*Introduction*

It is a great pleasure to have reached the launch of *Nationality and Statelessness in the International Law of Refugee Status* –as my wife says, another pithy title.

The institution of asylum goes back to the Classical Greeks or earlier. But refugee law did not exist before WW1 and came into being between the two World Wars. Whereas a generation earlier the growing economies of the New World had absorbed millions of persons driven from their homelands, ultimately giving them or their descendants new countries and identities, after WW1 most countries left in place much of the more intrusive immigration control they had introduced in wartime and faced economic conditions which discouraged acceptance of any substantial level of migration. Refugees were at this point in essence viewed as part of general migration, not as a separate issue.

Since the beginning of international law concerning refugees in those interwar years, issues of nationality and statelessness have had a close relationship with refugee law. It could be said to be a ‘permanent relationship’ on the part of refugee law, which has always been developed on the basis of established understandings about nationality, national protection, and the State, and has embedded these in its key instruments.

Initially, under the limited refugee instruments done between the Wars, the refugee was generally defined as someone of a particular geographical origin who had lost the protection of his State of origin, and the purpose of identifying him or her was to enable documentation of identity, place of origin, and status rather than more fundamental protection. The incidents that prompted what can now be seen as the earliest developments in a nascent refugee law were all broadly caused by deprivation of nationality or of the expected consequence of nationality, the right to enter and remain in a country of nationality. As Sir Richard Plender noted,

*During the present [twentieth] century the practice of withdrawing nationality from dissident individuals or groups has become increasingly widespread. In the 1920s, between one and two million people were deprived of their Soviet citizenship by the Bolsheviks. The German Reich followed a similar policy in respect of Jews in the 1930s. Measures of a comparable character (although on a smaller scale) were adopted during the same decade by the Italian and Turkish authorities.*[[1]](#footnote-1)

Expulsion, or effective expulsion, had happened before in history, as with the Huguenots coming to England and elsewhere in the 17th century. But it had not happened in the recent past on such a scale, or in such intimate conjunction with denationalisation, and there was no body of international law to address it, as Paul Weis, an authority on both nationality law and refugee law, observed;

*Denationalisation gave rise to hardly any discussion as to the consistency of this measure with international law as long as it was applied on a limited scale...* [[2]](#footnote-2)

In 1927 Sir John Fischer Williams, a leading international lawyer and former Assistant Legal Adviser to the Home Office, was able to point to no established standards at all restraining the State’s treatment of its own citizens on its own territory, or in relation to it. He could only advert to expulsion of human beings on to the territory of other States as incompatible with their sovereignty, in the world of developed States then being recognised by international law:

*It is no longer possible simply to send undesirables abroad. Slops may be thrown out of the windows of a settler’s hut on a prairie; in a town such a practice is inadmissible. English law has long abandoned the practice of transportation- partly no doubt from the fact that no temperate colony is now sufficiently under home control to allow of a practice.*[[3]](#footnote-3)

Hannah Arendt, exiled in 1933, stripped of German citizenship in 1937, later forced to flee from Vichy France before reaching New York in 1941, also wondered how Europe had betrayed the stateless in her own time. In 1948, in *The Origins of Totalitarianism*, she observed that it was citizenship of a State that gives human beings the ‘*right to have rights*’. Stateless persons, she concluded, ought to have rights simply because they are human, but her own experience had taught her a different lesson:

*If a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man.*[[4]](#footnote-4)

Those two quotations- from Fisher Williams and Arendt- describe characteristics of the world of the 1930s which the states of the nascent United Nations sought to address- by instruments including the Genocide Convention, the Universal Declaration of Human Rights 1948, the 1951 Convention, the 1954 Convention relating to the Status of Stateless Persons, the International Bill of Rights, and other instruments. The 1951 Convention also embodies the relationship of refugee law with nationality, the State, and protection. The reference country is ‘*the country of his nationality*’ or each such country in the case of plural nationals, and an individual must be unable or unwilling ‘*to avail himself of the protection of that country*’ by reason of ‘*well-founded fear of persecution*’, persecution being a broad term capable in principle of encompassing many acts including denationalisation.

This book aims to assess the influence upon article 1A CSR51 of a related field of international law, that of nationality and statelessness, with which there is what I have called a permanent relationship, where both international refugee law and international law relating to nationality are in particular respects porous to influence by the international law of human rights and the principle of non-discrimination.

The work for me began as less than that, with an an effort to address a single question of interpretation by providing a principled delineation of the circumstances in which conduct by States as regards nationality (or the deprivation thereof) constitutes persecution for purposes of the 1951 Convention relating to the Status of Refugees. Although I had a personal experience in the area, I was brought back to it by the preparation of a paper I was invited to deliver in 2014 at the First Global Forum on Statelessness in the Hague sponsored by UNHCR and the Statelessness Programme of Tilburg University, led by one of our speakers tonight Dr Laura van Waas. But having started on the enquiry other questions concerning the interaction of nationality, statelessness, and refugee status came up which seemed to me to have been dealt with insufficiently, or even erroneously, and the project widened itself to encompass a full examination of the interaction between nationality including the absence of it-statelessness- on the one hand, and article 1 of the Refugee Convention on the other.

As I entered into the task it seemed to me very striking that there had been no modern exploration of these issues. A major figure whose activity linked the fields in early years is Paul Weis, whose *Nationality and Statelessness in International Law*, published in its first edition in 1956 and its second in 1979, represented a human link between the law of nationality and statelessness, then in continuing development, and international refugee law, of which he can claim to be a founder. Born in Vienna, he survived internment in Dachau before escaping to the United Kingdom, of which country he later became a national. As chief legal adviser to the International Refugee Organisation and later legal adviser and then Director of the Division of International Protection within the staff of the United Nations High Commissioner for Refugees he played an important part in the creation and development of modern refugee law. But his work on nationality and statelessness was primarily done before the acute phase of development in refugee law after, and apart from his work, there was little attention to nationality issues- or even to important features of international law applicable to nationality, such as recognition, about which Lauterpacht and Chen had written substantial monographs.

The interpretation of article 1 CSR51 has in recent years undergone extraordinary development since the treaty came into effect in 1953. This has in part happened through the interrelationship of international human rights law and international refugee law. As regards the key concept of ‘persecution’, important early commentators such as Jacques Vernant[[5]](#footnote-5) and Atle Grahl-Madsen[[6]](#footnote-6) could anticipate the possibility of international human rights law providing a more developed framework for interpretation in the future, but this could only begin to become a developed reality after substantial international treaties had first come into force- the International Convention on the Elimination of All Forms of Racial Discrimination in 1969 and then both the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights in 1976- and then gained wide acceptance. The human rights based analysis could then be taken further, the most important commentators to do so being Guy Goodwin-Gill[[7]](#footnote-7) and James Hathaway.[[8]](#footnote-8)

International refugee law is now a substantial field in its own right. This is self-evidently a development to be welcomed. But one potential risk in the attainment of specialism and weight is the possibility that the underlying linkage between international refugee law and other areas of international law- notably for present purposes, the international law relating to nationality- may be elided. That risk is exacerbated by the relative diffuseness of the other law in question.

*Structure and Content of the Work*

The structure of the work is as follows. In Part A which contains important matters of background, chapter 1 considers definitions, in particular the definition of the key terms ‘nationality’ and ‘statelessness’, and the content of international law relating to those areas relevant to interpretation of key provisions in article 1 CSR51. Chapter 2 provides a brief account of the prehistory and history of the formation of today’s international refugee law, identifies key provisions in the centrepiece of that law, CSR51, and briefly identifies relevant provisions in other, generally regional, regimes. Chapter 3 contains a short account of the principled basis for interpretation of CSR51. In Part B, which contains the chapters focusing upon interpretation of particular provisions, chapter 4 considers the interpretation of ‘nationality’ as one of the reasons enumerated at article 1A(2) as necessary for a well-founded fear of persecution to qualify the possessor as a refugee. Chapter 5 treats of the interpretation of the term ‘nationality’ in the context of identification of the State or States of reference in relation to other requirements of the refugee definition at article 1A(2) CSR51. Thereafter chapter 6 considers the relevance of acts or omissions concerning nationality or kindred matters to the critical term ‘persecution’ in the same article. Two shorter chapters address invocations of nationality or related terms in the context respectively of cessation under article 1C CSR51 (chapter 7) and of exclusion under article 1E CSR51 (chapter 8).

Whilst the value of the exercise must ultimately be considered by the reader, it might be suggested that a number of particularly significant matters emerge:

First, ‘country of nationality’ in art 1A2 means country of actual current nationality. Whilst a line of Canadian authority has developed which treats the phrase as including a country whose nationality a claimant does not actually possess at the time of assessment, and this has attracted intermittent reference in other jurisdictions, the underlying conclusion in these authorities is not consistent with CSR51, whatever the position as a matter of domestic authority;

Second, in identifying the country of nationality on international plane recognition principles, as explored by Lauterpacht and Chen as well as by later writers, such as FA Mann, and applied by the House of Lords in *Oppenheimer v Cattermole*, may be relevant though opposability is not. This means that a nationality status may fall to be treated as ineffective on the international plane if inconsistent with ‘international conventions, international custom, and the principles of law generally recognised with regard to nationality’ (art 1 Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930)

Third, a particular approach is needed to cases in which plural nationality is present. These are distinct from other cases of ‘protection elsewhere’ by reason of the existence of a link of nationality, but this does not elide the protective purpose of the CSR51 regime. There is some functional parallel to the so-called ‘internal protection alternative’ concept applicable to questions of availability of protection elsewhere within a country of nationality, though with the distinction that a second or further country of nationality is here being considered. Given the distinctness of the situation and there is a need to apply a particularised approach consistent with the language of both paragraphs of article 1A(2) CSR51, this approach being identified in chapter 5 by the designation ‘external protection alternative’

-Fourth, arbitrary deprivation of nationality linked to statelessness and exclusion by reason of relevant discrimination is likely in many cases to represent a substantial breach of international law, and to constitute persecution for purposes of article 1A(2) CSR51.

*Why A Book About Interpretation Of Art 1A2 CSR51 at time of refugee ‘Crisis’*

We are told that today we have a refugee ‘crisis’, traced to 2015 when 1.2 million asylum applications were made in Europe. Within the EU certain States declined to comply with their obligation under European Union law to receive and process asylum seekers, imposing a disproportionate burden on other States and encouraging disorderly movement between States. One State, Hungary, even held a referendum aiming to emphasise its unwillingness to comply with its obligations in this respect- apparently ignoring the *Alabama Claims* principle that a State cannot excuse the breach of an international obligation by its domestic arrangements.

This might make some of us think of Evian, 1938, when a special conference was held in that attractive spa town to discuss the refugee crisis then enveloping much of Europe. The instruction to the head of the US delegation was that his task is to expedite and facilitate the immigration of refugees to those countries willing to receive them within the provisions of their existing legislation- the logical concomitant to which was that no measure should be entered into to address the then exceptional problem visible to every observer. Lord Winterton speaking for the United Kingdom stressed that Britain ‘*is not a country of immigration*’ and that ‘*for economic and social reasons the traditional policy of granting asylum can only be applied within narrow limits*’, though Britain would carefully survey prospects for admission to overseas territories. The French representative Henri Berenger stated that France had reached ‘the extreme point of saturation as regards admission of refugees’ and called for international burden-sharing: ‘*France considers the refugee problem to be an international political problem, which can only be finally solved by the joint and collective action of the Governments of the world.*’ Evian was a notorious failure so far as international action was concerned. In Depression conditions virtually all states acknowledged the general problem and virtually all were reluctant, if not entirely unwilling, to absorb additional immigrants themselves. There was no established international regime which could be directed to address the problem of refugees.

But we are not in an Evian situation. We are in the very different situation of having a developed regime, international refugee law, which has operated to the benefit of individuals, of States, and of what might justifiably be called the legitimate interests of humanity. There are 148 States Parties to the 1951 Convention and/or the 1967 Protocol.[[9]](#footnote-9) The regime is supported by one of the most effective United Nations programmes, that led by the United Nations High Commissioner for Refugees, and the last holder of that post appears now set to become the next Secretary-General of the UN. Many States remain both rhetorically and really committed to the regime, though inclined to try to game the system- for instance a characteristic of the past 10-15 years has been strong focus by States upon non-entrée measures such as carrier sanctions or interception. The situation of refugees is not only a European preoccupation. Many more refugees are protected elsewhere in relatively poor and sometimes troubled states like Pakistan or Kenya. The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa contains an additional category beyond those included in the 1951 Convention which expands the scope for protection rather than reducing it. It is clear that enemies of civilisation like so-called Islamic State would like the refugee protection system to stop, because this would deny people the chance by flight to show under what conditions they would sooner live, and instead provide ground for argument that the international community does not care or will not help.[[10]](#footnote-10) ISIS strategy also seeks to make Europeans think of refugees as potential security threats rather than the victims that they are

Against this background, it seems to me important that we strive to understand and apply the 1951 Convention and subsidiary instruments, as part of our own endeavours but also in the interest of those affected and the civilisation we live in. My grandfather the designer and art director Will Burtin, had left Germany in 1938. Drafted into the US Army in 1943 and assigned to the Office of Strategic Services, Burtin designed visual presentations of strategies and other materials for the OSS and gunnery manuals for the U.S. Air Force, in which the struggle was to take factory workers and farm boys and teach them to address complex and lethal problems of relative vectors. He was committed to the safety of the gunner, who ‘*was engaged in serious business in which his life might depend on the swift functioning of his knowledge and equipment.  He deserved dignified treatment and the clearest possible statement of facts.*’[[11]](#footnote-11) Writing this book has in one sense been easy- the material was there, and needed marshalling and consideration- but I have tried to be guided by a similar respect and care for the user and for those touched by its use.

*Closing*

So in closing I am grateful to all those mentioned in Acknowledgements in particular my Chambers at Lamb Building, my family, my wife Satwant Gill, and Hart Publishing- my publisher Sinead Moloney and her staff, and to the Chair and those who are about to speak.

1. R Plender, *International Migration Law* (2nd edition (Dordrecht/Boston/ London, Martinus Nijhoff, 1988) 144. [↑](#footnote-ref-1)
2. P Weis, *Nationality and Statelessness*, (2nd edn 1979, Leiden, Brill), 120. [↑](#footnote-ref-2)
3. J Fischer Williams, ‘Denationalization’ 8 British Year Book of International Law (1927) 45-61 at 57. [↑](#footnote-ref-3)
4. Arendt, *The Origins of Totalitarianism* (Harcourt, 1968), p. 300.  [↑](#footnote-ref-4)
5. Vernant J, *The Refugee in the Post-War World* (London, George Allen & Unwin, 1953) 7-8. [↑](#footnote-ref-5)
6. Grahl-Madsen A, *The Status of Refugees in International Law*, vol I, (Leyden, A.W. Sijthoff, 1966); vol II (Leyden, A.W. Sijthoff, 1972) 201, §84. [↑](#footnote-ref-6)
7. G Goodwin-Gill, *The Refugee in International Law* (OUP, 1983), and more recently Goodwin-Gill G and McAdam J, *The Refugee in International Law*, (3rd edn, Oxford, OUP, 2011). [↑](#footnote-ref-7)
8. J Hathaway, *The Law of Refugee Status* (Butterworths, 1991), J Hathaway and M Foster *The Law of Refugee Status*, (2nd edn, Cambridge, CUP, 2014). [↑](#footnote-ref-8)
9. UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, (http://www.unhcr.org/uk/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html) [↑](#footnote-ref-9)
10. ##  See for instance M Ignatieff, *The Refugees & the New War*, New York Review of Books Volume 62, Number 20, 17 December 2015.

 [↑](#footnote-ref-10)
11. W Burtin and L Lessing, *Interrelations* **Graphis** No 22, [1948] 108-122; *R Remington* and R Fripp, Design and Science: The Life and Work of Will Burtin (Lund Humphries, 2007). [↑](#footnote-ref-11)