

REFUGEES AND THE 1951 CONVENTION: AN INSIGHT INTO THE PROTECTION OF REFUGEES DURING ARMED CONFLICTS

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ABSTRACT

The Convention relating to the status of Refugees commonly referred to as the 1951 Refugees Convention is often viewed as the prayer and beacon of light to all refugees suffering amidst war torn conditions parallel to those exiting in Syria, Afghanistan etc. This begs the questions of what effect a situation of war or armed conflict has on the application of the 1951 Convention. A reading of the Convention shows that it does not appear to distinguish between wartime persecution and peacetime persecution¹. There is no qualification in Article 1 that demands the existence of national peace or war. Therefore, the Convention recognizes that persecution can be carried out in a multiplicity of ways, none of which is limited to a situation of war or peace. The point of discussion is the area between the Convention's requirement of persecution as an integral element of a person's refugee status, and the existence of war or armed conflict, from which an individual has fled. What remedy, if any, is offered by the Convention in this regard? Given that the Convention does not account for violence as a factor creating refugees, what impact does the existence of a violent situation have on the ability of a person to avail international protection? In other words, does war operate as an automatic disqualification on a person's ability to obtain refugee status? Finally, if international refugee law is found to be lacking in this regard, what recourse do victims of violence have under other areas of international law?

¹ *Convention Relating to the Status of Refugees*, Jul. 28 1951, art. 1.

Given the transformation in circumstances that force people to abandon their homes and seek the protection of the international community, the capability of the international law regime on this point is challenged. The classical definition of refugee is no longer sufficient to meet the exigencies of humanitarian crises that induce refugee flight. This research paper is concerned with examining the inadequacy of the current legal framework in situations of armed conflicts, and the ability of international law to reconcile modern refugee movements with the existing law relating to refugee protection.

INTRODUCTION

Refugees are a class of people requiring protection from persecution and factors that cause them to flee their homes have always existed. The massive refugee flows generated in Europe both during and after the two World Wars brought attention to the fact that a universal, uniform law was necessary to govern the relationship between refugees and the international community from which they seek safe harbor. The 1951 Convention relating to the Status of Refugees is the only binding international instrument concerning the protection of refugees. The definition in this Convention is largely a product of the circumstances dominating the international fora at that time. The Convention was negotiated in the backdrop of the world reeling from the physical and ideological effects of the Second World War, and the increasingly repressive communist regimes in the East which were also contributing to refugee flow². The main purpose of this definition was to restrict the broad general meaning of refugee by identifying the criteria that a person would have to fulfil in order to be considered a refugee³.

² Daniel J. Steinbock, *The Refugee Definition as Law: Issues of Interpretation*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 18, 19 (Frances Nicholson & Patrick Twomey ed., 1999).

³ GUY S. GOODWIN-GILL, REFUGEE IN INTERNATIONAL LAW 6 (Oxford University Press 2nd ed. 1998).

THE DILEMMA OF REFUGEE STATUS

The current definition of refugee reads as follows: a person who “owing to the well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear is unwilling to return to it.”⁴

In cases covered by the statutory definition, the violence is initiated against a specified group singled out as a target. However, the flight of refugees may also be a consequence of armed conflict or war, and affect individuals indiscriminately⁵. The element of specificity is lost, and results in a subsequent failure of a claim for refugee status. No longer is persecution the only provocation for fleeing a country, but generalized violence that renders a person’s continued residence intolerable is also an increasingly common phenomenon.

Transformation in Factors Prompting Refugee Flow

Despite the elimination of temporal and geographical limitations, the Convention still leaves several categories of persons in flight outside its protective fold. A large majority of Third World refugees are *de facto* excluded⁶ from the protection offered by the Convention for the sole reason that they are unable to prove discriminatory persecution as required by the Convention. They flee the consequences of violence in *general*, rather than specific and targeted “persecution”⁷. The problem with the traditional definition is that it does not correspond to global reality⁸, and the challenges confronted by people in conflict zones today. The ability to see international protection, and avail the security of another state is the only

⁴ *Convention Relating to the Status of Refugees*, Jul. 28 1951, UNTS Vol. 189, art. 1(A)(2).

⁵ ARISIDER R. ZOLBERG, ET AL., *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* (Oxford University Press 2nd ed. 1992).

⁶ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 10, 11 (Butterworths Canada 1st ed. 1991).

⁷ *Id.*

⁸ G. J. L. Coles, *Some Reflections on the Protection of Refugees from Armed Conflict Situations*, 7 IN *DEFENSE OF THE ALIEN*, 88, 78-121 (1984).

real, plausible option to populations caught up in the ethnic, political and social upheavals that are common occurrences in the global South⁹.

The change from refugee movements caused by methodical persecution to refugee flows induced by indiscriminate violence are immediately observable in post-colonial world order. Wars of national liberation were the most common stimulus for refugee movements in the latter half of the twentieth century. Drives for self-governance were largely resisted, especially in parts of Africa, by European settlers. In the French colony of Algeria, and the Portuguese-ruled territories of Angola, Guinea-Bissau and Mozambique, the decolonization process was violent and displaced a massive number of people¹⁰. In addition to this, ethnic conflicts like the partition of India, the expulsion of Palestine Arabs from Israel, and the treatment of the Chinese in Hong Kong combine a wartime conflict with a tinge of persecution, making the application of the 1951 Convention stand on shaky ground¹¹.

THE MEANING OF THE TERM 'REFUGEE'

The Ordinary Understanding

In ordinary parlance, a refugee is identifiable by the characteristics they possess that distinguishes them from persons in normal circumstances. Goodwin-Gill notes that the meaning of 'refugee' can be verified by drawing references to principles of international law¹², which are derived from a general usage of the word.

In layman's language, a refugee is a person who has fled from causes that endanger their life and/or liberty¹³. An important point of departure between refugees and other migrants is that

⁹ George Okoth-Obbo, *Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugee and International Law*, in *THE PROBLEM OF REFUGEES IN LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 9 (Vera Gowlland-Debbas ed., 1996).

¹⁰ GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* 92 (Oxford University Press 1st ed. 2001).

¹¹ Zolberg, et al. *supra* note 4 at 27, 28.

¹² GUY S. GOODWIN-GILL, *REFUGEE IN INTERNATIONAL LAW* 1 (Oxford University Press 2nd ed. 1998).

¹³ The *Oxford Dictionary* defines a refugee as a "person who has been forced to leave their country in order to escape war, persecution, or natural disaster."

to a refugee, the destination that they choose to flee to is immaterial¹⁴. A political refugee is distinguished from ordinary aliens (which includes stateless persons, economic migrants, fugitives from justice, etc.) because of a controversy between the refugee and the authorities of his home country, and that such a controversy is political in nature, serious enough to impair conditions of life in that country¹⁵. What is relevant are the factors that compel a person to abandon their home, society and community, and seek shelter elsewhere. It is implicit in this that a refugee is a person who is deserving of protection from these flight-inducing factors¹⁶.

The development of a definition of a refugee for the purposes of international law suggests that some amount of specificity is necessary to sever the group of people worthy of international protection from ordinary migrants who exercise their right of travel. The broad contours offered by the general understanding of the term would not suffice to address the requirements of a formal legal system.

Hathaway understands the development of a limited legal definition as a product of Western history¹⁷. Law evolves to meet the needs of a society and account for the constant forces of change. This idea of law as a tool of social engineering¹⁸ is one that applies equally to international law. Turbulent changes in the early to mid-twentieth century created a class of people who did not enjoy the protection of their home country and consequently, they fled to others. This *de facto* immigration exodus confirmed that governments and the international machinery would have to account for the forced migration and displacement of people¹⁹.

Evolution of the Refugee Definition in International Legislation

Commenting on the progression of defining the term ‘refugee’, Simpson noted that in aiming for specificity, the essential quality of a refugee must not be compromised. He identified this “essential quality” as “one who has sought refuge in a territory other than that in which he was

¹⁴ Goodwin-Gill, *supra* note 1.

¹⁵ ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEE IN INTERNATIONAL LAW* 78 (A. W. Slithoff-Leyden 1st ed. 1966).

¹⁶ *Id.*

¹⁷ JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 1 (Butterworths Canada 1st ed. 1991).

¹⁸ Roscoe Pound, *A Comparison of the Ideals of Law*, 47 HARV. L. REV. 1-2 (1933).

¹⁹ Hathaway, *supra* note 6 at 3.

formerly resident as a result of political events which rendered his continued residence in his former territory impossible or intolerable.²⁰”

The development of the definition of ‘refugee’ can be divided into three phases, based on the approach of lawmakers towards the refugee problem – the juridical phase²¹, the social phase²², and the individualist phase²³.

The Juridical Perspective (1920-1935)

This approach classified people as refugees based on the possession of two defining characteristics – (a) that the person was outside their country of origin, and (b) that the person did not enjoy the protection of their government²⁴. International instruments²⁵ during this period defined refugees as persons outside their state of origin who had effectively been deprived of the formal protection of their government, and who could therefore not move around internationally²⁶. The only recourse available to them was flight, which made them worthy of international protection.

For instance, a Russian refugee was defined in 1926 as “any person of Russian origin who does not enjoy or who no longer enjoys the protection of Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.” An Armenian was also defined as a person not enjoying the protection of the Government of the Turkish Republic²⁷. This characteristic was mirrored in the Convention Concerning the Status of Refugees Coming from Germany, in which the definition of refugee applies to both German nationals and stateless persons ordinarily residing in Germany who are proved to not enjoy the protection of the

²⁰ SIR JOHN HOPE SIMPSON, *REFUGEES – A PRELIMINARY REPORT OF A SURVEY 1* (1st ed. 1938).

²¹ Hathaway, *supra* note 6 at 2.

²² *Id.* at 4.

²³ *Id.* at 5.

²⁴ Grahl-Madsen, *supra* note 4 at 4. *See also* Hathaway, *supra* note 6 at 3.

²⁵ *See* Grahl-Madsen, *supra* note 4 at 4, 5.

²⁶ Barry Sautman, *The Meaning of Well-Founded Fear of Persecution in United States Asylum Law and International Law*, 9 FORDHAM INT’L. L. J. 527, 483-539 (1985).

²⁷ League of Nations, *Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees*, May 12 1926, LNTS No. 2004, para 2 available at <http://www.refworld.org/docid/3dd8b5802.html> (last accessed Nov. 6 2017).

German government²⁸. The Convention further clarifies that persons who leave Germany for personal convenience cannot be considered refugees²⁹. This trend reached its culmination with the establishment of the Intergovernmental Committee on Refugees, whose objective was to facilitate involuntary emigration from Germany, including Austria³⁰. The benefits of identity and travel documents were only available to refugees provided they “are stateless or do in fact enjoy the protection of any Government, that they are staying lawfully in the territory of the Contracting Government concerned.”³¹

When the bond of protection between government and individual is severed, no country is responsible for this category of persons. The withdrawal of international protection either through dematerialization or withdrawal of travel documents results in a malfunction in the legal order³². The juridical approach was designed to correct this breakdown of international legal machinery, by providing for methods through which these people could avail the protection of the international community³³. As such, the instruments that reflect the juridical perspective largely focus on the lack of national protection as essential for a person to be considered a refugee.

The Social Perspective (1935-1939)

The emphasis of this approach is on the external circumstances, of a political or social nature, that are beyond the control of an individual and affect the quality of life they are likely to enjoy in their country³⁴. It recognizes that formal loss of *de jure* protection is not the only push factor for forced migration, but that the factual situation in an individual’s home country can too render his residence there unsafe and dangerous. The response of the League of Nations to the

²⁸ League of Nations, *Convention Concerning the Status of Refugees Coming from Germany*, Feb. 10 1938, LNTS No. 4461, art. 1 available at <http://www.refworld.org/docid/3dd8d12a4.html> (last accessed Nov. 6 2017).

²⁹ Art. 1(2) notes “persons who leave Germany for reasons of purely personal convenience are not included in this definition.”

³⁰ Grahl-Madsen, *supra* note 4 at 5.

³¹ United Nations, *Agreement Relating to the Issue of Travel Documents to Refugees who are the Concern of the Intergovernmental Committee of Refugees*, Oct. 15 1946, UNTS No. 73, art. 1 available at <http://www.refworld.org/docid/502d026d2.html> (last accessed Nov. 6 2017).

³² Nafees Ahmed, *Refugee: The Semasiology of Definitional Dilemma*, 11 ISIL Y. B. INT’L HUMAN. & REFUGEE LAW, 320, 312-57

³³ Hathaway, *supra* note 6 at 3.

³⁴ *Id.* at 4, “Refugees defined from the social perspective are helpless casualties of broadly based social or political occurrences which separate them from their home society.”

situation in the Saar Basin³⁵ was the first time the international community acknowledged refugees *de facto*, following which the trend largely shifted away from the juridical relationship between individual and state towards examining scenarios on the ground that compel persons to leave their home country.

Agreements during this period were intended to protect people who were caught in the devastation and upheaval caused by the Second World War and the resulting chaos from the Nazi regime in Germany³⁶. The substance of this era lies in general, situation specific protection regimes for people affected by social or political phenomena³⁷. It focused on the uprooting event, rather than the harm caused to the individual by the uprooting³⁸.

The Individualist Perspective (1938-1950)

Hitherto, the international regime understood refugees as a group of people who shared common ground, either in the fact that their relationship with their home state had been severed or in that they were victims of a particularly violent and oppressive socio-political situation in their home country³⁹. Thus, group determination was the preferred method to grant access to international protection⁴⁰.

The individualist era marked a shift from assessing refugee status based on common characteristics to examining the position of an individual on a case-by-case basis. From the lens of an individualist perspective, a refugee is a person who flees injustice or incompatibility with their native authorities⁴¹. This instills a feeling of unease and vulnerability in a person,

³⁵ The crisis in the Saar Basin is notable for the success of the Nansen International Office for Refugees in resettling persons in the Saar Basin. The refugees mostly consisted of opponents to the regime of the National Socialists in Germany, who fled after a plebiscite resulted in the region joining the German Third Reich.

³⁶ See League of Nations, *Convention Concerning the Status of Refugees Coming from Germany*, Jul. 4 1936, LNTS No. 4461 available at <http://www.refworld.org/docid/3dd8d12a4.html> (last accessed Nov. 6 2017); *Council Resolution on Refugees from Sudetenland*, Jan. 17 1939, (1939) 20(2) League of Nations O. J. 73.

³⁷ Hathaway, *supra* note 6 at 4.

³⁸ Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L., 582, 583, 551-626

³⁹ See Hathaway, *supra* note 6 at 5.

⁴⁰ Hathaway, *supra* note 6 at 5.

⁴¹ *Id.*, "The essence of refugee status came to be discord between the individual refugee applicant's personal characteristics and convictions and tenets of the political system in her country of origin."

because they believe that their relationship with their home state is one of mistrust, which leads to a loss of national protection.

This shift in understanding is also a move from an objective description of the refugee class in international law to an inclusion of the subjective feelings individuals harbor towards their home state. A reflection of the individualism prized in western thought⁴², this perspective characterizes the modern refugee definition accepted as part of the 1951 Convention.

The 1951 Convention combines all the subjective element of individual fear along with the objective situation in a refugee's home state, all of which contributes to a *de jure* or *de facto* loss of national protection in its refugee definition, which reflects a convergence of all these approaches⁴³.

CONCLUSION

The description of Refugees and their rights under the 1951 Convention is largely a product of the circumstances dominating the international fora at that time. The Convention was negotiated in the backdrop of the world reeling from the physical and ideological effects of the Second World War, and the increasingly repressive communist regimes in the East which were also contributing to refugee flow⁴⁴. The main purpose of the definition as laid under this convention was to restrict the broad general meaning of refugee by identifying the criteria that a person would have to fulfil in order to be considered a refugee⁴⁵.

Given the post-war scenario in which the Convention definition was drafted, it initially consisted of two limitations – geographical, in that it applied only to refugees in Europe⁴⁶, and temporal, in that it only covered events prior to 1951⁴⁷, i.e., events resulting from the

⁴² Hathaway, *supra* note 6 at 6.

⁴³ *Supra* note 26 at 583.

⁴⁴ Daniel J. Steinbock, *The Refugee Definition as Law: Issues of Interpretation*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 18, 19 (Frances Nicholson & Patrick Twomey ed., 1999).

⁴⁵ Goodwin-Gill, *supra* note 1 at 6.

⁴⁶ *Convention Relating to the Status of Refugees*, Jul. 28 1951, art. 1(B)(1).

⁴⁷ *Convention Relating to the Status of Refugees*, Jul. 28 1951, art. 1(A)(2).

catastrophe of the Second World War. The 1967 Protocol did away with these limitations⁴⁸ to give way to the universally applicable definition that we know today.

Therefore, the current definition of refugee reads as follows: a person who “owing to the well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the nation of his/her nationality and is unable, or owing to such fear is unwilling to avail himself/herself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear is unwilling to return to it.”⁴⁹

‘Convention refugees’ are thus identifiable by the possession of the following characteristics: (a) they are outside their country of origin; (b) they are unable or unwilling to either avail the protection of that country or return to it; (c) this reluctance is attributable to a well-founded fear of persecution; (d) the persecution feared is based on reasons of race, religion, nationality, membership of a social group or political opinion⁵⁰.

This definition is considered restrictive, because it excludes many of the other reasons which could induce refugee flows, for example, generalized violence, civil wars, natural disasters, etc. which do not discriminate on the basis of identity. The 1951 Convention only makes room for persecution, in any form whatsoever, but persecution that has a nexus with a person’s inherent or perceived identity. These categories of people fleeing are equally in need of international protection, and the highly constricting definition in the 1951 Convention and the 1967 Protocol has been criticized on these grounds⁵¹. A literal interpretation of the Convention shows that if a peril faced by a claimant cannot be linked to their sociopolitical situation and that the marginalization faced is not for these reasons, the claim to refugee status fails⁵².

⁴⁸ *Protocol Relating to the Status of Refugees*, Oct. 4 1967, art. 1.

⁴⁹ *Convention Relating to the Status of Refugees*, Jul. 28 1951, UNTS Vol. 189, art. 1(A)(2).

⁵⁰ Goodwin-Gill, *supra* note 1 at 19, 20.

⁵¹ James C. Simeon, *Introduction: Searching for way to enhance the UNHCR’s capacity to supervise international refugee law*, in *THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW* 10 (James C. Simeon ed., 2013).

⁵² Hathaway, *supra* note 6 at 136, 137.