

Who is a Refugee?

The definition of a 'refugee' in international law is of critical importance for it can mean the difference between life and death for an individual seeking asylum. Definitions in international law, it may be noted, depart from the ordinary meaning of the word 'refugee'. In everyday speech, the word 'refugee' is used to describe a person who is forced to flee his or her home for any reason for which the individual is not responsible, be it persecution, public disorder, civil war, famine, earthquake or environmental degradation.¹ However, in international law, a 'refugee' is a person who is forced to leave home for certain specified reasons and who, furthermore, is outside the country of his or her origin and does not have its protection. Persons who are compelled to move but do not cross international borders are classified as 'internally displaced persons'.²

Different Definitions

Several attempts to define the term 'refugee' have been made in the course of the twentieth century. The definitions contained in different international instruments during the period of the League of Nations is the subject of Reading I.A. It provides the historical backdrop against which contemporary definitions need to be considered.³ These include

¹ A refugee can be defined in three ways: legally (as stipulated in national or international law); politically (as interpreted to meet political exigencies); and sociologically (as reflecting an empirical reality). Astri Suhrke, 'Global Refugee Movements and Strategies of Response', in M. Kritz, ed., *US Immigration and Refugee Policy: Global and Domestic Issues* (1983), pp. 157-62.

² For a review of the historical and practical reasons which justify alienage as a criterion to define a refugee, see the introduction to and Reading I.A of Chapter 7.

³ For a review of the role of international refugee organisations in the League period see Reading I.A of Chapter 4.

the definitions contained in the 1951 Convention on the Status of Refugees (hereafter the 1951 Convention), the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereafter the OAU Convention), and the Cartagena Declaration on Refugees, 1984 (hereafter the Cartagena Declaration).

In studying the different definitions readers should bear in mind the observation that while definitions help 'impose finite limits on human problems' they often 'tend to raise form over substance, class over need, [and] characterization over purpose'.⁴ At this point they become ideological or political devices to arbitrarily delimit or extend the problem.

The 1951 Convention Definition

The most widely accepted definition of a 'refugee' is that contained in the 1951 Convention.⁵ The mandate of the Convention extends to any person who

as a result of events occurring before 1 January 1951 and owing to 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.

However, despite the fact that this definition is widely accepted there is no avoiding, as Reading II.1.A points out, the Cold War origins of the 1951 Convention definition and its Eurocentric focus. Reading II.2.B, on the other hand, identifies the essential elements of the definition. The subsequent readings of Section II examine in detail the meaning of some of the key words or phrases in the Convention definition.

⁴ Guy Goodwin-Gill, 'The Benigno Aquino Lecture in Human Rights. Refugees and Human Rights: Challenges for the 1990s', *International Journal of Refugee Law* (Special Issue, September 1990), pp. 29-38 at p. 34.

⁵ As Hathaway puts it: 'The Convention refugee definition is of singular importance because it has been subscribed to by more than one hundred nations in the only refugee accords of global scope. Many nations have also chosen to import this standard into their domestic immigration legislation as the basis upon which asylum and other protection decisions are made.' James C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), p. v.

Well-founded Fear: Subjective or Objective Test?

Readings II.3.C to II.3.F consider the meaning of the crucial phrase 'well-founded fear' which occurs in the definition. Its interpretation has generated a debate on whether the subjective or the objective test should be applied in determining 'well-founded fear' of being persecuted. In Reading II.3.C the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* (hereafter the UNHCR Handbook) recommends the use of both the subjective and the objective tests. However, a leading scholar of international refugee law, James Hathaway, emphasises the objective test in Reading II.3.D. He contends that granting refugee status has little to do with the state of mind of the individual concerned.

The problem with advocating the sole use of the objective test is the underlying assumption that the 'subjective' perception of the individual represents an arbitrary evaluation of events. On the other hand, it is perhaps legitimate to ask if an 'objective' determination is possible at all. Are there really 'objective' facts out there waiting to be discovered? Do they allow the possibility of arriving at an ethical judgement on the pain and fear an individual experiences?⁶ Does the availability of a huge quantity of information on the human rights record of the country of origin offer a foolproof method of determining 'well-founded fear'? Or, is the goal of arriving at an 'objective' determination a pretext to impose the 'subjective' determination of status-determining authorities and courts on the asylum-seeker? Any determination is, after all, an interpretation and, where government agencies are concerned, deeply influenced by state policies. Thus, in a paranoid world the sole application of the objective test could mean, as Readings II.3.E and II.3.F strive to point out, the increasing disenfranchisement of the refugee claimant.⁷ These are somewhat difficult readings but will repay careful study.

Persecution

It is widely accepted that the drafters of the Convention deliberately left the meaning of 'persecution' undefined as it was an impossible task to

⁶ See Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press, Oxford, 1987).

⁷ In Reading II.3.F Douzinas and Warrington rely on post-modern scholarship to show how reliance on an objective test may lead to the commission of an ethical tort. For an introduction to post-modern scholarship and its critique see Steven Seidman, ed., *The Postmodern Turn: New Perspectives on Social Theory* (Cambridge University Press, Cambridge, 1994); Stuart Hall et al., eds, *Modernity and its Futures* (Polity Press in Association with Open University, Cambridge, 1992); Alex Callinicos, *Against Postmodernism: A Marxist Critique* (Polity Press, Cambridge, 1989).

enumerate in advance the myriad forms it might assume. But this omission also gave states a large measure of discretion, resulting in the absence of a 'coherent or consistent jurisprudence'.⁸ Readings II.4.G to II.4.I consider against this backdrop the meaning of the word 'persecution'. Reading II.4.G reproduces two brief sections on the subject from the UNHCR *Handbook*. In Reading II.4.H Aleinikoff reflects on the intention of the drafters of the Convention and examines the interpretation offered by the UNHCR *Handbook*. In the final reading Hathaway attempts a definition of 'persecution' by linking it to wider developments in the field of human rights. He distinguishes his position from those who would link the meaning of 'persecution' to a narrow subset of human rights.⁹

Nexus with Civil or Political Status

The 1951 Convention mandates protection only for those whose civil and political rights are violated, without protecting persons whose socioeconomic rights are at risk. It extends to persons who have been disenfranchised on the basis of race, religion, nationality, membership of a particular social group, or political opinion. Reading II.5.J examines the different civil and political rights which must be at risk.

Hathaway has described the 1951 Convention mandate as 'the lopsided and politically biased human rights rationale for refugee law'.¹⁰ The historical reason for reference to civil and political rights alone, as Reading II.1.A noted, was to embarrass the former Soviet Union and its allies whose record in the sphere of political and civil rights was less than wholesome. However, in the final analysis, the problem of defining a refugee is a debate about the epistemological principles which inform its elaboration. The Convention definition merely illustrates the point that definitions are not neutral devices but embody particular, usually partial, interpretations of social reality. Thus, the concept of a 'refugee' may be described as 'an essentially contested concept', i.e., a concept of which competing definitions may be advanced on the basis of different epistemological principles.¹¹

⁸ Guy S. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press, Oxford, 1996), second edition, p. 67.

⁹ The interpretation of the term 'persecution' raises a number of other significant questions which cannot, for reasons of space, be addressed here. These include the questions of 'agents of persecution' and the availability of an internal flight alternative (IFA) to deny refugee status. For a discussion of these issues see Goodwin-Gill, *ibid.*, pp. 69ff; and Karin Landgren, 'The Future of Refugee Protection: Four Challenges', *Journal of Refugee Studies* (Vol. 11, 1998), pp. 416-32 at pp. 417-20.

¹⁰ It may be traced to the distinction between negative and positive liberty made famous by Isaiah Berlin.

¹¹ For a discussion of the meaning of 'essentially contested concepts' see W.B. Gallie, *Philosophy and Historical Understanding* (Chatto and Windus, London, 1964), pp. 157-91.

Membership of a Particular Social Group: Gender Guidelines

In the last decade the literature on refugees has come to concern itself with the different experience of refugee women as compared to their male counterparts; they often fear persecution for different reasons than men, and face a different set of problems on becoming refugees. Reading II.6.K offers a critical introduction to feminist perspectives on the definition of refugee and considers the appropriateness of including gender as an enumerated basis for persecution in the Convention definition.¹²

In 1985, the UNHCR Executive Committee adopted Conclusion No. 39 which noted that refugee women and girls constituted the majority of the world's refugee population and that many of them were exposed to special problems.¹³ The Conclusion also recognised that states were free to adopt the interpretation that women asylum-seekers faced with harsh or inhuman treatment for having transgressed the social mores of the society in which they lived could be considered a 'particular social group' within the 1951 Convention definition. In October 1993, the UNHCR Executive Committee adopted Conclusion No. 73 on Refugee Protection and Sexual Violence. It recognised that asylum-seekers who have suffered sexual violence should be treated with particular sensitivity, and recommended the establishment of training programmes designed to ensure that those involved in the determination of refugee status are adequately sensitised to issues of gender and culture. In 1991, the UNHCR issued its 'Guidelines on the Protection of Refugee Women' which essentially addressed issues relating to women in refugee camps. However, the Guidelines also addressed gender-related persecution and recommended procedures to make the refugee adjudication process more accessible to women.

In March 1993, Canada issued its *Guidelines on Women Refugee Claimants Fearing Gender-related Persecution*, and became the first country to establish formal procedures for the adjudication of refugee claims made by women. The Guidelines formally recognise that women fleeing persecution because of their gender can be found to be refugees. In May 1995, the United States became the second country in the world to adopt formal guidelines recognising that women may experience discrimination unique to their gender, and that in some cases, such discrimination can meet the standards for refugee status. Reading II.6.L reproduces Section III of the US INS Guidelines entitled 'Legal Analysis of Claims', which serves as an introduction to a range of issues and considerations involved

¹² On the gender question in general see *The Polity Reader in Gender Studies* (Polity Press, Cambridge, 1994).

¹³ The Conclusions adopted by the Executive Committee of the UNHCR each year are not binding on state parties. They are mere recommendations but often have great value in practice.

in determining gender-based refugee status.¹⁴ While the establishment of these guidelines by Canada and the United States represents substantial progress, it is important to remember that they coexist with a host of restrictive practices—mentioned in Chapter 2—which all but ensure that women will not be able to access them. The deference with which status-determining authorities treat national asylum policies also makes it difficult to believe that the gender guidelines will translate into justice on the ground. The negative experience of Bosnian refugee women in the courts in Europe attests to this scepticism.¹⁵

The special concerns relating to the determination of refugee status of children are outlined in Reading II.7.M which reproduces an extract from the UNHCR guidelines for the protection and care of children.

Economic Migrants

The 1951 Convention does not, as we have seen, mandate protection for those whose socio-economic rights are at risk. But can a neat distinction be made between 'political' and 'economic' refugees? As Reading II.8.N points out, a sharp distinction between 'political' and 'economic' refugees is difficult to sustain. It is more likely that the political and economic causes of flight are so inextricably intertwined as to resist any simplistic classification as one or the other.¹⁶

¹⁴ For an introduction in general to United States law and practice see D.E. Anker, *The Law of Asylum in the United States: A Manual for Practitioners and Adjudicators* (American Immigration Lawyers' Association, Washington, D.C., 1989); T.A. Aleinikoff et al., eds., *Immigration: Process and Policy* (West Publishing House, Minnesota, 1995), third edition.

¹⁵ See U. David, 'Refugees from Bosnia and Herzegovina: Are they Genuine', *Suffolk International Law Review* (Vol. 28, 1995), pp. 53–131.

On the other hand, as has been pointed out by Deborah Anker and Nancy Kelly, 'while these guidances will affect only a small number of women, they are important, not only for those few who arrive . . . who should have an equal chance with men to obtain protection—but because they establish the principle that human rights instruments cannot exclude women, and that the harms women face because of their gender must be recognized and taken seriously.' *Harvard Law School News* (26 May 1995).

¹⁶ Prince Sadrudin Aga Khan, the former High Commissioner for Refugees, has rightly stressed that 'it would be wrong to draw too fine a distinction between the two, since political persecution and economic oppression can easily overlap. It is often the poorest members of society who are discriminated against (on grounds of race, religion or politics), and people flee from economic conditions which are the direct result of a political failure to guarantee distribution of food, land, jobs or education.' Sadrudin Aga Khan, 'Looking into the 1990s: Afghanistan and Other Refugee Crises', *International Journal of Refugee Law* (Special Issue, September 1990), pp. 14–28 at p. 24.

Readers would do well to return to this issue after studying Chapter 6 which deals with the causes of refugee flows. This chapter reveals the complexity of the problem, and in particular highlights the international dimension of the causes of refugee flows. The latter assumes importance in the North-South context, because states responsible for creating

However, because the Convention does not mandate protection for those whose socio-economic rights are at risk, states can regard individuals with such claims as economic migrants. This is often justified on the grounds that extending protection to such individuals could mean offering asylum to every poor person in the world. But, as Hathaway clarifies in Reading II.8.O, the right to seek asylum is carefully circumscribed in this regard. Mandating protection for those whose social and economic rights are at risk certainly does not mean that every poor person can claim refugee status.

Exclusion and Cessation Clauses

Not everyone who applies for refugee status deserves protection. The application of the 1951 Convention is subject to what have been termed 'exclusion clauses' embodied in Sections D to F of Article 1. They list certain categories of persons who do not deserve international protection. Clause F is of note for it excludes those who have committed crimes against peace and security, serious common law criminals and individuals who have acted in contravention of the principles and purposes of the United Nations. Reading II.9.P outlines the framework within which exclusion clauses are to be applied and briefly discusses the case of serious common law criminals.

Reading II.9.Q discusses the 'cessation clauses' contained in Clause C of Article 1 which lists the circumstances in which international protection may cease. Among other things, it makes the important point that the cessation clauses are exhaustive in their enumeration.¹⁷

The 1967 Protocol

The key feature of the Protocol of 31 January 1967 relating to the Status of Refugees (hereafter the 1967 Protocol) was that it removed the temporal and geographical limitations contained in the 1951 Convention. However, as Reading III.A points out, there was no attempt to reconsider the definition of the term 'refugee'. This meant that most third world refugees continued to remain de facto excluded, as their flight is frequently

the conditions in which socio-economic rights come to be at risk then turn round to classify those who seek to escape such conditions as economic migrants.

¹⁷ It is generally agreed that the enumeration of cessation clauses in Article 1C of the Refugee Convention and in the second section of Paragraph A of the UNHCR Statute is exhaustive. In other words, once a person has become a refugee as defined in Article 1 of the Convention or Paragraph 6A of the Statute, he continues to be a refugee until he falls under any of those cessation clauses.' Aile Grahl-Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff, Leyden, 1966), Vol. 1, p. 369.

prompted by natural disaster, war, or political and economic turmoil rather than by 'persecution', at least as that term is understood in the Western context.

Regional Instruments: The OAU Convention and the Cartagena Declaration

At the regional level different definitions of 'refugee' have been adopted, namely, the OAU Convention and the Cartagena Declaration. Reading IVA examines the conditions under which the different definitions were adopted in Africa and Latin America and their salient features.

The definition of 'refugee' contained in the 1951 Convention was expanded by the OAU Convention to meet specific aspects of refugee problems in Africa. It defines the term 'refugee' to include persons fleeing their country of origin due to external aggression, occupation, foreign domination, or events seriously disturbing public order in either a part or the whole of the country of origin or nationality. The addition implies a move away from the 1951 Convention's 'well-founded fear' of persecution standard, stressing that refugees included persons fleeing civil disturbances, violence and war irrespective of whether or not they have a well-founded fear of persecution. Thus, the OAU definition leaves open the possibility that the basis for the harm may be indeterminate, and also goes back to the pre-World War II practice of recognising group disenfranchisement. Another feature of the definition is that it extends protection to persons who seek to escape serious disruption of public order 'in either a part or whole' of their country of origin. Therefore, a person is not required to seek refuge in a safe part of his or her own country before seeking it outside.¹⁸

The Cartagena Declaration recommends a definition very similar to that contained in the OAU Convention.

For two decades after the adoption of the OAU Convention academics argued for the need to bring the 1951 definition in line with it. It was *inter alia* contended that the 1951 definition of refugee was not a moral definition.¹⁹ However, no sooner was the Cold War over that Western states jettisoned the debate on definitions; it was made clear that the definition contained in the 1951 Convention would not be revised. But is the West justified in resisting the expansion of the definition of refugee after states in Africa and Latin America have expanded it?

¹⁸ For recent practice relating to the 1951 Convention on this question see footnote 9 earlier.

¹⁹ Eugene Kamenka, 'On Being a Refugee', in Amin Saikal, ed., *Refugees in the Modern World* (Australian National University, Canberra, 1989), pp. 11-15 at p. 15.

Asia

In so far as Asia is concerned, mention must be made of the Bangkok Principles adopted by the Asian African Legal Consultative Committee (AALCC) in 1966. These Principles—reproduced as Reading VA—are non-binding and have, as noted in the Preface, not exercised the kind of influence that the Cartagena Declaration has in Latin America.²⁰

An Arab Convention?

In November 1992, a Group of Arab Experts meeting in Cairo adopted the 'Declaration on the Protection of Refugees and Displaced Persons in the Arab World'.²¹ Article 6 of the Declaration recommended that 'pending the elaboration of an Arab Convention relating to refugees, Arab States adopt a broad concept of "refugee" and "displaced person"....'

Stateless Persons

'Refugees' are to be distinguished from stateless persons, whether or not this distinction stands to reason. While the 1951 Convention addresses the problem of 'refugees' alone, the international legal rights of stateless persons are addressed in the Convention Relating to the Status of Stateless Persons, 1954, which came into force in 1960.²² It defines a 'stateless person' as a 'person who is not considered as a national by any State under the operation of its law'. The 1954 Convention was followed by the adoption of the Convention on the Reduction of Statelessness, 1961, which came into force in 1975.²³

²⁰ Readers should also refer to the *Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia* which adopted certain conclusions and recommendations for the Asian region in 1981. It recommended a definition akin to the one embodied in the OAU Convention. *Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia*, 19-22 January 1981 (under the Auspices of the Office of the United Nations High Commissioner for Refugees, Geneva, March 1981).

²¹ For the text of the Declaration see *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), Vol. II, p. 116. More recently, in March 1997, 'steps have been taken to develop a forum for regional consultations on the problems of refugees and displaced persons in Central Asia, South West Asia and the Middle East... with the participation of 13 governments.' *Opening Statement by the United Nations High Commissioner for Refugees at the Forty-eighth Session of the Executive Committee of the High Commissioner's Programme*, p. 8.

²² For the text of the Convention Relating to the Status of Stateless Persons, 1954, see *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), Vol. I, p. 75.

²³ For the text of the agreement see *ibid.*, p. 99.

In the League of Nations period refugees and stateless persons were not sharply differentiated, with both categories receiving assistance from international refugee organisations. However, at the time the 1951 Convention was drafted, France and the United States insisted that the problems of stateless persons were not only less urgent than those of the refugees but also gave rise to fewer social problems than in the case of refugees. The former Soviet Union, on the other hand, had tried to extend protection to stateless persons. In recent years, the problem of statelessness has arisen in several parts of the world, thus renewing interest in filling the gaps in the prevailing regime of international protection. Reading VII.A offers an introduction to some of the issues involved.

Are We All Refugees?

The final reading of Chapter 1 is included to encourage reflection on the 'striking similarities between the universal condition and the plight of refugees'. It is perhaps important to emphasise that Warner is not questioning the usefulness of the legal category of 'refugee' but merely pointing towards certain parallels between the refugee condition and the existential condition of humankind. Reading VII.A also calls for an imaginative rethinking of the idea of 'solutions' to the refugee problem, a matter which is the subject of Chapter 6. But readers should consider the criticism that Warner's thesis only connects with the existential condition of the affluent and the post-modern North rather than with the poor and predominantly pre-modern South.

I. EARLY DEFINITIONS

A. James C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), pp. 2-6.

Analysis of the international refugee accords entered into between 1920 and 1950 reveals three distinct approaches to refugee definition. Each of these perspectives—juridical, social, and individualist—was dominant during a part of the initial decades of refugee law.

The Juridical Perspective

From 1920 until 1935, refugees were defined in largely juridical terms, which meant that they were treated as refugees because of their membership in a group of persons effectively deprived of the formal protection of

the government of its state of origin. The purpose of refugee status conceived in juridical terms is to facilitate the international movement of persons who find themselves abroad and unable to resettle because no nation is prepared to assume responsibility for them.

These first refugee definitions were formulated in response to the international legal dilemma caused by the denial of state protection. The withdrawal of *de jure* protection by a state, whether by way of denaturalisation or the withholding of diplomatic facilities such as travel documents and consular representation, results in a malfunction in the international legal system. Because the then existing international law did not recognise individuals as subjects of international rights and obligations, the determination of responsibilities on the international plane fell to the sovereign state whose protection one enjoyed. When the bond of protection between citizen and state was severed, no international entity could be held accountable for the individual's actions. The result was that states were reluctant to admit to their territory individuals who were not the legal responsibility of another country. The refugee definitions adopted between 1920 and 1935 were designed to correct this breakdown in the international order, and accordingly embraced persons who wished to have freedom of international movement but found themselves in the anomalous situation of not enjoying the legal protection of any state.

The most fundamental form of *de jure* withdrawal of state protection is, of course, denaturalisation. It was the general policy of the League of Nations to extend protection to groups of persons whose nationality had been involuntarily withdrawn. As well, the League recognised that persons who could not obtain valid passports were entitled to international protection. Both of these groups received League of Nations identity certificates which contracting states agreed to recognise as the functional equivalent of passports.

The definitions of this era contained a criterion of ethnic or territorial origin, coupled with a stipulation that the applicant not enjoy *de jure* national protection. Only persons applying from outside their country of origin were eligible for refugee recognition. This is consistent with the notion of the refugee as an international anomaly: while the unprotected individual remained within the boundaries of her home state, there was no question of another country being confronted with a person outside the bounds of international accountability and, accordingly, no need to include her within the scope of League of Nations protection.

The Social Perspective

In contrast to the initial juridical focus, the refugee agreements adopted between 1935 and 1939 embodied a social approach to refugee definition. Refugees defined from the social perspective are the helpless casualties of broadly based social or political occurrences which separate them from