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Special Feature Seventh Colloquium on Challenges in International Refugee Law

James C. Hathaway

University of Michigan Law School, jch@umich.edu

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SPECIAL FEATURE
SEVENTH COLLOQUIUM ON CHALLENGES IN
INTERNATIONAL REFUGEE LAW

INTRODUCTION

*James C. Hathaway**

Refugee status at international law requires more than demonstration of a risk of being persecuted. Unless the risk faced by an applicant is causally connected to one of five specified attributes – his or her race, religion, nationality, membership of a particular social group, or political opinion – the claim to be a refugee must fail.¹ Because the drafters of the Refugee Convention believed that the world’s asylum capacity was insufficient to accommodate all those at risk of being persecuted, they opted to confine the class of refugees to persons whose predicament stems from who they are, or what they believe – the very sorts of values enshrined in non-discrimination law. To be sure, it is of course always wrong to persecute anyone, for any reason. But given the determination of states not to recognize as refugees all persons at risk of persecution, grounding the delimitation clause in the foundational principle of non-discrimination – the cornerstone of the international human rights system – was arguably a “least bad option.”²

Of the five non-discrimination grounds for accessing refugee status, the notion of risk for reasons of “political opinion” is perhaps the one that sits most comfortably with the general understanding of who is a refugee: indeed, it is common to refer to “political refugees” rather than to “refugees” as such. Yet despite the centrality of the concept of “political opinion” to refugee status, its parameters are not clearly understood.³

The classic definition of a political opinion embraces “any opinion on any matter in which the machinery of [s]tate, government, and policy may be engaged.”⁴ While it is endorsed by, for example, the Supreme Court of

* James E. and Sarah A. Degan Professor of Law and Director, Program in Refugee and Asylum Law, University of Michigan.

1. Convention relating to the Status of Refugees art. 1(A)(2), Jul. 28, 1951, 189 U.N.T.S. 137 [hereinafter “Refugee Convention” or “Convention”] (entered into force Apr. 22, 1954).

2. *See generally* JAMES HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 362-461 (Cambridge Univ. Press 2d ed. 2014) (1991).

3. *Id.* at 405-23.

4. GUY S. GOODWIN-GILL & JANE McADAM, *THE REFUGEE IN INTERNATIONAL LAW* 87 (3d ed. 2007). The definition proposed in the co-authored 2007 edition is unchanged from that proposed in GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 31 (1983).

Canada,⁵ other courts have found such a broadly conceived definition to be unwieldy. Only one month after its formal adoption by the Supreme Court of Canada, the Canadian Federal Court of Appeal expressed its concern that this definition was so broad that it would “obviate[] all of the enumerated grounds.”⁶ The Full Federal Court of Australia similarly opined that a political opinion “. . . is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society.”⁷ And New Zealand’s Refugee Status Appeals Authority has declared the classic definition to be “an unhelpful distraction. . . best avoided.”⁸

While there is no doubt much force in these critiques, the alternative approaches proposed have not been especially compelling. The New Zealand tribunal, for example, sensibly insisted that “context” is critical to an understanding of political opinion.⁹ But it has yet clearly to explain how to conduct a context-based inquiry in a way that ensures fairness between and among variants of political opinion claims. The European Union’s *Qualification Directive* provides that “. . . the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution. . . and to their policies or methods, whether or not that opinion, thought or belief has been acted on by the applicant.”¹⁰ But surely not every opinion about the actor of persecution is political (“I don’t like his fashion sense”), even as there are clearly opinions that are “political” that have nothing to do with the actor of persecution (as the “in particular” language impliedly recognizes). And while the United Nations High Commissioner for Refugees (UNHCR) has yet to offer a comprehensive view on the meaning of “political opinion,” it has, in the context of its guidance on asylum claims by children, observed that “[a] claim based on political opinion presupposes that the applicant holds, or is assumed to hold, opinions not tolerated by the authorities or society and that are critical of generally accepted policies, traditions or methods.”¹¹ While the statement is helpful as an affirmation that matters can be political without relating to the formal

5. Ward v. Canada (Attorney General), [1993] 2 S.C.R. 689, 744 (Can.).

6. Chan v. Canada (Minister of Employment and Immigration), [1993] 3 F.C. 675 (Can.), at [26].

7. V. v. Minister for Immigration and Multicultural Affairs, [1999] F.C.A 428, at [33].

8. *Refugee Appeal No. 76339* [2010] NZ RSAA at [87] (N.Z.). This decision was upheld on appeal: *M. v. Refugee Status Appeals Authority*, [2010] NZHC 1885 (NZHC, Sep. 17, 2010).

9. *Refugee Appeal No. 76044* [2008] NZAR 719 at [83], [87] (N.Z.).

10. Council Directive 2011/95, art. 10(1)(e), on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for Uniform Status for Refugees and for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), 2011 O.J. (L 337/9) (E.U.).

11. U.N. Office of the High Comm’r on Human Rights, *Guidelines on International Protection No. 8: Child Asylum Claims under Article 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009), at [45].

mechanisms of government, there is no good reason to suggest that an opinion ceases to be “political” simply because it accords with what authorities believe (“I love the ruling party”). And conversely, is it correct to suggest that so long as the opinion isn’t tolerated and is critical it is always “political”? Are there really no limits?

Against the backdrop of this conceptual confusion, the goal of the Seventh Colloquium on Challenges in International Refugee Law was to develop a principled and workable framework to guide the process of assessing when an individual should be understood to be at risk for reasons of “political opinion.” Working with refugee law expert Professor Catherine Dauvergne of the University of British Columbia, a group of senior Michigan law students first researched the issue from the perspective of both international law and comparative state practice.¹² Professor Dauvergne then drew on this research to author a comprehensive background study which was refined by a second group of senior Michigan law students.¹³ A select group of highly regarded international scholars and jurists was then invited to meet with a third group of Michigan law students over three days in March 2015 to debate the issues raised in the revised background study, published in this issue, and to agree to the standards that comprise the “Michigan Guidelines on Risk for Reasons of Political Opinion.”¹⁴

It is our hope that, as in the case of earlier Michigan Guidelines on the International Protection of Refugees,¹⁵ these unanimously agreed standards will inspire a thoughtful and principled debate among scholars, officials, and judicial and other refugee law decision-makers committed to the legally accurate and contextually appropriate application of international refugee law norms.

12. The members of the Comparative Asylum Law seminar in the fall of 2013 who conducted this research were Mary Soo Anderson, Emad Ansari, Katherine Blair, Betsy Fisher, Taylor French, Regina Garza, Matthew Justice, Fernanda Lopez Aguilar, Darren Miller, Katie Mullins, Johnny Pinjuv, Anne Recinos, Alan Wallis, Megan Williams, and Gracie Willis.

13. The members of the Refugee Law Reform seminar in the fall of 2014 who vetted and refined the draft study were Mary Soo Anderson, Emad Ansari, Adrienne Boyd, Carol Bundy, Cari Carson, Rosalind Elphick, Jenny Kim, Julie Kornfeld, Timothy Pavelka, Anne Recinos, Karima Tawfik, and Kelsey VanOverloop.

14. Michigan Guidelines on Risk for Reasons of Political Opinion, 37 MICH. J. INT’L L. 233 (2015).

15. Earlier guidelines have also been published in the *Michigan Journal of International Law*. *The Michigan Guidelines on the Exclusion of International Criminals*, 35 MICH. J. INT’L L. 3 (2013); *The Michigan Guidelines on the Right to Work*, 31 MICH. J. INT’L L. 293 (2010); *The Michigan Guidelines on Protection Elsewhere*, 28 MICH. J. INT’L L. 207 (2007); *The Michigan Guidelines on Well-Founded Fear*, 26 MICH. J. INT’L L. 491 (2005); *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 210 (2002); *The Michigan Guidelines on the Internal Protection Alternative*, 21 MICH. J. INT’L L. 131 (1999). For an easily accessible collection of all previous Michigan Guidelines, see REFLAW, <http://www.reflaw.org/pral-program-2/colloquium/> (last visited June 16, 2015).