



VULNERABILITY OF REFUGEE STATUS IN CONTEMPORARY INTERNATIONAL LAW

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ABSTRACT

Under international law, refugees are persons outside their countries of origin who are in need of international protection because of a serious threat to their life, physical integrity or freedom in their country of origin as a result of persecution, armed conflict, violence or serious public disorder. For many centuries, refugee movements were a result of religious and racial intolerance. It is obvious that the vulnerabilities that migrants and refugees face run deep. The international community has now recognized that human rights violations are a major cause of mass exoduses. The refugee problem continues to challenge the international community. Refugee-receiving States should maintain their commitment to the protection of refugees and encourage tolerance towards diversity; refugee-producing States should prevent acts that produce mass exoduses of their populations. The world needs to reach an agreement on how best to prevent new flows of refugees. If poverty is the major cause of refugee flows, some solutions could be found in development aid or technical assistance. If human rights violations are the principal causes of mass exoduses, solutions may lie in continuous monitoring by United Nations human rights bodies, condemnation of violations by the international community and the appointment of Special Rapporteurs to study specific situations and to make suggestions. If violent conflicts are the causes of flows, solutions may be found in preventive diplomacy, in the promotion of mediation as the means to conflict resolution and in respect for provisions of humanitarian law.

Keywords: *Refugee, vulnerability, humanrights, internationallaw*

INTRODUCTION

Refugee can be traced to the creation of man. People moving from their place of origin to another foreign country would not only suffer discomfort but would also experience the fact that the circumstances of their lives changed. Back to the days of old, there were series of exodus of persons to different foreign lands emanating from wars, sufferings, inequalities, bad governance

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and so on. International Refugee law is a set of rules and procedures that aims to protect, first, persons seeking asylum from persecution, and second those recognized as refugees under the relevant instruments. Its legal framework provides a distinct set of guarantees for these specific groups of persons, although, inevitably, this legal protection overlaps to a certain extent with international human rights law as well as the legal regime applicable to armed conflicts under international humanitarian law. Under international law, refugees are persons outside their countries of origin who are in need of international protection because of a serious threat to their life, physical integrity or freedom in their country of origin as a result of persecution, armed conflict, violence or serious public disorder.¹ This is why they are considered vulnerable persons.

The concept of vulnerability has grown rapidly both in scholarly and policy circles. In today's rule, anyone or anything can be vulnerable, be it places, individuals or societies.² But what exactly does it mean to be vulnerable? Seeking to answer this question, two main approaches have emerged. The first one considers particular groups as more vulnerable than others.³ With more emphasis on structural than on situational circumstances, the vulnerability label in this case gets attached to certain groups. For instance, most famously,⁴ has shown how 'women and children' often count as vulnerable groups. The second approach, inspired by feminist scholarship, argues that all humans⁵ can be vulnerable⁶ depending on situational factors⁷ and

¹UN General Assembly, Note on International Protection, 7 September 1994, A/AC.96/830, www.refworld.org/docid/3f0a935f2.html.

² C Levine, The concept of vulnerability in disaster research. *J Traum. Stress* [2004] 17 (5), Google Scholar.

³ A Pankhurst, 'Vulnerable groups' [1984] (8) *Disasters*, 206–213 Google scholar.

⁴ C Enloe, *The morning after: Sexual politics at the end of the Cold War*. (Berkeley: University of California Press 1993).

⁵M Fineman, The vulnerable subject: Anchoring equality in the human condition.(2008) <https://digitalcommons.law.yale.edu/yjlf/vol20/iss1/2>



contexts that create vulnerability.⁸ In contrast to the first approach, the focus here lies more on contingent causes rather than on symptoms of vulnerability.⁹ In this understanding, men, women, and children can all be vulnerable depending on the situations that render them vulnerable.¹⁰

In policies and practice of humanitarianism and forced displacement, vulnerability often serves as a static label to categorize some groups or individuals as vulnerable to grant them certain procedures, entitlements, or protection. However, there is not one unified understanding of vulnerability applicable across all policy and geographical contexts, and its definition remains contested. For instance, in its landmark decision in *M.S.S. vs. Belgium and Greece*, the European Court of Human Rights declared all asylum seekers to be a “particularly underprivileged and vulnerable population group in need of special protection”.¹¹ However, later decisions have overturned this recognition of all persons seeking protection as vulnerable, lending more support to a groups-based approach, as is the case in the Common European Asylum System (CEAS).¹² The Reception Conditions Directive of the CEAS, for instance, defines vulnerable persons as “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons

⁶ J Butler, *Frames of war: When is life grievable?*. (London and New York: Verso 2009).

⁷ C Cohn, “Maternal thinking” and the concept of “vulnerability” in security paradigms, policies, and practices. (2014) *Journal of International Political Theory*.

⁸ C Mackenzie and others, *Vulnerability: new essays in ethics and feminist philosophy*. (New York: Oxford University Press 2014).

⁹ C R Clark, ‘Understanding vulnerability: From categories to experiences of young Congolese people in Uganda. [2007] (21), *Child. Soc.*, 284–296.

¹⁰ L Turner, Are Syrian men vulnerable too? Gendering the Syria refugee response, (2016).

¹¹ International Journal of Refugee Law: *M.S.S. V. Belgium and Greece* European Court of human rights. Application No. 30696/09§251.: (2011) https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/case-mss-v-belgium-and-greece-application-no-3069609_en. Google Scholar

¹² B Hudson, ‘Migration in the Mediterranean: exposing the limits of vulnerability at the European Court of human rights’, [2018] (4) *Maritime Saf. Security*, 26–46. Google Scholar.



with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation”.¹³ In addition, the Asylum Procedures Directive considers “gender, sexual orientation and gender identity” as grounds for special procedural guarantees.¹⁴

In resettlement and other refugee admission policies, a key reference point to define ‘who is vulnerable’ are United Nations High Commission for Refugees (UNHCR) ‘resettlement submission categories’, namely “women and girls at risk; survivors of violence and/or torture; refugees with legal and/or physical protection needs; refugees with medical needs or disabilities; children and adolescents at risk; family reunification and persons with a lack of foreseeable alternative durable solutions”.¹⁵ While attaching the vulnerability label partly to certain social groups, UNHCR’s criteria and their envisaged enactment also require context-specific interpretation and prioritizing. However, the discretionary nature of refugee admission programs allows states, and to some extent the European Union (EU), to formulate additional criteria and leaves ample scope for translating these formal criteria into frontline practices.

Refugee Law is an aspect of human rights law which is designed to set out in which circumstances states will extend protection to persons in fear of persecution.¹⁶

The Convention relating to the Status of Refugees is the foundation of international refugee law.

The Refugee Convention defines the term “refugee” and sets minimum standards for the

¹³ European Union: *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. OJ L [2013] (32)*, Brussels: *Official Journal of the European Union*, 180. <http://data.europa.eu/eli/dir/2013/32/oj>.

¹⁴*Ibid.*

¹⁵ UNHCR, *UNHCR Resettlement handbook*. (2011) <https://www.unhcr.org/46f7c0ee2.pdf>.

¹⁶ J Rikhof, *Complicity in International Criminal Law and Canadian Refugee Law: A comparison*. [2006] (4) (4) *Journal of International Criminal Justice*, 702-722.



treatment of persons who are found to qualify for refugee status. Because the Convention was drafted in the wake of World War II, its definition of a refugee focuses on persons who are outside their country of origin and are refugees as a result of events occurring in Europe or elsewhere before 1 January 1951. As new refugee crises emerged during the late 1950s and early 1960s, it became necessary to widen both the temporal and geographical scope of the Refugee Convention. Thus, a Protocol to the Convention was drafted and adopted.¹⁷ Refugee Law seems primarily, although not exclusively, a matter of public international law, and is considered a component of international human rights law or humanitarian law generally. Initiated with a series of relatively ad hoc interwar procedures, modern refugee law came into its own after the Second World War with the establishment of the U.N.H.C.R., and the drafting of the Statute of United Nations High Commission for Refugees (“Statute”), and the 1951 Convention relating to the Status of Refugees (“Convention”), These documents define “refugee,” provide for certain rights relating to juridical status, non-expulsion, freedom of movement, employment, travel documents, participation in national welfare, education and rationing programs, and give the U.N.H.C.R. a role in administering and protecting these rights at the international level.¹⁸

Human rights law offers a promising starting point for understanding refugee law. Refugee law could be seen as a subsidiary system of human rights protection. The theory runs as follows: even though international law provides for the protection of an individual in the International Bill of Rights, the international human rights system is notoriously ineffective in many ways. The

¹⁷ UN High commissioner for Refugees, *Refugee Protection: A Guide to International Refugee Law*. (Accessed November <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3d4aba564&query=refugee%20law>).

¹⁸D Kennedy, *International Refugee Protection*. [1986] (8) (1) *Human Rights Quarterly*, 1-69.



purpose of refugee law could be to serve as a backup system. Individuals, whose human rights cannot be guaranteed in their country of origin, benefit from protection abroad, granted through refugee law. Thus, it is arguable that refugee law should become operative only on the premise that a human rights violation has taken place. Thus, when the 1951 Refugee Convention speaks of persecution, it essentially means human rights violation.¹⁹

The 1951 Refugee Convention as such does not identify specific groups of refugees as vulnerable or requiring special attention from national authorities. However, numerous Executive Committee (EXCOM) Conclusions of the United Nations High Commissioner for Refugees (UNHCR), as well as UNHCR guidelines, have been dedicated to certain groups distinguishable by sex, age or disability within the refugee population, and acknowledge their specific vulnerability compared to others and the need to take measures to accommodate their special needs. Moreover, UNHCR resettlement priorities are determined almost entirely on the basis of vulnerability of specific groups within the refugee population, including in protracted refugee situations.

The need for international protection arises because they are unable to avail themselves of the protection of their own country against these threats. International refugee law derives from a range of treaties (universal and regional), rules of customary international law, general principles of law, and national laws and standards. The 1951 Convention relating to the Status of

¹⁹ N Nathwani, The Purpose of Refugee Law. [2004], *Canadian Issues*, 29-32.



Refugees²⁰ and its 1967 Protocol²¹ laid the foundation upon which subsequent regional instruments have built, including the 1969 OAU Convention,²² the 1984 Cartagena Declaration,²³ the EU Qualification Directive²⁴ and other relevant instruments of the EU asylum *acquis communautaire*, and the 1966 Bangkok Principles.²⁵ Collectively, this body of law, complemented by international human rights law, makes up the international refugee protection regime under which UNHCR exercises its mandate responsibilities.²⁶ More specifically, and for the sake of clarity, individuals fleeing across borders for the following reasons would be refugees according to the 1951 Convention definition:

- a. persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;²⁷
- b. armed conflict, which may be rooted in and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides;²⁸

²⁰ Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137, (1951 Convention), <http://www.refworld.org/docid/3be01b964.html>.

²¹ Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267, <http://www.refworld.org/docid/3ae6b3ae4.html>.

²² The 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45, <http://www.refworld.org/docid/3ae6b36018.html>.

²³ Conclusion III(3) of the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, <http://www.refworld.org/docid/3ae6b36ec.html>.

²⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L 337.

²⁵ Asian-African Legal Consultative Organization (AALCO), Bangkok Principles on the Status and Treatment of Refugees, 31 December 1966 (final text adopted 24 June 2001).

²⁶ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), <http://www.refworld.org/docid/3ae6b3628.html>. UNHCR, Note on the Mandate of the High Commissioner for Refugees and his Office, October 2013, <http://www.refworld.org/docid/5268c9474.html>.

²⁷ Article 1A of the 1951 Convention.

²⁸ UNHCR, Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of



- c. violence perpetrated by organized gangs,²⁹traffickers,³⁰ and other non-State actors, against which the State is unable or unwilling to protect;
- d. persecution on the basis of sexual orientation or gender identity;³¹
- e. disasters (including drought or famine) where they are linked to situations of persecution or armed conflict rooted in racial, ethnic, religious, or political divides, or disproportionately affect particular groups.³²

Additional grounds can be found in regional instruments, such as being outside the country due to ‘events seriously disturbing public order’. The circumstances that underlie these grounds in a particular situation may equally give rise to refugee status under the 1951 Convention. Others in need of international protection: In addition, individuals who are outside their country of origin (typically because they have been forcibly displaced across international borders) but who may not qualify as refugees under international or regional law, may in certain circumstances also require protection, on a temporary or longer-term basis. This may include, for example, persons who are displaced across an international border in the context of disasters or the adverse effects of climate change,³³ but who are not refugees.³⁴ In such situations, a need for international

Refugees and the regional refugee definitions, 2 December 2016, HCR/GIP/16/12, <http://www.refworld.org/docid/583595ff4.html>.

²⁹ Conflict and Violence Guidelines, above n 10, as well as UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, 31 March 2010, www.refworld.org/docid/4bb21fa02.html.

³⁰ UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, 7 April 2006, HCR/GIP/06/07, www.refworld.org/docid/443679fa4.html.

³¹ UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, www.refworld.org/docid/50348afc2.html.

³² UNHCR, Legal considerations on refugee protection for people fleeing conflict and famine affected countries, 5 April 2017, www.refworld.org/docid/5906e0824.html.

³³ The Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change. <http://disasterdisplacement.org/the-platform/our-response>.



protection would reflect the inability of the country of origin to protect against serious harm. Complementary protection mechanisms³⁵ and temporary protection or stay arrangements³⁶ have proven important tools to ensure that international protection is provided in these circumstances, including under international human rights law. UNHCR, on the basis of its international protection expertise, has consistently advised States in this regard. Stateless persons: Stateless persons are another category who does not enjoy full national protection as citizens.³⁷ The 1954 Convention relating to the Status of Stateless Persons³⁸ and the 1961 Convention on the Reduction of Statelessness³⁹ provide valuable legal tools for their protection.⁴⁰

Status determination: The determination of refugee status is a legal or administrative process by which a government or UNHCR, according to its mandate, determines whether a person seeking international protection is considered a refugee under international, regional or national law. Such determinations can be made on an individualized basis or through group-based mechanisms (such as *prima facie* recognition or the provision of temporary protection). Stateless determination is equally grounded in international law, and refers to the process of determining

³⁴ Displacement in the context of disasters or the adverse effects of climate change would not usually, by itself, be grounds for refugee status. However, it should be recalled that some people fleeing in such contexts may be refugees.

³⁵ UNHCR, Providing International Protection Including Through Complementary Forms of Protection, 2 June 2005, EC/55/SC/CRP.16, as well as ExCom, Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection, No. 103 (LVI) of 2005. 4 .

³⁶ UNHCR, Guidelines on Temporary Protection or Stay Arrangements, February 2014 (“TPSA Guidelines”), www.refworld.org/docid/52fba2404.html.

³⁷ Convention Relating to the Status of Stateless Persons (28 September 1954) 360 UNTS 117, <http://www.refworld.org/docid/3ae6b3840.html>.

³⁸ *Ibid.*

³⁹ Convention on the Reduction of Statelessness (30 August 1961) 989 UNTS 175, [http:// www. Ref world .org /docid/3ae6b39620.html](http://www.Refworld.org/docid/3ae6b39620.html).

⁴⁰ UN General Assembly resolutions 3274 (XXIV) and 31/36 designate UNHCR as the body to examine the cases of persons who claim the benefit of the 1961 Convention; UNGA resolutions A/RES/49/169 of 23 December 1994 and A/RES/50/152 of 21 December 1995. <http://www.refworld.org/docid/3ae68c443f.html>.



whether a person is stateless. This process is distinct from reception arrangements that seek to identify, screen and refer new arrivals to appropriate services. This arrangement should apply equally to all arrivals, regardless of status.⁴¹

HISTORICAL OVER-VIEW OF REFUGEE

Refugee is any uprooted, homeless, involuntary migrant who has crossed a frontier and no longer possesses the protection of his or her former government. Prior to the 19th century the movement from one country to another did not require passports and visas; the right to asylum was commonly recognized and honoured. Although there have been numerous waves of refugees throughout history, there was no refugee problem until the emergence of fixed and closed state frontiers in the late 19th century. By the 1920s and '30s the tradition of political asylum had deteriorated considerably, partly because of growing insensitivity to human suffering and partly because of unprecedented numbers of refugees. For many centuries, refugee movements were a result of religious and racial intolerance. Entire groups were uprooted, exiled, or deported by secular or religious authorities in an effort to enforce conformity. Examples of such action include the expulsion of Jews from Spain in the late 15th century, the exodus of Huguenots from France after the revocation of the Edict of Nantes in 1685, and the eviction of Jews from Germany, Austria, and Sudetenland (now in the Czech Republic) in the 1930s.

Politically motivated refugee movements, frequent in modern times, have occurred intermittently since the development of governments powerful enough to oppress nonconformist minorities.

⁴¹ Office of the United Nations High Commissioner for Refugees .



The Russian Revolution of 1917 and the post-revolutionary civil war (1917–21) caused the exodus of 1.5 million opponents of communism. Between 1915 and 1923 more than 1 million Armenians left Turkish Asia Minor, and several hundred thousand Spanish loyalists fled to France in the wake of the 1936–39 Spanish Civil War. When the People’s Republic of China was established in 1949, more than 2 million Chinese fled to Taiwan and to the British crown colony of Hong Kong. The 1950s were marked by the Korean War (1950–53), the Hungarian Revolution (1956), the Cuban revolution (1959), and the Chinese take-over of Tibet (1959), all of which resulted in the flight of more than a million refugees. Between 1945 and 1961, the year that the communist regime erected the Berlin Wall (opened 1989), more than 3.7 million refugees from East Germany found asylum in WestGermany.

Several major refugee movements have been caused by territorial partition. After the defeat of Germany in World War II, for example, the Potsdam Conference of 1945 authorized the transfer of German minorities from a number of European countries, and 12 million Germans were dumped on the truncated territory of Germany, which was split into east and west regions. The partition of the Indian subcontinent in 1947 resulted in the exchange of 18 million Hindus from Pakistan and Muslims from India—the greatest population transfer in history. Some 8–10 million persons were also temporarily made refugees by the creation of Bangladesh in 1971.

Palestine’s partition in 1948 triggered an almost wholesale exodus of Palestinian Arabs in the wake of a military confrontation between the new state of Israel and neighbouring Arab countries. The disintegration of the vast European colonial empires also brought about the return



of thousands of British subjects from all parts of Africa and Asia, of French refugees from North Africa and Indochina, of Italians from Libya, and of the Dutch from Indonesia.

International action for refugees did not start until the 1920s. In 1921 Fridtjof Nansen of Norway was appointed by the League of Nations as high commissioner for refugees and devised a so-called League of Nations Passport (“Nansen Passport”), a travel document that gave the owner the right to move more freely across national boundaries. After Nansen’s death in 1930, the protection of refugees was entrusted to the Nansen International Office for Refugees, but this office accomplished little before its mandate expired in 1938. Other refugee-assistance organizations have included the Intergovernmental Committee on Refugees (1938–47), the United Nations Relief and Rehabilitation Refugee Organization (1947–52), and the Office of the United Nations High Commissioner for Refugees (UNHCR), established in 1950. The Intergovernmental Committee for European Migration (renamed the Intergovernmental Committee for Migration in 1980) was founded in 1951. Several nongovernmental and voluntary agencies, such as the International Rescue Committee, have also been established throughout the world. Since the 1960s large concentrations of refugees have been located in Africa and Asia. Although the numbers varied from year to year, each of the two regions accounted for more than three million refugees in 2005. In the same year, the total number of refugees worldwide was estimated to be roughly nine million.

Around the world, 82.4 million people have been forcibly displaced. That’s the most since World War II, according to the U.N. Refugee Agency (UNHCR). Since most people remain displaced within their home country, how many refugees are there in the world? About 26.4 million people



worldwide have fled to other countries as refugees. Another 4.1 million people are asylum-seekers who have applied for refugee status, but not received it yet. An estimated 42% of refugees are children, among whom are about 1 million born as refugees from 2018 and 2020. After a decade of war in Syria, thousands of refugee children have been living in a state of limbo, not knowing when, or even if, they will ever return home. In light of the pandemic, children face even more uncertainty.

Conflict and insecurity in other countries, including Ethiopia, Iraq, South Sudan, the Central African Republic, and Myanmar have also caused millions to flee their homes. Here are the top seven countries of origin that account for the most refugees in the world today. About two-thirds of today's refugees (68%) come from the first five.

CONCEPTUAL FRAMEWORKS

Refugee

Refugee is any uprooted, homeless, involuntary migrant who has crossed a frontier and no longer possesses the protection of his or her former government. They are people who have fled war, violence, conflict or persecution and have crossed an international border to find safety in another country. They often have had to flee with little more than the clothes on their back, leaving behind homes, possessions, jobs and loved ones. Refugees are defined and protected in international law. The 1951 Refugee Convention defines a refugee as a 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 their nationality and is



unable or, owing to such fear, is unwilling to avail themselves of the protection of that country." Regional legal instruments in Africa and the Americas have broadened this definition by including people who are compelled to leave their country because of "external aggression, occupation, foreign domination, internal conflicts, and massive violation of human rights or events seriously disturbing public order". By the end of 2017, there were 25.4 million refugee men, women and children registered across the world. Refugees are people forced to flee their own country and seek safety in another country. They are unable to return to their own country because of feared persecution as a result of who they are, what they believe in or say, or because of armed conflict, violence or serious public disorder. Many have been forced to flee with little more than the clothes on their back, leaving behind their homes, possessions, jobs and loved ones. They have suffered human rights violations, injured in their flight, seen family members and friends killed or attacked. Today, there are 35.3 million refugees globally. Most importantly, and for the sake of clarity, individuals fleeing across borders for the following reasons would be refugees according to the 1951 Convention definition: Individual who faced persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion;⁴² in the event of armed conflict, which may be rooted in or conducted along lines of race, ethnicity, religion, politics, gender or social group divides;⁴³ following violence perpetrated by organized gangs,⁴⁴ traffickers,⁴⁵ and other non-State actors, against which the State is unable

⁴² Article 1A of the 1951 Convention.

⁴³ UNHCR, Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions, 2 December 2016, HCR/GIP/16/12, <http://www.refworld.org/docid/583595ff4.html>.

⁴⁴ Conflict and Violence Guidelines, above n 10, as well as UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, 31 March 2010, www.refworld.org/docid/4bb21fa02.html.



or unwilling to protect; persecution on the basis of sexual orientation or gender identity;⁴⁶ above all, in disasters (including drought or famine) where they are linked to situations of persecution or armed conflict rooted in racial, ethnic, religious, or political divides, or disproportionately affect particular groups.⁴⁷

Vulnerability

The notion of vulnerability originates in the environmental sciences, where it is viewed as “a powerful analytical tool for describing states of susceptibility to harm, powerlessness, and marginality of both physical and social systems”⁴⁸ However, the diffusion of this notion well beyond the original field of application point out how “the ubiquity and elasticity of [the term] vulnerability generates a sense of familiarity and common sense or assumed understandings, which conceals diverse uses with enormously varied conceptual dimensions.”⁴⁹ Nowadays, most of the researchers agree that vulnerability involves a status of susceptibility and an evaluation of

⁴⁵UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, 7 April 2006, HCR/GIP/06/07, www.refworld.org/docid/443679fa4.html.

⁴⁶ UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, www.refworld.org/docid/50348afc2.html.

⁴⁷ UNHCR, Legal considerations on refugee protection for people fleeing conflict and famine affected countries, 5 April 2017, www.refworld.org/docid/5906e0824.html.

⁴⁸ W N Adger, Vulnerability. [2006] (16) (3) *Journal of Global Environmental Change*, 268–281.

⁴⁹ K Brown and others, The many faces of vulnerability. [2017] (16) (3), *Journal of Social Policy & Society*, 497–510.



the future in terms of real exposure to harming circumstances and to their consequences.⁵⁰ Both in origin and destination countries, as well as in those of transit, personal and context-related conditions (for example, institutional, economic, or environmental) often expose refugees to a range of detrimental outcomes, such as social isolation, discrimination, bad health or economic deprivation, which can interact in destructive ways. Thus, these conditions can compound the damages that arise from being in a detrimental situation.⁵¹

In the last decades, vulnerability has gained an increasingly important place in the debate on human rights both in refugees and migration studies, as well as in the humanitarian agencies practices. Consistently, vulnerability should be considered not only as a tool but also as a foundation in the international human rights law.⁵² In all of these, vulnerability refers to “a state of high exposure to certain risks, combined with a reduced ability to protect or defend oneself against those risks and cope with their negative consequences” These vulnerabilities arise for three reasons: Refugees are more exposed to shocks. Refugees are frequently victims of theft, harassment, discrimination, and aggression, and they are much more likely to suffer from problems associated with their physical and mental health. There is no agreed upon definition of what it means to be vulnerable. It is often said that the most poor, or with the most serious specific needs, are the “most vulnerable.”

⁵⁰ C Mackenzie and others, (2014) Introduction: What Is vulnerability and why does it matter for moral theory? In: W Rogers and others (Eds.) *Vulnerability. New essays in ethics and feminist philosophy*. (Oxford: Oxford University Press, 2014)1–29.

⁵¹ D Mendola and A Busetta, Family networks and refugees’ health conditions. A picture from Italian informal settlements. [2021] (18) (3), *Migration Letters*, 673–683.

⁵² S Da Lomba, Vulnerability and the right to respect for private life as an autonomous source of protection against expulsion. [2017] (6) (4) *Laws*, 32



Conflict

Conflict is a process of social interaction involving a struggle over claims to resources, power and status, beliefs, and other preferences and desires. It also includes the aims of the parties which may extend from simply attempting to gain acceptance of a preference, or securing a resource advantage, to the extremes of injuring or eliminating opponents.⁵³

Conflict and war are the most common cause of mass displacement of people, leading them to become refugees. In some cases, people can become refugees literally overnight when violence erupts in a country due to war or political unrest. Large groups of people are forced to flee their homes for many reasons, not just war or conflict. Hunger, poverty, and persecution for issues such as gender or sexual orientation are other reasons which cause people to flee their countries.

In recent years, climate change has also been recognized as a major factor in global refugee crises. In 2022, disasters triggered a record 32.6 million internal displacements, of which 98% were caused by weather-related disasters such as floods, storms, wildfires and droughts. With the global climate crisis only worsening, it is expected that the number of refugees seeking safety from natural disasters like drought, tsunamis and wildfires will continue to increase. Conflict is indeed a clash between individuals arising out of a difference in thought process, attitudes, understanding, interests, requirements and even sometimes perceptions.⁵⁴ When this happens,

⁵³ H Bisno, 'Managing Conflict' <https://viaconflict.wordpress.com/2013/12/15/definitions-of-conflict/>, accessed 21 September 2020.

⁵⁴ Management Study Guide, 'Understanding Conflict' <https://www.managementstudyguide.com/understanding-conflict.htm>, accessed 21 September 2022.



individuals are forced to leave their homes to other places for shelter and thereby leaving the refugees vulnerable.

SOURCES OF REFUGEE LAW

The main sources of refugee law are treaty law, notably the 1951 Convention relating to the status of refugees and its 1967 Protocol, and customary international law. Customary international law applies to all states irrespective of whether they are a party to relevant treaties or not. Regional instruments represent a further set of protections, particularly the 1969 Organization of African Unity Convention (for Africa) and, although it is not formally legally binding, the 1984 Cartagena Declaration (for Latin America).⁵⁵

The 1951 Convention relating to the Status of Refugees

The 1951 Convention, which was drafted as a result of a recommendation by the newly established United Nations Commission on Human Rights, was a landmark in setting standards for the treatment of refugees. The Convention, in its article 1, provides a general definition of the term "refugee". The term applies 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

⁵⁵International Refugee Law. http://www.geneva.academy.ch/RULAC/international_refugee_law.php.



former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". The Convention sets the minimum standards of treatment of refugees, including the basic rights to which they are entitled. It also establishes the juridical status of refugees and contains provisions on their rights to gainful employment and welfare, on the issue of identity papers and travel documents, on the applicability of fiscal charges, and on their right to transfer their assets to another country where they have been admitted for the purposes of resettlement. The Convention prohibits the expulsion or forcible return of persons having refugee status. Its article 33 stipulates that "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". Article 34 concerns the naturalization and assimilation of refugees. Other provisions deal with such rights as access to courts, education, social security, housing and freedom of movement.

The 1951 Convention could benefit only persons who had become refugees as a result of events occurring prior to 1 January 1951. However, the years following 1951 showed that refugee movements were not merely the temporary results of the Second World War and its aftermath. Throughout the late 1950s and 1960s new refugee groups emerged, in particular in Africa. These refugees were in need of protection which could not be granted to them under the limited time-frame of the 1951 Convention. The 1967 Protocol extended the application of the Convention to the situation of "new refugees", that is persons who, while meeting the Convention definition,



had become refugees as a result of events that took place after 1 January 1951. As of 1 April 1992, 111 States were party to the 1951 Convention and/or the 1967 Protocol.

1967 Protocol relating to the Status of Refugees

The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition. Together, the Refugee Convention and Protocol cover three main subjects: (a) The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status (b) The legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or refoulement, to a territory where their lives or freedom would be threatened. (c) States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention. By acceding to the Protocol, States agree to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

The Cartagena Declaration

In 1984, a colloquium of government representatives and distinguished Latin American jurists was convened in Cartagena, Colombia to discuss the international protection of refugees in the region. This gathering adopted what became known as the Cartagena Declaration. The Declaration recommends that the definition of a refugee used throughout the Latin American



region should include the 1951 Refugee Convention definition and also persons who have fled their country “because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.

Although the Declaration is not legally binding on States, most Latin American States apply the definition as a matter of practice; some have incorporated the definition into their own national legislation. The Declaration has been endorsed by the Organization of American States (OAS), the UN General Assembly, and UNHCR’s advisory Executive Committee.⁵⁶

The 1954 Convention relating to the Status of Stateless Persons: defines the term "stateless person" as a person who is not considered as a national by any State under the operation of its law. It further prescribes the standards of treatment to be accorded to stateless persons.

The 1961 Convention on the Reduction of Statelessness: State party to this Convention agrees to grant its nationality to a person born in its territory who would otherwise be stateless. The State also agrees, subject to certain conditions, not to deprive a person of his nationality if such deprivation would render him stateless. The Convention specifies that a person or groups of persons shall not be deprived of their nationality on racial, ethnic, religious or political grounds.

REGIONAL INSTRUMENTS

Africa

⁵⁶UNHCR Canada: Branch office of the UN Refugee Agency, which monitors practices, and policies of the Canadian government to ensure that rights of refugees and asylum seekers are protected.<http://www.unhcr.ca>



The growing number of refugees fleeing wars and internal conflicts in Africa, starting in the late 1950s, led to the adoption of what is generally considered the most comprehensive and significant regional treaty dealing with refugees. The Organization of African Unity (OAU), on 10 September 1969, adopted the OAU Convention governing the specific aspects of refugee problems in Africa. The primary importance of this Convention is its expanded definition of the term refugee. African States felt that "well-founded fear of persecution" was not sufficiently wide a criterion to cover all the refugee situations in Africa. The second paragraph of article 1 of the African Convention provides that "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". The OAU Convention complements rather than duplicates the 1951 Convention. Apart from the broad refugee definition, the OAU Convention regulates the question of asylum (art. II). It also contains important provisions on voluntary repatriation (art. V) and on the prohibition of subversive activities by refugees (art. III). As of February 1992, the OAU Convention had been ratified by 42 States.

Europe

The Council of Europe has adopted several instruments concerning refugees. Some of the most important are: (a) European Agreement on the Abolition of Visas for Refugees (1959); (b) Resolution 14 (1967) on Asylum to Persons in Danger of Persecution; (c) European Agreement on Transfer of Responsibility for Refugees (1980); (d) Recommendation on the Harmonization



of National Procedures Relating to Asylum (1981); (e) Recommendation on the Protection of Persons Satisfying the criteria in the Geneva Convention who are not Formally Refugees 1984).

HUMANITARIAN LAW, HUMAN RIGHTS AND REFUGEE LAW – THREE PILLARS

International humanitarian law, refugee law and human rights law are complementary bodies of law that share a common goal, the protection of the lives, health and dignity of persons. They form a complex network of complementary protections and it is essential that we understand how they interact.⁵⁷

The interplay between the “three pillars”:

Interface between international humanitarian law and human rights law

While international humanitarian law only applies in times of armed conflict, human rights law applies at all times; in times of peace and in times of armed conflict. The concurrent application of these two bodies of law has been expressly recognised by various international tribunals, including the International Court of Justice, the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights and, of course, numerous national courts.

Interface between International Humanitarian Law and Refugee Law

The relationship between international humanitarian law and refugee law is also a two-way cross fertilisation. Armed conflict and international humanitarian law are of relevance to refugee law and refugee protection in a number of ways. First, to determine who is a refugee. Many asylum

⁵⁷E Gillard, The International Association of Refugee Law Judges world conference, Stockholm, 21-23 April 2005.



seekers are persons fleeing armed conflict and often violations of international humanitarian law. Does this make them refugees? Not every person fleeing an armed conflict automatically falls within the definition of the 1951 Refugee Convention, which lays down a limited list of grounds for persecution. While there may be situations, notably in conflicts with an ethnic dimension, where persons are fleeing because of a fear of persecution based on their “race, religion, nationality or membership of a particular social group”, this is not always the case.

Recognising that the majority of persons forced to leave their state of nationality today are fleeing the indiscriminate effect of hostilities and the accompanying disorder, including the destruction of homes, food stocks and means of subsistence – all violations of international humanitarian law – but with no specific element of persecution, subsequent regional refugee instruments, such as the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees have expanded their definitions to include persons fleeing armed conflict.

Moreover, states that are not party to these regional instruments have developed a variety of legislative and administrative measures, such as the notion of “temporary protection” for example, to extend protection to persons fleeing armed conflict. A second point of interface between international humanitarian law and refugee law is in relation to issues of exclusion. Violations of certain provisions of international humanitarian law are war crimes and their commission may exclude a particular individual from entitlement to protection as a refugee.

THE ROLE OF THE UNITED NATIONS HIGH COMMISSION FOR REFUGEES



A humanitarian and non-political organization; the United Nations High Commission for Refugees (UNHCR) is mandated by the United Nations to protect refugees and help them find solutions to their plight. As the problem of displacement has grown in complexity over the past half century, UNHCR has also grown to meet the challenge. The Office, founded in 1950, has expanded from a relatively small, specialized agency with an envisioned three-year lifespan to an organization of over 4,000 staff members with offices in nearly 120 countries and an annual budget of US\$1 billion. In addition to offering legal protection, UNHCR now also provides material relief in major emergencies, either directly or through partner agencies. In its first fifty years, UNHCR has protected and assisted more than 50 million people and its work has earned two Nobel Peace Prizes in 1954 and 1981.

At the international level, UNHCR promotes international refugee agreements and monitors government compliance with international refugee law. UNHCR staff promotes refugee law among all people who are involved in refugee protection, including border guards, journalists, NGOs, lawyers, judges and senior governmental officials.

At the field level, UNHCR staff work to protect refugees through a wide variety of activities, including responding to emergencies, relocating refugee camps away from border areas to improve safety; ensuring that refugee women have a say in food distribution and social services; reuniting separated families; providing information to refugees on conditions in their home country so they can make informed decisions about return; documenting a refugee's need for resettlement to a second country of asylum; visiting detention centres; and giving advice to governments on draft refugee laws, policies and practices.



UNHCR seeks long-term solutions to the plight of refugees by helping refugees repatriate to their home country, if conditions are conducive to return, integrate into their countries of asylum, or resettle in second countries of asylum.

THE MANDATE OF UNITED NATIONS HIGH COMMISSION ON REFUGEES

The Refugee Convention and Protocol provide States Parties with a legal foundation for refugee protection. For its part, UNHCR has been given a mandate to provide international protection to refugees and seek permanent solutions to their problems through its Statute, adopted by the UN General Assembly in December 1950.

The Statute sets forth the High Commissioner's functions, including his/her authority to protect refugees as defined in terms similar, although not identical, to the Refugee Convention. Over the years, the General Assembly has expanded UNHCR's responsibility to include protecting various groups of people who are not covered by the Refugee Convention and Protocol. Some of these people are known as "mandate" refugees; others are returnees, stateless persons and, in some situations, internally displaced persons.

UNHCR's mandate is now, therefore, significantly more extensive than the responsibilities assumed by States Parties to the Refugee Convention and Protocol. One of the challenges facing refugees and countries of asylum today consists of bridging the "protection gap" which exists in situations where UNHCR seeks to protect persons with respect to whom concerned States do not recognise that they have a responsibility under any of the refugee instruments.



CONCLUSION

The fact remains that, regardless of whether a person is a refugee or an economic migrant, a citizen or non-citizen, whether he or she is fleeing persecution, armed conflicts, threats to his life or abject poverty, that person is entitled to minimum human rights and minimum standards of treatment, the absence of this protection leaves them vulnerable and the statutory meaning of Refugee must be expanded to incorporate all these burning issues. The refugee problem continues to challenge the international community. While refugee-receiving States should maintain their commitment to the protection of refugees and encourage tolerance towards diversity, refugee-producing States have the duty to prevent acts that produce mass exoduses of their populations. At the same time the world needs to reach an agreement on how best to prevent new flows of refugees. The root causes of these situations should be further studied and rectified.

If poverty is the major cause of refugee flows, some solutions could be found in development aid or technical assistance. If human rights violations are the principal causes of mass exoduses, solutions may lie in continuous monitoring by United Nations human rights bodies, condemnation of violations by the international community and the appointment of Special Rapporteurs to study specific situations and to make suggestions. If violent conflicts are the causes of flows, solutions may be found in preventive diplomacy, in the promotion of mediation as the means to conflict resolution and in respect for provisions of humanitarian law. At all times, however, the international community should be prepared to meet demands in cases of emergency. In this respect, the early warning system set up by the United Nations Secretary-



General could be of immense value. It could play an important role in predicting which situations are likely to generate large numbers of refugees. A coordinated and system-wide response will always be the most effective way of dealing with emergencies.

RECOMMENDATIONS

It is recommended that Parliaments and their members States in search for new meaning in Refugee law can do the following:

- 1. The principle of non-refoulement should be incorporated into national legislation.** To do so, laws concerning the entry of foreigners and border-control requirements must reflect the difference between those seeking asylum and others who may want to enter a country for other reasons. Review of national legislation on immigration may be necessary.
- 2. Broaden the refugee definition:** Parliaments and their members may wish to consider incorporating an expanded refugee definition, such as that found in the OAU Convention and the Cartagena Declaration, in national legislation.
- 3. Accede to international treaties:** The government should be encouraged to take steps with a view to accession to the Refugee Convention and Protocol, if it has not already done so. Accession to international human rights treaties relevant to refugee protection, particularly the Convention against Torture and the Convention on the Rights of the Child, and to international humanitarian law treaties should also be considered. On the regional level, parliaments in African countries that have not acceded to the OAU Convention should consider accession. Regional human rights treaties in Africa, Europe and the Americas also



provide standards relevant to refugee protection. Countries in those regions should consider acceding to them.

- 4. Review reservations and restrictive interpretations:** The validity of reservations and restrictive interpretations ought to be reviewed periodically. In the absence of any steps to that effect by the Executive, Members of Parliament may put questions to the Government or even present a private Member bill.
- 5. Implement international standards:** In addition to the treaties mentioned above, inspiration can be drawn from a significant body of international standards - including the Conclusions adopted by UNHCR's Executive Committee and guidelines, produced by UNHCR, on a range of refugee-related issues - in devising national systems of refugee protection. UNHCR offices can assist parliamentarians by providing information on these standards and commenting on proposed legislation.
- 6. Encourage Cooperation with UNHCR** Parliamentarians can ensure that their government provides UNHCR with information on the number and condition of refugees on the national territory, the implementation of the Refugee Convention, and the laws, regulations and decrees in force related to refugees. Parliamentarians can also seek UNHCR's views on matters related to refugee protection, including proposed or pending legislation, court cases and policy decisions. Since UNHCR has offices in nearly 120 countries; parliamentarians in most countries will find a UNHCR office in their capital city.