How do the different elements of the refugee definition fit together?

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Article 1A(2) of the Refugee Convention

[As a result of events occurring before 1 January 1951 and] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it.
Article 1A(2): four clauses

• “….owing to a well-founded fear of being persecuted [well-founded fear clause]

• for reasons of race, religion, nationality, membership of a particular social group or political opinion, [causal nexus or Convention reasons clause]

• is outside the country of his nationality [alienage clause]

• and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; [ or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it.][the availment clause]
“Meta”-refugee law issues

• the “fear test”
• the ‘protection test’
• The “Internal Protection Alternative (IPA)” test
• The risk assessment
• The discrimination test
• Lord Clyde in Horvath:-

• “The dangers of over-sophistication in the construction and application of the Convention are real and significant. Prolonged debate about the niceties of the language may readily lead to delay in the processing of what in the interests of everyone should be a relatively expeditious process. Of course there may often be difficult points of fact to be resolved and uncertainties in matters of fact which may not immediately be open to a clear answer. But it is obviously undesirable to heap onto the shoulders of the adjudicators and the members of the tribunals who already have a heavy burden of work an additional complexity in the unravelling of legal issues on the precise construction of the particular words used in the Convention.”
Is this meta-level of inquiry necessary?

• **ARGUMENTS IN FAVOUR:**
  1. Analytical rigour [see e.g. NZ Refugee Appeal No. 74665/03]
  2. Avoidance of particular types of errors in decision-making (e.g. Hathaway and Foster’s analysis of Internal Protection Alternative (IPA) decision-making)

• **ARGUMENTS AGAINST:**
  • Regarding (1): ambiguity/opacity of wording; need for a broad definition; flexibility of VCLT criteria; principle of dynamic interpretation; need for a holistic approach; observable redistribution of elements; reconcilability.
  • Regarding (2): similar types of errors occur whichever approach is adopted [see e.g. UNHCR Guidelines on “Internal Flight or Relocation Alternative”, 2003.]
Analytical rigour

• Example: New Zealand case, Refugee Appeal No.74665/03:

• “It is essential to ensure that one element is not inadvertently given a function or meaning which more properly belongs to another...Thus the question whether there is a Convention ground cannot sensibly be conflated or confused with the issue of risk (the well-foundedness element). Similarly, the question whether the anticipated harm can properly be described as “being persecuted” is not an analysis which belongs in the assessment of risk”
No sharp edges: Zimmerman and Mahler on IPA practice:

• Both the “well-founded fear of being persecuted “and the “protection” approaches may be valid, but that these elements are “intertwined in a way that renders the attribution of a clearly defined ‘textual home’ of the test practically inconceivable”, (‘Article 1A, para 2 1951 Convention, 446-463).
Reconcilability

• Guidelines on International Protection: ‘Internal Flight Relocation Alternative within the context of Article 1A(2) of the 19561 Convention and/or the 1967 Protocol relating to the Status of Refugee para 2:

• “Some [states] have located the concept of internal flight or relocation alternative in the “well-founded fear of being persecuted” clause of the definition, and other in the “unwilling...or unable...to avail himself of the protection of that country’ clause. These approaches are not necessarily contradictory, since the definition comprises one holistic test of interrelated elements. How these elements interrelate, and the importance be accorded to one or another element, necessarily falls to be determined on the facts of each individual case.”
Avoidance of particular types of error

• Example: Hathaway and Foster argue that if the Internal Protection Alternative (IPA) inquiry is located in the “well-founded fear of being persecuted” limb rather than (as they say) the “availment” clause, the following types of error arise:

• putting the onus of proof on the applicant;

• requirement to show countrywide persecution

• focusing solely on whether the well-founded fear can be negated even if it requires hiding or concealment;

• wrongly encouraging the inquiry to move directly to the question of well-founded fear without first making factual findings about the substance of the claim
Acid test(ing)

• Take the following well-accepted propositions of refugee law:
  • that protection concerns domestic/internal as well as external protection;
  • that actors of persecution can include non-state actors;
  • that use of the phrase “being persecuted” shows that inquiry must focus on the predicament of the refugee, rather than necessarily on the motives of the actors of persecution;
  • that the refugee assessment is forward looking and requires a risk assessment.
Proposed solution: (1) underlying objectives

- Simplicity
- Consistency of interpretation
- Quality of interpretation
- Consolidation - that was intention of 1979 Handbook - to build on state practice
- Convergence
Proposed solution: (2) a high threshold

• flexibility
• holistic
• broad correspondence, rather than precise location
• no sharp edges
• convergence
• high threshold