

International Refugee Law II: The 1951 United Nations Convention Relating to the Status of Refugees

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ABSTRACT

This chapter seeks to provide a brief overview on the Refugee Convention focusing on its two key elements, the refugee definition and the refugee status. Within the framework of this analysis, after discussing introductory issues such as the scope of international refugee law and the adoption and historical context of the Refugee Convention and its Protocol, the chapter also examines in detail the refugee definition (the inclusion, the exclusion and the cessation criteria) and the content of the refugee status. The refugee definition is a centrepiece of international migration law designating the potential beneficiaries of the refugee status, and by this designation, fulfilling the ultimate purpose of the Refugee Convention. Therefore, understanding the definition of refugees is crucial for seeing the broader context. The incremental nature of refugee rights is also an aspect that is worth analysing, thus the chapter devotes its last subchapter to this issue.

KEYWORDS

migration, non-refoulement, refugee convention, refugee definition, refugee status

1. Introduction: What Is International Refugee Law?

Personal sovereignty of states guarantees that individuals enjoy the protection of their country of nationality even when they are abroad by taking advantage of the toolbox of diplomatic and consular protection. Providing this protection for nationals is not a possibility but an obligation binding on states. Nevertheless, offering diplomatic and consular assistance presupposes the consent and willingness of the respecting state, and it can occasionally happen that this consent is totally absent, making it impossible for nationals to enjoy the protection of their home country. So as to assist to overcome these kinds of hurdles, international refugee law (hereinafter: IRL) covers

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those special situations when surrogate protection is provided by a state different from the country of nationality.¹

The issues of IRL are guided by three principles: the prohibition of discrimination, the principle of family unity, and the principle of non-refoulement.² The rationale behind the prohibition of discrimination stems from the solidarity-based approach of IRL, which is that states are not allowed to select only those refugees who are healthy, educated, and capable of working. The principle of family unity protects refugees from situations when they have to choose safety over their families. Even when close relatives (husbands, wives or direct descendants) are outside the scope of the refugee definition, they are free to live together with their refugee relative in the asylum state. Non-refoulement is certainly the most significant principle of IRL which applies both in international law and domestic law simultaneously. According to this principle, no individual may be deported or returned to a state, regardless of whether it is their country of origin, if their life or personal freedom is at risk of being violated in that country due to their race, nationality, religion, social status or political opinion.³

Taking into account the aim of this book, i.e., discussing the main issues of human rights-related branches of international law, it is worth providing a brief overview of a comparison between international human rights law (hereinafter: IHRL) and IRL. However, while these branches share a common essence in focusing on human dignity, the differences are notable.

IHRL	IRL
Protection of individuals, both nationals and aliens, under the jurisdiction of a state (<i>lex generalis</i>)	Protection of aliens fleeing from their country of nationality (compared to IHRL, it is <i>lex specialis</i>)
A shield used against abuses committed by any state whose jurisdiction the individual is under, including someone's country of nationality	A shield used for the protection of those fleeing from persecution in their country of nationality, and as a consequence, crossing international borders
Human rights are universal and unalienable (natural law approach is dominant)	Refugee status depends on formal legal criteria (positive law approach is dominant)
Applies to every human being	Applies only to asylum seekers and refugees
Every human being has human rights	Not every human being has refugee rights per se, they depend on circumstances provided by the legislator

Table.1. The Comparison of International Human Rights Law and International Refugee Law⁴

1 Kovács, 2016, p. 402.

2 Nagy, 2014, p. 527.

3 See: Mariam Kevlishvili's and Tamta Zaalishvili's work, as a separate chapter devoted to non-refoulement in this book. A detailed analysis of this principle can be found there.

4 Author's own compilation.

Currently, migration-related and refugee problems make IRL a highly relevant field of international law which is unambiguously underpinned by the intensity of ongoing public and political debates. Some key indicators also tell more than a hundred words on the relevance of IRL. According to the Refugee Data Finder, in mid-2024:

- there were 122.6 million forcibly displaced people worldwide as a result of persecution, conflict, violence, human rights violations or events seriously disturbing public order;
- there were 37.9 million refugees;
- there were 8 million asylum seekers; and additionally
- 5.7 million other people in need of international protection.⁵

These indicators are skyrocketing, even though the refugee problem dates back to more than a hundred years.

2. The Refugee Convention and Its Protocol in General Terms

The international community encountered the refugee problem as a global trend only in the twentieth century due to the fact that two historical-social-legal preconditions of this problem should have been met before the phenomenon gained universal significance. These were the closure of national borders and the magnitude of mass influxes following international and non-international armed conflicts.⁶

After World War I, some two million Russians, Armenians, and others were forced to flee their countries of origin between 1917 and 1926.⁷ Subsequently, for humanitarian reasons, the international community began to assume responsibility for protecting and assisting refugees, and the first institutional framework was provided under the auspices of the League of Nations, where numerous treaties were adopted: (I) the 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees;⁸ (II) the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees;⁹ (III) the 1933 Convention relating to the International Status of Refugees¹⁰ (hereinafter: 1933 Refugee Convention); (IV) the 1938 Convention concerning the Status of Refugees Coming from Germany;¹¹ (V) the 1939 Additional Protocol to the Provisional Arrangement; and (VI) the Convention concerning

5 UNHCR, 2025, The UN Refugee Agency, Refugee Data Finder.

6 The Balkan Wars (1912–1913), the First World War (1914–1918), and its aftermath in the Near East, i.e., the wars in the Caucasus (1918–1921) and the Greco-Turkish War (1919–1922), caused significant refugee flows in the states involved, especially in the Russian Empire. Between one and two million refugees left Russia (or the Soviet Union) for Central Asia, East Asia, and the European countries of Asia Minor, between 1918 and 1922. See: Jager, 2001, p. 727.

7 Hathaway, 2021, p. 19.

8 League of Nations, 1926.

9 League of Nations, 1928.

10 League of Nations, 1933.

11 League of Nations, 1938.

the Status of Refugees Coming from Germany.¹² As a matter of fact, these treaties were strictly limited in their personal scope, focusing on Russians, Armenians, and Germans. Nevertheless, it is worth mentioning that the 1933 Refugee Convention was a more comprehensive and forward-looking treaty, and it also dealt with administrative measures (e.g., the issuing of Nansen certificates¹³), juridical conditions, labour conditions, industrial accidents, welfare and relief, education, and fiscal issues, as well as exemptions from reciprocity. The principle of non-refoulement was stipulated *ipso jure* under this treaty for the first time as well.

When World War II finally came to an end, an urgent need emerged within the newly set up United Nations (hereinafter: UN) that an institutional regulation of IRL is essential on the universal level. Initially, three specialised agencies of the UN were in charge of refugee issues: (I) the International Refugee Agency (hereinafter: IRA), terminated shortly after its establishment; (II) the United Nations Relief and Rehabilitation Agency (hereinafter: UNRRA), for Jews surviving the tragedy of Holocaust; and (III) the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter: UNRWA), taking care of Palestinian refugees.

Nonetheless, it soon became clear that the creation of a comprehensive refugee institution within the UN is inevitable.¹⁴ These steps paved the way to the adoption of the currently effective universal treaty regime of IRL that comprises two legal instruments: the 1951 UN Convention relating to the Status of Refugees (hereinafter: Refugee Convention)¹⁵ and its 1967 Protocol relating to the Status of Refugees (hereinafter: Protocol).¹⁶ Unlike the majority of the other UN covenants and conventions, they are not overseen by a treaty-based committee but by the Office of the United Nations High Commissioner for Refugees (hereinafter: UNHCR). With 146 ratifications,¹⁷ both instruments enjoy worldwide acceptance and many of their provisions qualify as customary norms of international law.

The Refugee Convention and its Protocol have three key elements that are of special significance from the perspective of IHRL: the refugee definition, the content of refugee status, and the principle of non-refoulement. According to Chetail, these pillars perfectly reflect the “existential dilemma” of refugee law, creating a fragile balance between the competence of states to control the access of aliens to their territory, while protecting the most vulnerable fleeing from gross human rights violations.¹⁸

12 League of Nations, 1939.

13 The so-called “Nansen certificates” were official refugee travel passports issued between 1922 and 1938. First, they were issued by the League of Nations’ Office of the High Commissioner for Refugees to stateless persons. The refugee travel passports quickly became known for their promoter, the Norwegian statesman and polar explorer, Fridtjof Nansen.

14 Kovács, 2026, p. 403.

15 United Nations, 1951.

16 United Nations, 1967, p. 267.

17 See: United Nations Treaty Collection, 1951, Chapter V (Refugees and Stateless Persons), No. 2.

18 Chetail, 2019, p. 169.

The Refugee Convention was drafted almost immediately after World War II, demonstrating the outstanding efforts of the UN's early work, recognising that the refugee problem affects the international community as a whole, and that cooperation and burden-sharing in this field are essential. In terms of the historical contexts of the Refugee Convention, it is noteworthy that the Refugee Convention was drafted as a response to the specific horrific events that took place during World War II, notably the Holocaust and the Stalinist expansion into Central and Eastern Europe.¹⁹ Its adoption was therefore the result of an era when refugees were primarily the persecuted victims of highly organised predatory states.²⁰

Taking into account the challenges of the post-war era, and the fact that most of the refugees were of European origin, victims of the Nazi mass extermination and the communist regimes in Central and Eastern Europe, the Refugee Convention originally included a deadline which limited its geographical and temporal scope of application to the then known groups of refugees, i.e. persons who had become refugees as a result of events occurring in Europe before 1 January 1951.²¹ After the adoption of the Refugee Convention, however, refugee issues unrelated to World War II emerged in different parts of the globe, leading to efforts to make the Refugee Convention fully applicable in any refugee situation. Consequently, the Protocol removing the geographical and temporal limitations was adopted sixteen years after the Refugee Convention.²² With the Protocol, the Refugee Convention assumed a universal scope. Since then, this has been the only modification ever attached to the Refugee Convention.

Even though the Refugee Convention is of great importance and reflects contemporary global challenges, the understanding that it is an outdated instrument has become commonplace in recent decades. According to Fitzpatrick, these criticisms stem basically from three reasons. One is that the Refugee Convention's persecution-centred approach seems anachronistic and conceptually inadequate in that forced migration is typically driven by violence that does not involve persecution.²³ Policy analysts also emphasise that the meaningful increase in the number of forcibly displaced persons (hereinafter: IDPs) has resulted in costly procedures, which are burdensome for states in economic and social terms.²⁴ Finally, and pragmatically, there has also been an erosion of support for the Refugee Convention among traditional asylum states, some of whom have expressed their desire for a new regime.²⁵

To set a hypothesis to this chapter, we should depart from the personal scope of the Refugee Convention, as the international protection it provides was tailored to a

19 Hernández, 2019, p. 427.

20 Shacknove, 2016, p. 165.

21 For a comprehensive analysis, see: Hathaway, 2021; Goodwin-Gill and McAdam, 2007; Lambert, 2010; Zimmermann 2011.

22 Weis, 1990, p. 1.

23 Zolberg, Suhrke and Aguayo, 1989, pp. 1–394.

24 Fitzpatrick, 1996, pp. 230–231.

25 Helton, 1994, p. 1623.

very limited category of refugees, i.e. individual political asylum seekers and not mass influxes. The Refugee Convention is therefore unable to provide protection for IDPs or those who flee from their home countries without persecution or owing to some other drivers not enumerated under the Refugee Convention, like armed conflicts, famine, or extreme poverty. Nonetheless, in spite of the criticisms, the Refugee Convention is still in force and every year millions of asylum claims are settled in accordance with its provisions. Therefore, to understand the effective operation of the refugee legal regime, the following sub-chapters will pursue a detailed analysis on the refugee definition and refugee status.

3. Who Is a Refugee?

According to the UNHCR, ‘a refugee is someone who has been forced to flee his or her country because of persecution, war or violence’. War and violence, either ethnic, tribal or religious, are leading factors of refugees fleeing their homes still today.²⁶ Nevertheless, the legal definition of the term “refugee” under the Refugee Convention is rather complex, basically due to the limitations attached to it. These limitations are rooted in finding a delicate balance between states’ obligations stemming from the principle of solidarity and states’ concerns regarding unmanageable mass influx. Thus, the refugee definition is a two-fold concept: on the one hand, it is essential to recognise those who are in need of international protection from persecution and their rights, on the other hand, it is also necessary to determine what the obligations of states are under international law when providing protection for the most vulnerable.²⁷ For the textual interpretation of the Refugee Convention, one should establish that the Contracting States emphasised the latter aspect: the focus is significantly more on state obligations rather than on the individual rights of refugees.

This feature of the Refugee Convention is unambiguously a result of the treaty’s historical background. In the era of its adoption, no universal human rights instruments existed; only the Universal Declaration of Human Rights²⁸ (hereinafter: UDHR) was adopted, which is not a treaty but a non-binding resolution of the UN General Assembly. Unlike human rights treaties adopted within the framework of the UN in subsequent years, the Refugee Convention does not simply enumerate unalienable and unconditional rights without discrimination for its beneficiaries. That is, the Refugee Convention is not a comprehensive instrument providing international protection for any victim of irregular forced migration. While human rights apply to

26 UNHCR, 2025, What is a refugee?

27 Chetail, 2019, p. 169.

28 United Nations General Assembly, 1948, art. 14(1): ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations’.

everyone due to the dignity inherent in every individual, refugee rights depend on the formal recognition of refugee status by states.²⁹

Article 1(A)(2) of the Refugee Convention provides,

‘[...] for the purposes of the present Convention, the term ‘refugee’ shall apply to any 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.’

The refugee definition is the *raison d'être* of the Refugee Convention, and it is a fundamental category of international migration law. Refugees, unlike internally displaced persons, are involved in international migration, i.e. they are outside their country of origin, and at the same time, they are irregular forced migrants (*nota bene*, refugees can never be considered illegal migrants). Additionally, Article 14 of the 1948 UDHR enshrines the right to seek and enjoy asylum from persecution,³⁰ and states shall not abuse this human right in their asylum procedures. It only depends on states, however, who they will recognise as a refugee, and who will become an undocumented illegal alien.³¹ The Refugee Convention does not comprise the definition of asylum seeker, but it can be derived from Article 14 of the UDHR. In accordance with the UNHCR's pragmatic approach, an asylum-seeker is someone who is seeking or intends to seek international protection, either refugee status or complementary protection due to armed conflicts, human rights violations or persecution. At the end of the asylum procedure, not every asylum seeker will be found to be refugee, but every refugee was once an asylum seeker.³²

According to the Refugee Convention, refugee status is declaratory in nature. As the UNHCR eloquently stated, ‘he [an asylum seeker] does not become a refugee because of recognition but is recognised because he is a refugee’.³³ One can therefore conclude that the declaratory nature of the refugee status is based on a rebuttable presumption that asylum seekers are assumed to have the status of refugees with regard to the benefits of non-refoulement protection for the duration of the asylum procedure, unless subsequently it is proved otherwise.

Nonetheless, the refugee definition is a limited category from several perspectives. At the Conference of Plenipotentiaries³⁴ of the Refugee Convention, state delegates, as a consequence of their general fear of unmanageable mass influx, insisted they would not sign a “blank cheque” assuming unlimited and indefinite commitments in terms

29 Chetail, 2014, pp. 19–72.

30 Ádány, 2016, p. 239.

31 Nagy, 2014, p. 525.

32 UNHCR, 2025, Asylum Seekers.

33 UNHCR, 2011, p. 38.

34 United Nations, 1951, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary record of the 35th meeting.

of all refugees for the future.³⁵ As Bhabha points out, ‘from the outset, the refugee protection regime was intended to be restrictive and partial, a compromise between unfettered state sovereignty over the admission of aliens, and an open door for non-citizen victims of serious human rights violations’.³⁶ Thus, the final version of the refugee definition was adjusted in line with states’ estimates of the probable numbers of prospective beneficiaries.³⁷ Simply put, the refugee definition was tailored to cover individual political refugees, not the mass influx of migrants. It is also true, however, that the Final Act of the Conference of Plenipotentiaries³⁸ made a recommendation³⁹ for States Parties to apply the Refugee Convention “beyond its contractual scope” to other persons who otherwise would not be protected by the provisions of the Refugee Convention.

3.1. The Scope of the Refugee Definition: Who Is Covered?

Article 1(A)(2) of the Refugee Convention is also known as the inclusion clause of the refugee definition stipulating the positive criteria of earning a refugee status. As already referred to above, the refugee definition is inherently limited in scope and requires three requirements to be achieved, and contemporary scholarly discussion classifies these criteria as the inclusion, exclusion, and cessation clauses.⁴⁰

The inclusion clause enumerates four cumulative conditions of refugee status:

- condition (1): the refugee is outside his country of nationality;
- condition (2) the refugee is unable or unwilling to avail himself of the protection of the country of origin;
- condition (3) the reason for this inability or unwillingness is attributable to a well-founded fear of persecution; and
- condition (4) persecution or the lack of protection provided by the country of origin is in connection with at least one of five limitative grounds (race, religion, nationality, membership of particular social group, or political opinion).

These positive preconditions of the refugee status highlight a significant difference between refugee rights and human rights: although all refugees, like all human beings, have human rights, as an especially vulnerable group they are entitled to consideration and additional protection on a national and an international level. Rights under the Refugee Convention, however, unlike human rights, are not inalienable

35 Bem, 2004, p. 609.

36 Bhabha, 2002, p. 176.

37 Ibid., p. 155.

38 United Nations, 1951, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc. A/CONF.2/108/Rev.1.

39 This recommendation served as an incentive to the subsequent adoption of regional instruments in Africa, Asia, Europe, and Latin America. See: Organization of African Unity, 1969; Asian-African Legal Consultative Organization, 1966; European Union, 2011; Cartagena Declaration, 1984.

40 For a comprehensive analysis, see in detail Goodwin-Gill and McAdam, 2007, pp. 63–197; Zimmermann and Mahler, 2011, pp. 281–465; Chetail, 2019, pp. 170–171.

and unconditional. In accordance with the inclusion criterion, refugee status offers a protection of substitution based on the principle of surrogacy when the country of origin violates the bond of trust, loyalty, protection, and assistance between the national and the state which otherwise constitutes the normal basis of society.⁴¹

3.1.1. Condition (1): *The Refugee Is Outside the Country of His Nationality*

According to the UNHCR's interpretation, the term "nationality" refers to citizenship, as in most cases refugees retain the nationality of their country of origin.⁴² The applicant's well-founded fear of persecution must be connected with his country of nationality. While the asylum seeker's well-founded fear of persecution is related to some other country, he can avail himself of the protection of the country of nationality, and therefore will not need international protection.⁴³ It functions as a *stricto sensu* rule, with no exceptions, that an applicant, who has a nationality, needs to be outside the country of his origin. Therefore, international protection cannot come into play as long as a person is within the territorial jurisdiction of his home country. IDPs, even though that they are also victims of forced migration and in need of protection, do not fall under the scope of the Refugee Convention. This *stricto sensu* rule is among the most significant limitations imposed by the Refugee Convention, and the growing mass of IDPs makes it an even more worrying problem for the international community.⁴⁴

3.1.2. Condition (2): *The Refugee Is Unable or Unwilling to Avail Himself of the Protection of the Country of His Nationality*

Inability to avail themselves of the protection of the country of nationality is caused by objective circumstances beyond the control of asylum seekers. For instance, insurgencies, grave disturbance, and (civil) wars may lead to a general situation in a country that prevents nationals from availing themselves of protection. These circumstances may also make state protection ineffective or simply denied, meaning services that are normally available for co-nationals become unavailable, which may intensify the applicant's fear of persecution. By contrast, unwillingness refers to asylum seekers who refuse to accept the protection provided by their home country. Unwillingness is more subjective than inability; however, it is counterbalanced by the qualification of "owing to such fear". The UNHCR points out the relationship between unwillingness and being outside one's country of origin, 'where a person is willing to

41 Shacknove, 2016, p. 164.

42 Like nationals of any state, stateless persons may also become refugees, and the Refugee Convention offers protection for them under art. 1(2) as follows, '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'.

43 UNHCR, 2019, pp. 25–26.

44 According to UNHCR's Refugee Data Finder, as of mid-2024, there were 68.3 million IDPs worldwide as a result of persecution, conflict, violence, human rights violations, or events seriously disturbing public order; see: UNHCR, 2025, The UN Refugee Agency, Refugee Data Finder.

avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country “owing to well-founded fear of persecution”.⁴⁵

Article 1(A)(2) of the Refugee Convention contains a subsequent parallel phrase that refers to stateless persons, ‘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 this context, “former habitual residence” means ‘the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned’.⁴⁶ In the case of stateless asylum seekers, the “country of nationality” is replaced by “the country of his former habitual residence”, and the expression “unwilling to avail himself of the protection” is replaced by “unwilling to return to it”. Logically, in the case of stateless persons, availment of protection will not arise. Obviously, not all stateless persons will be refugees; nonetheless, once a stateless person is recognised as a refugee in relation to the country of his former habitual residence, any further change of country of habitual residence will not affect his refugee status.⁴⁷

3.1.3. Condition (3): The Reason for the Refugee’s Inability or Unwillingness Is Attributable to a Well-Founded Fear of Persecution

The well-founded fear of persecution is a key element of the refugee definition. Nevertheless, fear is an inherently subjective condition and a state of mind, meaning the refugee definition includes a subjective element related to the person applying for asylum. In this vein, the evaluation of the applicant’s statements is more relevant than a judgement on the ongoing situation in the asylum seeker’s country of nationality. The evaluation of fear is inseparable from the assessment of the applicants’ personality, their psychological reactions, credibility, family background, and their membership of a racial, religious, national, social, or political group, as well as their own interpretation of their situation and their personal experiences. Counterbalancing the subjectivity of fear, the drafters of the Refugee Convention added the qualification “well-founded”. The UNHCR notes that “well-founded” implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation’.⁴⁸ The Refugee Convention sets a reasonable degree of likelihood of persecution for the applicant to demonstrate, and accordingly, judicial case law confirmed that states cannot apply a higher standard. Under universal treaty law, there is no adopted definition of the term “persecution”, and attempts to agree on such a definition have met with little success over the years. In accordance with Article 33 of the Refugee Convention, a threat to life or freedom on the grounds of race, religion, nationality, membership of

45 UNHCR, 2019, p. 27.

46 United Nations, 1950, Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, p. 39.

47 UNHCR, 2019, p. 27.

48 Ibid., p. 19.

a particular social group, or political opinion unambiguously counts as persecution; however, other gross human rights violations may also fall within the meaning of the term “persecution”.

3.1.4. Condition (4): The Five Limitative Grounds for Persecution

Race. Race is traditionally interpreted in line with Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.⁴⁹ The term “race”, in its widest sense, covers skin colour, descent, and national or ethnic origin. According to the UNHCR, the mere fact of being the member of a particular racial group is not enough to substantiate a claim to refugee status; at the same time, there may be cases where, due to the circumstances affecting the group, such membership, in itself, provides a sufficient ground to fear persecution.⁵⁰ Discrimination on the grounds of race has been condemned world-wide over the years and is today identified as one of the most serious form of human rights violations.

Religion. When interpreting the term “religion”, the UDHR and the International Covenant on Civil and Political Rights⁵¹ (hereinafter: ICCPR) can serve as points of departure. Article 18 of the UDHR and Article 18 of the ICCPR deal with the freedom of thought, conscience, and religion that encompasses the freedom of the individual to change his beliefs, to manifest his religion even in public places, and his freedom in observance, practice, teaching, and worship. In accord with this, persecution on religious grounds may take place in various forms, e.g. it can be directed against those subscribing to a different belief system, or it can be directed against adherents of the same faith based on divisions within the religious group, such as a group’s or an individual’s refusal to recognise certain tenets of the same religion.⁵² According to the UNHCR, it may also assume the form of the prohibition of membership of a religious community, worship in private or in public, or religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.⁵³

Nationality. The term “nationality” under the Refugee Convention means more than citizenship, it is the civil status thereof.⁵⁴ Nationality may refer to membership in a particular ethnic or linguistic group and it sometimes overlaps with race. A typical scenario of persecution based on nationality occurs when two or more ethnic or linguistic groups live together within the boundaries of a state, conflicts ensue, and persecution or the threat of persecution arises. In these cases, when a conflict is combined with political movements, distinction between persecution on

49 United Nations, 1965, International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, p. 195.

50 UNHCR, 2019, p. 23.

51 International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171 and Vol. 1057, p. 407.

52 Hernández, 2019, p. 428; UNHCR, 2004, Guidelines on International Protection No. 6.

53 UNHCR, 2019, p. 23.

54 Hernández, 2019, p. 428.

the grounds of nationality or of political opinion is quite difficult, especially when a political movement is strongly connected with a specific nationality. In addition, persecution related to nationality may assume numerous other forms, e.g. when an occupying state targets the nationals living on the occupied state's territory, or it may even take place against stateless persons when they are deprived of the access to nationality they are legally entitled to. Although most cases involve persecution of individuals who belong to a national minority, there also have been incidents in various continents where a person belonging to a majority group might have feared persecution by a dominant minority.⁵⁵

Membership in a particular social group. The term “membership in a particular social group” is potentially the broadest category among the grounds for persecution under the refugee definition, the aim being to provide the Convention's protection for those otherwise not covered by the other four grounds. Simply put, this ground can serve as a “gap-filler” when none of the other grounds apply. For instance, in *González et al (“Cotton Field”) v Mexico*⁵⁶ the Inter-American Court of Human Rights (hereinafter: IACtHR) established persecution on the grounds of gender⁵⁷ as persecution on the grounds of membership in a particular social group. In this case, three young women disappeared after leaving work, their bodies later found in the cotton fields of their hometown. The women's bodies displayed evidence of intense physical and psychological torture, mutilation, and sexual abuse. During the investigations, law enforcement officials did not provide the young women with justice, and they were not willing to help the victims' mothers in finding out what had happened. Indeed, the families of the deceased received continual threats from local officials to withdraw their complaints. As a result of the mothers' testimonies, the work of advocates, and data supplied by civil society organisations, a systematic pattern of violence against women and widespread discrimination was presented to the IACtHR.⁵⁸

International courts have also confirmed that sexual orientation and gender identity may constitute “membership in a particular social group”. For example, *X, Y, Z v Minister voor Immigratie en Asiel*⁵⁹ concerned three asylum seekers in the Netherlands from Senegal, Sierra Leone, and Uganda. In each country of origin, homosexuality is a crime punishable by life imprisonment (except in Senegal where it is punishable by five years of imprisonment). Even though the applicants did not demonstrate that persecution had taken place in any of the cases, or that they had been threatened with persecution on the grounds of their sexual orientation, the Court of Justice of the European Union established that due to the criminalisation of homosexuality in their countries of origin, they would have a well-founded fear of being persecuted if they

55 UNHCR, 2019, p. 24.

56 *González et al. v Mexico*, 2016.

57 Edwards, 2003, pp. 51–57.

58 According to reports, between 1993 and 2005, 4,456 young women disappeared in this Mexican municipality. See: Centre for Women, Peace and Security, 2024, Tackling Violence against Women: Landmark cases – *González, Monreal and Mondárrez (“Cotton Field”) v. Mexico*.

59 *X, Y and Z v. Minister voor Immigratie en Asiel*, 2013.

were returned home. The European Court of Human Rights (hereinafter: “ECtHR”) arrived at a similar conclusion in *OM v Hungary*,⁶⁰ where the court held that the detention of a homosexual asylum seeker, who had fled Iran because of his homosexuality, was arbitrary, reiterating that sexual orientation and gender identity may be covered by the term “membership in a particular social group”.

When clarifying the term “membership in a particular social group”, *Canada (Attorney General) v Ward*⁶¹ is also a landmark case. The defendant, Patrick Ward, fled Northern Ireland for fear of being murdered by the Irish National Liberation Army (hereinafter: INLA), from which he had defected. He was ordered by the INLA to guard hostages; however, when he found out the hostages were to be executed, he let them escape. After being tortured by the INLA and serving three years in an Irish jail for his role in the hostage-taking, he fled to Canada where he applied for refugee status. In the Ward judgement, the Supreme Court of Canada adopted a broad interpretation of the term “membership in a particular social group” and took into special consideration the “defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative”. As Hernández sums up,⁶² in accordance with the Ward judgement, a particular social group can be defined by:

- innate or unchangeable characteristics, e.g., gender, linguistic background, sexual orientation;
- associations that are fundamental to the members’ human dignity, e.g. human rights activists; and
- a former voluntary status, as ‘one’s past is an immutable part of the person’.⁶³

Eventually, the court found that Ward did not fall into the category of “membership in a particular social group” but had been persecuted by the INLA due to his political opinion, i.e. the killing of innocent hostages is an unacceptable way to bring about political changes.⁶⁴ Consequently, the idea that a particular social group normally comprises persons of similar background, habits, or social status, may also include other grounds of persecution, such as race, religion or nationality.

Political opinion. Under Article 1(A)(2) of the Refugee Convention, the last of the grounds for persecution is political opinion. As has already been demonstrated with the Ward judgement above, the meaning of the term “political opinion” goes beyond political affiliation or membership in a political party. The UNHCR observes that,

‘holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical

60 *O.M. v. Hungary*, 2016.

61 *Canada (Attorney General) v. Ward*, 1993, paras. 67–68.

62 Hernández, 2019, p. 429.

63 *Canada (Attorney General) v. Ward*, 1993, para. 739.

64 *Canada (Attorney General) v. Ward*, para. 750.

of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant.⁶⁵

This implies that the concerned individual holds an opinion that has either been expressed or has come to the attention of the authorities. It may also be that the applicant has not given any expression to his or her opinions; however, owing to the intensity of his or her convictions, it may be reasonable to believe that those convictions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. In such a case, the asylum seeker can be considered to fear persecution on the grounds of political opinion.

In summary, Article 1(A)(2) of the Refugee Convention provides an exhaustive list of grounds for persecution, and excludes many typical drivers of forced migration, e.g., armed conflicts, extreme poverty, famine, natural disasters, pandemics, or persecution on other grounds.

3.2. Who Is Excluded?

The exclusion clause,⁶⁶ focusing on the common concerns of states regarding aliens accessing their territory, further underpins the conditionality and selectiveness of the refugee status. Even if the abovementioned positive preconditions have been satisfied, asylum seekers can be excluded from the protection provided by the Refugee Convention under other supplementary circumstances.

Article 1(D) of the Refugee Convention provides,

‘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.’

Additionally, Article 1(E) of the Refugee Convention states,

‘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.’

And finally, Article 1(F) of the Refugee Convention spells out,

65 UNHCR, 2019, p. 24.

66 Ibid., pp. 111–139; Chetail, 2019, pp. 169–177.

‘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.’

As can be concluded from Articles 1(D), 1(E), and 1(F), a person cannot benefit from the substitute protection offered by the Refugee Convention if he:

- already enjoys some other form of international or national protection (IRO, UNRRA, UNRWA etc.);
- possesses the rights and obligations attached to nationality in the country of residence; or
- has committed serious crimes (crimes against peace [crime of aggression], crimes against humanity, war crimes, serious non-political crimes, and acts contrary to the purposes and principles of the UN).

3.3. When Does the Protection Cease to Apply?

The cessation clause⁶⁷ underlines the temporary nature of the Refugee Convention's protection.

Article 1(C) provides:

‘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 re-acquired 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 connexion 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(1) 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 of the circumstances in connexion 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 (1) of this article who is able to

67 UNHCR, 2019, pp. 140–163; Chetail, 2019, pp. 169–177.

invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.’

The provisions under Article 1(C) enumerate the reasons for the termination of refugee status. When the rationale for refugee status is no longer justifiable, the surrogate convention protection ceases to apply. The reasons for the termination of refugee status can be either connected with the refugee concerned and his or her voluntary acts or with a change of circumstances in the country of origin.

4. Refugee Status: The Rights of Refugees Under the Refugee Convention

Refugee status is defined by refugee rights and obligations. Their universal rights stem from two principal sources: IHRL and the Refugee Convention. The latter outlines the basic minimum standards for the treatment of refugees as well as their own obligations towards the host state. Regarding their obligations, refugees are required under Article 2 of the Refugee Convention to abide by the laws and regulations of their country of asylum and respect measures taken for the maintenance of public order. Their rights, as Hathaway explains, derive from the Refugee Convention and result in obligations on the side of states. These convention rights are still highly relevant, despite the significant development of IHRL since 1951. Throughout the last seven decades, several human rights conventions have been adopted, which provide legal safeguards and fundamental protection for refugees.

Why is it important then that not only the Refugee Convention but also human rights conventions provide guarantees for refugees? There are multiple reasons this two-layered protection is required. First, many refugee-specific problems are not covered by general human rights law. Second, economic rights in general are defined as duties of progressive implementation and may legitimately be denied to non-citizens by less developed countries. Third, not all civil rights are guaranteed to non-citizens, and most of those which do apply to them can be withheld on the grounds of their lack of nationality during national emergencies. And finally, the duty of non-discrimination under international law has not always been interpreted in a way that guarantees refugees the substantive benefit of relevant protections.⁶⁸ Still, international human rights law provides additional rights for refugees under the 1950 Refugee Convention, and its application and interpretation by international and national courts make it possible to refine the standards of refugee rights to respond to contemporary challenges.

Besides the determination of the refugee definition and conceptualising the principle of non-refoulement, the set of rights deriving from refugee status is the third fundamental pillar of the Refugee Convention. Indeed, access to protection is based upon these two other criteria: the recognition of the asylum seeker as a refugee, and

68 Hathaway, 2021, p. 173.

whether the asylum seeker is protected by the principle of non-refoulement.⁶⁹ While Shacknove defines the three core criteria of refugee status as asylum, material relief, and permanent resettlement,⁷⁰ Chetail identifies the essence of refugee status with criteria of entitlement and standard of treatment.⁷¹ Additionally, Molnár summarises protection status under the Refugee Convention as follows:

- the principle of non-refoulement, i.e. no States Party shall expel or return 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 or political opinion;
- recognised refugees should be provided with travel documents; and
- Contracting States should either provide refugees equal treatment with their own nationals (e.g. freedom of religion, access to justice, labour and social security rights, and intellectual property rights), or provide refugees with definitely not less favourable treatment than that provided for other foreigners (e.g. housing, self-employment, independent professions, and acquisition of property).⁷²

In detail, the Refugee Convention provides for:

Refugee rights	Respecting articles
The right to non-discrimination	Articles 3 and 5
The right to freedom of religion	Article 4
The right to be issued civil, identity, and travel documents	Articles 12, 27 and 28
The right to housing, land, and property, including intellectual property	Articles 13, 14 and 21
The right to access to justice	Article 16
The right to decent work	Articles 17 to 19 and 24
The right to education	Article 22
The right to social protection	Articles 23 and 24(2)–(4)
The right to freedom of movement within the territory	Article 26 and Article 31(2)
The right not to be punished for irregular entry into the territory of a contracting state	Article 31
The right not to be expelled, except under certain, strictly defined conditions	Article 32

Table.2. Refugee Rights under the Refugee Convention⁷³

69 Chetail, 2014, p. 23.

70 Shacknove, 2016, p. 276.

71 Chetail, 2019, pp. 177–179.

72 Molnár, 2016, p. 48.

73 Author's own compilation.

As for the treatment of refugees, the Refugee Convention sets three standards. There are rights, e.g. freedom of religion, access to justice, or the right to elementary education, where all refugees enjoy the same treatment accorded to nationals. There are other rights, e.g. the right to decent work or the right to association, where refugees are treated as most favoured aliens, i.e. a treatment accorded to nationals of a foreign country in the same circumstances. And there is a third category of rights, e.g. the right to housing or the right to freedom of movement, where refugees are treated not less favourably than the treatment generally accorded to aliens in the same circumstances.⁷⁴

The Refugee Convention's approach to refugee rights is not what is regularly provided under human rights instruments. It is not based on an enumeration of states' obligations equally applicable to all refugees. Instead, the drafters of the Refugee Convention attempted to give additional rights as the bond strengthens between the refugee and the asylum state. As a result, the structure of the refugee rights regime is incremental, i.e. whereas all refugees benefit from a basic set of rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state.⁷⁵ This was highlighted by the UK Supreme Court in *R (ST, Eritrea) v Secretary of State for the Home Department*.⁷⁶ The key issue here was the age of an Eritrean asylum seeker who had presented himself to police claiming that he was sixteen years old, it being unlawful for the Home Department under UK domestic law to detain unaccompanied minors except in limited circumstances. The Court stated,

'[t]he rights that attach to the status of refugee under the Convention depend in each case on the possession of some degree of attachment to the contracting State in which asylum is sought [...] An examination of the Convention shows that it contemplates five levels of attachment to the contracting States.'

A textual analysis of the Refugee Convention shows five levels of rights. The most basic set of rights, or core rights, are applicable as soon as the refugee comes under the *de jure* or *de facto* jurisdiction of the asylum state. The second set applies when the refugee enters into the asylum state's territory, and the third only inheres once the refugee is lawfully or habitually within the asylum state's territory. A fourth set of rights is applicable when the refugee is lawfully staying within the asylum state's territory, while the final rights accrue only upon satisfaction of a durable residency requirement. Hathaway is of the view that "as the refugee's relationship to the asylum state is solidified over the course of this five-part assimilative path, the Convention requires that a more inclusive range of needs and aspirations be met".⁷⁷ However, Hathaway describes this "assimilative path" as a doctrinal reconstruction that is not

74 Chetail, 2014, p. 42.

75 Hathaway, 2021, pp. 174–175.

76 *R (ST (Eritrea)) v. Secretary of State for the Home Department*, 2012, para. 21.

77 Hathaway, 2021, p. 177.

demonstrated by the *travaux préparatoires*, and accordingly, Chetail observes, ‘albeit attractive, this conceptualization of the refugee status as an assimilative process remains an *a posteriori* and essentially doctrinal reconstruction’.⁷⁸

At the same time, this incremental and multi-layered regime implies that the levels of refugee rights build upon each other: a refugee who enters into the asylum state’s territory is also under the *de jure* or *de facto* jurisdiction of the asylum state; a refugee who is lawfully or habitually within the asylum state’s territory has also entered into the asylum state’s territory; a refugee who is lawfully staying is also lawfully or habitually within the asylum state’s territory; and finally, a refugee satisfying the durable residency requirement is also lawfully staying within the asylum state’s territory. Consequently, it is a preliminary and especially significant issue to define the nature of the refugee’s attachment to the asylum state.⁷⁹ As the UK House of Lords highlighted in *Secretary of State for the Home Department v AH (Sudan)*,⁸⁰ ‘once they achieve refugee status, not merely are they safeguarded from return home but they secure all of the other manifold benefits provided for under the Convention relating to the Status of Refugees’.⁸¹ In the same case, the UK House of Lords established that each of the three Sudanese applicants had a well-founded fear of persecution in Darfur; nevertheless, in reconsidering their remitted appeals, it found that it would not be unduly harsh to expect the applicants to internally relocate to Khartoum.

This progressive entitlement to rights and benefits under the Refugee Convention determines the applicable law at the three stages of a refugee’s life cycle. At “level 1”, the recipients of rights are asylum seekers who are assumed to have a temporary presence, and the sole purpose of their entitlements is to make it possible to examine their applications. At “level 2”, the holders of rights are formally recognised refugees supported by the legislative intent to facilitate their progressive integration into the asylum state’s society. Finally, at “level 3”, rights encourage asylum states to naturalise refugees as a closure of the refugee’s life cycle.

5. Concluding Remarks

IRL covers those special situations when the consent and intent to give protection to its nationals against human rights abuses is absent on the side of the home state, and surrogate protection provided by a state different from the country of origin becomes crucially needed. In order to determine who is entitled to this surrogate protection, the Refugee Convention and its Protocol provide legal guidelines, most importantly, by conceptualising the refugee definition and the content of the refugee status.

78 Chetail, 2019, p. 181.

79 Hathaway, 2021, pp. 174–175.

80 *Secretary of State for the Home Department v. AH (Sudan)*, 2007.

81 *Ibid.*, para. 32.

The analysis of the refugee definition demonstrates that international protection was tailored to a very limited category of migrants, and the Refugee Convention is therefore not able to provide protection for IDPs or those who flee their home countries without persecution or owing to some other drivers not enumerated under Article 1(A) (2) (armed conflicts, famine, extreme poverty etc.). It is also worth mentioning that the Refugee Convention is not a human rights treaty guaranteeing unalienable and unconditional rights paired with refugee status. Although recognition of a refugee is declaratory in nature, rights stemming from refugee status are not unalienable and unconditional: the acquisition of refugee rights presupposes recognition, and these rights cease to apply when refugee status is terminated. Moreover, refugee rights are also incremental; that is, the more the bond strengthens between the refugee and the asylum state, the more the Refugee Convention provides for refugees.

Migration-related and refugee problems make IRL a highly relevant branch of international law these days, which is obviously demonstrated by the intensity of ongoing public and political debates. At mid-2024, there were 122.6 million forcibly displaced people, and 37.9 million refugees worldwide, alarming indicators of the current situation. International cooperation on this field is more significant than ever, and the revision of the effective treaty regime should also be considered to offer more efficient solutions for challenges generated by mass influx.

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