

REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
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INTERNATIONAL AND REGIONAL DEFINITIONS OF REFUGEE

From the UN 1951 Convention and 1967 Protocol Relating to the Status of Refugees:

The term "refugee" shall apply to any person who:

(2) [O]wing 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.

From the 1984 Cartagena Declaration on Refugees

[T]he definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

From the Convention Governing the Specific Aspects of Refugee Problems in Africa

[T]he term "refugee" shall mean every person who, 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.

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

From the European Union's Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, Art. 5, Directive 2011/95/EU:

A "beneficiary of international protection" means a person who has been granted refugee status or subsidiary protection status.

A "refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a

particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

A “person eligible for subsidiary protection” means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

INTERNATIONAL AND REGIONAL DEFINITIONS OF "REFUGEE"

1951 UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES,
189 U.N.T.S. 150, entered into force April 22, 1954.

PREAMBLE

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international- scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1. - Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee,, shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) 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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national; and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily reacquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

....

Article 31. - Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32. - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33. - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Protocol Relating to the Status of Refugees
606 U.N.T.S. 267, entered into force Oct. 4, 1967.

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

Article 1. - General provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

....

Cartagena Declaration on Refugees

Adopted at a colloquium entitled "Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios" held at Cartagena, Colombia from 19 - 22 November 1984

....

The Colloquium adopted the following conclusions:

....

3. To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

PREAMBLE

We, the Heads of State and Government assembled in the city of Addis Ababa, from 6-10 September 1969, Have agreed as follows:

Article 1

Definition of the term "Refugee"

1. For the purposes of this Convention, the term "refugee" shall mean every person who, 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.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

....

DONE in the City of Addis Ababa this 10th day of September 1969.

Excerpts from Guy S. Goodwin-Gill, Introductory Note to 1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees
<http://legal.un.org/avl/ha/prsr/prsr.html>

Introduction

The 1951 Convention relating to the Status of Refugees, with just one “amending” and updating Protocol adopted in 1967 (on which, see further below), is the central feature in today’s international regime of refugee protection, and some 144 States (out of a total United Nations membership of 192) have now ratified either one or both of these instruments (as of August 2008). The Convention, which entered into force in 1954, is by far the most widely ratified refugee treaty, and remains central also to the protection activities of the United Nations High Commissioner for Refugees (UNHCR).

In the aftermath of the Second World War, refugees and displaced persons were high on the international agenda. At its first session in 1946, the United Nations General Assembly recognized not only the urgency of the problem, but also the cardinal principle that “no refugees or displaced persons who have finally and definitely ... expressed valid objections to returning to their countries of origin ... shall be compelled to return ...” (resolution 8 (I) of 12 February 1946). The United Nations’ first post-war response was a specialized agency, the International Refugee Organization (IRO, 1946-1952), but notwithstanding its success in providing protection and assistance and facilitating solutions, it was expensive and also caught up in the politics of the Cold War. It was therefore decided to replace it with a temporary, initially non-operational agency, and to complement the new institution with revised treaty provisions on the status of refugees.

The historical context also helps to explain both the nature of the Convention and some of its apparent limitations. Just six years before its conclusion, the Charter of the United Nations had identified the principles of sovereignty, independence, and non-interference within the reserved domain of domestic jurisdiction as fundamental to the success of the Organization (Article 2 of the Charter of the United Nations). In December 1948, the General Assembly adopted the Universal Declaration of Human Rights, article 14, paragraph 1, of which recognizes that, “Everyone has the right to seek and to enjoy in other countries asylum from persecution”, but the individual was only then beginning to be seen as the beneficiary of human rights in international law. These factors are important to an understanding of both the manner in which the 1951 Convention is drafted (that is, initially and primarily as an agreement between States as to how they will treat refugees), and the essentially reactive nature of the international regime of refugee protection (that is, the system is triggered by a cross-border movement, so that neither prevention, nor the protection of internally displaced persons come within its range).

The United Nations High Commissioner for Refugees and the 1951 Convention

After extensive discussions in its Third Committee, the General Assembly moved to replace the IRO with a subsidiary organ (under Article 22 of the Charter of the United Nations), and by resolution 428 (V) of 14 December 1950, it decided to set up the Office of the United Nations High Commissioner for Refugees with effect from 1 January 1951. Initially set up for three

years, the High Commissioner's mandate was regularly renewed thereafter for five-year periods until 2003, when the General Assembly decided "to continue the Office until the refugee problem is solved" (resolution 58/153 of 22 December 2003, paragraph 9).

The High Commissioner's primary responsibility, set out in paragraph 1 of the Statute annexed to resolution 428 (V), is to provide "international protection" to refugees and, by assisting Governments, to seek "permanent solutions for the problem of refugees". Its protection functions specifically include "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto" (paragraph 8 (a) of the Statute).

A year earlier, in 1949, the United Nations Economic and Social Council appointed an Ad Hoc Committee to "consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention".

The Ad Hoc Committee decided to focus on the refugee (stateless persons were eventually included in a second convention, the 1954 Convention relating to the Status of Stateless Persons), and duly produced a draft convention. Its provisional draft drew on IRO practice under its Constitution, identified a number of categories of refugees, such as the victims of the Nazi or Falangist regimes and those recognized under previous international agreements, and also adopted the general criteria of well-founded fear of persecution and lack of protection (See United Nations doc. E/AC.32/L.6, 23 January 1950).

On July 28 1951, at the Palais des Nations, Geneva, the first twelve nations signed the Convention Relating to the Status of Refugees, drafted by the world Conference of Plenipotentiaries on Refugees and Stateless Persons which met from 2 to 25 July. In August 1950, the Economic and Social Council returned the draft for further review, before consideration by the General Assembly, and then finalized the Preamble and refugee definition. In December 1950, the General Assembly decided to convene a Conference of Plenipotentiaries to finalize the Convention (resolution 429 (V) of 14 December 1950).

The Conference met in Geneva from 2 to 25 July 1951 and took as its basis for discussion the draft which had been prepared by the Ad Hoc Committee on Refugees and Stateless Persons, save that the Preamble was that adopted by the Economic and Social Council, while article 1 (definition) was as recommended by the General Assembly and annexed to resolution 429 (V). On adopting the final text, the Conference also unanimously adopted a Final Act, including five recommendations covering travel documents, family unity, non-governmental organizations, asylum, and application of the Convention beyond its contractual scope.

Notwithstanding the intended complementarity between the responsibilities of the UNHCR and the scope of the new Convention, a marked difference already existed: the mandate of the UNHCR was universal and general, unconstrained by geographical or temporal limitations, while the definition forwarded to the Conference by the General Assembly, reflecting the reluctance of States to sign a "blank cheque" for unknown numbers of future refugees, was restricted to those who became refugees by reason of events occurring before 1 January 1951

(and the Conference was to add a further option, allowing States to limit their obligations to refugees resulting from events occurring in Europe before the critical date).

The Convention Refugee Definition

Article 1A, paragraph 1, of the 1951 Convention applies the term “refugee”, first, to any person considered a refugee under earlier international arrangements. Article 1A, paragraph 2, read now together with the 1967 Protocol and without the time limit, then offers a general definition of the refugee as including any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion. Stateless persons may also be refugees in this sense, where country of origin (citizenship) is understood as “country of former habitual residence”. Those who possess more than one nationality will only be considered as refugees within the Convention if such other nationality or nationalities are ineffective (that is, do not provide protection).

The refugee must be “outside” his or her country of origin, and the fact of having fled, of having crossed an international frontier, is an intrinsic part of the quality of refugee, understood in its ordinary sense. However, it is not necessary to have fled by reason of fear of persecution, or even actually to have been persecuted. The fear of persecution looks to the future, and can also emerge during an individual’s absence from their home country, for example, as a result of intervening political change.

Persecution and the Reasons for Persecution

Although the risk of persecution is central to the refugee definition, “persecution” itself is not defined in the 1951 Convention. Articles 31 and 33 refer to those whose life or freedom “was” or “would be” threatened, so clearly it includes the threat of death, or the threat of torture, or cruel, inhuman or degrading treatment or punishment. A comprehensive analysis today will require the general notion to be related to developments within the broad field of human rights (cf. 1984 Convention against Torture, article 7; 1966 International Covenant on Civil and Political Rights, article 3; 1950 European Convention on Human Rights, article 6; 1969 American Convention on Human Rights, article 5; 1981 African Charter of Human and Peoples’ Rights).

At the same time, fear of persecution and lack of protection are themselves interrelated elements. The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear. However, there is no necessary linkage between persecution and Government authority. A Convention refugee, by definition, must be unable or unwilling to avail him- or herself of the protection of the State or Government, and the notion of inability to secure the protection of the State is broad enough to include a situation where the authorities cannot or will not provide protection, for example, against the persecution of non-State actors.

The Convention requires that the persecution feared be for reasons of “race, religion, nationality, membership of a particular social group (added at the 1951 Conference), or political opinion”.

This language, which recalls the language of non-discrimination in the Universal Declaration of Human Rights and subsequent human rights instruments, gives an insight into the characteristics of individuals and groups which are considered relevant to refugee protection. Persecution for the stated reasons implies a violation of human rights of particular gravity; it may be the result of cumulative events or systemic mistreatment, but equally it could comprise a single act of torture.

Persecution under the Convention is thus a complex of reasons, interests, and measures. The measures affect or are directed against groups or individuals for reasons of race, religion, nationality, membership of a particular social group, or political opinion. These reasons in turn show that the groups or individuals are identified by reference to a classification which ought to be irrelevant to the enjoyment of fundamental human rights.

The Convention does not just say who is a refugee, however. It goes further and sets out when refugee status comes to an end (article 1C; for example, in the case of voluntary return, acquisition of a new, effective nationality, or change of circumstances in the country of origin). For particular, political reasons, the Convention also puts Palestinian refugees outside its scope (at least while they continue to receive protection or assistance from other United Nations agencies (article 1D)), and excludes persons who are treated as nationals in their State of refuge (article 1E). Finally, the Convention definition categorically excludes from the benefits of refugee status anyone whom there are serious reasons to believe has committed a war crime, a serious non-political offence prior to admission, or acts contrary to the purposes and principles of the United Nations (article 1F). From the very beginning, therefore, the 1951 Convention has contained clauses sufficient to ensure that the serious criminal and the terrorist do not benefit from international protection.

Non-refoulement

Besides identifying the essential characteristics of the refugee, States party to the Convention also accept a number of specific obligations which are crucial to achieving the goal of protection, and thereafter an appropriate solution.

Foremost among these is the principle of non-refoulement. As set out in the Convention, this prescribes broadly that no refugee should be returned in any manner whatsoever to any country where he or she would be at risk of persecution (see also article 3, 1984 Convention against Torture, which extends the same protection where there are substantial grounds for believing that a person to be returned would be in danger of being tortured).

The word non-refoulement derives from the French *refouler*, which means to drive back or to repel. The idea that a State ought not to return persons to other States in certain circumstances is first referred to in article 3 of the 1933 Convention relating to the International Status of Refugees, under which the contracting parties undertook not to remove resident refugees or keep them from their territory, "by application of police measures, such as expulsions or non-admittance at the frontier (refoulement)", unless dictated by national security or public order. Each State undertook, "in any case not to refuse entry to refugees at the frontiers of their countries of origin".

The 1933 Convention was not widely ratified, but a new era began with the General Assembly's 1946 endorsement of the principle that refugees with valid objections should not be compelled to return to their country of origin (see above, resolution 8 (I)). The Ad Hoc Committee on Statelessness and Related Problems initially proposed an absolute prohibition on refoulement, with no exceptions (United Nations Economic and Social Council, Summary Record of the twentieth meeting, Ad Hoc Committee on Statelessness and Related Problems, First Session, United Nations doc. E/AC.32/SR.20, (1950), 11-12, paras. 54 to 55). The 1951 Conference of Plenipotentiaries qualified the principle, however, by adding a paragraph to deny the benefit of non-refoulement to the refugee whom there are "reasonable grounds for regarding as a danger to the security of the country..., or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Apart from such limited situations of exception, however, the drafters of the 1951 Convention made it clear that refugees should not be returned, either to their country of origin or to other countries in which they would be at risk.

The Convention Standards of Treatment

In addition to the core protection of non-refoulement, the 1951 Convention prescribes freedom from penalties for illegal entry (article 31), and freedom from expulsion, save on the most serious grounds (article 32). Article 8 seeks to exempt refugees from the application of exceptional measures which might otherwise affect them by reason only of their nationality, while article 9 preserves the right of States to take "provisional measures" on the grounds of national security against a particular person, but only "pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary ... in the interests of national security".

States have also agreed to provide certain facilities to refugees, including administrative assistance (article 25); identity papers (article 27), and travel documents (article 28); the grant of permission to transfer assets (article 30); and the facilitation of naturalization (article 34).

Given the further objective of a solution (assimilation or integration), the Convention concept of refugee status thus offers a point of departure in considering the appropriate standard of treatment of refugees within the territory of Contracting States. It is at this point, where the Convention focuses on matters such as social security, rationing, access to employment and the liberal professions, that it betrays its essentially European origin; it is here, in the articles dealing with social and economic rights, that one still finds the greatest number of reservations, particularly among developing States.

The Convention proposes, as a minimum standard, that refugees should receive at least the treatment which is accorded to aliens generally. Most-favoured-nation treatment is called for in respect of the right of association (article 15), and the right to engage in wage-earning employment (article 17, paragraph 1). The latter is of major importance to the refugee in search of an effective solution, but it is also the provision which has attracted most reservations. Many States have emphasized that the reference to most-favoured-nation shall not be interpreted as entitling refugees to the benefit of special or regional customs, or economic or political agreements. Other States have expressly rejected most-favoured-nation treatment, limiting their

obligation to accord only that standard applicable to aliens generally, while some view article 17 merely as a recommendation, or agree to apply it “so far as the law allows”.

“National treatment”, that is, treatment no different from that accorded to citizens, is to be granted in respect of a wide variety of matters, including the freedom to practice religion and as regards the religious education of children (article 4); the protection of artistic rights and industrial property (article 14); access to courts, legal assistance, and exemption from the requirement to give security for costs in court proceedings (article 16); rationing (article 20); elementary education (article 22, paragraph 1); public relief (article 23); labour legislation and social security (article 24, paragraph 1); and fiscal charges (article 29).

Article 26 of the Convention prescribes such freedom of movement for refugees as is accorded to aliens generally in the same circumstances. Eleven States have made reservations, eight of which expressly retain the right to designate places of residence, either generally, or on grounds of national security, public order (ordre public) or the public interest.

....

The 1967 Protocol Relating to the Status of Refugees

The origins of the 1967 Protocol relating to the Status of Refugees, which reflected recognition by UNHCR and the States members of its Executive Committee that there was a disjuncture between the universal, unlimited UNHCR Statute and the scope of the 1951 Convention, were quite different from those of the latter. Instead of an international conference under the auspices of the United Nations, the issues were addressed at a colloquium of some thirteen legal experts which met in Bellagio, Italy, from 21 to 28 April 1965. The Colloquium did not favour a complete revision of the 1951 Convention, but opted instead for a Protocol by way of which States parties would agree to apply the relevant provisions of the Convention, but without necessarily becoming party to that treaty. The approach was approved by the UNHCR Executive Committee and the draft Protocol was referred to the Economic and Social Council for transmission to the General Assembly. The General Assembly took note of the Protocol (the General Assembly commonly “takes note” of, rather than adopts or approves, instruments drafted outside the United Nations system), and requested the Secretary-General to transmit the text to States with a view to enabling them to accede (resolution 2198 (XXI) of 16 December 1966). The Protocol required just six ratifications and it duly entered into force on 4 October 1967.

The Protocol is often referred to as “amending” the 1951 Convention, but in fact, and as noted above, it does no such thing. The Protocol is an independent instrument, not a revision within the meaning of article 45 of the Convention. States parties to the Protocol, which can be ratified or acceded to by a State without becoming a party to the Convention, simply agree to apply articles 2 to 34 of the Convention to refugees defined in article 1 thereof, as if the dateline were omitted (article I of the Protocol). As of August 2008, Cape Verde, Swaziland, the United States of America and Venezuela have acceded only to the Protocol, while Madagascar, Monaco, Namibia and St. Vincent & the Grenadines are party only to the Convention (and the Congo, Madagascar, Monaco, and Turkey have retained the geographical limitation).

Article II on the cooperation of national authorities with the United Nations is equivalent to article 35 of the Convention, while the few remaining articles (just eleven in all) add no substantive obligations to the Convention regime.

Evaluation

The Convention is sometimes portrayed today as a relic of the cold war and as inadequate in the face of “new” refugees from ethnic violence and gender-based persecution. It is also said to be insensitive to security concerns, particularly terrorism and organized crime, and even redundant, given the protection now due in principle to everyone under international human rights law.

The Convention does not deal with the question of admission, and neither does it oblige a State of refuge to accord asylum as such, or provide for the sharing of responsibilities (for example, by prescribing which State should deal with a claim to refugee status). The Convention also does not address the question of “causes” of flight, or make provision for prevention; its scope does not include internally displaced persons, and it is not concerned with the better management of international migration. At the regional level, and notwithstanding the 1967 Protocol, refugee movements have necessitated more focused responses, such as the 1969 OAU/AU Convention on the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration; while in Europe, the development of protection doctrine under the 1950 European Convention on Human Rights has led to the adoption of provisions on “subsidiary” or “complementary” protection within the legal system of the European Union.

Nevertheless, within the context of the international refugee regime, which brings together States, UNHCR and other international organizations, the UNHCR Executive Committee, and non-governmental organizations, among others, the Convention continues to play an important part in the protection of refugees, in the promotion and provision of solutions for refugees, in ensuring the security of States, sharing responsibility, and generally promoting human rights. A Ministerial Meeting of States Parties, convened in Geneva in December 2001 by the Government of Switzerland to mark the fiftieth anniversary of the Convention, expressly acknowledged, “the continuing relevance and resilience of this international regime of rights and principles...”.

In many States, judicial and administrative procedures for the determination of refugee status have established the necessary legal link between refugee status and protection, contributed to a broader and deeper understanding of key elements in the Convention refugee definition, and helped to consolidate the fundamental principle of non-refoulement. While initially concluded as an agreement between States on the treatment of refugees, the 1951 Convention has inspired both doctrine and practice in which the language of refugee rights is entirely appropriate.

It was no failure in 1951 not to have known precisely how the world would evolve; on the contrary, it may be counted a success that the drafters of the 1951 Convention were in fact able to identify, in the concept of a well-founded fear of persecution, the enduring, indeed universal, characteristics of the refugee, and to single out the essential, though never exclusive, reason for flight. That certainly has not changed, even if the scope and extent of the refugee definition have

matured under the influence of human rights, and even as there is now increasing recognition of the need to enhance and ensure the protection of individuals still within their own country.

Related Materials

A. Legal Instruments

Convention relating to the International Status of Refugees, Geneva, 28 October 1933, League of Nations, Treaty Series, vol. 159, p. 200.

Universal Declaration of Human Rights, General Assembly resolution 217 (III) of 10 December 1948.

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, United Nations, Treaty Series, vol. 213, p. 221.

International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

OAU/AU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, United Nations, Treaty Series, vol. 1001, p. 45.

American Convention on Human rights: "Pact of San José, Costa Rica", San José, 22 November 1969, United Nations, Treaty Series, vol. 1144, p. 123.

African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, United Nations, Treaty Series, vol. 1520, p. 217.

Cartagena Declaration on Refugees, Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

Convention on the Rights of the Child, New York, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

B. Documents

Statute of the Office of the United Nations High Commissioner for Refugees. General Assembly resolution 428 (v) of 14 December 1950.

Report of the Ad Hoc Committee on Statelessness and Related Problems, Provisional draft of parts of the definition article of the preliminary draft convention relating to the status of refugees,

prepared by the Working Group on this article (E/AC.32/L.6 and Corr. 1 and Rev.1, 23 January 1950).

Ad Hoc Committee on Statelessness and Related Problems, First Session, E/AC.32/SR.20, (1950), 11-12, paras. 54-55.

Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees
HCR/IP/4/Eng/REV.1Reedited, Geneva, January 1992, UNHCR 1979.(See also the website of the Office of the United Nations High Commissioner for Refugees for other handbooks and guidelines: <http://www.unhcr.org>.)

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