

Guy S. Goodwin-Gill

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GUY S. GOODWIN-GILL

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PREFACE

Refugees have been a continuous feature of international life in the present century. They were one of the first concerns of both the League of Nations and the United Nations, and over the last sixty years vast numbers have found the opportunity of a new life in countries of asylum and resettlement. Yet no end is in sight to the potential for future flows. The major inspiration for this book has come from my own involvement with the cases of many hundreds of refugees and asylum-seekers, in my capacity as a legal adviser in the Office of the United Nations High Commissioner for Refugees (UNHCR). Latterly, however, added impetus was given to the project by a growing sense of dissatisfaction with existing mechanisms and procedures, and the feeling that these and the commentaries on them have failed to develop and keep pace with the crucial issues, let alone with the dimensions of today's problems. At times it has seemed as if refugees are not only an apprehended, but also an accepted dimension to every conflict, whether resulting from external aggression or from radical, internal political and social upheavals.

The fact of flight across frontiers by those in fear for their lives or freedom neatly sets in opposition the sovereign self-interest of states and the apparently near-universal sentiments of concern which people feel for those deserving protection. Only since the beginning of this decade has attention begun to focus on what seems to me to be an essential premiss: that the situation of being a refugee is, and ought to be, a situation of exception; and on its corollary: that legal and political measures should be directed either to the avoidance of that situation, so that people may pursue their lives in peace, at home, and free from prejudice and persecution; or to its prompt resolution through voluntary repatriation.

Political realities, reported daily in the world's media, often make remote the attainment of this ideal; thus, refugee law and the protection of those who flee continue to occupy an essential place in any international regime professing concern for humanitarian issues. In the light of this dimension, I have attempted to describe the foundations and the framework of refugee law by concentrating on three core issues: the definition of refugees,

‘asylum’ for refugees, and the protection of refugees. My aim has been to show that refugees are a class known to and defined by general international law; that certain legal implications follow from the existence of this class and of related principles (in particular, that states are bound not to return refugees to territories where they may be persecuted or where their life or freedom may be threatened); and that the international community, besides being responsible in a general sense for finding solutions, also has the necessary legal standing to protect refugees, for which purpose it may be represented by UNHCR or by individual states. In pursuit of these objectives, I have examined the provisions and effectiveness of relevant treaties, state practice (especially in the face of recent refugee crises), and the measures taken by states in their municipal law and administrative arrangements to protect refugees.

I hope that this book will serve not only as an authoritative statement of the current law, but also as a pointer to the future, as a basis for further enquiry and the development of appropriate principles and solutions. Overall, the exceptional situation of the refugee cannot be isolated from broader human rights issues. If so much in the way of basic freedoms and standards of treatment can be achieved for the refugee, then no less ought to be attainable on behalf of every man, woman, and child who has not yet chosen flight from their homeland.

Sydney
December 1982

Guy S. Goodwin-Gill

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This study has some of its origins in my research work leading to the degree of Doctor of Philosophy in the University of Oxford, part of which was published in 1978 as *International Law and the Movement of Persons between States*. Certain of the ideas were introduced, and others began to be elaborated, in an article published in volume 3 of the *Michigan Yearbook of International Legal Studies*. The greater part of the research and writing, however, was completed during 1981 and, wherever possible, has been updated in the light of developments throughout 1982.

The process whereby ideas have developed and matured necessarily owes much to the influence of those with whom I have worked, sparred, and disagreed over the last six years, too many to mention and thank by name. I am especially grateful, however, to Dr James Crawford, Reader in Law at the University of Adelaide and now of the Australian Law Reform Commission, and to Gervase Coles, Deputy Legal Adviser in the Australian Department of Foreign Affairs and now Chief, Conferences and Treaties Section, UNHCR. Both read substantial portions of the manuscript and offered much valued criticism and advice. The worth of my own practical experience has been heightened by my association with many government officials involved in refugee matters; it almost always seemed to me that we shared humanitarian objectives, even if our ideas about appropriate solutions to particular problems may have differed. I am pleased to have had the opportunity to work with Roy McDowall, of the United Kingdom Home Office; Ian Simington, Assistant Secretary, Refugees and International Branch of the Australian Department of Immigration and Ethnic Affairs and now Senior UNHCR Co-ordinator for South-East Asia; and John Hoyle, of the Australian Department of Foreign Affairs.

I owe a special debt to the members of Australia's Determination of Refugee Status Committee and its Secretariat, in particular, John Forster, for long its chairman and always a source of helpful advice; also Keith Baker, John Cleary, Peter Byrne, Sue Bromley, Greg Jones, Tony Greville, Barbara Phi, Peter Job, and Howard Porter. In New Zealand, too, I was pleased to be

closely associated with the Inter-departmental Committee on Refugees, with its chairman, Bill Mansfield, Head of the Legal Division, Ministry of Foreign Affairs, and with Dell Higgin and Joan Wiltshire.

I received a great deal of practical help from colleagues in the United Nations Joint Office in Sydney. Gilberto Rizzo gave early encouragement before leaving as chief of that office to return to the United Nations Department of Public Information in New York. His successor, Dr Hugo Idoyaga, with many years field experience as a Representative for UNHCR, was a constant source of knowledge and assistance, while I am grateful also to my colleague in the resettlement area, Veronica Bull. The librarians of the United Nations Information Centre in Sydney, Pat Cook and Con Sarantis, willingly ferreted out many an obscure document, while Gayle Delaney and Nguyen Thi Thao gave patient help with typing. It will also be clear that much is owed to those colleagues in UNHCR Headquarters, Geneva, and in UNHCR offices throughout the world who were willing to share in a positive way their own views and experience. The opinions expressed here nevertheless remain my own, and are not necessarily held by the Office of the United Nations High Commissioner for Refugees.

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Chapter I

DEFINITION AND DESCRIPTION

1. Refugees

In this work, the word 'refugee' is used as a term of art, that is, a term having a content verifiable according to principles of general international law. In ordinary usage, it may enjoy a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. The destination of the person fleeing is not relevant; the flight is to freedom, to safety. Likewise, the reasons dictating flight may be many; flight from oppression, from a threat to life or liberty, flight from prosecution; flight from deprivation, from grinding poverty; flight from war or civil strife; flight from the consequences of natural disasters, earthquake, flood, drought, famine. Implicit in the ordinary meaning of the word 'refugee' lies an assumption that the person concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes of flight. The 'fugitive' from justice, the person fleeing criminal prosecution for breach of the law in its ordinary and non-political aspect, is therefore often excepted from this category of refugees.¹ For the purposes of international law, states have limited the concept of the refugee as beneficiary of protection and assistance. For example, 'economic refugees'—the term is generally frowned upon—are not considered to come within the definition. The solution to their problem, perhaps, lies more within the province of international aid and development, rather than in the institution of asylum.

Defining refugees may appear an unworthy exercise in legalism and semantics, obstructing a prompt response to the needs of people in distress. States have nevertheless insisted on fairly restrictive criteria for identifying those who are to benefit from

¹ The Shorter Oxford English Dictionary defines a refugee as 'one who, owing to religious persecution or political troubles, seeks refuge in a foreign country; orig. applied to the French Huguenots who came to England after the revocation of the Edict of Nantes in 1685'. Refuge is in turn defined, *inter alia*, as 'shelter or protection from danger or trouble, succour sought by, or rendered to a person ... A place of safety or security; a shelter, asylum, stronghold'.

refugee status. For the victims of natural calamities,² the very fact of need may be the sufficient identifying factor, but for the victims of conditions or disasters with a human origin, additional factors are required. The purpose of any definition or description of the class of refugees is to facilitate, and to justify, aid and protection; moreover, in practice, satisfying the relevant criteria will indicate entitlement to the pertinent rights or benefits. In determining the content in international law of the class of refugees, therefore, the traditional sources—treaties and the practice of states—must be examined, with account taken also of the practice and procedures of the various bodies established by the international community to deal with the problems of refugees.

2. Refugees defined in international instruments 1922–46

In treaties and arrangements concluded under the auspices of the League of Nations, a group or category approach to the definition of refugees was adopted. That someone was (a) outside their country of origin and (b) without the protection of the government of that state, were sufficient and necessary conditions. A Russian refugee, for example, was defined in 1926 to include ‘any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality’.³ In this instance, presence outside the country of origin was not explicitly required, but was implicit in the objectives of the

² By GA Res. 2816 (XXVI), 14 Dec. 1971, the Office of the Disaster Relief Co-ordinator was established with the UN, in recognition of the necessity ‘to ensure prompt, effective and efficient response to a Government’s need for assistance, at the time of a natural disaster or other disaster situation’. Cf. Brown, *Disaster Preparedness and the United Nations* (1979) 14–32; he cites (at 29) UN legal counsel opinion that the phrase ‘other disaster situations’ would ordinarily cover ‘man-made disasters’, but notes that this aspect was discounted in the Secretary-General’s preliminary report (E/4994, 9) and that co-sponsors of Res. 2816 (XXVI) were not in agreement on the issue. See further UN doc. A/35/228, paras. 19–25 (1980), and the critical report of the Joint Inspection Unit: JIU/REP/80/11; UN doc. A/36/73 and Add. 1; also on special economic and disaster relief assistance, UN docs/ A/36/737 and Add. 1. In 1981, the General Assembly resolved to strengthen the capacity of the UN system to respond to natural disasters and other disaster situations: GA Res. 36/225, 17 Dec. 1981.

³ Arrangement relating to the issue of identity certificates to Russian and Armenian refugees, 12 May 1926: 84 LNTS no. 2004. The definition of ‘Armenian refugee’ was to like effect: *ibid.* See also ‘Assyrian, Assyro-Chaldean, and assimilated refugee’ as defined in the arrangement of 30 June 1928: 89 LNTS no. 2006; art. 1, 1933 Convention relating to the international status of refugees, and reservations thereto: 159 LNTS no. 3663.

arrangements, namely, the issue of identity certificates for the purpose of travel and resettlement.⁴

A similar approach was adopted in 1936 arrangements in respect of those fleeing Germany,⁵ which were later developed by Article 1 of the 1938 Convention, to cover:

- (a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or fact, the protection of the German Government.
- (b) Stateless persons not covered by previous conventions or agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German government.⁶

Article 1(2) excluded from the definition persons who left Germany for reasons of purely personal convenience.

At a meeting in Evian in the same year, participating states resolved to establish an inter-governmental committee with, as its primary objective, 'facilitating involuntary emigration from Germany (including Austria)'.⁷ Included within the scope of the committee's activities were those who had yet to emigrate on account of their political opinions, religious beliefs, or racial origin, as well as those who had already left for those reasons and had not established themselves elsewhere.⁸

Commenting on definitions, Simpson observed in 1938 that all had certain inherent deficiencies. He stressed the importance of keeping in view the 'essential quality' of the refugee as one 'who

⁴ It was also provided that certificates should cease to be valid if the bearers returned to their country of origin; see form and wording of the certificate attached to the arrangement of 5 July 1922: 13 LNTS no. 355; Res. 9 of the arrangement of 30 June 1928: 89 LNTS no. 2005; certificate attached to the Convention concerning the status of refugees coming from Germany of 10 Feb. 1938: 192 LNTS no. 4461.

⁵ Art. 1, provisional arrangement concerning the status of refugees coming from Germany, 4 July 1936: 171 LNTS no. 3952.

⁶ 1938 Convention concerning the status of refugees coming from Germany: 191 LNTS no. 4461. The definition was subsequently extended to cover persons coming from Austria, following the *Anschluss*; see the additional protocol, 14 Sept. 1939: 198 LNTS no. 4634.

⁷ See further below, ch. V. s. 3, on the scheme for 'orderly departure' from Vietnam. Speaking in 1979 to the Geneva Conference on Refugees and Displaced Persons in Southeast Asia, United States Vice-President Mondale characterized the 1938 Evian Conference as a failure. 'The civilized world', he said, 'hid in a cloak of legalism.' UN Press Release SG/REF/3, 21 July 1979, Take 2, p. 1.

⁸ Para. 8, Resolution adopted by the Intergovernmental Meeting at Evian, 14 July 1938: LN OJ, 19th year, nos. 8-9: Aug.-Sept. 1938, 676-7. See also art. 1, agreement relating to the issue of travel documents to refugees who are the concern of the Intergovernmental Committee on Refugees, 15 Oct. 1946: 11 UNTS 73.