State protection and internal relocation

Presentation by Mark Symes and Hugo Storey for the Refugee Law Initiative

January 2019

Early debates

- Were the actions of “non state actors” a matter against which the Refugee Convention was intended to operate? *Aitseguer* in the House of Lords said “yes”: such is the only tenable meaning of the Refugee Convention
- Did the signatories see “protection” as referencing diplomatic protection or the home country’s system for providing “protection”?

“Effectiveness” or “best efforts”?

- Early UK Tribunal cases sum up the debate:
- (a) *Yousfi* – does the “protection” prevent a “real risk” of harm eventuating?
- (b) *Lounadi* – was the state acting reasonably bearing in mind its resources?
- (c) *Debrah* – was there a “sufficiency of protection” having regard to international law requirements?

What are the requirements of international law?

- UNGA 1998 Resolution *Right and Responsibility … to Promote and Protect Universally Recognised Human Rights* etc:

> "Each State has a prime responsibility and duty to protect, promote and implement all human rights … by adopting such steps as may be necessary … as well as the legal guarantees required to ensure that all persons under its jurisdiction .. are able to enjoy all those rights … in practice"

Horvath test

- UKHL concluded that the test was
- The availability of a system for protection and a reasonable willingness to operate it
- A practical standard
- Focus on the justice machinery and its ability to detect, punish and prosecute

Australia and New Zealand were unimpressed: any test that did not measure whether the well founded fear was countered by the “protection” would be contrary to the non-refoulement duty

Democracies and the presumption of protection

- Many courts have said as much, most famously *Canada v Ward*
- *Svazas* (EWCA): legacy of the past may nevertheless impede a young democracy's ability to protect

The UK post-*Horvath*

- Various Judges subsequently claimed to be making rulings that were consistent with *Horvath* though in truth questioning its premise, eg
- *Kacaj* and *Noune*: “ineffective” best efforts by authorities might mean protection not legally adequate
- *Dhima:* can the available protection “reasonably be expected to meet and overcome the real risk of harm”

Exhausting domestic protection

- ECtHR in *Aksoy*: not expected to pursue remedies where experiences led applicant to be “vulnerable, powerless and apprehensive of the authorities”
- No need to try and access “protection” that the country evidence shows demonstrably ineffective: thus futile steps are not required, *Skenderaj* (EWCA)
- Protection must cater for the individual circumstances: additional protective steps may be required, eg the ECtHR in *Osman* and the EWCA in *Bagdanivicius* – do the authorities know (or should they know) of relevant particular circumstances such that “additional protection” required

Identity of non-state actors

- *Svazas* (EWCA): special attention must be given to persectuors "clad in the authority of the very state … supposed to afford its citizens protection"
- Thus a State must act "promptly and effectively" to prevent this kind of abuse - though the majority emphasised that this did not mean that there had to be a "guarantee" of protection
- A spectrum of cases, the more senior the misbehaving actors, the easier it would be to rebut any presumption of state protection

Can only States provide protection?

- UK Tribunal found in *Dyli* that UNMIK/KFOR could provide protection, as there was no reason for the international community to provide protection where it was available nationally
- UNMIK/KFOR had assumed state functions at the instance of the national authorities
- In *Gardi* (EWCA) it was noted that “protection of that country” referenced “country of his nationality” and thus the ability to grant nationality appeared essential; and only States were accountable in international law

Dual meaning of protection

- EWCA in *AG:*
- One meaning is a simple question of fact: are there local forces operating that diminish the risks faced in practice to below the “well founded fear” level?
- The other meaning is the contested legal term of art: what entities can provide protection?
- A positive answer to the first question tends to render the second one redundant

Internal relocation

- Where is this found in the Refugee Convention's text?
- Language has changed over time
  - Internal flight
  - Internal relocation
  - International protection

It has materialised in Strasbourg's Article 3 ECHR jurisprudence: so is it a peremptory norm of international law?

Elements of internal relocation

- Existence of safe haven
- Accessibility of safe haven
- Reasonableness of life there

Life in the safe haven

- Reasonableness (which suggests a balancing exercise without a high threshold) or undue harshness?
- Hathaway has argued that the measure should be assurance of the core rights which the Geneva Convention requires for refugees
- The notion that “basic norms of civil, political and socio-economic human rights” must be secured has gained more traction
- UKHL in *Januzi* said that everything was relevant
- Access to critical social safety nets crucial

Introduction

Does protection within the meaning of Art 1A(2) mean external or internal(=domestic) protection?

Where should the protection test be located within the refugee definition?

What is the interrelationship between protection and fear (the 'protection test' versus 'the fear' test)

Must protection within the meaning of Article 1A(2) be state protection?

Must the approach to the meaning of protection within Article 1A(2) be a human right one?

How effective should protection be?

Assuming we are concerned with state protection, must the protection afforded be by state actors?

How does one establish the threshold of adequate or effective state protection?

In which limb of the Article 1A(2) definition should we locate the IFA/IRA/IPA test?

Must a human rights approach be taken to the IPA?

Hathaway and Foster, LRS2,329-330

"Finally, it is important to recognise that any assessment is to be undertaken <u>exclusively</u> in relation to the ability of the state to protect, not in relation to the possibility that non-governmental agencies such as those "that advise or shelter women from…violence" could provide some assistance to the applicant. As explained above, the <u>only relevant source of protection</u> is one that is legally sanctioned and operated by the state and is able to enforce and put into effect protective mechanisms against the threat of harm."

Hathaway and Foster LRS2 cont'd

"Since in most cases it is the police force which "is the only institution mandated with the protection of a nation's citizens and in possession of enforcement powers commensurate with this mandate", the availability of forms of assistance and relief such as those providing material relief, psychological support, and other remedies essential to victim recovery is **irrelevant** to the question of whether there is an ability on the part of the state to provide protection."

Hathaway and Foster LRS2 cont'd

- "As observed by the Canadian Federal Court, for example, the victims of sexual violence "may show [the country's] civil society sector's efforts to combat the problem of sexual violence, but it does not demonstrate that the state has made efforts at the legislative, judicial or enforcement levels", let alone that any such efforts have been effective."

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.

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Article 1D Refugee Convention

"The Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the [UNHCR] protection or assistance""

James Crawford, “The Criteria for Statehood in International Law”

“It is sometimes said that 'willingness to observe international law' is a criterion for statehood. But it is particularly necessary to distinguish recognition from statehood in this context. Unwillingness or refusal to observe international law may well constitute grounds for refusal of recognition, or for such other sanctions as the law allows, just as unwillingness to observe Charter obligations is a ground for non-admission to the United Nations. Both are, however, distinct from statehood.”

Hypothetical example

In State A persons from ethnic minorities face a real risk of serious harm from extreme right wing racist groups.

The state does not take positive steps to protect the ethnic minorities against such groups.

However, there is an extremely well-organized and effective and durable umbrella of civil society organisations whose impact is that the racist groups are never able to attack or effectively threaten anyone.