Current Challenges in Refugee Law*

Guy S. Goodwin-Gill**

Introduction

‘Current challenges in refugee law’ are well-covered in the various contributions to this volume, whether they emerge in regional developments and reforms, in securitisation, access to asylum procedures, exclusion, interception, external controls, or the scope of refugee protection. To these, one might add that the big questions are also still worth looking at, including Why protect? Why protect ‘refugees’? Where should refugees be protected, how, and by whom?

The international agenda is full, too, whether in relation to the role of law in bringing statelessness to an end, or in protecting the stateless on the move; protracted refugee situations, and law’s role again in reducing their number or improving protection and the quality of life; preventing the necessity of flight (not very fashionable today); co-operation between States as a legal principle or dynamic institution; the accountability of international organizations, not excluding UNHCR, whether in determining status, ‘governing’ camps and settlements, promoting or implementing solutions; the legal and political responsibility for internally displaced persons (especially for those among them who may desperately need the option of international flight); the treatment of children in flight and the applicable law, due regard being paid to the best interests of the child; the relation of human rights law to international refugee law and to international humanitarian law; and the very notion of asylum and the right to seek asylum in this modern, mobile world.

With so many challenges ahead, this paper settles for a narrower focus, and aims to tease out a limited number of situations in which we see most clearly the urgent necessity to translate the protection required by international law into meaningful domestic institutions, to see the applicable rules and principles incorporated by appropriate legislation, effectively implemented in decision-making and upheld in the judgments of courts and tribunals.

---

* Revised text of a presentation given at the Post-Graduate Workshop on Refugee Law, Refugee Law Initiative, Doctoral Affiliates Network, Senate House, University of London, 5 December 2012.

** Senior Research Fellow, All Souls College, Professor of International Refugee Law, University of Oxford, Oxford.
There is necessarily a tension here between the ‘inherent’ jurisdiction of every State to ‘manage’ migration; and the ‘inherent’ obligation of every State to fulfil its treaty obligations in good faith, and to respect, promote and protect human rights. That tension produces discord. Rules and principles are open to challenge, either generally or in the facts of particular cases. The powerful principle of non-refoulement is contested in spurious legal argument, or through often secret agreements, assurances, and memoranda of understanding. Practice here is leaking into the still ongoing debate over internal relocation, while the quality of local protection is once again being integrated, not so subtly, into arguments about the well-foundedness of fear or the risk, or serious risk, of treatment contrary to Article 3 of the European Convention.

Certainly, there are difficulties inherent in a system of ‘universal’ human rights, the protection of which is divided up among territorial units of widely differing capacities, resources, and capabilities, not to mention divergent views on the world; and international lawyers must always beware of theories built on the sands of academic speculation and far removed from the acid test of State practice, let alone the lived lives of people on the move.

But looking at the movement of people between States, it is not difficult to make out the expanding extent to which rules and principles of international law increasingly circumscribe States’ freedom of action. What appeared once on the perimeter, an element perhaps in building an abuse of rights argument, now is in the foreground. It is no longer permissible to deny protection through the use of racial stereotypes; to detain arbitrarily and indefinitely those who may be stateless or not ‘returnable’ to any other place; to disregard risk, or to displace responsibility onto the shoulders of others, whether it be a country of transit, a partner State in a regional organization, a paid client State, or the country of origin. This paper focuses precisely on notions of risk, considered from two perspectives: first, from that of risk to the State; and second, from circumstances where the existence of risk of harm to the human rights of individuals presently outside their own country triggers obligation and responsibility.

The context, however, is one ‘peculiarly susceptible to the tyranny of phrases’, to use James Brierly’s felicitous language, for this is an area of interests which ‘engage the emotions and the prejudices’ of people at large, including decision-makers, policy-makers, and commentators, too. Brierly was thinking of situations where issues demanding unprejudiced consideration seek shelter, ‘under a mischievous phrase, whether it be sovereignty, or independence,

---

1 Brierly, J.L., ‘Matters of Domestic Jurisdiction’ (1925) 6 British Yearbook of International Law 8–19, 8.