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2002

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Recommended Citation
Hathaway, James C. "The Causal Nexus in International Refugee Law." Foreword to Mich. J. Int'l L. 23, no. 2 (2002): 207-9.

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THE CAUSAL NEXUS IN INTERNATIONAL REFUGEE LAW

*James C. Hathaway**

For all of its value as a critical mechanism of human rights protection, international refugee law is not an all-encompassing remedy. In at least two ways, the category of persons of concern to refugee law is significantly more narrow than the universe of victims of human rights abuse. First, only persons able somehow to leave their own country can be refugees. Alienage is a requirement for refugee status because of concerns about the limits of international resources and the potential for responsibility-shifting, as well as in recognition of the fundamental constraints which sovereignty still places on meaningful intervention by the international community. Second, not even all persons in flight from serious human rights abuse and who manage somehow to make their way to an asylum state qualify as refugees under international law. Only those able to show that their fear of being persecuted is "for reasons of race, religion, nationality, membership of a particular social group or political opinion" are entitled to the protection of the Refugee Convention. This second fundamental limitation on access to refugee status is the subject of this special collection of essays.

The University of Michigan Law School's Second Colloquium on Challenges in International Refugee Law, convened in March 2001, was devoted to consideration of the import of the nexus ("for reasons of") clause in the international refugee definition. Senior students enrolled in the Program in Refugee and Asylum Law prepared a comprehensive analytical survey of current state practice in leading asylum countries. This work was critiqued by a select group of experts in international refugee law, who then worked collaboratively with the students in Ann Arbor to define an understanding of the nexus clause which could be recommended to governments and decision-makers around the world. The result of that endeavor, the *Michigan Guidelines on Nexus to a Convention Ground*, appears in this volume at page 210. In addition to publication of the *Guidelines* themselves, contributors to the Colloquium unanimously recommended that portions of the analytical survey be refined for publication so that readers could appreciate more fully the complexity of the issues at stake in the nexus debate. We are pleased here to include three essays which highlight the core concerns in the contemporary jurisprudential debate, and explain why the approach

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recommended in the *Michigan Guidelines* is an apt response to those challenges.

In the first article, "Repairing the Legacy of *INS v. Elias-Zacarias*," (p. 223), Shayna Cook critically assesses the caselaw which has applied the leading American precedent on the nexus issue. In 1992, the Supreme Court of the United States determined that the aberrational language of the US statute implementing its duties under international law—in which the reference is to "persecution . . . on account of" an enumerated ground, rather than "being persecuted for reasons of" a Convention factor—effectively requires proof of the subjective motivation of the persecutor before refugee status can be granted. Because Elias Zacarias, a young Guatemalan man who had been threatened with death for refusing to join anti-government guerrillas, could not establish that the guerrillas were motivated by animosity towards his political neutrality, his refugee claim was denied. This extraordinary interpretation—in which the protection of asylum seekers is effectively made contingent on whether persecutors choose to announce their motivations, or at least provide circumstantial evidence of their goals—is impossible to square with either the text or surrogate protection purposes of international refugee law. As Cook makes clear, it has also resulted in an inconsistent and largely unprincipled asylum jurisprudence in the United States.

In "Persecution in the Fog of War: The House of Lords' Decision in *Adan*," (p. 247), Michael Kagan and William Johnson consider the 1998 British precedent in which refugee status was denied to a Somali family on the grounds that the nexus requirement is not satisfied where "every group seems to be fighting some other group or groups in an endeavour to gain power." The House of Lords opined that the "for reasons of" requirement should be interpreted in the context of a civil war to require evidence of some greater risk of adverse treatment than would befall other Somalis. Because Adan could not establish that either he as an individual or the groups of which he was a member were more at risk than others in the chaos which followed upon the 1991 collapse of the Siad Barre regime, his claim was denied. The court here did not insist on evidence of the subjective motivation of the persecutor (indeed, in its 1999 decision of *Shah and Islam*, the House of Lords held that the risk of "being persecuted" could be said to be "for reasons of" a protected ground where the Convention ground accounted for *either* the infliction of the harm *or* the concomitant failure of state protection). But it mistakenly elevated one means of proving a causal nexus, namely evidence of differential risk, to an absolute requirement in the case of refugees from civil war. Kagan and Johnson cogently critique the court's *sui generis*

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approach to cases arising in the context of civil war, and argue for a "simple impact" test of causation in refugee law.

In the final essay, "Causation in Context: Interpreting the Nexus Clause in the Refugee Convention," (p. 265), Michelle Foster takes up the extraordinarily difficult question of just what degree of "connection" between a Convention ground and the risk of being persecuted is required for the refugee definition to be satisfied. Foster argues that the causation standard in refugee law should be context-specific. In the result, the propensity of many courts uncritically to import causation standards from other bodies of law (in particular, the "but for" test from tort law) should be rejected. After a careful survey of the relationship between refugee law and the major bodies of law in which causation concerns are frequently canvassed, she explains why inspiration from analysis of anti-discrimination law and equity is particularly apposite. Foster concludes that a "contributing cause" approach to causation best realizes the objectives of the Refugee Convention, taking account in particular of the practical context within which protection decisions must be made.

The essence of the approach to causation recommended by this set of *Michigan Guidelines* is, in the end, fairly straightforward. Most fundamentally, both the language and the context of the Refugee Convention make clear that the required causal nexus may be established by evidence of the reason for the threat or infliction of harm, for the withholding of state protection, or simply for the predicament faced (whether intentional or not). A Convention ground need not be the sole, or even the dominant cause of the risk of being persecuted, but it must be a contributing cause to the risk. The same test should be applied whether the risk is experienced individually or as part of a group, and whether in war or in peace.

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