CHAPTER II

The 1951 United Nations Convention Relating to the Status of Refugees: Contemporary Theory and Practice

Nóra Béres

Abstract

This chapter seeks to provide an analysis on the framework of interpretation of the 1951 United Nations Convention relating to the Status of Refugees with special regard to its key elements: the definition of the term 'refugee', the concept of refugee status (including illegal entry to a country), and the principle of non-refoulement. When it comes to the application of the provisions enshrined under the Convention, the fact that that neither a treaty body nor a human rights monitoring mechanism were set up by the drafters must be taken into consideration. Nevertheless, as an ultimate source of international law, the Convention is regularly and variously interpreted by both international courts and national tribunals, and in addition to legal scholarship, judicial case law operates as a guide in determining the real essence and meaning of the Convention's provisions. In this vein, this chapter applies concept analysis and legal case analysis as methodology to discuss in detail the most significant norms of contemporary international refugee law.

Keywords: Refugee Convention, refugee definition, refugee status, illegal entry to a country, non-refoulement

Nóra Béres (2024) 'The 1951 United Nations Convention Relating to the Status of Refugees: Contemporary Theory and Practice'. In: Anikó Raisz (ed.) *Migration and Central Europe. Challenges and Legal Responses,* pp. 83–119. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2024.armace_2

1. Introduction

As of 2024, the issue of refugees remains among the problems of most concern to the international community. According to the latest data provided by the United Nations High Commissioner for Refugees (hereinafter: 'UNHCR') and Statista, in mid-2023, as a result of armed conflicts, persecution, human rights violations, or other events seriously disturbing public order, there were 110 million forcibly displaced people worldwide. The majority of the refugee flows are generated by the war in Ukraine, the conflict in Yemen, and the attacks in the eastern region of the Democratic Republic of the Congo, as well as the crises in Afghanistan, Ethiopia, and Syria.[1] Most people fleeing across borders come from just a few countries like Afghanistan, Myanmar, South Sudan, Syria, and Venezuela. To be more precise, over half of all refugees (52%) come from just three countries: Syria (6.5 million), Afghanistan (6.1 million), and Ukraine (5.9 million), while Pakistan, Bangladesh, Uganda, Iran, Türkiye, Columbia, and Germany host the largest number of refugees.[2] Although the phenomenon is not a new trend, the ongoing challenges highlighted by recent numbers means that the ongoing topicality of refugees issues remains undisputable.

When it comes to a global phenomenon with a universal scope, as is the case with migration and refugee-related challenges, it is worth examining what international law offers as a solution for these transnational problems. In this context, a focused analysis of the 1951 Convention relating to the Status of Refugees[3] (hereinafter: 'Refugee Convention' or 'Convention')[4] and its 1967 Protocol relating to the Status of Refugees[5] (hereinafter: 'Protocol') seems to be necessary, and the question should be raised as to how a legal instrument that is over seventy years old can provide appropriate mechanisms for modern legal difficulties. This chapter therefore combines concept analysis and legal case analysis as its methodology to pursue this research aim and to discuss in detail the most significant norms of contemporary international refugee law.

Even though the Refugee Convention is of great significance and reflects contemporary global challenges, the idea that it is outdated 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

1 *Refugees and IDPs worldwide – Statistics & Facts* [Online]. Available at: https://www.statista.com/topics/10555/refugees-and-idps-worldwide/#topicOverview (Accessed: 14 May 2023). UNHCR, 2022.

2 UNHCR Refugee Data Finder [Online]. Available at: https://www.unhcr.org/refugee-statistics/ (Accessed: 25 January 2024).

3 Convention relating to the Status of Refugees, Geneva, 28 July 1951, UNTS, vol. 189.

4 For comprehensive analysis see Zimmermann and Mahler, 2011.

5 Protocol relating to the Status of Refugees, New York, 31 January 1967, UNTS, vol. 606, p. 267.

driven by violence that does not involve persecution.[6] Policy analysts also emphasise that the significant increase in the numbers of forcibly displaced persons has resulted in costly procedures, which are burdensome for States in economic and social terms.[7] 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.[8] 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 very limited category of refugees, i.e., individual political asylum seekers and not a mass influx. The Refugee Convention is therefore unable to provide protection for internally displaced persons (hereinafter: 'IDPs') or those who flee from their home countries without persecution or owing to some other drivers not enumerated under the 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 definition of the term 'refugee', refugee status, and the principle of non-refoulement.

2. The adoption of the Refugee Convention and its Protocol

The refugee problem became of concern to the international community early in the twentieth century due to the development, and then coexistence, of two historical-legal-social preconditions: the closure of national borders and the intensity of refugee flows following a succession of major conflicts.[9] In connection with the events of the First World War, some two million Russians, Armenians, and others were forced to flee their countries of origin between 1917 and 1926.[10] 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: the 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees,[11] the

6 Zolberg, Suhrke and Aguayo, 1989, pp. 1–394.
7 Fitzpatrick, 1996, pp. 230–231.
8 Helton, 1994, p. 1623.
9 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.
10 Hathaway, 2021, p. 19.
11 Arrangement of 12 May 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees, League of Nations, Treaty Series Vol. LXXXIX, No. 2004.

1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees,[12] the 1933 Convention relating to the International Status of Refugees[13] (hereinafter: '1933 Convention') the 1938 Convention concerning the Status of Refugees Coming from Germany,[14] and the 1939 Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees Coming from Germany.[15] As can be concluded based on the *ratione personae* of the treaties listed above, the majority of the League of Nations refugee instruments were limited in scope, focusing on Russians, Armenians, and Germans. Nonetheless, the 1933 Convention, initiated by the International Committee of the Red Cross (hereinafter: 'ICRC'), was a more comprehensive and forward-looking treaty and dealt with administrative measures (e.g., the issuing of Nansen certificates[16]), juridical conditions, labour conditions, industrial accidents, welfare and relief, education, and fiscal issues, as well as exemptions from reciprocity. Most importantly, the principle of non-refoulement acquired the status of international treaty law by virtue of Art. 3 of the 1933 Convention as follows:

> Each of the Contracting Parties undertakes not to remove or keep from its territory by applications of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

This provision of the 1933 Convention served later as a model for Art. 33 of the Refugee Convention[17] enshrining the prohibition of refoulement.[18] By stipulating non-refoulement under the 1933 Convention, a humanitarian approach appeared in international refugee law, thanks to the work of the ICRC. Regardless, the 'success' of the 1933 Convention is strongly questionable[19] as only nine States ratified it.[20]

The contemporary universal treaty regime of international refugee law currently in effect, adopted under the auspices of the United Nations (hereinafter: 'UN') and

12 Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees, League of Nations, Treaty Series Vol. LXXXIX, No. 2005.

13 Convention of 28 October 1933 relating to the International Status of Refugees, 1933.

14 Convention of 10 February 1938 concerning the Status of Refugees Coming from Germany, League of Nations, Treaty Series Vol. CXCII, No. 4461.

15 Additional Protocol of 14 September 1939 to the Provisional Arrangement and to the Convention concerning the Status of Refugees Coming from Germany, League of Nations, Treaty Series Vol. CXCVIII, No. 4634.

16 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.

17 Molnár, 2016, pp. 51–53.

18 Jager, 2001, p. 730.

19 Some authors argue that the unwillingness demonstrated towards acceptance of the 1933 Convention was driven by two competing understandings of the sovereignty concept. See Beck, 1999, pp. 597–624.

20 Convention of 28 October 1933 relating to the International Status of Refugees, 1933.

overseen by the UNHCR, comprises 'two key legal documents: the 1951 Refugee Convention and its 1967 Protocol. With 147 ratifications,[21] both instruments enjoy worldwide acceptance and many of their provisions have been levelled up to customary norms of international law. The Refugee Convention and its Protocol are built upon three fundamental pillars: the definition of 'refugee', refugee status, and the principle of non-refoulement. As Chetail remarks, these pillars perfectly reflect the 'existential dilemma' of refugee law, creating the fragile balance between the competence of States to control the access of aliens to their territory and the protection of the most vulnerable people fleeing from gross human rights violations.[22]

The Refugee Convention was drafted almost immediately after the Second World War, an outstanding achievement of the UN's early work, recognising that refugee problems affect the international community as a whole, and that cooperation and burden-sharing in this field are therefore inevitable. It is significant that the Refugee Convention was drafted in response to the specific horrifying events that had taken place during and after the Second World War, notably the Holocaust and the Stalinist expansion into Central and Eastern Europe.[23] Its adoption was therefore the result of an era when refugees were primarily the persecuted victims of highly organised predatory States.[24]

Taking into account the challenges of the post-war era, and given 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 contained a deadline which limited its 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.[25] After the adoption of the Refugee Convention, however, refugee problems unrelated to the Second World War kept occurring in different parts of the globe, leading to efforts to make the Refugee Convention fully applicable to any refugee situations. As a result, the Protocol removing the geographical and temporal limitations was adopted sixteen years after the original Refugee Convention.[26] With the Protocol, the Refugee Convention assumed universal scope. Since then, however, no further modifications have been adopted related to the Refugee Convention or its Protocol.

21 See United Nations Treaty Collection, Chapter V Refugees and Stateless Persons, 2. Conventions relating to the Status of Refugees, Geneva, 28 July 1951, Status [Online]. Available at: https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (Accessed: 13 January 2024).

22 Chetail, 2019, p. 169.

23 Hernández, 2019, p. 427.

24 Shacknove, 2016, p. 165.

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

26 Weis, 1990, p. 1.

3. The definition of the term ‘refugee’ under the Refugee Convention

Who is a refugee? That is a simple question, and we might as well provide a simple answer to that. As Shacknove sums up, ‘a refugee […] is a person fleeing from life-threatening conditions, […] who has crossed an international frontier because of a well-founded fear of persecution’.[27] However, the legal definition of the term ‘refugee’ is not that simple, and its complexity basically lies in 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 refugee flows. Therefore, defining who is a refugee serves a dual purpose: recognising those who are in need of international protection from persecution, while at the same time determining the obligations of States under international law.[28] Regarding the language used in the text of the Refugee Convention, it is the latter that is emphasised: the focus is significantly more on State obligations than on individual rights.

This feature of the Refugee Convention’s text is clearly a result of the treaty’s historical context. In 1951, no universal human rights covenants or conventions had yet been adopted; only the Universal Declaration of Human Rights[29] (hereinafter: ‘UDHR’) existed, 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 everyone due to the dignity inherent in every individual, refugee rights depend on the formal recognition of refugee status.[30]

In accordance with Art. 1(A)(2) of the Refugee Convention,

> […] 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.

27 Shacknove, 2016, p. 163.

28 Chetail, 2019, p. 169.

29 United Nations General Assembly Resolution 217 (III) A, 10 December 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.*

30 Chetail, 2014, pp. 19–72.

Beyond any doubt, the definition of the term 'refugee' is the real essence of the Refugee Convention. As Nagy observes, the term 'refugee' 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 irregular forced migrants, but cannot be considered illegal migrants. Moreover, Art. 14 of the 1948 UDHR *expressis verbis* enshrines the right to seek and enjoy asylum from persecution,[31] and States shall not abuse this human right in their asylum procedures. In practice, however, it is the final decision of the domestic asylum authority that will determine whether the asylum seeker needs international protection or not. Once this final decision enters into effect, the asylum seeker's refugee status will be recognised, or he will become an undocumented illegal alien.[32]

According to the Refugee Convention, refugee status is declaratory in nature. As the UNHCR eloquently stated,

> a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee.[33]

One can therefore conclude that the declaratory nature of 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 proven otherwise. As Goodwin-Gill and McAdam remark, 'in principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx'.[34]

The declaratory nature of refugee status has also been given due consideration in judicial case law. For instance, Justice Kirby of the High Court of Australia in his dissenting opinion in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004,*[35] where the applicant was an Afghan national of the Hazara ethnic group who feared that the Taliban would kill him upon returning to Afghanistan because of his ethnicity, emphasised that by using the term 'recognition', rather than 'rendering', 'becoming', or 'constituting', the Refugee Convention connotes a process whereby a person, who already is a refugee, gains 'formal recognition' as such within the country of refuge. Therefore, recognition does not render a person a 'refugee' but it simply recognises the status as one that preceded the recognition.

31 Ádány, 2016, p. 239.
32 Nagy, 2014, p. 525.
33 UNHCR, 2011, p. 38.
34 Goodwin-Gill and McAdam, 2021, p. 469.
35 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*, [2006] HCA 53 (Aus. HC, Nov. 15, 2006), at [96], per Kirby J. (dissenting).

Nonetheless, the definition of the term 'refugee' is a limited category from numerous perspectives. 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. It was always clear that only a subset of forced transnational migrant persecutes were intended beneficiaries.[36]

At the Conference of Plenipotentiaries[37] of the Refugee Convention, State representatives, as a consequence of their general fear of unmanageable refugee flows, insisted they would not sign a 'blank cheque' assuming unlimited and indefinite commitments in terms of all refugees for the future.[38] Thus, the final definition of the term 'refugee' was adjusted in line with States' estimates of the probable numbers of prospective beneficiaries.[39] Simply put, the definition of the term 'refugee' was tailored to mean individual political refugees, not mass influxes of migrants. It is also true, however, that the Final Act of the Conference of Plenipotentiaries[40] made a recommendation[41] for State Parties to apply the Refugee Convention beyond 'its contractual scope' to other persons who otherwise would not be protected by the provisions of the Convention. That is, the Refugee Convention provides for the basic minimum standards that apply to refugees, while State Parties are free to offer additional protection for those who are not covered by the Convention's limited definition.

Although the Refugee Convention provides no agreed and detailed procedure for States to follow in establishing who is a refugee, the UNHCR issued a 'Handbook of Guidelines',[42] a soft law instrument, to assist domestic asylum authorities in ap-

36 Bhabha, 2002, p. 176.

37 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 35th meeting, held at the Palais des Nations, Geneva, on Wednesday, 25 July 1951 [Online]. Available at: https://digitallibrary.un.org/record/696484 (Accessed: 14 August 2023).

38 Bem, 2004, p. 609.

39 Bhabha, 2002, p. 155.

40 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, A/CONF.2/108/Rev.1, 25 July 1951 [Online]. Available at: https://www.unhcr.org/publications/final-act-united-nations-conference-plenipotentiaries-status-refugees-and-stateless (Accessed: 14 August 2023).

41 This recommendation served as an incentive to subsequent adoption of regional instruments in Africa, Asia, Europe, and Latin America. See Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted on 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Bangkok Principles on the Status and Treatment of Refugees, adopted at the Asian-African Legal Consultative Organization's 40th Session (31 December 1966) in New Delhi; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (n 15) (EU Qualification Directive); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted on 22 November 1984).

42 UNHCR, 2019.

plying the refugee criteria in practice. The handbook was first published in 1979 and re-published in 1992 and 2019.

3.1. The inclusion clause

As already mentioned above, the definition of the term 'refugee' under the Refugee Convention is inherently limited in scope and requires three criteria to be met. Contemporary scholarly discussion classifies these criteria as the inclusion, exclusion, and cessation clauses.[43] The inclusion clause is provided under Art. 1(A)(2) of the Refugee Convention and enumerates four cumulative conditions of refugee status: (i) the refugee is outside his or her country of origin; (ii) the refugee is unable or unwilling to avail himself or herself of the protection of the country of origin; (iii) the reason for this inability or unwillingness is attributable to a well-founded fear of persecution; and (iv) 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 are positive preconditions of refugee status and they 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 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.[44] As the UK Supreme Court clearly highlighted in *Horvath v Secretary of State for the Home Department,*[45] 'the general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community.' In this particular case, the applicant was a Slovak national and a member of the Roma minority who, along with his family, had been the target of racially motivated ill-treatment by skinheads. After fleeing Slovakia, he applied for asylum in the UK, where his application was dismissed unanimously by the court as he was able to acquire protection from his country of origin against the non-state actors.

43 For 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.

44 Shacknove, 2016, p. 164.

45 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 497 (Lord Hope of Craighead).

3.1.1. '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.[46] The applicant's well-founded fear of persecution must be connected with his or her country of nationality. As long as the asylum seeker's well-founded fear of persecution is related to some other country, he or she can avail himself or herself of the protection of the country of nationality, and therefore will not need international protection.[47] 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 or her origin. Therefore, international protection cannot come into play as long as a person is within the territorial jurisdiction of his or her 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.[48]

3.1.2. 'And is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'

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 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 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"'.[49]

46 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'.

47 UNHCR, 2019, pp. 25–26.

48 According to UNHCR's Refugee Data Finder, as of the end of 2022, there were 62.5 million IDPs worldwide as a result of persecution, conflict, violence, human rights violations, or events seriously disturbing public order [Online]. Available at: https://www.unhcr.org/refugee-statistics/ (Accessed: 22 January 2024).

49 UNHCR, 2019, p. 27.

Art. 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'.[50] 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. Of course, 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.[51]

3.1.3. The well-founded fear of persecution

The well-founded fear of persecution is the key element of the definition of 'refugee'. Nevertheless, fear is an inherently subjective condition and a state of mind, meaning the definition of the term 'refugee' 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 judgment on the ongoing situation in the asylum seeker's country of origin. 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. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.[52]

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. In *Immigration and Naturalization Service v*

50 Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, New York, 16 January to 16 February 1950, UN Doc. E/1618, p. 39.
51 UNHCR, 2019, p. 27.
52 UNHCR, 2019, p. 19.

Cardoza-Fonseca[53] the US Supreme Court held that to show a 'well-founded fear of persecution', aliens need not prove that it is more likely than not that they will be persecuted in their home country. Cardoza-Fonseca, a Nicaraguan national, entered the US in 1979 as a visitor; however, she overstayed her US visa, and the Immigration and Naturalization Service began proceedings to deport her. She admitted that she was in the US illegally but applied for two forms of relief in the deportation hearings: asylum and withholding of deportation. Under US law, the Immigration and Naturalization Service had the discretion to grant asylum to an alien eligible for that relief but must withhold deportation if the alien is eligible for that kind of relief. The US Supreme Court found that the threshold for withholding deportation, which was established previously in *Immigration and Naturalization Service v Stevic,*[54] was too high for asylum applicants to reach and confirmed that the standard set by the Refugee Convention is what needs to be met when applying for asylum in the US. Likewise, the UK House of Lords found in *R v Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals*[55] that the requirement that an asylum seeker had to have a 'well-founded' fear of persecution if he was returned to his own country meant that a reasonable degree of likelihood that he would be so persecuted had to be demonstrated, and in deciding whether the applicant had established his claim that his fear of persecution was well-founded, the Secretary of State could take into account facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant in order to determine whether the applicant's fear was objectively justified.[56]

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 Art. 33 of the Refugee Convention, a threat to life or freedom on the grounds of race, religion, nationality, membership of 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'. The New Zealand Refugee Status Appeals Authority found in *Refugee*

53 *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, 9 March 1987 (US Supreme Court).

54 *Immigration and Naturalization Service v Predrag Stevic*, 467 US 407, 467 US 407 104 S. Ct. 2489; 81 L. Ed. 2d 321; 1984 U.S. LEXIS 100, 5 June 1984 (US Supreme Court). In this judgment, the US Supreme Court held if an alien seeks to avoid deportation proceedings by claiming that he will be persecuted if he is returned to his native land, he must show a 'clear probability' that he will be persecuted there. This threshold was absolutely a higher one than the 'well-founded fear of persecution' established under the Refugee Convention.

55 *R v Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals* (UN High Commissioner for Refugees Intervening) [1988] AC 958, 16 December 1987 (UK House of Lords).

56 In this case, issue to be determined was the correct test to apply in order to determine whether six Tamils from Sri Lanka, who had arrived in the UK on various dates in 1987, were entitled to refugee status.

Appeal No. 71427/99[57] that core norms of international human rights law are relied on to define forms of serious harm within the scope of persecution. The applicant had divorced her abusive husband and had rediscovered her child that the husband had given up for adoption without her consent. If she had been returned to Iran, she would have been subjected to death or imprisonment. In this case, the refugee authority applied a human rights approach in establishing persecution. When assessing the existence of persecution, the individual circumstances of each case are determining, since 'the subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned'.[58] In *Korablina v Immigration and Naturalization Services,*[59] the applicant, a then fifty-five-year old native of Russia and a citizen of Ukraine, witnessed and was the subject of repeated beatings and severe harassment by an ultra-nationalist group in Kiev due to her Jewish heritage. The US Court of Appeals for the 9th Circuit held that less intense incidents of persecution (e.g., discrimination in different forms, specific instances of violence and harassment towards an individual and his or her family members) taken together, may be seen as persecution on cumulative grounds.

3.1.4. The five limitative grounds for persecution

Race is traditionally interpreted in line with Art. 1 of the International Convention on the Elimination of All Forms of Racial Discrimination[60] (hereinafter: 'ICERD'). 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 provides in itself a sufficient ground to fear persecution.[61] 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.

When interpreting the term 'religion', the UDHR and the International Covenant on Civil and Political Rights[62] (hereinafter: 'ICCPR') can serve as points of departure. Art. 18 of the UDHR and Art. 18 of the ICCPR deal with the freedom of thought, conscience, and religion that encompasses the freedom of the individual to change his or her beliefs, to manifest his or her religion even in public places, and his or her freedom in observance, practice, teaching, and worship. In this vein, persecution on

57 *Refugee Appeal No. 71427/99*, 16 August 2000 (New Zealand Refugee Status Appeals Authority).
58 UNHCR, 2019, p. 21.
59 *Korablina v Immigration and Naturalization Services*, No. 97-70361, 158 F 3d, 23 October 1998 (US Court of Appeals for the 9th Circuit).
60 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS, vol. 660, p. 195.
61 UNHCR, 2019, p. 23.
62 International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171 and vol. 1057, p. 407.

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.[63] 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 practise their religion or belong to a particular religious community.[64]

The term 'nationality' under the Refugee Convention means more than citizenship, it is the civil status thereof.[65] Nationality may refer to membership in a particular ethnic or linguistic group and it sometimes overlaps with race. A typical scenario of persecution on the ground of nationality occurs when two or more ethnic or linguistic groups live together within the boundaries of a State, conflicts ensue, and persecution or the danger of persecution arises. In these cases, when a conflict is combined with political movements, distinction between persecution on 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.[66]

The term 'membership in a particular social group' is potentially the broadest category among the grounds for persecution under the definition of 'refugee', the aim being to provide the Convention's protection for those otherwise not covered by the other four grounds. This category is therefore suitable for international and national courts to fill in lacunae when the other grounds prove to be inapplicable. For instance, in *González et al ('Cotton Field') v Mexico*[67] the Inter-American Court of Human Rights (hereinafter: 'IACtHR') established persecution on the ground of gender[68] as persecution on the ground 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

63 Hernández, 2019, p. 428. UNHCR 'Guidelines on International Protection No. 6: "Religion-Based Refugee Claims under Article 1A.2 of the 1951 Convention and/or the 1967 Protocol"', 28 April 2004, UN Doc. HCR/GIP/04/06.

64 UNHCR, 2019, p. 23.

65 Hernández, 2019, p. 428.

66 UNHCR, 2019, p. 24.

67 *González et al ('Cotton Field') v Mexico,* IACtHR Ser C, No 205 (16 November 2016).

68 Edwards, 2003, pp. 51–57.

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.[69]

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*[70] 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 (expect in Senegal where it is punishable by five years of imprisonment). Even though the applicants in none of the cases demonstrated that persecution had taken place, or that they had been threatened with persecution on the ground 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 were returned home. The European Court of Human Rights (hereinafter: 'ECtHR') arrived at a similar conclusion in *OM v Hungary*,[71] 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'.

Additionally, when clarifying the term 'membership in a particular social group', *Canada (Attorney General) v Ward*[72] is 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 judgment, 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,[73] in accordance with the Ward judgment, a particular social group can be defined by:

69 According to reports, between 1993 and 2005, 4,456 young women disappeared in this Mexican municipality. See Tackling Violence against Women, Centre for Women, Peace + Security, Landmark Cases, Gonzalez, Monreal and Monarrez ('Cotton Field') v. Mexico [Online]. Available at: https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/gonzalez-et-al-v-mexico/ (Accessed: 10 January 2024).

70 *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12-C-201/12, CJEU (7 November 2013).

71 *OM v Hungary*, ECtHR, no. 9912/15, 5 July 2016.

72 *Canada (Attorney General) v. Ward* [1993] 103 DLR (4th) 1, paras. 67–68.

73 Hernández, 2019, p. 429.

(i) innate or unchangeable characteristics, e.g., gender, linguistic background, sexual orientation; (ii) associations that are fundamental to the members' human dignity, e.g., human rights activists; and (iii) a former voluntary status, as 'one's past is an immutable part of the person'.[74] 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.[75] 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.

Under Art. 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 judgment 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 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.[76]

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 ground of political opinion.

In summary, Art. 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. As the Supreme Court of Canada pointed out in the Ward judgment,

> the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for 'persecution' in order to warrant international protection, for example, results in the exclusion of such pleas as those of

74 *Canada (Attorney General) v. Ward,* para. 739.
75 *Canada (Attorney General) v. Ward,* para. 750.
76 UNHCR, 2019, p. 24.

> economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home State is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.[77]

3.2. The exclusion clause

The exclusion clause,[78] focusing on the common concerns held by States regarding aliens accessing to their territory, further underpins the conditionality and selectiveness of 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. Art. 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.

Besides that, Art. 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, Art. 1(F) of the Refugee Convention spells out,

> 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 Arts. 1(D), 1(E), and 1(F), a person cannot benefit from the substitute protection offered by the Refugee Convention if he or she: (i) already enjoys some other form of international or national protection; (ii) possesses the rights and obligations attached to nationality in the country of residence; or (iii)

77 *Canada (Attorney General) v. Ward,* paras. 67–68.
78 UNHCR, 2019, pp. 111–139; Chetail, 2019, pp. 169–177.

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). Related to the last excluding criterion, in *Pushpanathan v Canada*[79] the Supreme Court of Canada established, 'the rationale […] is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees'. In this case, the applicant arrived in Canada from his country of origin, Sri Lanka, seeking refugee status. However, before his asylum claim was settled in Canada, he had been convicted of conspiracy to traffic in narcotics and had been sentenced to imprisonment. Therefore, the court dismissed his refugee claim under Art. 1(F) of the Refugee Convention that excludes applicants 'with respect to whom there are serious reasons for considering that [they have] been guilty of acts contrary to the purposes and principles of the United Nations'.

3.3. The cessation clause

The cessation clause[80] underlines the temporary nature of the Convention's protection. Art. 1(C) of the Refugee Convention 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 invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

The provisions under Art. 1(C) enumerate the reasons for the termination of refugee status. When the rationale for refugee status is no longer justifiable, the

79 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 63.
80 UNHCR, 2019, pp. 140–163; Chetail, 2019, pp. 169–177.

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

Refugee rights and obligations make the refugee status. Their universal rights stem from two principal sources: international human rights law 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. For their obligations, refugees are required under Art. 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 makes clear, 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 human rights law 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 that not only the Refugee Convention but also human rights conventions provide guarantees for refugees? There are multiple reasons this two-layered protection is needed. 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.[81] Still, international human rights law provides additional rights for refugees under the 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.

4.1. The rights of refugees under the Refugee Convention

Besides the determination of the term ‘refugee’ 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,

81 Hathaway, 2021, p. 173.

and whether the asylum seeker is protected by the principle of non-refoulement.[82] While Shacknove defines the three core criteria of refugee status as asylum, material relief, and permanent resettlement,[83] Chetail identifies the essence of refugee status with criteria of entitlement and standard of treatment.[84] Additionally, Molnár summarises protection status under the Refugee Convention as follows: (i) the principle of non-refoulement, i.e., no State 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; (ii) recognised refugees should be provided with travel documents; and (iii) 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).[85] In detail, the Refugee Convention provides for (i) the right to non-discrimination (Arts. 3 and 5); (ii) the right to freedom of religion (Art. 4); (iii) the right to be issued civil, identity, and travel documents (Arts. 12, 27 and 28); (iv) the right to housing, land, and property, including intellectual property (Arts. 13, 14 and 21); (v) the right to access to justice (Art. 16); (vi) the right to decent work (Arts. 17 to 19 and 24); (vii) the right to education (Art. 22); (viii) the right to social protection (Arts. 23 and 24[2-4]); (ix) the right to freedom of movement within the territory (Art. 26 and Art. 31[2]); (x) the right not to be punished for irregular entry into the territory of a contracting State (Art. 31); and (xi) the right not to be expelled, except under certain, strictly defined conditions (Art. 32).[86]

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.[87]

The Refugee Convention's approach to refugee rights is not that 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

82 Chetail, 2014, p. 23.
83 Shacknove, 2016, p. 276.
84 Chetail, 2019, p. 177–179.
85 Molnár, 2016, p. 48.
86 For a comprehensive analysis, see Zimmermann, 2011.
87 Chetail, 2014, p. 42.

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.[88] This was highlighted by the UK Supreme Court in *R (ST, Eritrea) v Secretary of State for the Home Department*.[89] The key issue 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'.[90] However, Hathaway describes this 'assimilative path' as a doctrinal reconstruction that is not 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'.[91]

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

88 Hathaway, 2021, pp. 174–175.
89 *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, 21 Mach 2012), para. 21.
90 Hathaway, 2021, p. 177.
91 Chetail, 2019, p. 181.

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.[92] As the UK House of Lords highlighted in *Secretary of State for the Home Department v AH (Sudan)*[93] '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'.[94] 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 naturalize refugees as a closure of the refugee's life cycle.

In accordance with the textual analysis of the Refugee Convention, the levels of protection, the levels of attachment to the asylum State, and the respective Convention rights can be synthetized as follows:

92 Hathaway, 2021, pp. 174–175.

93 *Secretary of State for the Home Department v. AH (Sudan),* [2007] UKHL 49 (UK HL, 14 November 2007).

94 *Secretary of State for the Home Department v. AH (Sudan),* para. 32.

Table 1. Levels of protection under the Refugee Convention[95]

Level of protection	**Level of attachment to the asylum State**	**Rights under the Refugee Convention**
Level 1: basic guarantees that refer to the term 'refugee' without any further qualification	1. The refugee is under the *de jure* or *de facto* jurisdiction of the asylum State	Art. 3: non-discrimination Art. 13: movable and immovable property Art. 16(1): access to courts Art. 20: rationing Art. 22: education Art. 29: fiscal charges Art. 33: non-refoulement Art. 34: naturalization Some contextual rights also apply: Art. 5: respect for other rights Art. 6: exemption from insurmountable requirements Art. 7(1): 'aliens generally' default Art. 8: exemption from exceptional measures Art. 12: respect for personal status
Level 2: physical or lawful presence	2. The refugee enters into the asylum State's territory	Physical presence Art. 4: religion Art. 27: identity papers Art. 31(1): non-penalization for illegal entry or presence Art. 31(2): movements of refugees unlawfully in the country of refugee
	3. The refugee is lawfully or habitually within the asylum State's territory	Lawful presence Art. 18: self-employment Art. 26: freedom of movement Art. 32: expulsion

95 Author's own.

Level of protection	Level of attachment to the asylum State	Rights under the Refugee Convention
Level 3: lawful residence or stay, physical residence, or habitual residence	4. The refugee is lawfully staying within the asylum State's territory	Lawful residence or stay Art. 15: right of association Art. 17: wage-earning employment Art. 19: liberal professions Art. 21: housing Art. 23: public relief Art. 24: labour legislation and social security Art. 28: travel documents In some cases, Art. 7(2) (exemption from reciprocity) and Art. 17(2) (exemption from restrictive measures imposed on aliens in the context of 'wage-earning employment') may also apply. (Physical residence – Art. 25: right to administrative assistance for civil status documents)
	5. The refugee meets the durable residency requirement	Habitual residents Art. 7(2): exemption from requirements of legislative reciprocity Art. 17(2)(a): exemption from requirements of any restrictive measures imposed on the employment of aliens

4.2. The evolution of an 'illegal entry to a country'

The Refugee Convention devotes an independent provision to the penalizing of asylum seekers illegally entering into or staying in a State Party's territory as well as referring to possible immunity under some circumstances. Art. 31(1) states,

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

The rationale of this provision is eloquently explained by Hoffmann: 'the drafters aimed at establishing a well-functioning, orderly system of processing refugee claims'.[96] The benefit of immunity from penalties for illegal entry or presence may be contemplated as one of the refugee rights attached to the physical presence of the refugee on the territory of the asylum State;[97] at the same time, it is a benefit narrowly interpreted and applied upon the existence of exact circumstances: (i) applicants shall 'present themselves without delay to the authorities'; (ii) and they shall 'show a good cause for their illegal entry or presence'. These preconditions need further interpretation, where judicial case law can serve as a point of departure.

In respect of Art. 31 of the Refugee Convention, the England and Wales High Court made significant contributions in *R v Uxbridge Magistrates Court and Another, Ex parte Adimi,*[98] where each applicant had fled from persecution in their home countries and their claims were denied due to arriving in the UK with false passports. In this case, the court underlined that the purpose of Art. 31 of the Refugee Convention was to provide immunity for genuine refugees whose quest for asylum reasonably involved a breach of the law. Where the illegal entry or use of false documents or delay could be attributed to a *bona fide* desire to seek asylum, then that conduct should be covered by Art. 31. It follows that Art. 31 offers protection not only for those whose asylum claim was eventually recognised but also for those who seek asylum in good faith (so-called 'presumptive refugees').[99] Additionally, to enjoy the protection of Art. 31, a refugee must have come directly from the country of his persecution, have presented himself to the authorities without delay, and have shown good cause for his illegal entry or presence, and a brief stop *en route* to an intended sanctuary would not invalidate this protection. In this vein, Goodwin-Gill elaborates that refugees are not required to have come literally 'directly' from their home country:

> The intention, reflected in the practice of some States, appears to be that, for Article 31(1) to apply, other countries or territories passed through should also have constituted actual or potential threats to life or freedom, or that onward flight may have been dictated by the refusal of other countries to grant protection or asylum, or by the operation of exclusionary provisions, such as those on safe third country, safe country of origin, or time limits. The criterion of 'good cause' for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account.[100]

The Refugee Convention fails to clarify whether the term 'penalties' refers only to criminal sanctions or also encompasses administrative sanctions. In *R v Secretary*

96 Hoffmann, 2016, p. 97.
97 Chetail, 2019, p. 178.
98 *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999] EWHC 765 (Admin), [2001] Q.B. 667, 29 July 1999 (England and Wales High Court, Administrative Court).
99 Goodwin-Gill, 2003, p. 193.
100 Ibid. p. 194.

of State for the Home Department, ex parte Makoyi,[101] the Queen's Bench Division of the High Court of England held that 'a penalty, on the face of it, would appear to involve a criminal sanction […] the word 'penalty' in Article 31 is not apt to cover detention such as exists in the present situation'. Hoffmann, based on Art. 33(4) of the 1969 Vienna Convention on the Law of Treaties[102] (hereinafter: 'VCLT'), the official French version of the convention text *('sanctions pénales'*), and the fact that Art. 31 was adopted on the initiative of France,[103] likewise argues that the term 'penalties' should be understood as 'criminal penalties', while Goodwin-Gill is of the view that the humanitarian object and purpose of the Refugee Convention should prevail when interpreting Art. 31(1) and a broader interpretation covering administrative penalties should be adopted.[104]

When interpreting the term 'penalties' under Art. 31(1) of the Refugee Convention, *Amuur v France*[105] marks a landmark decision of the ECtHR, where the court found that the French authorities had violated the applicants' right to liberty and security by holding four Somali nationals in the international zone of the Paris-Orly airport. The applicants arrived in France by airplane after fleeing Somalia due to fear for their lives there; however, the Minister of the Interior refused them the right to entry and the applicants were sent back to Somalia. The ECtHR established that holding third-country nationals in international zones involves restrictions upon liberty; however, the court also held that the fact that an asylum seeker can voluntarily leave the country where he or she wishes to take refuge cannot exclude a restriction on liberty. As for penalties, the ECtHR argued,

> in order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5 [of the ECHR], the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention

101 *R v. Secretary of State for the Home Department, ex parte Makoyi,* English High Court (Queen's Bench Division), No. CO/2372/91, 21 November 1991.

102 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, UNTS, vol. 1155, p. 331., Art. 33(4) '[…] the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.

103 Hoffmann, 2016, pp. 97–98.

104 Goodwin-Gill, 2003, pp. 194–195.

105 *Amuur v. France*, ECtHR, no. 19776/92, 25 June 1996.

> on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions. Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country. Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.[106]

In connection with penalties, the UN Human Rights Committee (hereinafter: 'HRC') found in *A v Australia*[107] that it was not arbitrary *per se* to detain individuals requesting asylum, nor was there a rule of customary international law which would render all such detention arbitrary. In this case, 'A' was a Cambodian national who arrived in Australia by boat in 1989 with his Vietnamese wife and their children. In the same year, the Australian Government declared people fleeing post-genocidal violence in Cambodia to be 'economic refugees', and the family was detained for more than four years in immigration detention. They had no contact with a lawyer for nearly a year and, as a result of transfers between detention centres in different Australian states, lost contact with the legal support they did obtain. In *A v Australia,* the HRC found that every decision to keep a person in detention should be open to periodic review so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors, detention may be considered arbitrary, even if entry was illegal.

Consequently, while administrative detention is permissible under Art. 31(2) of the Refugee Convention, in the end of the day, it is equivalent to a penal sanction whenever essential safeguards are lacking, such as judicial remedies or restrictions on excessive duration. Goodwin-Gill is of the view that the distinction between criminal and administrative sanctions seems irrelevant in this context.[108]

106 *Amuur v. France,* paras. 42–43.
107 *A v. Australia*, CCPR/C/59/D/560/1993, 30 April 1997 (UN Human Rights Committee).
108 Goodwin-Gill, 2003, pp. 195–196.

The term 'illegal entry or presence' has quite a straightforward meaning. Illegal entry may encompass the use of false or falsified documents (e.g., passports, visas), the use of other means to deceive authorities, or entry into a State's territory with the help of smugglers or human traffickers. Illegal presence may even result from a legal entry, e.g., after a permitted period of stay expires. The meaning of the term 'good cause' is also not problematic, since being a refugee with a well-founded fear of persecution is generally accepted as sufficient good cause.

5. The principle of non-refoulement

The ultimate cornerstone of the Refugee Convention is the principle of non-refoulement. Art. 33(1) of the Refugee Convention provides:

> 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.

According to contemporary interpretation of non-refoulement, Art. 33 of the Convention, to which no reservations are allowed under Art. 42[109] of the Convention and under VII (1) of its Protocol, embodies a *lex specialis* within the framework of international refugee law, distinguishing it from other human rights instruments.

Beyond a shadow of a doubt, the principle of non-refoulement qualifies as a landmark of international refugee law; moreover, it has such a considerable impact on the regime of the Refugee Convention that it can be labelled 'the cornerstone of international refugee law'.[110] As Gammeltoft-Hansen establishes, 'the non-refoulement obligation serves as the entry point for all subsequent rights that may be claimed under the 1951 Refugee Convention. Without this, little else matters'.[111] At the same time, it is important to note that in accordance with Art. 33(1) of the Refugee Convention, non-refoulement does not mean a right of the individual to be granted asylum in a particular State.[112] Indeed, it means that where a particular State is not prepared to grant asylum to a person in need of international protection, it must adopt a fair procedure and offer efficient guarantees that the person in need will not be removed or expelled to a country where his or her life, dignity, or freedom would

109 Refugee Convention, Art. 42(1) 'At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36–46 inclusive'.

110 San Remo Declaration, 2001.

111 Gammeltoft-Hansen, 2011, p. 44.

112 Weis, 1995, p. 342.

be endangered based on race, religion, nationality, membership of a particular social group, or political opinion.[113] The prohibition of refoulement applies to all authorities of a State Party to the Refugee Convention and all persons acting on behalf of a State Party. As for the standard of proof for the prohibition of refoulement, 'would be threatened' means a relatively high threshold, a 'reasonable degree of likelihood that the persecution will occur'.[114]

Non-refoulement differs from asylum from both conceptual and legal perspectives. While non-refoulement is a negative obligation of States, prohibiting them from sending any person back to a country of persecution, asylum is a positive one encompassing the admission to a new residence and long-lasting protection from the jurisdiction of another state. In other words, non-refoulement is an obligation of States, whereas granting asylum is a right they possess, which at the same time means that it is not a right of the individual.[115] As a consequence of this normative separation, the Refugee Convention, except in its Preamble,[116] does not include any provisions on asylum, and this kind of silence was intentional on the part of those drafting the Refugee Convention. The statement of the UK delegate to the Conference of Plenipotentiaries unambiguously clarified this stance; 'The right of asylum […] was only a right, belonging to the State, to grant or refuse asylum not a right belonging to the individual and entitling him to insist on its being extended to him'.[117] Nevertheless, there are unalienable interactions between the State obligation of non-refoulement and the State right to grant asylum: non-refoulement shall be taken into consideration when a State decides on granting or refusing asylum. From this viewpoint, the separation of non-refoulement and asylum seems quite hypothetical, as in practice, before removing an asylum seeker from a State's territory, the assessment of non-refoulement shall be conducted by the respecting State in all circumstances.

Under Art. 33(1) of the Refugee Convention, the material scope of the principle of non-refoulement is relatively broad. The wording 'in any manner whatsoever' means any act of sending back non-nationals when there is a real risk of their persecution. According to contemporary jurisprudence, the legal nature of that act is irrelevant, and it might be realised in deportation, extradition, maritime interception, non-admission at the border, transfer, rendition etc.[118] Therefore, the essence is not the act but its consequence, i.e., putting the dignity, life, or liberty of the person in danger. At the same time, refoulement is different from expulsion or deportation as these

113 Lauterpacht and Bethlehem, 2003, p. 76.

114 *R v. Secretary of State for the Home Office, ex parte Sivakumaran and Conjoined Appeals* (UNCHR Intervening) [1998] AC 958 (UK), para. 993.

115 Chetail, 2019, pp. 190–190.

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

117 UNGA 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting' (22 November 1951) UN Doc. A/CONF.2/SR/13, 13.

118 Chetail, 2019, p. 187; Lauterpacht and Bethlehem, 2003, p. 87.

terms cover a more formal process whereby a lawfully residing non-national may be required to leave a State or be forcibly removed.[119] The prohibition of refoulement encompasses not only the prohibition on being returned to the country of origin, but also to any country where the person's life or freedom would be threatened based on any of the five limitative grounds.

As for the personal scope, the protection against refoulement under Art. 33(1) applies to any person who meets the 'inclusion criteria' of the refugee definition provided under Art. 1(A)(2) of the Refugee Convention, and at the same time does not fall under the scope of the 'exclusion criteria' (see the comprehensive analysis above).[120] Additionally, the prohibition of refoulement applies not only to refugees but also to asylum seekers, which can be primarily explained by the declaratory nature of the refugee status. As the UNHCR established,

> every refugee is, initially, also an asylum seeker, therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because application might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.[121]

One can therefore conclude that the declaratory nature of refugee status is based on a rebuttable presumption that asylum seekers are assumed to have the equivalent status as refugees with regard to the benefits from non-refoulement protection for the duration of the asylum procedure unless proven otherwise. As Goodwin-Gill and McAdam remark, 'in principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx'.[122] Consequently, non-refoulement is of special significance for asylum seekers: as they may be potential refugees, they should not be returned or expelled while their asylum application is pending. Additionally, as Chetail observes,[123] the personal scope of non-refoulement under the Refugee Convention can be also supported by the principle of *effet utile*. According to the International Court of Justice, which took its stance on *effet utile* in the *Case Concerning the Territorial Dispute between Libya and Chad*, the principle of effectiveness is among the 'the fundamental principles of interpretation of treaties'.[124] *Effet utile* means that among the numerous methods of treaty interpretation the one

119 Goodwin-Gill and McAdam, 2021, p. 466.
120 UNHCR, 2007.
121 UNHCR 'Note on International Protection: Submitted by the High Commissioner' (31 August 1993) UN Doc. A/AC.96/815, para. 5.
122 Goodwin-Gill and McAdam, 2021, p. 469.
123 Chetail, 2019, p. 188.
124 *Case Concerning the Territorial Dispute, Libyan Arab Jamahiriya v. Chad*, (1994) ICJ Reports 6, para. 51.

which best gives the practical effect of the respective norm shall be applied, and it could not be realised if asylum seekers were excluded from the protection based on non-refoulement.

The asylum seeker's application *per se* triggers the application of non-refoulement as soon as the person is within the jurisdiction of the State Party to the Refugee Convention. The ECtHR pointed out in *Amuur v France* (see in detail above) and *Hirsi Jamaa and Others v Italy*[125] that non-refoulement protects from the moment when the person concerned intends to cross the border of another country, i.e., it does not only protect those already within the territory of a particular country from being removed. The *Hirsi Jamaa and Others v Italy* case involved Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. Returning them to Libya without examining their case exposed them to a risk of ill-treatment and amounted to a collective expulsion. As the HRC remarks, this jurisdiction is extended to 'anyone within the power of effective control of that State Party, even if not situated within the territory of the State Party'.[126] Therefore, non-refoulement has a so-called extraterritorial scope, meaning it is applicable on those territories that are not part of state territory in a legal sense but under the effective control of the respective State Party.[127] According to the UNHCR interpretation, where the drafters of the Refugee Convention intended a particular clause of the treaty to apply only to those within the territory of a State Party, they chose language which leaves no doubt as to their intention. Besides, the UNHCR established that any interpretation which tailors the geographical scope of Art. 33(1) as not applicable to measures whereby a State, outside its territory, drives back refugees to a country where they are threatened by persecution would be manifestly inconsistent with the humanitarian object and purpose of the Refugee Convention and its Protocol.

The first two paragraphs of the Preamble of the Refugee Convention read as follows:

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination', and 'considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.

The UNHCR underpins the overriding humanitarian object and purpose of the Refugee Convention based on a comprehensive review of the *travaux préparatoires*.

125 *Hirsi Jamaa et al v. Italy,* ECtHR, no. 27765/09, 23 February 2012.

126 UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 10.

127 De Boer, 2015, pp.118–134; Goodwin-Gill, 2011, pp. 443–457; Trevisanut, 2014, pp. 661–675.

The UNHCR, in accordance with Art. 32 of the VCLT[128] on the supplementary nature of historical interpretation, is of the view that turning to the drafting history of Art. 33(1) is not necessary due to the unambiguous wording of this provision; however, *travaux préparatoires* might be of interest in explaining the content and scope of non-refoulement.[129]

Even though non-refoulement has a relatively broad scope of application, it is not an absolute term under the Refugee Convention. During the drafting of the Refugee Convention, the 1951 Conference of Plenipotentiaries raised concerns related to the absoluteness of the prohibition of non-refoulement.[130] The final text of Art. 33(2) therefore provides that,

> the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

This provision encompasses two exceptions that reflect a state-centred approach: the first is connected with the public security of the host country, while the second protects the host country specifically against crime. Nonetheless, these provisions should be interpreted restrictively and only be applied to highly exceptional circumstances. The wording of Art. 33(2) clearly implies this restrictive approach when it comes to the second exception defending the host country specifically against crime: (i) 'convicted by a final judgment' suggests effective remedies were exhausted; (ii) 'for a particularly serious crime' suggests that international crimes, such as crimes against humanity, and crimes against the state, such as terrorism, should be taken into consideration; and (iii) 'constitutes a danger to the community of that country' suggests that due to the risk of subsequent offence the person represents a danger to the host country.[131] However, Art. 33(2) of the Refugee Convention does not affect the host State's non-refoulement obligations under international human rights law, which are absolute and allow no such exceptions.[132]

Although a return to the State where persecution has occurred is prohibited under Art. 33(1) of the Refugee Convention, a return to any other State is not, which has led to restrictions applied by host States such as the 'first country of arrival rule' and the

128 VCLT, Art. 32:
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

129 UNHCR, 2007.

130 Goodwin-Gill and McAdam, 2021, p. 468.

131 Chetail, 2019, pp. 189–190.

132 Lauterpacht and Bethlehem, 2003, pp. 159, 166, 179.

'safe third country rule'. This approach often entails 'chains of deportation', leading to refugees finding themselves in the first State where they arrived after having fled their homeland.[133] Additionally, some States practice 'extraterritorial refoulement' and intercept refugees on the high seas to keep them outside territorial waters. In *Sale v Haitian Centers Council,* the US Supreme Court[134] found that intercepting Haitians on the high seas and returning them to their home State is lawful; however, the Inter-American Commission on Human Rights (hereinafter: IACommHR) in the same case (*Haitian Interdiction Case*)[135] declared it a breach of Art. 33 of the Refugee Convention. The *Sale v Haitian Centers Council* is a case in which the US Supreme Court ruled that the President's executive order that all aliens intercepted on the high seas could be repatriated was not limited by the Immigration and Nationality Act of 1952 or Art. 33 of the Refugee Convention. In the same vein, Italy and Libya signed a bilateral agreement in 2012 to return refugees (though the ECtHR declared this unlawful in *Hirsi Jamaa and Others v Italy* [see in detail above]). Australia has also pursued a legally dubious practice for a number of years concerning 'offshore processing centres', where asylum seekers have not only been returned on the high seas so they cannot enter state territory, but their asylum applications have also been assessed in these processing centres, and even if they are recognised as refugees, they have been legally prevented from settling in Australia.[136]

6. Concluding remarks

This chapter has focused on the framework of interpretation of the Refugee Convention with special regard to the definition of the term 'refugee', the nature of refugee status, including the benefit of immunities from penalties for illegal entry to or presence in a country, and the principle of non-refoulement. In order to provide a contemporary interpretation of the Refugee Convention, this chapter has paid special attention to the subsequent development of international law, construing and applying the core concepts of the Refugee Convention within the normative context prevailing at the time of its interpretation, i.e., in light of the human rights treaties (UDHR, ECHR, ICERD, ICCPR etc.) adopted since its entry into force. In addition, as those drafting the Refugee Convention established neither a treaty body nor a human rights monitoring mechanism to provide an authentic interpretation for the instrument, due consideration has been devoted to respecting international

133 Hernández, 2019, pp. 431–432.
134 *Sale v. Haitians Centers Council* (1993) 509 US 155.
135 *The Haitian Centre for Human Rights et al v. US* 10.675 IACommHR No 51/96 OEA/Ser.L/V/II.95 doc.7 Rev [1997] 550, paras. 156–158.
136 Gammeltoft-Hansen, 2011, pp. 100–157.

and national judicial and committee case law, such as that of the ECtHR, IACtHR, HRC, IACommHR, the UK House of Lords and Supreme Court, and the US Supreme Court.

The analysis of the definition of the term 'refugee' demonstrates that international protection was tailored to a very limited category of refugees, 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 Art. 1(A)(2) (such as armed conflicts, famine, or extreme poverty). It is worth mentioning as well 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. Two of the refugee rights have been analysed in this chapter in detail: the benefit of immunities from penalties for illegal entry to or presence in a Contracting State and the guarantee that foreign nationals will not be sent back based on the principle of non-refoulement. As far as the assessment of illegal entry or presence is concerned, the prohibition of criminal sanctions is not an absolute one, and applicants need to present themselves without delay to the authorities, as well as needing to show a good cause for their illegal entry or presence. Non-refoulement, the centrepiece of international refugee law, has proved to be limited in scope under the Refugee Convention; nonetheless, the ever-evolving doctrine of international human rights law has broadened its meaning to an absolute one, and it has grown beyond Art. 33(2) of the Convention.

Based on the concise analysis outlined in this chapter, one may conclude that while the Refugee Convention has many textual limitations, it has been applied as an ultimate tool in protecting those who really are in need, and despite its outdated concept, judicial interpretation finds a way to maintain it as a living instrument.

References

Ádány, T. V. (2016) 'Nemzetközi jogi szempontok a migrációs válság kezeléséhez', *Iustum Aequum Salutare,* 12(2), pp. 237–249.

Beck, R. J. (1999) 'Britain and the 1933 Refugee Convention: National or State Sovereignty?', *International Journal of Refugee Law,* 11(4), pp. 597–624; https://doi.org/10.1093/ijrl/11.4.597.

Bem, K. (2004) 'The Coming of a "Blank Cheque" – Europe, the 1951 Convention, and the 1967 Protocol', *International Journal of Refugee Law,* 16(4), pp. 609–627; https://doi.org/10.1093/ijrl/16.4.609.

Bhabha, J. (2002) 'International Gatekeepers? The Tension between Asylum Advocacy and Human Rights', *Harvard Human Rights Journal,* 15(1), pp. 151–181.

Chetail, V. (2014) 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in Rubio-Marín, R. (ed.) *Human Rights and Immigration,* First edn. Oxford: Oxford University Press, pp. 19–72; https://doi.org/10.1093/acprof:oso/9780198701170.003.0002.

Chetail, V. (2019) *International Migration Law*, Firs edn. Oxford: Oxford University Press https://doi.org/10.1093/law/9780199668267.001.0001.

De Boer, T. (2015) 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection', *Journal of Refugee Studies,* 28(1), pp. 118–134; https://doi.org/10.1093/jrs/feu024.

Edwards, A. (2003) 'Age and Gender Dimensions in International Refugee Law' in Feller E., Türk, V., Nicholson, F. (eds.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. First edn. Cambridge: Cambridge University Press, pp. 46–80; https://doi.org/10.1017/CBO9780511493973.006.

Fitzpatrick, J. (1996) 'Revitalizing the 1951 Refugee Convention', *Harvard Human Rights Journal,* 9(1), pp. 229–253.

Gammeltoft-Hansen, T. (2011) *Access to Asylum: International Refugee Law and the Globalisation of Migration Control,* First edn. Cambridge: Cambridge University Press https://doi.org/10.1017/CBO9780511763403.006.

Goodwin-Gill, G. S. (2003) 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Feller, E., Türk, V., Nicholson, F. (eds.) *Refugee Protection in International Law,* First edn. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511493973.011.

Goodwin-Gill, G. S., McAdam, J. (2021) *The Refugee in International Law,* Fourth edn. Oxford: Oxford University Press, https://doi.org/10.1093/law/9780198808565.001.0001.

Hathaway, J. C. (2021) *The Rights of Refugees under International Law*, Second edn. Cambridge: Cambridge University Press, https://doi.org/10.1017/9781108863537.004.

Helton, A. C. (1994) 'Forced Migration: A Need for New Approaches by the International Community', *Fordham International Law Journal,* 18(1), pp. 1623–1636.

Hernández, G. (2019) *International Law*, First edn. Oxford: Oxford University Press, https://doi.org/10.1093/he/9780192848260.001.0001.

Hoffmann, T. (2016) 'Can Asylum-Seekers Be Penalized for Illegal Entry to the Country? Some Comments on the Compatibility of the Hungarian Regulation with Article 31 of the 1951 Geneva Convention' in Rixer, Á. (ed.) *Migrants and Refugees in Hungary. A Legal Perspective,* Budapest: Károli Gáspár University of the Reformed Church in Hungary, pp. 95–103.

Jager, G. (2001) 'On the History of the International Protection of Refugees', *International Review of the Red Cross,* 83(843), pp. 727–737; https://doi.org/10.1017/S1560775500119285.

Lambert, H. (2016) *International Refugee Law,* First edn. New York: Routledge.

Lauterpacht, E., Bethlehem, D. (2003) 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller, E., Türk, F., Nicholson, F. (eds.) *Refugee Protection in International Law: The UNHCR's Global Consultations on International Protection,* Cambridge – New York – Geneva: Cambridge University Press, pp. 81–177, [Online]. Available at: https://www.unhcr.org/publications/refugee-protection-international-law (Accessed: 13 January 2024); https://doi.org/10.1017/CBO9780511493973.008.

League of Nations (1933) Convention of 28 October 1933 relating to the International Status of Refugees, Refworld. Global Law&Policy Database, Treaty Series, 159(3663), [Online]. Available at: https://www.refworld.org/legal/agreements/lon/1933/en/17584 (Accessed: 20 March 2024).

Molnár, T. (2016) 'The Right to Asylum in International Law' in Rixer, Á. (ed.) *Migrants and Refugees in Hungary. A Legal Perspective,* Budapest: Károli Gáspár University of the Reformed Church in Hungary, pp. 37–53.

Molnár, T. (2016) 'The Principle of Non-Refoulement under International Law: Its Inception and Evolution in a Nutshell', *Corvinus Journal of International Affairs,* 1(1), pp. 51–61.

Nagy, B. (2014) 'A menekültjog' in Kende, T., Nagy, B., Sonnevend, P., Valki, L. (eds.) *Nemzetközi jog,* Budapest: Wolters Kluwer CompLex Kiadó.

Shacknove, A. E. (2016) 'Who is a Refugee?' in Lambert, H. (ed.) *International Refugee Law.* First edn. New York: Routledge, pp. 163–173; https://doi.org/10.4324/9781315092478-7.

Trevisanut, S. (2014) 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea', *Leiden Journal of International Law,* 27(3), pp. 661–675; https://doi.org/10.1017/S0922156514000259.

UNHCR (2007) Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, UN High Commissioner for Refugees, 26 January 2007. [Online]. Available at: https://www.refworld.org/docid/45f17a1a4.html (Accessed: 3 October 2023).

UNHCR (2011) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN High Commissioner for Refugees, UN Doc. HCR/1P/4/ENG/REV.3, p. 38.

UNHCR (2019) Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN High Commissioner for Refugees, UN Doc. HCR/1P/4/ENG/REV.4.

UNHCR (2022) UNHCR's Global Trends Report: 100 Million Displaced, UN High Commissioner for Refugees, 16 June 2022. [Online]. Available at: https://www.youtube.com/watch?v=vl8gYm4nNDQ (Accessed: 25 January 2024).

Zimmermann, A., Mahler, C. (2011) 'Article 1A para 2 (Definition of the Term "Refugee")', *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary,* First edn. Oxford: Oxford University Press, pp. 281–465; https://doi.org/10.1093/actrade/9780199542512.001.0001.

Zolberg, A. R., Suhrke, A., Aguayo, S. (1989) *Escape from Violence. Conflict and the Refugee Crisis in the Developing World.* Oxford: Oxford University Press.

Weis, P. (1990) *The Refugee Convention. The Travaux Préparatoires with a Commentary* [Online]. Available at: https://www.unhcr.org/sites/default/files/legacy-pdf/4ca34be29.pdf (Accessed: 13 August 2023).

Weis, P. (1995) *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary,* First edn. Cambridge: Cambridge University Press.

San Remo Declaration on the Principle of Non-Refoulement, September 2001. [Online]. Available at: https://perma.cc/JH4T-JDQD (Accessed: 20 August 2023).