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国际难民法的新发展

编者按(Editors' Introduction)

Refugee protection is a prime concern of the international community. The 1951 Refugee Convention and its Protocol remain the sole multilateral treaties governing refugee status and protection with a global reach, and this year marks the 65th anniversary of the adoption of the 1951 Refugee Convention.

World events in recent years highlight the relevance of international refugee law, which is centered around and built on concepts, provisions, and principles in the 1951 Refugee Convention, in today's international community. According to UNHCR, 2015 is likely to exceed all previous records for global forced displacement as almost a million people have crossed the Mediterranean as refugees and migrants and conflicts in Syria and elsewhere continue to generate staggering levels of human suffering.[1] Meanwhile, international realities pose many challenges to the operation of the 1951 Refugee Convention. Disagreements appear on both theoretical and practical levels and do not seem easy to resolve.

The evolution of international refugee law in the past decades has shown considerable flexibility of the 1951 Refugee Convention to be interpreted and applied in response to changing realities of refugee circumstances. For

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[1] *UNHCR report confirms worldwide rise in forced displacement in first half* 2015, 18 December 2015, available at http://www.unhcr.org/5672c98c34.html.

example, the 1967 Protocol cuts the temporal and geographical limitation of the Convention refugee definition, paving the way for the possibility of a broader and quasi-universal refugee governance regime; doctrines and practices of non-State persecution kick in when States are no longer the only source of persecution; and human rights standards have been enthusiastically incorporated into the interpretation of the 1951 Refugee Convention as international human rights law vigorously proliferates. Through theories and practices as such, the boundaries of the 1951 Convention have expanded to cover more victims of forced displacement and to operate as a living international legal instrument.

History and reality have also shown that the flexibility of the 1951 Refugee Convention is not unlimited. The text of the Convention safeguards the boundary of interpretation, and the agreement-be it explicit or tacit-of the parties is crucial in treaty interpretation. As Lord Bingham notes in the *Januzi* case, "the parties to an international Convention are not to be treated as having agreed something they did not agree".[2] One may also draw on *travaux préparatoires* to assert that the aim of the 1951 Refugee Convention is only to provide international protection to a narrowly defined category of persons who can prove a well-founded fear of persecution for enumerated Convention reasons.[3] In a press release of 1 July 2015 concerning the Mediterranean Refugee Crisis, UNHCR asserted that nationals from Syria "are almost universally deemed to qualify for refugee status or other forms of protection" and nationals from Afghanistan and Eritrea "are also mostly considered to qualify for refugee status".[4] It might be argued that such a view that almost every individual from a certain country qualifies for refugee status goes beyond

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[2] *Januzi v. Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426 [4].

[3] See Bríd Ní Ghráinne, "The Internal Protection Alternative Inquiry and Human Rights Considerations-Irrelevant or Indispensable?", *International Journal of Refugee Law*, Vol. 27, No. 1, 2015, p. 33.

[4] *Mediterranean Crisis* 2015 *at six months: refugee and migrant numbers highest on record*, 1 July 2015, http://www.unhcr.org/5592b9b36.html.

the boundary of interpretation and the capacity of international refugee law. It might also be argued whether the existence of war or armed conflict in the country of origin automatically qualifies asylum seekers as having a well-founded fear of persecution for enumerated Convention reasons.

Tensions among the boundaries of the 1951 Refugee Convention are also heightened by the structural characteristics of international refugee law. Since there is no authority entitled to provide conclusive interpretation of the Convention on the international plane, the task of determining the Convention's meaning has thus fallen principally to domestic decision makers.[5] Given the ambiguity of certain Convention's key terms-such as "persecution" and "protection"-and the significant role played by State practices in initiating and then shaping a common legal understanding of such terms, it may well be hard to distinguish to what extent State practices "interpret" and to what extent "generate" international refugee law.

While international protection of refugees is designed to be a system of global burden-sharing, sovereign States retain the exclusive rights to police their borders by controlling the entry of foreigners. It is up to the domestic political decision makers, rather than other States or any international authority, to decide their asylum and immigration law and policy. Moreover, a meaningful discussion of international refugee governance need also look at the responsibility of refugee generating countries. It would be hard to expect a "sustainable development" of the international protection of refugees if the international community fails to alleviate refugee generating circumstances and to enforce liability upon refugee generating countries in an efficient manner.

It is those tensions and complexities around the boundaries of the 1951 Refugee Convention that bring about the idea of this symposium. We hope to take this symposium as an opportunity to reappraise the boundaries of the 1951 Refugee Convention in the present context and as a small yet meaningful way

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[5] James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, Cambridge: Cambridge University Press, 2nd edn., 2014, p. 3.

to mark the 65th anniversary of the adoption of such an important international legal instrument.

In this symposium, six authors and co-authors from four continents provide four articles and one book review, all of which explore the boundaries of the 1951 Refugee Convention from their unique perspectives.

In the Chinese translation of *Non-Refoulement in a World of Cooperative Deterrence* co-authored by Professor James C. Hathaway and Dr. Thomas Gammeltoft-Hansen, the authors explore the territorial boundary of the principle of *non-refoulement*-one of the most important provisions in the 1951 Refugee Convention-by examining the legality and legitimacy of new forms of cooperation-based *non-entrée* policies adopted by developed States. Cooperative *non-entrée* policies are carried out in the territory of States of origin or transit, which in some case are non-party of the 1951 Refugee Convention. According to the authors, the attempts of the wealthier countries to insulate themselves from liability for refugee deterrence by having such actions takeing place outside their own territory will face serious legal challenges in international law. Three evolving areas of international law—jurisdiction, shared responsibility, and liability for aiding or assisting —are likely to stymie many if not all of the new forms of *non-entrée*.

In *International Obligations on Facilitating Refugee Naturalization* authored by Professor LIANG Shuying, the author explores the boundary of the obligation of State parties to facilitate naturalization of refugees. Article 34 of the 1951 Refugee Convention stipulates the obligations of State parties to facilitate the assimilation and naturalization of refugees. For refugees who have a well-founded fear of being persecuted in their country of origin, assimilation and naturalization into the receiving State can be crucial to their well-being. For States parties to the 1951 Refugee Convention, they should perform Article 34 in good faith, but there is no obligation of according local integration or naturalization. As a matter of State sovereignty, granting nationality is within the full discretion of the receiving State. The author argues that State parties are required to make every effort to facilitate naturalization of refugees and that

assimilation is the precondition of naturalization. Assimilation, as the step towards gaining a genuine legal link with the receiving State, should serve as the boundary to clarify the obligation of facilitating naturalization of refugees.

In the Chinese translation of *The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement* authored by Professor Jane McAdam, the author explores the interpretative boundary of refugee status in the 1951 Convention and complementary protection in human rights law in the context of displacement triggered by the influence of climate change and disasters. Ever since climate change and disasters became one of the factors leading to displacement and migration, there have been academic debates as to whether the 1951 Refugee Convention is flexible enough to cover the so-called "environmental refugees" or "climate change refugees". According to the author, New Zealand jurisprudence shows a number of difficulties in applying the refugee definition in the 1951 Convention to the context of climate change and disasters for various reasons, and the New Zealand Immigration and Protection Tribunal has made no legal recognition of "climate change refugees". As the New Zealand cases reveal the boundary of the 1951 Convention, the author further highlights the need to fill the protection gaps by other legal and policy responses.

In *The General Concept of Refugee in International Law: Historical Evolution, Interpretative Conundrum and a Possible Solution* authored by Mr. CHAO Yi, the author explores the limits of rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties (VCLT) in providing an authentic interpretation of the general concept of refugee in international law, as is defined in Article 1(A)(2) of the 1951 Convention and revised by Article 1 of the 1967 Protocol. Against the background that inconsistent even contradictory application of the 1951 Convention often claims justification from the same rule of treaty interpretation, the author takes the concept of "persecution", a term at the core of refugeehood, as an example to illustrate why interpretative tools in VCLT-ordinary/special meaning, context, object and purpose, subsequent agreement/practice, and preparatory work-are of

little help to reaching an authentic understanding of certain Convention terms and can be utilized by countered arguments as discoursal instruments. According to the author, a meaningful interpretation of the general concept of refugee in international law can be approached by looking at the "greatest common factor" of the practices and *opinio juris* of State parties to the 1951 Convention based on the framework of customary international law.

In the review essay of Professor LIU Guofu's groundbreaking new book *Chinese Refugee Law*, Professor ZHU Xiaoqing appraises the book as "a work with rich content and clear viewpoints". According to the reviewer, *Chinese Refugee Law* analyzes the core concepts of refugee law in both Chinese and English, linguistic and legal, domestic and international contexts. While combining the local practices of refugee protection in China with the international legal framework of the 1951 Refugee Convention and 1967 Protocol, *Chinese Refugee Law* also explores the possibility of specific legislation or regulation concerning refugee protection in China's domestic legal system. Professor LIU Guofu's effort in sketching the normative framework of Chinese refugee law by outlining its values, principles, and mechanisms stresses core issues that embody the interaction and boundaries between the 1951 Refugee Convention and domestic legal systems.

International refugee law develops in the overlapping legal space between State sovereignty and humanitarian principles.[6] The ever-changing balance between the two keeps pushing the boundaries of the 1951 Refugee Convention, sometimes forward and sometimes backward. We sincerely hope that this symposium can provoke more thoughts and academic efforts into the exploration and reappraisal of the boundaries of the Refugee Convention in the present world where the vitality and vigor of international refugee law come with as many challenges and problems.

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[6] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Oxford: Oxford University Press, 3rd edn., 2007, p. 1.