed conditions of the modern world. These include such areas as the protection of child refugees, trafficked persons, gender-related asylum and those who are conscientious objectors to military service. These are the contemporary issues of refugee law. Here, old-fashioned concepts are being reworked to make way for wider protections in a way that was unimaginable 20 years ago. In this sense, refugee law has exciting and challenging times ahead. This compilation of essays does not cover every issue there is to discuss in this changing field of inquiry. It does, however, focus on the major themes of rights, security, the United Nations High Commissioner for Refugees (UNHCR), international humanitarianism and state interests.

Part I begins with a chapter by Catherine Dauvergne on ‘Refugee law as perpetual crisis’, where she explains that, whilst on the one hand, prosperous refugee receiving states are increasingly moving to close their borders to asylum seekers and to assert new mechanisms of control, on the other hand, extra-legal migration is growing in all regions of the globe and this has intensified pressure on the asylum system. This has led
to a proclaimed refugee crisis being diagnosed at regular intervals over the past two decades. Accordingly, ‘crisis’ is the starting point to an understanding of refugee law. Refugee law, she contends, persists as a notion of crisis. This is manifestly so given that mass movements of refugees are generally viewed as crises. Examples proliferate, such as the ‘Indochinese crisis’, the ‘Congo crisis’, the ‘Kosovo crisis’, and so on. In its origins, moreover, the contemporary refugee regime was devised to address the crisis of mass displacement in Europe following the Second World War. Refugee law has since its inception had an association with ‘crisis’. The legal regime is specifically designed to respond to refugees as ‘crises’. It has shaped refugee law in its management and its likely futures. The key insights that this affords us is to view refugee law as crisis. This is clear within refugee jurisprudence, within refugee politics, and within our understanding of international law as a whole. All of this, according to Catherine Dauvergne, shows us how within the world of international relations, refugee law is connected to the broader ‘refugee regime’.

These insights, and especially those regarding the nature of the broader ‘refugee regime’ are picked up in the next contribution, where Satvinder Juss, in the second chapter, ‘The UNHCR Handbook and the interface between “soft law” and “hard law” in international refugee law’ considers how, while the Geneva Convention on the Status of Refugees 1951, supplemented by its 1967 Protocol, is the primary source of modern refugee law, the final text was, from a lawyer’s point of view, deemed to be ‘inconclusive’ in its meaning and intent. It was subsequently necessary for the UNHCR to step in, as the body charged with the task of supervising international conventions, to produce in 1979 the UNHCR Handbook relating to the Criteria for Determining Refugee Status (‘the Handbook’). This was an important document, given that it arose from a request to the UNHCR by states parties for guidance on the meaning and interpretation of the Convention, and the UNHCR set out to do precisely that in the Handbook. It has had a limited impact, however, arising from its equivocal authority before courts and tribunals, which is the direct result of the way in which ‘knowledge’ systems in the world are conceived, constructed and perceived. State interests always militate against the recognition of wider forms of knowledge systems. This impacts adversely on the global resolution of major problems of international law and governance. Satvinder Juss sets out to make good his thesis by reference to a detailed examination of two particular examples, namely, the ‘Palestinian crisis’ and the ‘Afghan crisis’. Both generate refugees. However, for refugee law to become effective, the ‘knowledge system’ of the pronouncements of the UNHCR must be seen as having
Introduction

‘ostensible’ legal authority. Only then can one rescue the status of the Handbook and other UNHCR pronouncements, such as the ‘UNHCR Notes’ and the UNHCR Eligibility Guidelines. These must all be conceived as norm-setting international rules that occur outside the province of traditional international law.

The third chapter is by Colin Harvey. In ‘Is humanity enough? Refugees, asylum seekers and the rights regime’ he explores the interaction between an international legal regime that continues to place great store by the fact of a legally imagined status, and a globalized practice of human rights that underlines the centrality of inclusive guarantees. He examines this question because the wider global conversation is one where we say that we treat all human beings with equal concern and respect. Those displaced by human rights abuses rely on more inclusive notions of the suffering of others we owe responsibilities towards in our world. Yet, as he argues, what really matters is not a ‘constructed status’ but the fact of humanity itself. Each person possesses, simply by virtue of her personhood, intrinsic human dignity. This can be contrasted with approaches which stress communal membership, belonging and national status as fundamental to the rights, responsibilities and entitlements of individuals. However, there is a foundational tension behind the political and legal discussions. The ‘political’ never quite disappears from legality. The law, however, cannot just simplistically be described as exotic political struggle. This is because legal interpretative argumentation on the contours of rights has an integrity of its own, even if more than ‘law’ is at work. Colin Harvey augments his thesis with an analysis, in the deportation context, of the interpretation and application of Article 3 of the European Convention on Human Rights. He sets out, for instrumental purposes, to tease out what is at work when attempts are made to categorise human persons in humanitarian and human rights contexts. He raises the question that has long confounded all those working in refugee law, namely, do human rights underpin, challenge, support or even replace refugee law?

Part II highlights the centrality of human rights to future development of a principled body of refugee law. In four chapters, covering child rights, trafficked persons, draft dodgers and gender-related asylum claims, the leading areas of contemporary refugee law are discussed. Jason M. Pobjoy in ‘A child rights framework for assessing the status of refugee children’ considers how the international community has adopted two treaties that respond independently to the particular difficulties occasioned by involuntary alienage and to the special care and assistance required by children: the Convention relating to the Status of Refugees and the Convention on the Rights of the Child. However, according to
Jason Pobjoy, the identity of a refugee child is layered and complex and it is important that protection is tailored to respond both to the difficulties associated with refugeehood and the distinct needs and vulnerabilities of childhood. In situating the refugee child in international law, he considers how international refugee law and international law on the rights of the child might be more creatively aligned to respond to the reality that the at-risk individual is both a child and a refugee. His focus, accordingly, is on the capacity of the two legal regimes to respond to the distinct needs of a refugee child in the context of the status determination process. His central thesis is that there must be greater alignment between the two legal regimes. This will enhance the protection afforded to refugee children. Pobjoy traces the development of international law relating first to refugees and then to children. He inquires into how the two key international instruments operating within the respective fields have cross-fertilized (or not) with each other over the past century. This provides a basis for discussion about ‘modes of interaction’ where the Convention on the Rights of the Child might appropriately be engaged to assist in determining the status of a refugee child. He ends with the redoubtable proposition that the Convention on the Rights of the Child may give rise to an independent source of status outside the international refugee protection regime.

The second chapter is on human trafficking. In ‘Protecting trafficked persons from refoulement: re-examining the nexus’ Susan Kneebone examines the proposition sometimes encountered in refugee law that, although refugee status is grounded in the idea of loss of membership or protection by a state, refugee law does not guarantee attainment of membership elsewhere. This has resulted in the focus in refugee law shifting to controlling refugees at origin in the form of ‘source-control’. Susan Kneebone shows that this is clearly evident in the context of persecution by non-state actors, when the courts focus upon the ability and willingness of the state (or its agents) to provide protection. This notion poses a challenge to trafficked persons because trafficked persons are frequently threatened by harm from non-state actors, and because in refugee law the standard of protection sanctioned by the courts in that context appears to be less rigorous than that imposed on states in international law in relation to trafficked persons. If the focus of refugee protection is clearly on ‘source-control’, then the issue is whether this is consistent with the standards imposed by the international anti-trafficking framework and its underlying concept of shared state responsibilities. The anti-trafficking framework, in the form of the Protocol on Preventing, Suppressing and Punishing Trafficking in Persons, Especially Women and Children (2000), known popularly as ‘the Trafficking
Protocol’, has a ‘transnational’ character which is based upon the notion of cooperation between states. This has resulted in some recent decisions of the European Court of Human Rights (Rantsev v Cyprus and Russia) and other courts emphasizing the obligations of states, both of origin and destination, to protect persons from trafficking-like situations. Susan Kneebone argues that this approach is clearly at odds with refugee law which focuses upon ‘source-control’ or ‘attribution’ of responsibility on the part of the state of origin. She therefore elaborates on the inadequacies of a ‘source-control’ approach to refugee protection involving trafficked persons, and considers the resulting implications for refugee law. In particular, she suggests that there may be room for a new and revitalized approach given that some recent decisions by UK courts about the refugee status of trafficked persons are moving in the direction of embracing the anti-trafficking standards and are abandoning the ‘source-control’ approach to refugee protection.

In the third chapter, Pene Mathew takes up the topic of the refugee rights of conscientious objectors, which is becoming so topical in the context of the revolutions of the ‘Arab Awakening’ now taking place across the Middle East. In ‘Draft dodger/deserter or dissenter? Conscientious objection as grounds for refugee status’ she opens with the example of a Syrian colonel who defected to Jordan, as a man quite willing to serve in the military, but not to fight against his own people, thus becoming a partial conscientious objector. She considers the position in law and observes how, where one of the parties to the conflict is not readily characterized as evil, conscientious objection has often met with ambivalence and hostility. This is because bearing arms has traditionally been the mark of (male) citizenship, and considerations of humanity rarely outweigh that duty. The result is that many national decision-makers confronted with asylum claims based on conscientious objection have refused to recognize the claimants as refugees. According to Pene Mathew, national jurisprudence in this respect is out of step with current international legal developments. This is because international law has now recognized that citizenship does not require a person to serve in the military where this compels the individual to act against the dictates of their conscience. Any state which overrides individual conscience has failed to protect the citizen’s rights. Nevertheless, there are some very difficult questions concerning the balancing act between individual and collective, and subjectivity and objectivity, which still confront decision-makers. The author here sets out first principles regarding the treatment of conscientious objectors. She then examines some of the key precedents which show that all too frequently, refugee claims based on
conscientious objection fail. She then reviews the development of international human rights and refugee law concerning conscientious objection. This enables her to demonstrate that conscientious objection is protected by the human right to freedom of conscience, and that conscientious objectors should, in principle, be recognized as refugees. The more difficult question is whether both total conscientious objectors and partial conscientious objectors are equally protected by freedom of conscience. The case law on conflicts that may violate the rules of *jus ad bellum* is compared with the case law on conflicts in which there are violations of the *jus in bello* or international humanitarian law. Her informative chapter concludes by calling on national decision-makers to revisit their jurisprudence on the topic of conscientious objection.

The fourth chapter by Siobhán Mullally is entitled ‘Gender asylum law: providing transformative remedies?’. She has a hopeful message. Yet, it is not one that is an unmitigated success story. She examines the developing canvass of refugee law through the application of human rights standards. This has internationalized refugee law, taking it well beyond the constraints of domestic asylum adjudication proceedings. Human rights activism on women’s human rights, gender and sexuality law, has been crucial in securing recognition of gender-related persecution. Nevertheless, such recognition has been uneven with continuing difficulties faced in ensuring consistency at domestic levels. Landmark cases including *Shah and Islam, S395, HJ and HT, Khawar, Kasinga* and *Fornah* have pushed the boundaries. They have extended the limits of refugee law. Positive decisions recognizing gender-related claims increased following these cases. The UNHCR revised its gender guidelines, its guidelines on sexual orientation and on particular social group asylum claims. It continues to assert that gendered violations of human rights fall within the scope of the refugee definition and the protections of the 1951 Convention. Indeed, the 2012 UNHCR Guidelines on Sexual Orientation and/or Gender Identity refugee claims note that the Yogyakarta Principles reflect well-established principles of international law and, although not binding, set out the applicable human rights protection framework. In particular, the specificities of gendered identities and of LGBTI related claims are recognized, as the UNHCR seeks to move its practice beyond earlier references to ‘homosexuals’ or ‘homosexual practices’, terms that both rendered invisible other forms of sexual orientation and gender identity-related persecution, and were found offensive by many.

Siobhán Mullally demonstrates, however, that the process of adding in gender-related claims reveals many of the shortcomings of attempts to fit into inherited legal categories and practices. The permeability of refugee
Introduction

law is limited, and while significant battles may be won through landmark cases and strategic litigation, the everyday problems of establishing credibility and absence of internal protection alternatives continue. A comparative study of nine EU states reveals the mixed experiences of gender guidelines in the asylum process and ad hoc approaches to implementation. Even where such guidelines exist, the impact on adjudication processes appears limited. The extent to which such guidelines comply with evolving UNHCR guidance notes and guidelines also varies considerably, with notably little attention given to the specificities of LGBTI claims. Many of these difficulties relate to the structure of refugee law’s categories itself. Others arise in the context of everyday asylum adjudication and as such may appear less visible without detailed empirical analysis of the practice of gender asylum law. Such analysis points to the obstacles that bubble beneath the surface, including the gate-keeping functions exercised by assessments of credibility and international protection alternatives. Progressive developments in human rights law are often slow to cross over into refugee law, reflecting the peculiar challenge to state sovereignty that comes with a request for asylum. According to Siobhán Mullally, immigration remains one of the last bastions of state sovereignty and asylum adjudication is often tainted by immigration control concerns that limit the transformative potential of appeals to universalizing human rights norms.

Part III has three chapters. These focus on securitization, exclusion and internal flight alternative (IFA). Idil Atak and François Crépeau begin with the securitization of refugee law in their chapter, ‘The securitization of asylum and human rights in Canada and the European Union’. With the unprecedented rise in the number of forcibly displaced persons around the world, migration and asylum have become critical and debated issues in many countries. These have led to concerns related to security, territorial sovereignty and border control. This in turn has fundamentally altered the playing field of immigration regulation. Many states have criminalized illegal entry, removed all help to irregular migration and imposed excessive penalties for migrant smuggling. Border control has once again become the traditional symbol of national sovereignty. Idil Atak and François Crépeau explain how, securitization is defined as a process of social construction that pushes an area of regular politics, such as asylum, into an area of security. The issue is therefore described as an existential threat to fundamental values of society and the state. In the name of urgency and survival, these measures often reach above and beyond the law and the ordinary political process. To develop their thesis, Idil Atak and François Crépeau adopt a comparative approach to draw attention to the dilemma faced by destination countries.
The contemporary debate that they focus on is how the securitization of asylum has resulted in the introduction of more restrictive legislative and administrative policies which are clearly at variance with states’ domestic and international obligations of human rights and with the spirit and often the letter of the Convention relating to the Status of Refugees (‘1951 Geneva Convention’). The main focus of the authors is on the European Union (EU) and Canadian practices. These draw on similar experience in other Global North countries. They show how since the 1980s securitization has been a major feature of asylum policies in the EU and in Canada. The free movement of persons across the EU’s internal borders has been accompanied with an array of flanking measures and external border controls, and europeanization enables states to reinforce existing preventive and deterrent measures against asylum seekers. It results in the establishment of common norms and cooperation mechanisms, making the system less attractive for asylum seeking. A similar trend is observed in North America, where the United States and Canada increasingly cooperate and harmonize their policies to stem unwanted migration. Canada also recently reformed its asylum system and adopted new norms directly inspired by European policies. Idil Atak and François Crépeau have two objectives. They first analyse how the security prism has been used as a peculiar political frame to fashion asylum into a security issue without regard to its objective nature or to the actual threat. They secondly examine how securitization of asylum transforms the logic of domestic structures and public policies and how this process lowers refugee protection standards to the minimum possible and increases the vulnerability of asylum seekers. In the end, they show how this particular framework has legitimized international cooperation, repressive norms and policies against asylum seekers, including the use of detention as a central tool of migration management.

Next, James C. Simeon in ‘Ethics and the exclusion of those who are “not deserving” of Convention refugee status’ considers the so-called ‘exclusion clauses’ in Article 1F of the 1951 Convention and its 1967 Protocol. It is commonly asserted that those who are excluded from Convention refugee status because there are ‘serious reasons for considering’ that they have committed a crime against peace, a war crime, or a crime against humanity; a serious non-political crime outside the country of refuge, or are guilty of acts contrary to the purposes and principles of the United Nations, are not deserving of international refugee protection. He asks whether, as an ethical consideration, it is appropriate to label anyone as ‘not deserving of international refugee protection”? With the emergence of the modern international human rights system which guarantees fundamental human rights to all, it is arguably no longer...
Introduction

appropriate to label some persons as ‘deserving of international refugee protection’ and others as ‘not deserving of international refugee protection’. Furthermore, aside from the negative moral and ethical connotations with respect to ‘labeling’ persons per se, a fundamental principle of justice and fairness is the presumption of innocence in any criminal proceedings and, accordingly, it is neither proper nor correct, in a technical legal sense, to state that a person is not deserving of international refugee protection. According to James Simeon, even those who are excluded from Convention refugee status cannot be refouled or sent back to a country where there would be ‘more than a mere possibility’ of being persecuted. Non-refoulement is deemed to be jus cogens or a peremptory norm in international law and, consequently, no state can send a person back to a country where they could face persecution. The principle of non-refoulement is then the very keystone of the international refugee protection system in the world today. A second ethical question is whether those persons who are excluded from Convention refugee status ought to be prosecuted? If a person has not already been tried, convicted and sentenced before, it may be appropriate either to extradite the person to stand trial for their crimes or for the state, where the person is seeking asylum, to consider prosecuting the claimant. Therefore, ‘exclusion’ in these circumstances may also be unethical. A third ethical question is whether prosecuting, either domestically or internationally, those who have been excluded under Article 1F is essential for ensuring that international human rights, and by extension international refugee rights, are truly protected under the rule of law? James Simeon suggests that it is self-evident that not doing so, when it is appropriate and warranted, would be to allow impunity for those who are serious human rights abusers and the persecutors of others. These three ethical questions should be confronted because they are relevant to how the 1951 Convention and its 1967 Protocol are applied and interpreted by refugee law decision-makers, and to the way that the UNHCR conducts its own refugee status determination under its Statute. It is, therefore, not enough to proceed on the basis that a person is ‘excluded’ from refugee status under the 1951 Refugee Convention.

Finally, Rebecca Wallace in a thought-provoking chapter, ‘Internal relocation alternative in refugee status determination: is the risk/protection dichotomy reality or myth? A gendered analysis’, considers instances of female genital mutilation (FGM), domestic violence, forced marriage and human trafficking subject to IFA procedures in chosen jurisdictions. She notes how international guidelines on internal relocation exist, but these are somewhat contradictory. They provide little clarity. She examines these guidelines and questions their status and
value. The different guidelines identify four elements to which regard must be had when determining whether a person can access meaningful domestic protection: an ability to access the proposed internal protection alternative; the absence of a risk of being persecuted in that place; the absence of other forms of serious harm; and the ability to access a minimum level of civil, political and socio-economic rights. Historically, different emphasis has been placed on the factors regarding the feasibility of internal relocation. Decision-making bodies tended to accentuate either the perceived risk a claimant faces in his or her own country, or the sufficiency of the protection offered by his or her own state. This led to disparity and unpredictability in decision making between, and arguably within, prospective host countries. The absence of international consensus precipitated individual jurisdictions to find their own balance in the risk versus protection analysis. Rebecca Wallace, accordingly, examines the case law of four jurisdictions: Australia, Canada, New Zealand and the United Kingdom. She argues that the risk/protection divide allegedly exists, with Canada and New Zealand emphasizing in the analysis the protection afforded and Australia and the United Kingdom placing more weight on the element of perceived risk. This is the view proffered by the New Zealand Status Appeals Authority.