International Refugee Law between Scholarship and Practice

Rosemary Byrne* and Thomas Gammeltoft-Hansen†

ABSTRACT

Current challenges to the traditionally privileged position of law in both refugee policy and refugee studies invite scholars to consider carefully the approach we take to our craft. This article argues that refugee law scholarship is surrounded by thin walls, as researchers broker the ‘dual imperative’ to simultaneously advance knowledge and protection in a field heavily influenced by policy interests and networks of practitioners that actively take part in, and promote, scholarly production. These close links between the field and the policy world continue to shape research agendas, methodologies, and scholarly positions. This article draws from Bourdieusian field theory and legal sociology to offer a prism through which to look at the forces that influence refugee law research and to consider their implications for scholarship. It is argued that greater sensitivity to the underlying dynamics of our profession is essential, not only to ensure more inclusivity in the community of scholars and expand the current canon of refugee law, but ultimately to sustain claims to policy relevance.

* Professor of Legal Studies, Social Science Division, New York University Abu Dhabi.
† Professor of Legal Science with special responsibilities in migration and refugee law, University of Copenhagen; Visiting Chair, Pontifical Catholic University, Rio de Janeiro.

The authors are grateful to Till Tietz for his development of the dataset for this article, which includes a compilation of meta- and author data up to 2018 for the entire corpus of academic articles published in the International Journal of Refugee Law, as well as 1,003 articles on refugee law published in general law journals. The authors also extend their appreciation to Amal Al-Gergawi, Cristina Lupusor, Ciara O’Rourke, and Yao Xu for their much-valued research assistance, and to colleagues at the Sérgio Vieira de Mello Academic Chair, Brazil; the iCourts Centre of Excellence, University of Copenhagen; and the Identities Workshop, NYU Abu Dhabi (April 2019), for their thoughtful comments.

© The Author(s) (2020). Published by Oxford University Press. This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivs licence (http://creativecommons.org/licenses/by-nc-nd/4.0/), which permits non-commercial reproduction and distribution of the work, in any medium, provided the original work is not altered or transformed in any way, and that the work is properly cited. For commercial re-use, please contact journals.permissions@oup.com
1. INTRODUCTION

International law has traditionally maintained a privileged position within both global refugee policy and refugee scholarship. This is reflected in the early adoption of a binding international convention, the 1951 Convention relating to the Status of Refugees, which since 1967 has served as the global governance framework for the international refugee regime. Despite waning political support for refugees, States have repeatedly confirmed their commitment to the core principles of international refugee law, most recently in the 2016 New York Declaration. Such formal endorsements notwithstanding, it is hard to escape the feeling that the privileged position of refugee law, and of refugee lawyers, is currently changing. Not simply because adherence to existing legal standards is faltering in many places – in itself hardly a new thing – but also because international law and legal expertise appear to be losing turf to other modes of governance in current discussions about global refugee policy.

The 2018 Global Compact on Refugees (GCR) is a case in point. States expressly rejected submitting themselves to any new legal commitments, leading to the diplomatic neologism of the ‘compact’ as a form of political and non-binding agreement previously reserved for corporate entities. References to existing standards and legal commitments in the text itself are moreover scant, with the emphasis instead placed on more technical and procedural aspects of refugee governance. Both in form and substance, the Compact represents a step back from international law as the otherwise preferred language of international relations.

Distinct disappointment with law as the dominant mode of governance for refugee policy has further been expressed by scholars from other parts of refugee studies. In their book, Refuge, Alexander Betts and Paul Collier argue that ‘refugee law is no longer effective’ and that ‘its relevance should be an empirical question not an assumption’. Several governments seem to mirror that position, specifically seeking out expertise.

---


from other fields and disciplines in the ongoing discussions of both national and global political reforms. In a recent essay, David Cantor thus provocatively queries whether the international refugee legal framework has ‘outlived its utility’ and whether we may be seeing the ‘end days of refugee law’.9

Notwithstanding the inherent limits of refugee law and its protection regime, the current frustration with those who practise in the field is not without precedent. Howard Adelman, writing in 1995, argued that:

international lawyers concerned with refugees have become the super-egos of the refugee world, haunting consciences who continually hold up standards of the Refugee Convention, international human rights conventions, constitutions, due process, principles of natural and administrative justice, to show how far short current or proposed legislation fails from these standards.10

And according to Guy S Goodwin-Gill, former High Commissioner Sadako Ogata openly proclaimed her disdain for refugee lawyers, ‘whom she perceives as rigid and backwards looking, invoking the past to frustrate the realistic and pragmatic approaches to refugee problems which are considered to be the proper realm of the political scientist as pro-activist humanitarian’.11

Such challenges are often directly related to shifting policy agendas.12 Where States systematically begin to probe the boundaries of their legal commitments when existing principles fail to meet current political fashions, the law and lawyers tend to be among those blamed. Struggles over the relative importance of refugee law and legal expertise are thus to be expected, not least in times when existing policy paradigms are failing and new ones are being tested.13

12 ibid 9; Hathaway and Neve (n 4). This dynamic is not only limited to situations where international law frustrates the adoption of more restrictive policy measures. As Coles wrote in regard to the early years following the adoption of the Refugee Convention, ‘legal and general thinking, influenced by the 1951 Convention, failed to keep pace with the development of practice, and in the succeeding years, the gap between theory and practice widened increasingly. ... Law especially became increasingly divorced from reality; instead of the law becoming a means to channel thinking and action along lines of humanity and practicality, it became, in many situations, a cause of distorted thinking and inappropriate action.’ GJL Coles (n 10) 212.
At the same time, for an academic field so intimately related to the political world around it, we believe that this is a particularly important moment at which to reflect on the development and current state of refugee law scholarship. Challenges to international refugee law produce different and sometimes difficult academic, ethical, and political choices for legal scholars working on refugee issues. While some academics have become actively involved in various forms of activism and strategic litigation to counter or rein in government policies, others have launched reform proposals in the hope of rekindling State support. There is no consensus amongst refugee lawyers as to whether or how to engage with ongoing policy processes. While practice-oriented dialogues have always been a core feature of refugee law scholarship, more voices today approach these links from a critical perspective, warning that any kind of ‘solution-oriented’ input from scholars is open to corruption in the ensuing political process. Meanwhile some colleagues experience that their academic work and personal credibility become subject to politicized external critique. Navigating these choices requires continued reassessment of the political realities at stake for refugees and, we believe, a more open discussion amongst scholars to justify and reflect on the wider consequences of different strategies. Understanding the constitution and trajectory of international refugee law as an academic field serves as an essential baseline for this process.

Notably, there is not an extensive tradition for such introspection in refugee law scholarship. The small body of work that explores the academic field of refugee law was mostly written two decades ago, and mainly directed towards an external readership. Rather, the evolution of refugee law scholarship is often seen simply as the history of refugee law itself. So far, there is no parallel to the revisionism that has seized the wider fields of human rights and international law. Attempts to reflect on the development of refugee studies moreover often sidestep or bracket the legal discipline.

This article seeks to revisit international refugee law by recognizing the influence of its position between the worlds of the academy, politics, and advocacy. It does so by exploring the intersections between refugee law scholarship and practice. We argue that, within the


field, research is generally characterized by a ‘dual imperative’ to simultaneously advance scholarly and protection-oriented objectives. Externally, the academic field of refugee law is heavily influenced by international organizations and networks of practitioners that actively take part in and promote particular kinds of scholarly production. Ultimately, this has important implications for the kinds of questions raised by legal scholars, the methodologies applied, and the diversity of perspectives and pluralism enabled within the field. As challenges to the legitimacy of refugee law are once again mounting, there is an impetus for the profession at large to reflect on and critically reassess the current trajectory of the field.

In part 2, this article discusses the characteristics of refugee law as an academic field and the tensions that this creates for a profession seeking to advance protection at the intersection of scholarly and political spaces. Part 3 focuses on the distinctive ethos of refugee scholars to broker the ‘dual imperative’ between research and advocacy. This remains an underlying feature of methodological debate and places constraints on research that might risk undermining already fragile protection practices. Part 4 then delves into the research–policy nexus, exploring the implications of the heavy involvement of the professional community in scholarly production and the impact this has on approaches to refugee legal research and the development of the discipline. Part 5 concludes with a call for a deeper, reflexive conversation about our common profession.

2. THE THIN WALLS OF INTERNATIONAL REFUGEE LAW

Since the 1970s, international refugee law has evolved into a generally recognized sub-field within the legal discipline. Pierre Bourdieu’s work reminds us that this hard-earned standing as an academic field flows not simply from an expanding body of substantive scholarship, but also from the relative level of structural autonomy in relation to its political and economic environment, and the educational system within which it develops. Social fields can have a gravitational pull with far-reaching effects on the behaviour of actors, which they may, or may not, be aware of. For refugee law scholars, a degree of autonomy vis-à-vis the broader academy is achieved through, for example, the establishment of academic journals dedicated to the field, course programmes, and research centres. At the same time, however, refugee law delicately straddles the boundaries between research and policy. Acknowledging this central dynamic, also common to many other areas of international law, casts the traits of refugee scholarship into stark relief. Much refugee law scholarship is directly oriented towards the central actors, ideals, and processes underway in the wider asylum policy community. Yet it also, itself, draws non-academic actors and institutions into the process of scholarly production.

This double bind is a product of the particular institutionalization of refugee law. On the one hand, refugee law scholarship – like its sister discipline international human rights law – has protection as a paramount concern, imposing a ‘dual imperative’ for the field,

---

with academics often fulfilling the roles of both scholar and advocate. Consequently, refugee law scholars are often invested in multiple types of ‘professional arenas’ beyond the academy through which other rewards are pursued alongside strictly scholarly expertise. Refugee law may in this respect be considered what some sociologists call a ‘weak field’ – closely tethered to both societal and political structures and shifting agendas within the academy. Unsurprisingly, methodological and theoretical developments in refugee law often mirror broader trends across adjacent legal fields and the wider discipline. Legal sociology, and more generally field theory, offers a constructive prism through which to expose and engage with the underlying forces that influence knowledge production by scholars working within, around, and through the thin walls surrounding refugee law.

On the other hand, the relatively weak institutionalization of refugee law means that the relationship between scholarship and practice is organized differently in comparison to other ‘weak fields’; such as for instance human rights or European Union (EU) law. Contrary to general human rights law, where the most prominent scholars have different options to serve as mandate holders, committee members, or judges within the United Nations (UN) or regional human rights architectures, few such positions exist beyond the national level in regard to refugee law. Conversely, in the absence of an international court and dedicated treaty committees to support the international refugee law regime, the academic field becomes all the more important as a source of guidance for legal interpretation. The fragmentation of jurisprudence across national jurisdictions provides legal scholars with a unique role in terms of translating, linking, and synthesizing case law. This affords a particular

---


24 Perhaps the closest, a Special Rapporteurship on the Human Rights of Migrants was created in 1999 and addresses the human rights of asylum seekers and refugees under its mandate. UN Commission on Human Rights, ‘Human Rights of Migrants’, UN res 1999/44 (27 April 1999).

status to key textbooks in international refugee law, well-worn copies of which belong to case workers and adjudicators around the world. As Audrey Macklin further points out, refugee law is replete with examples where interpretations originally forwarded by prominent legal scholars have subsequently found favour within national jurisprudence.26

The dual bind between scholarship and practice has several more practical implications. First, refugee law scholarship retains close connections to professional communities outside academia. This is true at the individual level where ‘revolving door’ dynamics or ‘double hatting’ is commonplace. Like many colleagues, both authors of this article have at various times in their careers taken on part-time or temporary assignments for refugee organizations, served as advisers or in appointed positions within national or regional human rights bodies, and either worked on or adjudicated asylum and immigration cases. Most refugee legal scholars are part of both transnational and national networks that are dominated by overlapping communities of scholars, decision makers, practitioners, and representatives of non-governmental organizations (NGOs). As Jeff Crisp comments, refugee law is a highly ‘networked’ field.27

This holds true for financial structures as well. A substantial percentage of research funding in this area derives from policy-oriented donors. Specialized refugee research centres are often heavily dependent on support from sources beyond the university and traditional research councils. This is particularly pronounced within the EU. From 1994 onwards, when the then European Community turned towards funding social science research with institutions in Member States and ‘third party partners’, a significant number of projects have been funded in and around the field of migration and refugees.28 Through its growing network of funding mechanisms, research that aligns with the policy objectives of the EU is prioritized, and projected impact is a central criterion for the assessment of research proposals.29 Policy-oriented research funding is, in turn, amplified by a more general trend in the social sciences and within university faculties to assess research according to the opaque metrics of ‘impact’ and ‘civil engagement’.30

International organizations are in addition well represented on the editorial boards of most leading refugee and migration journals. The International Journal of Refugee Law (IJRL) is an independent academic journal but has always maintained a close

relationship with the United Nations High Commissioner for Refugees (UNHCR).\textsuperscript{31} The interdisciplinary journal \textit{International Migration} is directly published by the International Organization for Migration (IOM). The UN GCR calls for the creation of:

> a \textit{global academic network} on refugee, other forced displacement, and statelessness issues ... involving universities, academic alliances, and research institutions, together with UNHCR and other relevant stakeholders, to facilitate research, training and scholarship opportunities which result in specific deliverables \textit{in support of the objectives of the global compact}.\textsuperscript{32}

Many major refugee organizations themselves internalize research functions, and dedicated academic tracks are often organized as part of international policy processes. Refugee law scholarship, in other words, is not simply a free-floating intellectual history but very much a product of, and a response to, surrounding political developments.\textsuperscript{33}

One would generally assume scholarly consensus within such policy-oriented fields to loosely follow dominant political interests.\textsuperscript{34} The quest for access, relevance, and impact may also create tensions with the academic’s mission. Edward Said’s reflections on the intellectual and society highlight the vulnerability of principled positions when confronted by fear of controversy, disapproval, and the hopes ‘to be asked back, to consult, to be on a board or prestigious committee, and so to remain within the responsible mainstream’.\textsuperscript{35} Withstanding such pressures and incentives confronts many, if not most, researchers across disciplines; in ‘weak fields’, the challenge is simply more pronounced. This recognition was present at the inception of the \textit{Journal of Refugee Studies}. In its first issue, in the inaugural editorial, Roger Zetter considered the impact on research of the ‘clientelist relationship’ with agencies. He argued that the highly sensitive and uncertain environment within which agencies and governments work has many factors that militate against independent examination and its capacity to question ‘fundamental and accepted tenets on which refugee assistance, law and administration have been based’. ‘Thus,’ he concluded, ‘the disturbing findings and the potential controversies are not welcomed’.\textsuperscript{36}

However, critical voices are present in refugee law scholarship, as a longitudinal reading of the IJRL readily demonstrates. In its most recent special issue focusing on the GCR, several contributors are disparaging of States, UNHCR, and other actors for their roles and the missed opportunities of the process.\textsuperscript{37} Somewhat rarer within

\textsuperscript{31} This was made clear in the journal’s very first editorial. Guy S Goodwin-Gill and the Members of the Editorial Board, ‘Refuge Law and the Protection of Refugees’ (1989) 1 International Journal of Refugee Law 1, 3–4.

\textsuperscript{32} GCR (n 5) para 43 (emphasis added).

\textsuperscript{33} Vauchez (n 20) 136.

\textsuperscript{34} ibid.


the wider refugee law literature are explicit reflections in terms of how policy interests, apprehensions, and funding impact research. In a recent article, Jaya Ramji-Nogales argues that the current political climate has made refugee law scholars particularly resistant to embracing new approaches and less open to accepting legal change.38

Resistance does indeed seem to be a theme underlying much refugee law scholarship. Particularly since the end of the Cold War and the consequent decline in geopolitical support for refugee protection, international refugee law is often seen as a ‘bulwark’ against restrictive political developments, as Goodwin-Gill famously phrased it.39 When forming alignments within political realms, refugee scholars thus tend to gravitate towards the transnational, focusing on international institutions, regional bodies, and international NGOs with similar rights-based mandates. As the following part will elaborate, this outlook continues to structure refugee law scholarship today and has important implications for how refugee lawyers are likely to respond to both specific policy developments and discussions about reforming global refugee policy more generally.

3. BROKERING THE ‘DUAL IMPERATIVE’ IN REFUGEE LAW

Refugee research is characterized by its reciprocal relationship between scholarship and advocacy.40 The ‘dual imperative’41 to simultaneously undertake rigorous research and to promote the rights and agency of refugees, as it has been dubbed by scholars in other parts of refugee studies, is for most scholars a natural extension of the field’s subject matter. It is fundamentally difficult to justify research into situations of extreme human suffering unless the alleviation of that suffering is an explicit objective of one’s research agenda.42 This applies to legal scholarship as well – as Goodwin-Gill pointedly argues, international refugee scholarship should never be ‘just “academic”, divorced from the real problems of protection’.43 Brokering this ‘dual imperative’, however, is not always straightforward, and can sometimes place competing demands on scholars.44 Within refugee law, as with much legal scholarship, core academic debates typically are

40 Jacobsen and Landau (n 17).
42 Roger Cohen explicitly refers to the competing demands of scholarship and advocacy: ‘Can one possibly develop the distance, the techniques and methods to describe and analyse issues impregnated with need, with fear, irrationality and emotion? In other words, is there a hopeless and irredeemable conflict between scholarship on the one hand and advocacy on the other?’ Cited in Nicholas van Hear, ‘Editorial Introduction’ (1998) 11 Journal of Refugee Studies 341, 343.
linked to real or potential litigation, policy processes, and practices on the ground.\textsuperscript{45} This is a common trait in many domains of international law, with distinctive ramifications depending upon the given policy area. For refugee legal scholarship, the imperative advancement of individual protection occurs in a particularly politicized and, at times, hostile policy environment. The importance of scholarship to support refugee protection may further invite linkages with advocacy groups and organizations. As a result, refugee law scholarship can easily become, or be perceived to be, entwined with more partisan interests.

In order to expand the scope of protection and rein in new State practices, refugee law scholarship often pushes at the frontiers of interpretation. Within this process, internal struggles over treaty interpretation emerge, waged through claims about international legal methodology. This applies, for instance, to the rich debate around the geographical application of the \textit{non-refoulement} principle that continues to evolve in tandem with State practice.\textsuperscript{46} As Gregor Noll concluded early on, ‘the battle on the proper interpretation of Article 33 [of the 1951 Refugee Convention] can no longer be won on a substantial level. The decisive arguments are those relating to the interpretation of interpretative rules.’\textsuperscript{47}

The result of such methodological debates is a plethora of self-proclaimed positivist approaches striking different balances between, on the one hand, more dynamic interpretations and emphasis on object and purpose, and, on the other hand, emphasis on State practice and sovereigntist principles. Each of these may be subjected to critique on various bases. Teleologically driven approaches have faced criticism for failing to adhere to core methodological standards and hence amounting to little more than ‘wishful legal thinking.’\textsuperscript{48} UNHCR-commissioned research and parts of the wider turn to human rights in refugee law have similarly been criticized for persistently overstating the reach of international refugee law in its construction of \textit{opinio juris} and regime interaction.\textsuperscript{49} More fundamentally, significant differences exist within the field in regard to core methodological issues, for instance the role of State practice and its implications for interpreting protection obligations, or the relative importance of the \textit{travaux préparatoires} in deciphering the object and purpose of the Refugee Convention.\textsuperscript{50}

\textsuperscript{45} For a discussion of advocacy in legal scholarship as a response to the impact of professional demands on the academy, see Mark Tushnet, ‘Legal Scholarship: Its Causes and Cures’ (1981) 90 Yale Law Journal 1205, 1205–06.

\textsuperscript{46} For an attempted overview, see Thomas Gammeltoft-Hansen, \textit{Access to Asylum: International Refugee Law and the Globalisation of Migration Control} (Cambridge University Press 2011).


These central debates that relate to treaty interpretation or State practice concern the fundamentals of public international law, yet often occur as mere sidebar discussions amongst refugee legal scholars. Such disputes are often written off internally as simply a matter of poor legal craftsmanship by opposing scholars. Doctrinal disagreement within the field may also, at least in part, come down to subjective differences – and consequent struggles – about interpretive outlook. At the same time, there is always a risk that an academic field characterized by strong policy imperatives may provide an echo chamber for well-intentioned but poorly developed legal methodologies. There is a point in this process where advocacy-driven approaches can risk further undermining support for international refugee law. As Goodwin-Gill warns: ‘[a] great, indeed damaging, disservice is done to the protection of refugees by pretending that rules exist where there are none’.51

How we as scholars navigate the ‘dual imperative’ has implications for the field’s relationship to the legal discipline more generally. As Karen Jacobsen and Loren Landau observe, the short-circuiting of methodological analysis has also been a problem in other disciplines.52 The centripetal orientation of refugee scholarship can lead to accusations of methodological sloppiness from colleagues in other sub-fields and disciplines.53 In law, it is outside our comfortable community of refugee scholars that more confrontational discussions with colleagues from other legal fields about interpretation and what constitutes ‘good legal scholarship’ often take place. An engagement with these critiques by clearly setting out and justifying methodological choices to peers is important to ensure that refugee law is not marginalized or seen as becoming out of touch with other parts of the legal discipline.54

The ‘dual imperative’ does not necessarily impair the strength of underlying methodologies, as the high standard of the canon of refugee legal scholarship attests. Its absence, however, would more likely invite analyses that push boundaries, even with discomforting outcomes. Within the current proliferation of wider scholarship on refugees, one can identify thousands of articles published in journals across disciplines.55 Refugee legal scholarship is also published in a wide range of legal and other journals. It is remarkable, however, that it has long remained barely marginal in public international law journals.56 With its centrality to our craft, there is a great deal that refugee law could

52 Jacobsen and Landau (n 17).
53 Finn Stepputat and Ninna Nyberg Sørensen, ‘Sociology and Forced Migration’ in Fiddian-Qasmiyeh and others (eds) (n 15) 86; Black (n 17); ibid.
54 Black (n 17) 67; Chimni (n 14).
gain and give by grafting refugee legal analysis more fully onto the debates of its parent discipline. The process of routine publication in journals and conferences where the ‘dual imperative’ is less pronounced to professional peers can provide a healthy environment to ensure that refugee legal scholarship withstands rigorous methodological scrutiny. It would also transmit the developed expertise in the discipline to a broader community of researchers. In turn, this may feed back into the field, leading to a more diversified body of scholars bringing new perspectives to refugee law.

The ‘dual imperative’ also matters in terms of how scholars position themselves and respond to new policy measures. Whereas previously, international organizations could generally count on support from scholars in regard to major policy processes, the restrictive climate for refugees in recent decades means that more refugee law scholars are likely to remain sceptical of new policy proposals. From the outset, these are met with a critical scrutiny of their reform claims and what can actually be achieved within the parameters of existing political mandates. From this vantage point, scholars may choose to refrain from policy engagement on the basis that input to these processes is easily compromised. Alternatively, they may spearhead alternative reform proposals based on either more idealist or realist conceptions.57

Other scholars again have become involved in more bottom-up forms of refugee advocacy. There is a longstanding tradition of refugee law professors and, on occasion, their students, becoming involved in cases before both domestic courts and international human rights bodies. This has become institutionalized in several universities that have established legal aid clinics or centres offering assistance in accessing justice for refugees and asylum seekers, such as the Refugee Rights Unit at the University of Cape Town, the Refugee Law Project at Makerere University in Kampala, or the Clinical Legal Education programme with the University of Hong Kong and Chinese University of Hong Kong. In reforms underway in the central and eastern European States, the Open Society Institute and UNHCR have supported the establishment of refugee legal education through clinics within universities across the region.58 A number of refugee scholars are currently engaged in pioneering strategic litigation that both in


substance and choice of judicial fora is pushing beyond the traditional confines of international refugee law.\(^59\)

Again, these strategies are open to internal contestation. Those choosing to stand outside current policy processes such as the GCR argue that such initiatives are clouded by institutional interests, involve scholars in a largely symbolic manner, and are unlikely to be effective.\(^60\) Conversely, alternative reform proposals advanced by academics have been accused of either being too far removed from the practical realities of States to have any impact, or inherently apologetic to the interests of powerful States, and open to misuse or partial application.\(^61\)

Lastly, the article has been discussing how the profession brokers the ‘dual imperative’ with this assumption of its underlying desire to have a positive impact on refugee protection. There is an inverse assumption that the orthodox parameters of the types of protection-focused questions asked, and the kinds of answers we publish, can be influenced by the fear of a negative impact on refugees and protection. Such inhibitions, however, must not prevent a candid review of the nature and validity of the assumptions we hold as scholars about the use of legal research to advance protection. There is a general awareness, particularly acute in the current political climate, that research findings can be exploited, distorted, and manipulated to serve an anti-refugee political agenda. The as yet unmet challenge of the profession is to identify strategies and spaces for scholars exploring sensitive rights issues that limit these risks.

4. THE RESEARCH–POLICY NEXUS

If refugee law scholars are generally oriented towards policy and practice, refugee professionals and organizations are also deeply invested in research and academic production. Many refugee organizations maintain some form of internal research capacity. UNHCR has provided financial support to countless different research projects, but also to transnational educational platforms such as the Refugee Law Reader.\(^62\) Like several other refugee organizations, UNHCR maintains some degree of internal research capacity. The Evaluation and Policy Unit, established in 1999, was operational for many years, along with its working paper series, New Issues in Refugee Research. Further, several UNHCR flagship publications, including The State of the World’s Refugees and

\(^{59}\) For instance, the Global Legal Action Network brought a 2017 submission to the International Criminal Court in regard to Australia’s offshore and privately operated detention centres, and in 2018 helped file a case to the European Court of Human Rights (ECtHR) in regard to the Italian–Libyan pullback scheme. See <https://www.glanlaw.org>.


various thematic and global consultations, are published with leading academic publishers rather than openly available as in-house reports. The call in the GCR for a ‘global academic network’ is similarly oriented towards realizing the Compact’s official objectives.

As mentioned above, refugee organizations and individual professionals are often heavily involved as contributors of scholarly publications and in editing academic journals and book series. The IJRL is an example in point. The journal was founded as an independent publication under Oxford University Press, but as stated in the editorial to its first edition in 1989, an open and close interaction with UNHCR has always been part of its raison d’être. Like other practice-oriented law journals, the IJRL regularly includes relevant policy documents. UNHCR is represented on the journal’s Editorial Board, and a handful of long-time refugee professionals from different organizations feature among the most prolific contributors of articles to the journal. While that may be written off as the result of a few extraordinary individuals capable of maintaining a significant academic profile in addition to their professional positions, in an examination of the body of scholarly articles published in the IJRL since its inception, UNHCR – in addition to the official documents published – also appears as the second-largest institutional contributor of peer-reviewed articles. As the leading refugee law journal globally, the IJRL represents the extent to which the cross-fertilization between the policy and the academic worlds is deeply integrated into the canon of the profession.

The unusually engaged participation by international organizations and civil society activists in scholarly activities may be seen to reflect the centrality of the academic field of refugee law in negotiating and progressively developing refugee protection principles. Alongside the absence of international bodies and fora focused on refugee protection, is the enormous amount of domestic litigation in courts and administrative fora on the central tenets of substantive and procedural refugee law. Refugee law texts and articles play an important role in cataloguing, synthesizing, and disseminating this body of national jurisprudence. Against this backdrop, it is clear why positivist advocacy approaches towards refugee law are so dominant in the scholarship. The range of examples where academic interpretations have subsequently found favour with domestic courts or influenced State practice is a testament to that fact.

From an academic perspective, the close and interactive relationship between scholarship and practice in international refugee law entails several benefits and represents a likely point of envy for many scholars in other policy-relevant fields struggling to establish similar connections to non-academic audiences. The open interface between scholarly and policy communities offers critical insights into processes of legal and political

---


64 GCR (n 5) para 43.

65 Goodwin-Gill and the Members of the Editorial Board (n 31) 1.
deliberation that is often inaccessible to academics. This helps scholars fine-tune their research agenda, sheds light on the reasoning behind particular legal outcomes, and creates feedback loops in terms of how academic opinions are received by decision makers and other stakeholders. Indeed, open dialogue and cross-fertilization between academia and practice is a major strength for any field engaged in empirically based and problem-solving research. As Cantor notes, close collaborations between professionals and scholars are furthermore essential if international refugee law is to persevere in a world that is, as he puts it, increasingly ‘hostile to refugee protection’.

At the same time, the close relationship between scholarship and practice gives rise to some critical considerations. First, the narrow interface between scholarship and practice, centred around a handful of major international organizations, may, of course, make it more difficult for scholars to voice criticism regarding the role of these central institutions. Historically, scholars who have done so have often found themselves standing outside research and policy-related fora where these organizations play a major role. This has not been without contention, as can be seen by the intense scholarly debate about the role of UNHCR and IOM in the process and substance of the two UN Compacts. Reviewing UNHCR’s past engagement with scholars, Crisp notes ‘the organization’s hegemonic tendencies in relation to refugee issues and its sometimes tetchy response to external criticism’. As such, the success of the proposed academic network to be convened by UNHCR in relation to the GCR will rest, at least

---


67 Byrne (n 17); Black (n 17) 67.


70 Conversely, it should be noted that some of the most insightful and nuanced critiques of various refugee organizations have often been forwarded by current or former professionals within the field.


72 Crisp (n 27) 641.
in part, on the presence of scholars representing constructive critiques and alternative approaches to mainstream practices which may, at times, run against UNHCR's select policy agendas.\textsuperscript{73}

Secondly, it is important to ask how this relationship is being brokered, particularly in terms of inclusion and exclusion of voices in the field. International refugee law – perhaps more than other disciplines in refugee studies – has historically struggled to include perspectives from the global South.\textsuperscript{74} Challenging the traditional and largely Eurocentric canon of modern refugee law, it is worth pointing out that one of the first articles dealing with legal regulation of refugees at the national level after the Second World War was authored by SP Chablani, an Indian scholar, who had been approached to carry out a study of the rehabilitation of refugees in the Federal Republic of Germany, based upon his work experience at the Indian Ministry of Rehabilitation.\textsuperscript{75}

Within refugee law specifically, a further concern is that the strong policy ties may favour particular kinds of research agendas and methodologies. According to BS Chimni, the close relationship to UNHCR has historically led to an emphasis on positivist scholarship with a liberal orientation, which lends itself more easily to policy purposes and can help legitimate a particular vision of international refugee law.\textsuperscript{76} Yet refugee law scholarship today arguably represents a much more sprawling field. Several scholars explicitly distance themselves from positivist approaches and/or the perceived limits of acceptable interpretive outcomes that may pertain to policy-commissioned research. In their place, scholars have applied a range of different legal approaches to refugee law, including critical legal theory,\textsuperscript{77} post-colonial and third world approaches,\textsuperscript{78} feminist theory,\textsuperscript{79} realism,\textsuperscript{80} law and economics,\textsuperscript{81} and

\textsuperscript{73}ibid.

\textsuperscript{74}Cantor (n 9) 207; Chimni (n 14).


\textsuperscript{76}Chimni (n 14) 350, 353; Harvey (n 14) 118.


\textsuperscript{80}Harvey (n 14).

\textsuperscript{81}Schuck (n 57).
transnational law to name but a few. In addition, distinctly interdisciplinary approaches to international refugee law are today more commonplace, with scholars drawing on, for example, political philosophy, political science, sociology, anthropomology, psychology, and forensic approaches. In some cases, to the extent that different approaches to research challenge or engage awkwardly with commonly accepted refugee law categories, or fail to conform to mainstream visions

---


of international law, they have been met with resistance or scepticism by policy organizations. A greater openness to insights from this broader academic landscape is essential if scholarship is to play a meaningful role in critically assessing and constructively informing policy.

And lastly, but not least, it is relevant to ask how and by whom the parameters for shared research agendas are set. While funding for refugee research has increased significantly in recent years, much of this funding is attached to predefined and specific requirements in terms of policy outcomes and impact. At a time when the political environment is particularly difficult for refugee protection, one may fear that earmarked and policy-driven research funding is too narrowly circumscribed by current political outlooks. More generally, research commissioned or edited by operational agencies is generally subject to very specific knowledge needs, often centred around the agency’s own work, that may ultimately limit its wider policy application. As Oliver Bakewell argues, there is a case to be made for more *prima facie* ‘policy irrelevant research’ that can challenge the existing categories and priorities of policymakers and practitioners in their framing of research questions and subject areas.

5. CONCLUSION

The thin walls between scholarship and practice shape both the internal logics of refugee law scholarship and the wider structural conditions of the academic field. This is exemplified by the ‘dual imperative’ of refugee law scholarship, and in the way that the field is institutionally organized with intimate ties to external stakeholders and the wider community of refugee professionals. Both factors help structure the trajectory of the field in terms of the scope of the research undertaken, the disciplinary and legal frameworks adopted for analysis, and the establishment of particular methodologies and interpretive outlooks as being within or outside the mainstream.

For many among us, these traits are readily welcomed. The ‘dual imperative’ is worn as a badge of honour and the interactive relationship with policy organizations and individual professionals is especially cherished at a time when overall political support for both international refugee law and fundamental protection principles is low. At the same time, the political environment within which refugee law scholars operate requires that we carefully navigate choices about how we broker the relationship between research and advocacy objectives, whether in our scholarship or when deciding if, and on what premises, to engage in processes related to policy reform, strategic litigation, or public debate.

Each of these issues is open to a range of positions depending on one’s theoretical, strategic, and political outlook. In this article, we have deliberately tried to refrain from passing judgment or taking sides in the ongoing debates about interpretation or policy engagements. As international refugee law is (yet again) receiving more attention both politically and within the broader academy, it nonetheless becomes important for refugee law scholars to reflect on and carefully stake out their interpretative outlook.

90 Black (n 17) 67.
vis-à-vis the broader legal discipline. The increased integration of refugee legal research within our cognate legal communities, whether it be in public international, constitutional, administrative, or other areas of law, has the benefit of widening the reach of refugee law scholarship while testing it in an environment where similar protection-oriented modalities are either absent or weakened.

Similarly, as global policy processes currently call for even closer integration between scholarship and refugee professionals, it is important to question how this relationship is brokered. The analysis above is not intended as a criticism of individual scholars for maintaining close relations to policy actors – an accusation that readily applies to both authors of this article. The risk we see emerging from the collective constitution of the field is the extent to which it can encourage the exclusion of particular approaches, questions, or positions. An overly narrow construction of the research–policy nexus not only undermines the continued development of the field; it undermines the benefits of cross-sectoral engagement. Limiting research ultimately limits much-needed innovation in policy solutions.

Refugee law scholarship has so far avoided the kind of deep internal scrutiny characterizing related fields such as international human rights law and the broader interdisciplinary field of refugee studies. Understanding refugee law requires that we look more deeply at the implications of how the field straddles the realms of scholarship and policy. A turn to legal sociology and Bourdieu’s theory of fields as relational social spaces offers one constructive prism through which to look at the forces that influence our work. Greater sensitivity to the underlying dynamics of our profession is essential, not only to ensure inclusivity in the community of scholars and expand the current canon of refugee law, but ultimately to sustain claims to practice and policy relevance.

An exercise of this nature presents certain difficulties. Internal scrutiny within professions, such as that undertaken in this article, always entails methodological challenges in terms of establishing sufficient distance and objectivity. Moreover, openly engaging with the dynamics of external influences on scientific process – be it those of moral imperatives, global institutions, advocacy networks, or partisan priorities – can help facilitate political actors intent on dismantling already fragile refugee legal protections. The thin walls that separate refugee scholars from the politicized environment they inhabit have been a central theme in this article. Creating inclusive spaces for unhindered discussions to take place amongst refugee law scholars necessitates a continuous search for more effective strategies to deflect external fallout from a healthy internal critique of the field. In sum, we believe it will be by encouraging new perspectives, including more actors, posing new questions, experimenting with new methods, and introducing new paradigms, that the greatest promise lies for refugee law scholarship to effectively fulfil its dual mandate.

An issue picked up by, among others, David Kennedy when reflecting on his time working as a protection officer at UNHCR. Kennedy (n 14) 2.