

THE CAUSAL NEXUS IN INTERNATIONAL REFUGEE LAW

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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*

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.

LES RECOMMANDATIONS DE MICHIGAN SUR LE LIEN AVEC UN MOTIF CONVENTIONNEL

Les efforts pour promouvoir la vitalité contemporaine de la définition conventionnelle du terme réfugié se sont généralement attachés à affiner notre interprétation des circonstances dans lesquelles un individu peut être considéré comme courant un risque “d’être persécuté,” ou à donner une pertinence contemporaine au contenu des cinq motifs sur lesquels le risque devrait être fondé—race, religion, nationalité, appartenance à un certain groupe social ou opinion politique. En comparaison, peu de réflexion a été consacrée sur comment concevoir le mieux le lien ou la relation de causalité entre le motif conventionnel et le risque d’être persécuté. Dans quelles circonstances le risque peut-il être considéré “du fait de” un des cinq motifs conventionnels?

La jurisprudence de nombreux grands pays d’asile est simplement silencieuse sur cette question, alors que les décisions rendues dans d’autres Etats assument qu’en droit des réfugiés la causalité peut être définie par une analogie sommaire aux standards utilisés dans d’autres branches du droit. Les cours supérieures n’ont que rarement cherché à élaborer soigneusement une interprétation de la causalité de pertinence spécifique au droit des réfugiés, incluant les questions essentielles d’un standard de causalité et les types de preuve qui devraient guider l’enquête de causalité.

Dans le but de promouvoir une interprétation commune des exigences de base pour la reconnaissance du statut conventionnel de réfugié, nous nous sommes engagés, en collaboration, dans une étude et une réflexion soutenue sur les normes et la pratique étatique relatives à l’enquête de causalité. Cette recherche fut débattue et affinée au second Colloque sur les défis en droit international des réfugiés, organisé en mars 2001 par le Programme en droit des réfugiés et d’asile de l’Université de Michigan. Ces recommandations sont le produit de cet effort, et reflètent le consensus des participants au colloque sur la manière dont le lien de causalité avec un motif conventionnel devrait être compris en droit international des réfugiés.

THE MICHIGAN GUIDELINES ON NEXUS TO A CONVENTION GROUND

Efforts to promote the contemporary vitality of the Convention refugee definition have usually focussed on refining our understanding of the circumstances in which an individual may be said to be at risk of “being persecuted,” or on giving contemporary relevance to the content of the five grounds upon which risk must be based—race, religion, nationality, membership of a particular social group or political opinion. Comparatively little thought has been given to how best to conceive the causal linkage or nexus between the Convention ground and the risk of being persecuted. In what circumstances may the risk be said to be “for reasons of” one of the five Convention grounds?

The jurisprudence of many leading asylum states is simply silent on this issue, while decisions rendered in other states assume that causation in refugee law can be defined by uncritical analogy to standards in other branches of the law. Only rarely have senior courts sought carefully to conceive an understanding of causation of specific relevance to refugee law, including the critical questions of a standard of causation and the types of evidence which should inform the causation inquiry.

With a view to promoting a shared understanding of the basic requirements for the recognition of Convention refugee status, we have engaged in sustained collaborative study and reflection on the norms and state practice relevant to the causation inquiry. This research was debated and refined at the Second Colloquium on Challenges in International Refugee Law, convened in March 2001 by the University of Michigan’s Program in Refugee and Asylum Law. These Guidelines are the product of that endeavour, and reflect the consensus of Colloquium participants on how the causal nexus to a Convention ground should be understood in international refugee law.

CONSIDÉRATIONS GÉNÉRALES

1. Toute personne qui se trouve hors de son propre pays et qui a une crainte bien fondée d'être persécutée n'est pas un réfugié au sens de la Convention. Le risque encouru par le demandeur doit être causalement lié à au moins l'un des cinq motifs énumérés par la Convention- race, religion, nationalité, appartenance à un certain groupe social ou opinion politique.
2. Dans beaucoup d'Etats, le lien de causalité requis est explicitement rencontré sur la base de l'exigence selon laquelle la crainte bien fondée de persécution d'un réfugié soit ". . . du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques . . .". Dans d'autres Etats, le lien de causalité n'est pas envisagé comme un élément définitionnel *per se*, mais se trouve plutôt inclus dans l'analyse des autres exigences conventionnelles. Qu'elle soit traitée comme un élément définitionnel indépendant, ou comme une partie d'une interprétation générale du statut de réfugié, l'existence d'un lien avec un motif conventionnel devrait être évaluée à la lumière du texte, du contexte, et des objets et buts de la Convention des réfugiés et de son Protocole.
3. Il n'est pas du devoir du demandeur d'identifier de façon précise la raison pour laquelle il éprouve une crainte bien fondée d'être persécuté. Il appartient à l'Etat évaluant la demande de statut de réfugié de décider quel motif conventionnel, s'il y en a un, rencontre la crainte bien fondée du demandeur d'être persécuté.
4. Le risque d'être persécuté peut parfois provenir des circonstances dans lesquelles deux ou plusieurs motifs conventionnels existent dans le chef de la même personne; dans ce cas, la combinaison de tels motifs définit la relation causale à une crainte bien fondée d'être persécuté.
5. On ne devrait pas attendre d'un individu qu'il renie ses croyances ou son identité protégée dans le but d'éviter de susciter l'attention de l'Etat ou de l'agent non-gouvernemental de persécution.

GENERAL CONSIDERATIONS

1. Not every person who is outside his or her own country and has a well-founded fear of being persecuted is a Convention refugee. The risk faced by the applicant must be causally linked to at least one of the five grounds enumerated in the Convention—race, religion, nationality, membership of a particular social group or political opinion.
2. In many states, the requisite causal linkage is explicitly addressed on the basis of the requirement that a refugee's well-founded fear of being persecuted be “. . . *for reasons of* race, religion, nationality, membership of a particular social group or political opinion . . .” In other states causation is not treated as a free-standing definitional requirement, but rather is subsumed within the analysis of other Convention requirements. Whether treated as an independent definitional factor or as part of a general understanding of refugee status, the existence of a nexus to a Convention ground must be assessed in the light of the text, context, objects and purposes of the Refugee Convention and Protocol.
3. It is not the duty of the applicant accurately to identify the reason that he or she has a well-founded fear of being persecuted. The state assessing the claim to refugee status shall decide which, if any, Convention ground is relevant to the applicant's well-founded fear of being persecuted.
4. The risk of being persecuted may sometimes arise in circumstances where two or more Convention grounds combine in the same person, in which case the combination of such grounds defines the causal connection to the well-founded fear of being persecuted.
5. An individual shall not be expected to deny his or her protected identity or beliefs in order to avoid coming to the attention of the State or non-governmental agent of persecution.

NATURE DU LIEN DE CAUSALITÉ REQUIS

6. La relation causale requise est entre un motif conventionnel et la crainte bien fondée du demandeur “d’être persécuté” (en anglais, “. . . *of being persecuted* . . .”). L’attention portée à la situation du demandeur découle à la fois de l’emploi de la voix passive dans les textes officiels de la Convention, et du but fondamental de la Convention, qui est de définir les circonstances dans lesquelles une protection internationale substitutive est justifiée.
7. Puisque c’est la situation du demandeur qui doit être causalement liée à un motif conventionnel, le fait que sa crainte subjective soit basée sur un motif conventionnel ne suffit pas à justifier la reconnaissance du statut de réfugié.
8. Le lien de causalité entre la situation du demandeur et le motif conventionnel sera établi par la preuve des raisons qui ont conduit soit à la réalisation soit à la menace d’un préjudice donné, ou qui poussent l’Etat d’origine du demandeur à ne pas fournir une protection effective en face d’un risque émanant de personnes privées. L’attribution du motif conventionnel au demandeur par l’Etat ou l’agent de persécution non-gouvernemental suffit à établir la relation causale requise.
9. Un lien de causalité peut être établi, qu’il y ait ou non preuve d’inimitié, de nuisance ou d’animosité particularisée de la part de la personne ou du groupe responsable de la réalisation ou de la menace d’un préjudice donné, ou de la part de l’Etat qui refuse sa protection aux personnes encourant un risque de préjudice de provenance non-gouvernementale.
10. Le lien de causalité peut aussi être établi en l’absence de toute preuve d’intention de porter préjudice ou de refuser la protection, aussi longtemps qu’il est établi que le motif conventionnel contribue à exposer le demandeur au risque d’être persécuté.

STANDARD DE CAUSALITÉ

11. Les standards de causalité développés dans d’autres branches du droit international ou national ne devraient pas être considérés comme étant nécessairement pertinents pour la reconnaissance du statut de réfugié. En ce que la reconnaissance du statut de réfugié est à la fois orientée vers la

NATURE OF THE REQUIRED CAUSAL LINK

6. The causal connection required is between a Convention ground and the applicant's well-founded fear of "*being persecuted*" (in French, "... *d'être persécutée* ...") The focus on the applicant's predicament follows both from the passive voice employed in the official texts of the Convention and from the Convention's fundamental purpose of defining the circumstances in which surrogate international protection is warranted.
7. Because it is the applicant's predicament which must be causally linked to a Convention ground, the fact that his or her subjective fear is based on a Convention ground is insufficient to justify recognition of refugee status.
8. The causal link between the applicant's predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm, or which cause the applicant's country of origin to withhold effective protection in the face of a privately inflicted risk. Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.
9. A causal link may be established whether or not there is evidence of particularized enmity, malignity or *animus* on the part of the person or group responsible for infliction or threat of a relevant harm, or on the part of a State which withholds its protection from persons at risk of relevant privately inflicted harm.
10. The causal link may also be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the Convention ground contributes to the applicant's exposure to the risk of being persecuted.

STANDARD OF CAUSATION

11. Standards of causation developed in other branches of international or domestic law ought not to be assumed to have relevance to the recognition of refugee status. Because refugee status determination is both protection-oriented

protection et tournée vers l'avenir, il n'est pas certain de tirer quelque instruction utile des standards de causalité déterminés par des considérations relevant de la recherche de la responsabilité criminelle ou civile, ou qui sont orientés exclusivement vers l'analyse des événements passés.

12. Le standard de causalité devrait aussi prendre en compte les réalités pratiques de la détermination du statut de réfugié, en particulier les combinaisons complexes des circonstances qui peuvent donner lieu au risque d'être persécuté, la prévalence des différences de conviction, et la difficulté d'obtention de la preuve à travers les divisions linguistiques et culturelles.
13. En considérant les objets et les buts uniques de la détermination du statut de réfugié, et prenant en compte les défis pratiques de la détermination du statut de réfugié, le motif conventionnel mérite de ne pas être considéré comme la seule, ou même la dominante, cause du risque d'être persécuté. Il devrait seulement être un facteur contribuant au risque d'être persécuté. Si, toutefois, le motif conventionnel est insuffisant au point de n'être pas pertinent, le statut de réfugié ne devrait pas être reconnu.

PREUVE DE CAUSALITÉ

14. La relation de causalité requise entre le risque d'être persécuté et le motif conventionnel peut être établie par preuve directe ou circonstancielle
15. Qu'elle soit vécue individuellement ou en tant que membre d'un groupe, la crainte d'être persécuté doit être rattachée à des raisons liées à un motif conventionnel. Ainsi, la preuve que les personnes qui partagent la race, la religion, la nationalité, l'appartenance à un certain groupe social ou encore l'opinion politique du demandeur courent plus de risque d'être persécutées que d'autres dans le pays d'origine représente une forme suffisante de preuve circonstancielle qu'un motif conventionnel a été un facteur contribuant au risque d'être persécuté.
16. Il n'y a, cependant, aucune exigence qu'un demandeur d'asile court plus de risque que d'autres personnes ou groupes dans son pays d'origine. La question pertinente consiste plutôt à savoir si le motif conventionnel est causalement lié à la situation du demandeur,

and forward-looking, it is unlikely that pertinent guidance can be gleaned from standards of causation shaped by considerations relevant to the assessment of civil or criminal liability, or which are directed solely to the analysis of past events.

12. The standard of causation must also take account of the practical realities of refugee status determination, in particular the complex combinations of circumstances which may give rise to the risk of being persecuted, the prevalence of evidentiary gaps, and the difficulty of eliciting evidence across linguistic and cultural divides.
13. In view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.

EVIDENCE OF CAUSATION

14. The requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence.
15. A fear of being persecuted is for reasons of a Convention ground whether it is experienced as an individual, or as part of a group. Thus, evidence that persons who share the applicant's race, religion, nationality, membership of a particular social group or political opinion are more at risk of being persecuted than others in the home country is a sufficient form of circumstantial evidence that a Convention ground was a contributing factor to the risk of being persecuted.
16. There is, however, no requirement that an applicant for asylum be more at risk than other persons or groups in his or her country of origin. The relevant question is instead whether the Convention ground is causally connected to the applicant's predicament,

indépendamment du fait de savoir si d'autres individus ou groupes courent aussi une crainte bien fondée d'être persécutés pour le même ou un autre motif conventionnel.

17. Aucune règle spéciale ne gouverne l'application du standard de lien de causalité à la situation des réfugiés venant d'un pays où il y a un risque de guerre, ou d'autre violence ou oppression à grande échelle. Les demandeurs venant d'un tel pays ne sont pas automatiquement des réfugiés au sens de la Convention. Ils sont cependant en droit d'être reconnus comme réfugiés si leur race, religion, nationalité, appartenance à un certain groupe social ou opinion politique représente un facteur contribuant à leur crainte bien fondée d'être persécutés dans de telles circonstances. Par exemple, les personnes fuyant une guerre peuvent être des réfugiés conventionnels là où soit la raison de la guerre, soit la manière dont la guerre est conduite, démontre un lien de causalité entre le motif conventionnel et le risque d'être persécuté.
18. Le statut de réfugié n'est pas réservé aux personnes qui sont membres d'un groupe politique, religieux ou d'autre groupe minoritaire. Bien que les membres de groupes minoritaires soient en pratique plus fréquemment exposés au risque d'être persécutés que ne le sont les personnes qui font partie de populations majoritaires, la seule exigence pour la reconnaissance du statut de réfugié est la démonstration qu'un motif conventionnel représente un facteur contribuant au risque d'être persécuté.

irrespective of whether other individuals or groups also face a well-founded fear of being persecuted for the same or a different Convention ground.

17. No special rule governs application of the causal nexus standard in the case of refugees who come from a country in which there is a risk of war or other large-scale violence or oppression. Applicants who come from such a country are not automatically Convention refugees. They are nonetheless entitled to be recognized as refugees if their race, religion, nationality, membership of a particular social group or political opinion is a contributing factor to their well-founded fear of being persecuted in such circumstances. For example, persons in flight from war may be Convention refugees where either the reason for the war or the way in which the war is conducted demonstrates a causal link between a Convention ground and the risk of being persecuted.
18. Refugee status is not restricted to persons who are members of a political, religious or other minority group. While members of minority groups are in practice more commonly exposed to the risk of being persecuted than are persons who are part of majority populations, the only requirement for recognition of refugee status is demonstration that a Convention ground is a contributing factor to the risk of being persecuted.

Ces recommandations reflètent le consensus de tous les participants au second colloque sur les défis en droit international des réfugiés, tenu du 23 au 25 mars 2001 à Ann Arbor, Michigan, États-Unis d'Amérique.

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These Guidelines reflect the consensus of all the participants at the Second Colloquium on Challenges in International Refugee Law, held at Ann Arbor, Michigan, USA, on March 23–25, 2001.

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