Confronting Complexity: Interpretation or Over-Interpretation?

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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.

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By Guy S. Goodwin-Gill[*]

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.

[8] UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees (2003).

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Since 1951—and since the mid-1970s especially—there has been a phenomenal growth in "refugee jurisprudence." UNHCR's Refworld database now holds over 10,000 decisions, which makes for a lot of "noise," out of which it can be hard to extract consistent and coherent lines of reasoning. Nevertheless, the primary focus remains the refugee definition, because satisfying its terms leads, in principle, to an international status and to protection. Moreover, although the 1951 Convention rarely mentions or speaks of rights, today we understandably do speak of refugee rights, such as the right not to be sent back to risk of persecution or other relevant harm, which is the reverse side of the state's duty of *non-refoulement*. And because rights are involved, correct interpretation becomes critical, requiring not just a measure of responsibility, but also an awareness and heightened sense of consequences. It is of concern, therefore, when perhaps well-intentioned rephrasing of treaty terms distorts meaning or focus, or when governments advance legally unsound interpretations with a view to limiting or avoiding their responsibilities.

Although some 148 states are now party to the 1951 Convention and/or the 1967 Protocol, there is no single body with the competence to pronounce with authority on the meaning of words, let alone their application in widely and wildly differentiated and evolving fact situations. In the first instance, it is therefore for each state party to implement its international obligations in good faith and, in its practice and through its courts and tribunals, to determine the meaning and scope of those obligations.

We begin with the words. As international lawyers, we take guidance from the general rule of treaty interpretation usefully codified in Article 31 of the 1969 Vienna Convention on the Law of Treaties, and from the supplementary means identified in Article 32. In particular, we come to the words of the refugee definition and interpret them in accordance with their ordinary meaning in context and in light of the object and purpose of the treaty in question. "Ordinary meaning" is important, because these are the words on which states have agreed, and which encapsulate international obligation.

Many states have incorporated their refugee obligations in municipal law, or use the refugee definition, in one way or another as the basis or criterion for asylum and non-removal policies. In the process of incorporation, some use the words of the Convention verbatim, while others may try to "improve" on the original, or variations may creep in through the accidents of the legislative process. Do any of these differences matter?

They can do, for practice shows that even apparently innocuous differences in wording can lead to deviations from the international standard. The test of compliance, however, remains the text of the treaty and its international meaning, so that domestic incorporation and application are to be judged in that light.

For example, the 1980 Refugee Act talks of being persecuted "on account of," not "for reasons of," race, religion, and so forth, and of membership "in," not "of," a particular social group. The differences may seem harmless, though the words "on account of" have in fact generated considerable forensic debate on the necessity for evidence of persecutory intent in the United States, which has not been replicated to the same extent in other jurisdictions using the language of "reasons." Why is not exactly clear.

However, it is not the varieties of the legislative language chosen to implement international legal standards which is the subject of these comments, interesting as they are. Rather, the aim is to sound a note of caution, to invite second thoughts, about some of the verbal assumptions which have been generated in interpreting and applying the 1951 Convention. For glosses upon words by courts and commentators can acquire a life of their own, and though apparently reasonable or innocuous in themselves, can end up constraining the scope

of the 1951 Convention and diverting attention from its purpose—to ensure the protection of individuals and groups at risk of persecution.

Three brief examples follow, drawing on the Convention's references to *protection*, *persecution*, and *reasons*. These are followed by a slightly longer comment on the necessity for an interpretive approach more thoroughly grounded in international law, which takes a look at one aspect of *exclusion* from the protection of the Convention.

Protection

During the time of the League of Nations, a refugee was understood as someone outside his or her country of nationality or former nationality, who did not enjoy the protection of the government of that country. "Protection" here was understood to mean "diplomatic protection," that is, the protection which might be obtained from embassies and consulates.

The 1951 Convention defines a refugee as someone, also outside their country, who has a well-founded fear of persecution and is unable or unwilling to avail themselves of the protection of their government. "Protection" (or its absence) has thus become part of the definition, qualifying the fear of persecution and the notion of well-foundedness. The focus has shifted to whether there is *local*, rather than diplomatic, protection.

There was no necessary reason for this conjunction. The notion of "well-founded fear of persecution" could be determined, as it were, on its own and on its merits, with the inability or unwillingness to avail oneself of protection being simply or mainly consequential on the major premise. Interpretation, however, has taken another route, and the emphasis on protection has led to presumptive descriptions about the purpose of the Convention. This is said to be about providing *surrogate* protection, with the international community seeking, by way of treaty, to replace what the national community—the state—fails to provide.

While this is good enough perhaps to describe the international refugee protection regime as a whole, it is problematic when "surrogacy" enters the definition, displaces attention from individual risk, and is used to deny refugee status except in the most egregious cases of want of local protection.

Persecution

The notion of persecution is not defined in the 1951 Convention, but the drafters certainly understood the concept in historical perspective, given their knowledge of the then still-recent events of the 1920s, 1930s, and 1940s. Since 1951, "human rights" may have allowed the notion to be fleshed out, at least at the theoretical level, but as Professor Jastram has observed, whether and to what extent this has contributed to clarity is a moot point.

The human rights connection, however, has also encouraged the idea that persecution is *necessarily* associated with discrimination. It certainly can be, but is this always the case? It would certainly be wrong to dismiss the simple, single act of persecution, merely because evidence of discrimination was absent.

Reasons

The Convention requires that the persecution feared be "for reasons of" race, religion, nationality, membership of a particular social group, or political opinion. This is sometimes paraphrased to require a *nexus* between persecution and one or more of the Convention grounds. Is this just another way of describing what the Convention is looking for? Possibly, but again the word comes with baggage: it has a markedly predicative content and can

operate to place additional evidentiary obstacles in the way of the refugee in need of protection, particularly if the focus shifts too far away from the issue of risk of harm.

The Purposes and Principles of the United Nations

My final example is the field of exclusion, that is, the denial of refugee status under Article 1F(c) of the 1951 Convention to someone whom there are serious reasons for believing has committed acts contrary to the purposes and principles of the United Nations.

Although this provision has history behind it—variations appeared in the Constitution of the International Refugee Organization, Article 14(2) of the Universal Declaration of Human Rights, and paragraph 7 of the UNHCR Statute—it has long been criticized for its vagueness and uncertainty, and for its liability to abuse by governments looking for ways to deny protection. These days, however, it is fast becoming a fashionable basis for objection to the grant of refugee status, particularly since the Security Council declared the obvious in Paragraph 5 of Resolution 1373 (Sept. 28, 2001), namely, that terrorism was contrary to the purposes and principles of the United Nations. This it did in a legal context, and precisely for the purpose of encouraging states parties so to interpret the 1951 Convention as to ensure that refugee protection was not abused.

What the Security Council did not do was to determine the international legal meaning and content of "terrorism" for these purposes. In fact, even though there is presently wide agreement on the constituent elements of a number of "crimes in international law," often described as "terrorist acts," there is no crime of "terrorism" as such in international law. Does this make it open season for states, which are therefore free to slip under the terrorism rubric any act by any party to a non-international armed conflict, or by anyone in opposition to an established government, no matter how tyrannical and violative of human rights it may be?

The answer, in my view, is "No." Interpretation is again the issue, and Article 31(3)(c) of the Vienna Convention requires that there be taken into account, together with context, "any relevant rules of international law applicable in the relations between the parties." When the UN Security Council declares that "terrorism" is contrary to the purposes and principles of the United Nations, it is referencing a body of law and practice among states members of the international community, in which sufficient evidence *may* be found of consensus as to the legal meaning of terms.

In Resolution 1373, the UN Security Council is also referencing a particular provision of the 1951 Convention and proposing an approach to the meaning of Article 1F(c) which will ensure the protection of refugees (which is the object and purpose of the Convention), while denying that protection to those whom there are serious reasons for considering to have committed "terrorist acts," *as defined by international law*, or on which there exists a sufficient measure of international consensus. This two-fold international legal context first engages the UN Charter, the 1951 Convention, and relevant aspects of international humanitarian and human rights law; and second, it puts in issue the obligation of states parties to the 1951 Convention to implement that treaty in good faith, and in the light of the true meaning of its terms. It is thus *not* open to any state party unilaterally to determine what shall be considered "terrorism" for the purposes of exclusion under article 1F(c); rather, it must proceed *within* the law.

Interpreting the 1951 Convention presents the challenge of reconciling a "living instrument" with consistency with international law. A good-faith interpretation of the treaty is called

for, which reflects, if not the unknown intent of the drafters, then its object and purpose and the practice of states and their consent to be bound.

The Vienna Convention's reminder to take account also of relevant rules of international law applicable in the relations between the parties is an important constraint on interpretation, not necessarily in all cases (international law, for example, has very little to say about the meaning of "social group"), but certainly with regard to those terms and phrases which *do* beg a reference to international law and regulation, such as "the purposes and principles of the United Nations." This requirement, incidentally, is not just a constraint. It is also an invitation to think outside the box, taking account, in the refugee law context, of other protective rules of international law, such as the prohibition of racial discrimination, or the human right of everyone to be recognized as a person before the law, with all that that implies for due process.