

# The 1951 United Nations Convention Relating to the Status of Refugees

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## ABSTRACT

This chapter seeks to provide the readers with a brief overview of the key elements of the Refugee Convention. To this end, the definition of “refugee” will be analysed first of all, where the so-called inclusion, exclusion and cessation criteria will be scrutinised with due consideration. Within the framework of assessment of the inclusion element, the meaning of ‘being outside the country of his nationality’, well-founded fear, persecution, and of the five limitative grounds as motives of persecution will be highlighted. Secondly, refugee rights will be examined within a comparison of refugee rights and human rights. For the third pillar of this chapter, the principle of non-refoulement will be addressed as a cornerstone of international refugee law. Concluding remarks will also be added in closing this chapter.

## KEYWORDS

asylum, non-refoulement, refugee, UNHCR, Refugee Convention

## 1. The Refugee Convention as the Fundamentum of International Refugee Law: Old Rules, New Challenges?

The 1951 Convention relating to the Status of Refugees<sup>1</sup> (hereinafter referred to as the Refugee Convention)<sup>2</sup> and its 1967 Protocol relating to the Status of Refugees<sup>3</sup> (hereinafter referred to as Protocol) are fundamental components of international refugee law. The Refugee Convention was adopted at a diplomatic conference organised by the United Nations (hereinafter referred to as the UN) in Geneva, Switzerland, on 28th July 1951. Since then it has been subject to only one amendment in the form of the Protocol. The temporal and territorial scope of the Refugee Convention were initially limited focusing on ‘events occurring before 1st January 1951’ which were understood

1 United Nations, 1951.

2 For comprehensive analysis see: Zimmermann and Mahler, 2011.

3 United Nations, 1967, p. 267.

Nóra Béres (2026) ‘The 1951 United Nations Convention Relating to the Status of Refugees’ in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 193–220. [https://doi.org/10.71009/2026.pknb.uphr\\_5](https://doi.org/10.71009/2026.pknb.uphr_5)



to mean ‘events occurring in Europe’ prior to that date. The Protocol eliminated these temporal and territorial limitations, and has expanded the *ratione temporis* and *ratione loci* of the Refugee Convention, providing universal protection for any person worldwide.<sup>4</sup> Accordingly, the more than 70-year-old text of the Refugee Convention reflects the approach of the post-WWII era, and judicial interpretation plays a crucial role in adjusting the treaty to the challenges of modern times.

The Refugee Convention, *inter alia*, defines the term “refugee”, outlines the standards of treatment of refugee protection, and sets up the framework of the United Nations High Commissioner for Refugees (hereinafter: UNHCR). As of the time being, there are 146 States Parties<sup>5</sup> to the Refugee Convention, and 147 States Parties to the Protocol,<sup>6</sup> meaning that both enjoy an almost universal acceptance. Additionally, the majority of rules provided under the Refugee Convention are of customary origin, binding universally on any State irrespective of its treaty status.

Despite the Refugee Convention being of great importance and an inevitable point of reference in handling contemporary global migration challenges, there has been a notable rise in a perspective that deems it as outdated legal instrument. Agreeing with Fitzpatrick, this can be attributed to three main reasons. Firstly, the Refugee Convention’s approach putting emphasis on persecution as a central tenet of refugee definition appears to be both anachronistic and conceptually inadequate in the context of ongoing forced migratory patterns, which are predominantly driven by violence but lack a clearly defined persecutive ground.<sup>7</sup> For instance, those compelled to seek refuge due to climate change, rising sea levels, or desertification are excluded from refugee protection on the basis that they lack a persecutory ground. Secondly, policy analysts have pointed out that the significant increase in the number of forcibly displaced persons has resulted in costly procedures, which are burdensome for States both in economic and social terms.<sup>8</sup> Moreover, from a pragmatic point of view, there has been a noticeable decline in support for the Refugee Convention among traditional asylum-granting States, who at times have expressed the desire for a new regime.<sup>9</sup>

Actually, the Refugee Convention was not meant to deal with the mass migration flows that we face these days. Rather, it was drafted with the intention of managing a foreseeable number of asylum seekers. Nevertheless, the Refugee Convention was designed to guarantee safeguards to individual political asylum seekers, not large-scale influxes. Consequently, the Refugee Convention’s capacity to provide protection for various categories of individuals, including internally displaced persons (hereinafter referred to as IDPs) and those fleeing from their countries of nationality without facing persecution or due to other drivers not specified under the Refugee

4 UNHCR, n.d.

5 United Nations, 1951, Chapter V. Refugees and Stateless Persons, 2.

6 *Ibid.*, Refugees and Stateless Persons, 5.

7 Zolberg et al., 1989, pp. 1–394.

8 Fitzpatrick, 1996, pp. 230–231.

9 Helton, 1994, p. 1623.

Convention, such as armed conflicts, famine, and extreme poverty, is restricted. Even though it has faced harsh criticism, the Refugee Convention remains in force and millions of asylum claims are settled in accordance with its provisions on an annual basis.<sup>10</sup> However, this concept of the Refugee Convention, as described above, is the main reason why this treaty regime does not appear to work when facing modern day challenges.

## 2. Historical Context and Current Relevance of the Refugee Convention

Refugee issues first grabbed the attention of the international community at the turn of the 20th century.<sup>11</sup> Due to the events surrounding WWI, approximately two million Armenians, Russians and asylum seekers from other origins were compelled to depart from their home countries between 1917 and 1926.<sup>12</sup> In the aftermath of these events, the international community began to assume responsibility for the protection and assistance of refugees driven away by humanitarian reasons, and the first institutional framework was provided under the auspices of the newly established international organisation, the League of Nations, where numerous treaties were adopted that are no longer in effect.

As has already been highlighted above, the effective UN treaty regime of international refugee law is comprised of two key legal documents, the Refugee Convention and its Protocol which have three essential elements: the refugee definition, the content and scope of refugee status, and the prohibition of expulsion or return (“non-refoulement”). As Chetail describes precisely, these elements truly reflect the “existential dilemma” of refugee law, creating a fragile balance between the competence of States controlling the access of aliens to their territory and the protection of the most vulnerable fleeing from gross human rights violations.<sup>13</sup>

The Refugee Convention was adopted directly after the end of WWII, which represented a significant accomplishment of the UN’s early efforts to address the war-generated refugee crisis. The drafting of the Refugee Convention was a direct response to the horrifying events that took place during and after WWII by the Nazis and Communists in Europe.<sup>14</sup> This kind of speedy reaction of the UN-led international community is not very common: for instance, the International Convention on the Elimination of All Forms of Racial Discrimination was only adopted in 1965, and

10 Béres, 2024, pp. 84–85.

11 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. About 1 and 2 million refugees left Russia, then the Soviet Union, for European countries of Asia Minor, Central Asia and East Asia between 1918 and 1922. See: Jager, 2001, p. 727.

12 Hathaway, 2021, p. 19.

13 Chetail, 2019, p. 169; Béres, 2024, p. 87.

14 Hernández, 2019, p. 427.

the International Covenant on Civil and Political Rights as well as the International Covenant of Economic, Social and Cultural Rights in 1966. This also means that at the time of its adoption, the Refugee Convention would have had no context with other UN human rights covenants or conventions.

In consideration of the challenges experienced in the post-WWII era, particularly the fact that the majority of refugees were of European origin due to the Nazi mass extermination and the Communist regimes in Central and Eastern Europe, the Refugee Convention was established with a deadline that 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 1st January 1951.<sup>15</sup> However, following the adoption of the Refugee Convention, refugee problems not related to WWII continued to occur in various regions worldwide, leading to endeavours to extend the full application of the Refugee Convention to all refugee situations. Consequently, the Protocol, removing the geographical and temporal limitations, was adopted sixteen years after the original Refugee Convention.<sup>16</sup> The Protocol thus endowed the Refugee Convention with universal scope. Since that time, no further modifications have been adopted relating to the Refugee Convention or its Protocol, though.

### 3. The Definition of a Refugee in Accordance with the Refugee Convention

The term “refugee” is an accurately defined category under the Refugee Convention, and even if international refugee law is solidarity-driven on the first place, not every vulnerable person fleeing from life-threatening circumstances will be legally recognised as a refugee. The complexity of the definition of a refugee basically stems from the limitations attached to it, which aim to find a delicate balance between States’ obligations derived from the principle of solidarity, and States’ concerns regarding unmanageable refugee influxes.<sup>17</sup> Therefore, defining who is a refugee serves a dual purpose: firstly, it is a means of recognising those individuals who are in need of international protection from persecution; and secondly, it enables the determination of the respective obligations incumbent upon States under international law.<sup>18</sup> In general terms, the Refugee Convention rather puts an emphasis on the latter purpose: most of the time, States’ obligations are in sharp focus while individual rights are left in the background. The historical context of the Refugee Convention offers an obvious explanation to this approach. During the drafting and adoption of the Refugee Convention, no other UN human rights treaties existed, only the UN General Assembly

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

16 Weis, 1990, p. 1.

17 Béres, 2024, p. 88.

18 Chetail, 2019, p. 169.

resolution on the Universal Declaration of Human Rights<sup>19</sup> (hereinafter referred to as the UDHR), which was adopted in 1948. Lacking the human-rights-centric approach that fittingly describes other UN covenants and conventions, the Refugee Convention does not guarantee unalienable and unconditional rights for any human being, and it does not provide international protection for any victim of irregular forced migration. The difference between human rights and refugee rights is clearly demonstrated here. Whilst human rights apply to any human being due to their dignity, refugee rights depend on the formal recognition of the refugee status.<sup>20</sup>

Art. 1(A)(2) of the Refugee Convention provides,

‘[...] for the purposes of the present Convention, the term “refugee” shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’.

The definition complies with the human rights approach that appears under Art. 14 of the 1948 UDHR guaranteeing the right to seek and enjoy asylum from persecution, which reads as follows,<sup>21</sup>

- ‘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’.

According to the Refugee Convention, refugee status is declaratory in nature, which means that State authorities do not constitute this status, they merely recognise it. According to the UNHCR,

‘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’.<sup>22</sup>

19 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.’

20 Chetail, 2014, pp. 19–72; Béres, 2024, p. 88.

21 Ádány, 2016, p. 239.

22 UNHCR, 2011, p. 38

In accordance with this approach, a rebuttable presumption may be set up related to the refugee status and principle of non-refoulement: asylum seekers are deemed to be potential refugees as far as the benefits arising from non-refoulement are concerned until it is proven that they are not entitled to refugee status.<sup>23</sup> 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’.<sup>24</sup> 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*<sup>25</sup> also added some valuable remarks on the declaratory nature of the refugee status, emphasising that the language of “recognition” suggests a process whereby an asylum seeker, 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.<sup>26</sup>

Although there is no agreed and detailed procedure to follow for States under the Refugee Convention in order to establish who is a refugee, the UNHCR has issued a ‘Handbook of Guidelines’,<sup>27</sup> a soft law instrument, to assist domestic asylum authorities in applying the refugee criteria in practice. This ‘Handbook of Guidelines’ was published in 1979 for the first time and re-published in 1992 and in 2019.

Nonetheless, the refugee definition is a very limited legal category from several other perspectives. From the outset, the refugee protection regime was designed to be restrictive and to partially reflect the compromise between State sovereignty over the admission of aliens and State obligation of the protection of victims of grave human rights violations.<sup>28</sup> At the Conference of Plenipotentiaries<sup>29</sup> of the Refugee Convention, State representatives, as a consequence of their general fear of unmanageable refugee flows, insisted on not signing a “blank cheque” and assuming unlimited and indefinite commitments in terms of all refugees for the future.<sup>30</sup> Thus, the definition of refugee was tailored to individual political refugees, not to the mass influx of migrants.

As has been already mentioned above, the definition of refugee is inherently limited in scope and requires three criteria to be met, namely inclusion, exclusion and cessation criteria.<sup>31</sup>

23 Béres, 2024, p. 89.

24 Goodwin-Gill and McAdam, 2021, p. 469.

25 *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).

26 In this case, the applicant was an Afghan national of the Hazara ethnic group fearing that the Taliban would kill him upon returning Afghanistan because of his ethnicity.

27 UNHCR, 2011.

28 Bhabha, 2002, p. 176.

29 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 35<sup>th</sup> meeting, held at the Palais des Nations, Geneva, on Wednesday, 25 July 1951.

30 Bem, 2004, p. 609.

31 For comprehensive analysis, see in detail Goodwin-Gill and McAdam, 2021, pp. 63–197; Zimmermann and Mahler, 2011, pp. 281–465; Chetail, 2019, pp. 170–171.

### 3.1. Key Elements of the Definition of Refugee: The Inclusion Criterion

The inclusion criterion is enshrined under Art. 1(A)(2) of the Refugee Convention, encompassing four cumulative elements of the refugee status. These elements are as follows: (I) the refugee is outside his 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 of 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 therefrom is in connection with at least one of five limitative grounds such as race, religion, nationality, membership of particular social group or political opinion. These elements may also be considered as positive preconditions of the refugee status which reflect a notable difference between refugee rights and human rights. As Béres sums up,

‘although all refugees have human rights as anyone else and shall be additionally protected as an especially vulnerable group with considerate care on international as well as on national level, rights under the Refugee Convention, 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.’<sup>32</sup>

‘The general purpose of the convention is to enable the person who no longer has the benefit of protection against persecution for a conventional reason in his own country to turn to protection from the international community.’<sup>33</sup>

#### 3.1.1. Being Outside the Country of His Nationality

In the criterion of ‘being outside the country of his nationality’, the term “nationality” is to be understood as referring to the concept of citizenship, since in the majority of cases, refugees retain the nationality of the country from which they originate.<sup>34</sup> One should bear in mind that in order to qualify for international protection, an applicant’s well-founded fear of persecution must be connected with their country of nationality. In cases where the asylum seeker’s well-founded fear of persecution is related to some other country, he can avail himself of the protection of his country

32 Béres, 2024, p. 91; see also: Shacknove, 2016, p. 164.

33 *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489, 497 (Lord Hope of Craighead). In this case, the applicant was a Slovak national and a member of the Roma minority who, along with his family, was the target of racially motivated ill treatment by skinheads. After fleeing Slovakia, he claimed for asylum in the UK, where his application was dismissed unanimously by the court, since he was able to acquire protection from his country of origin against the non-state actors.

34 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.*’

of nationality, and therefore will not need recourse to international protection.<sup>35</sup> This works as a *stricto sensu* rule with no exceptions, meaning that applicants must be outside their country of origin to qualify for international protection. Consequently, the territorial jurisdiction of their home country precludes the possibility of seeking international protection. IDPs constitute a particularly salient case within the field of forced migration, given that they are also victims of this phenomenon and in need of protection. However, they do not fall under the scope of the Refugee Convention due to this *stricto sensu* rule, which is considered one of the most remarkable limitations set up by the Refugee Convention. This limitation is of particular concern in light of the growing mass of IDPs worldwide these days.<sup>36</sup>

Under Art. 1(A)(2), a refugee is also ‘unable or, owing to such fear, is unwilling to avail himself of the protection of that country’. On the one hand, inability represents the objective side of this element referring to circumstances that grow beyond the asylum seekers. E.g., insurgencies, grave disturbance, and (civil) wars may lead to a general situation in a country that prevents nationals from availing protection. These circumstances may also render State protection ineffective or simply denied, resulting in the unavailability of services that are normally available to co-nationals. This, in turn, may intensify an applicant’s fear of persecution. On the other hand, unwillingness is also related to asylum seekers who refuse to accept the protection provided by their home country. “Unwillingness” is more subjective than “inability”, however it is counterbalanced to some extent by the qualification of ‘owing to such fear’. The UNHCR highlights the connection between unwillingness and being outside someone’s country of origin as ‘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”’.<sup>37</sup>

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’.<sup>38</sup> 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’. Consequently, in the case of stateless persons, the availability of protection will not arise at all. It is also true that not all stateless persons will be refugees, however, once a stateless person

35 UNHCR, 2019, pp. 25–26.

36 According to UNHCR’s Refugee Data Finder, as of end-2023 as a result of persecution, conflict, violence, human rights violations or events seriously disturbing public order, there were 68.3 million IDPs worldwide.

37 UNHCR Handbook 2019, p. 27.

38 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.

is recognised as a refugee relating the country of his former habitual residence, any further change in his or her country of habitual residence will not affect his or her refugee status.<sup>39</sup>

### 3.1.2. *Well-Founded Fear*

The well-founded fear of persecution is an essential element of the definition of refugee. However, fear is an inherently subjective sensation and a state of mind, thus the definition of refugee adds a subjective element relating to the person applying for asylum. Subsequently, the evaluation of the applicant's statements is more relevant than a judgment on the ongoing situation in the asylum seeker's country of nationality. The evaluation of fear is inseparable from the assessment of the applicants' personality, their psychological reactions, credibility, family background, their membership in a racial, religious, national, social, or political group, as well as their own interpretation of their situation, and their personal experiences.<sup>40</sup> Counterbalancing the subjectiveness of fear, the drafters of the Refugee Convention added the qualification of 'well-founded' to it. 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. "Well-founded fear" therefore contains a subjective and an objective element, and in determining whether "well-founded fear" exists, both elements should be taken into consideration'.<sup>41</sup>

### 3.1.3. *Persecution*

In the context of universal treaty law, a general definition of "persecution" is still missing, as historical efforts to establish such a definition have met with only moderate success. In line with Article 33 of the Refugee Convention, the threat of harm to life or freedom, on the basis of factors such as race, religion, nationality, membership of a specific social group, or political opinions will certainly result in persecution. Nevertheless, other serious violations of human rights can also be considered as persecution. The New Zealand Refugee Status Appeals Authority established in Refugee Appeal No. 71427/99<sup>42</sup> that the core norms of international human rights law are relied on to define the forms of serious harm within the scope of persecution. In this case, the applicant had divorced her abusive husband and had reconnected with her child, whom she had previously adopted without his knowledge. However, if she had been returned to Iran, she would have been at risk of death or imprisonment. As this case demonstrates, the national refugee authority applied a human rights approach in determining whether persecution had occurred. In determining the existence of

39 UNHCR, 2019, p. 27.

40 Béres, 2024, p. 93.

41 UNHCR, 2019, p. 19.

42 *Refugee Appeal No. 71427/99*, 16 August 2000 (New Zealand Refugee Status Appeals Authority).

persecution, the individual circumstances of each case are of special importance, given that ‘the subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned’.<sup>43</sup> In *Korablina v. Immigration and Naturalisation Services*,<sup>44</sup> where the applicant, then a fifty-five-year old native of Russia and 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 less intensive persecutive incidents (e.g., discrimination in different forms, specific instances of violence and harassment toward an individual and his or her family members) altogether, as cumulative grounds, these could also lead to persecution.

### 3.1.4. Five Limitative Grounds as Motives of Persecution

The definition of refugee exhaustively enumerates five limitative grounds that may count as motives of persecution: race, religion, nationality, membership in a particular social group, and political opinion.

Race should be interpreted in accordance with Art. 1 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination<sup>45</sup> (hereinafter referred to as ICERD), also adopted by the auspices of the UN. The definition of “race”, in its widest meaning, additionally covers colour, descent, and national or ethnic origin. The UNHCR notes that the mere fact of being a member of a particular racial group is not enough to substantiate a claim to refugee status, however, at the same time there may be cases where, due to the circumstances affecting the group, such membership provides in itself sufficient grounds to fear persecution.<sup>46</sup> Discrimination on the grounds of race has been subject to world-wide condemnation over the years, and today it can be identified as one of the most serious form of human rights violations.<sup>47</sup>

So as to establish a definition of the term “religion”, it is recommended that the UDHR and the International Covenant on Civil and Political Rights<sup>48</sup> (hereinafter: ICCPR) be regarded as points of departure. Art. 18 of the UDHR and Art. 18 of the ICCPR stipulate the right to freedom of thought, conscience and religion, which encompasses the liberty of the individual to adopt different beliefs, to manifest their religion in public spaces, and to engage in observance, practice, teaching, and worship. In this regard, it is important to note that persecution on religious grounds may manifest itself in various forms. For instance, it can be directed against a

43 UNHCR, 2019, p. 21.

44 *Korablina v. Immigration and Naturalization Services*, No. 97-70361, 158 F 3d, 23 October 1998 (US Court of Appeals for the 9<sup>th</sup> Circuit).

45 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS, vol. 660, p. 195.

46 UNHCR, 2019, p. 23.

47 Béres, 2024, p. 95.

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

different conviction or based on faith and directed against adherents of the same faith due to divisions within the religious group. Alternatively, it might be motivated by an individual's refusal to recognise certain tenets of the same religion.<sup>49</sup> The UNHCR asserts that this concept may also manifest itself as the prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or of serious measures of discrimination imposed on individuals on the basis of their religious practice or affiliation with a specific religious community.<sup>50</sup>

The term "nationality" as defined in the context of the Refugee Convention signifies more than mere citizenship, rather it encompasses the civil status of nationals.<sup>51</sup> The term "nationality" is understood to denote membership of a specific ethnic or linguistic group. In certain instances, it may coincide with the concept of "race". A typical scenario of persecution on the grounds of nationality occurs when two or more ethnic or linguistic groups coexist within the boundaries of a State, leading to the occurrence of conflicts, and the potential for persecution or the threat of persecution arises. In such cases, the distinction between persecution on the grounds of nationality or political opinion becomes particularly challenging, especially when a political movement is closely associated with a specific nationality. Furthermore, it should be noted that nationality-related persecution may manifest itself in a variety of forms. For instance, an occupying State may target nationals residing within the occupied State's territory. Additionally, such persecution may be inflicted upon stateless individuals, in instances where their access to nationality is legally guaranteed, yet still denied to them. Whilst it is true that the majority of cases of persecution on the grounds of nationality concern individuals who belong to a national minority, there have also been numerous incidents on various continents where a person belonging to a majority group has feared persecution by a dominant minority.<sup>52</sup>

The term of 'membership in a particular social group' is potentially the broadest category among the persecutive grounds under the refugee definition with the aim to provide conventional protection for those who are otherwise not covered by the other four drivers. Subsequently, this category is suitable for international and national courts to fill in *lacunae* when other grounds have proven to be inapplicable. For instance, in *González et al ('Cotton Field') v. Mexico*<sup>53</sup> the Inter-American Court of Human Rights (hereinafter referred to as IACtHR) established that persecution on the grounds of gender<sup>54</sup> and persecution on the grounds of membership in a particular social group had both occurred in combination. In this case, three young women disappeared after leaving work, and later, their bodies were found in the cotton fields

49 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.

50 UNHCR, 2019, p. 23.

51 Hernández, 2019, p. 428.

52 UNHCR, 2019, p. 24.

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

54 Edwards, 2003, pp. 51–57.

of their hometown. The women's bodies displayed evidence of intense physical and psychological torture, mutilation, and sexual abuse. During the investigations, law enforcement officials did not provide the young women justice, and they were unwilling to help the victims' mothers in finding out what had happened. Moreover, the families of the deceased received continuous threats from local officials to withdraw their complaints. The mothers' testimonies, work of advocates and data delivered by civil society organisations, illustrating a systematic pattern of violence against women and widespread discrimination, was presented to the IACtHR.<sup>55</sup> International courts also confirmed that sexual orientation and gender identity could fall under the scope of 'membership in a particular social group'. For example, *X, Y, Z v. Minister voor Immigratie en Asiel*<sup>56</sup> concerned three asylum seekers in the Netherlands from Senegal, Sierra Leone, and Uganda. In each country of origin, homosexuality is a crime that is punishable by life or long-term imprisonment. Despite that in none of the cases could the applicant demonstrate that persecution took place, or that he was threatened with persecution on the grounds of his 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 would had been returned home. The European Court of Human Rights (hereinafter referred to as the ECtHR) arrived at a similar conclusion in *OM v. Hungary*<sup>57</sup> 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 could fall into the term of 'membership in a particular social group'. Additionally, when clarifying the definition of 'membership in a particular social group', *Canada (Attorney General) v. Ward*<sup>58</sup> is also a landmark case. The defendant, Patrick Ward, fled Northern Ireland due to the risk of being murdered by the Irish National Liberation Army (hereinafter referred to as the INLA), from which he had defected. He was charged with guarding hostages by the INLA, however, when he found out that the hostages were to be executed, he allowed them to escape. After being tortured by the INLA and imprisoned in Ireland due to his role in the hostage-taking, he fled to Canada where he applied for refugee status. In the Ward decision the Supreme Court of Canada interpreted the term of 'membership in a particular social group' in a broader meaning and took into special consideration the 'defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative'. Eventually, the court found that Ward did not fall into the category of 'membership in a particular social group' but he was persecuted by the INLA due to his political opinion (that is, the killing of innocent hostages being

55 According to reports, between 1993 and 2005, 4 456 young women disappeared in the respecting Mexican municipality. See: Tackling Violence against Women, Centre for Women, Peace + Security, Landmark Cases, *Gonzalez, Monreal and Monarrez ("Cotton Field") v. Mexico*.

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

57 *OM v. Hungary*, ECtHR, No. 9912/15, 5 July 2016.

58 *Canada (Attorney General) v. Ward* [1993] 103 DLR (4<sup>th</sup>) 1, paras. 67–68.

an unacceptable way to bring about political changes).<sup>59</sup> Consequently, a particular social group normally comprises persons of a similar background, habit, or social status, and this heading may also overlap with other persecutive grounds, such as race, religion or nationality.

Art. 1(A)(2) of the Refugee Convention includes political opinion as the last persecutive ground. The definition of “political opinion” expands beyond a simple political affiliation or membership of a political party, as has already been pointed out in the Ward ruling above. The UNHCR notes 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’.<sup>60</sup>

Therefore, political opinion can be taken into consideration on persecutive grounds when the concerned individual holds an opinion that either has been expressed or has come to the attention of the authorities. However the situation may also occur where the applicant has not given any expression of his or her opinions, owing to the intensity of his or her convictions, and thus it may be reasonable to believe that his or her convictions will at some point find an expression and the applicant will, as a result, come into conflict with the authorities. In such a case, the asylum seeker can be considered to have fear from persecution on the grounds of their political opinion.<sup>61</sup>

All things considered, Art. 1(A)(2) of the Refugee Convention provides on an exhaustive list of persecutive grounds, and excludes many typical drivers of forced migration, e.g., armed conflicts, extreme poverty, famine, natural disasters, pandemics, and persecution on other grounds. As was clearly highlighted in the Ward decision,

‘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 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’.<sup>62</sup>

<sup>59</sup> *Canada (Attorney General) v. Ward*, para. 750.

<sup>60</sup> UNHCR, 2019, p. 24.

<sup>61</sup> Béres, 2024, pp. 96–98.

<sup>62</sup> *Canada (Attorney General) v. Ward*, paras. 67–68.

### 3.2. Key Elements of the Definition of Refugee: The Exclusion Criterion

The exclusion clause<sup>63</sup> further underpins the conditionality and selectiveness of refugee status, and reflects common concerns of States towards aliens accessing their territories. Accomplishing the abovementioned positive preconditions is not sufficient to gain refugee status, and individuals, even those in need, can additionally be excluded from the protection provided by the Refugee Convention for other supplementary reasons. Art. 1(D) of the Refugee Convention enshrines that

‘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 provides that

‘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 that

‘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’.

Concluding the grounds of exclusion, Arts. 1(D), 1(E) and 1(F) of the Refugee Convention, a person cannot benefit from the substitute protection offered by the Refugee Convention if he: already enjoys some other form of international or national protection, for example, he is offered protection by the UN Relief and Works Agency for Palestine Refugees in the Near East, or he was given refugee status by some other State; possesses the rights and obligations attached to nationality in the country of residence, that is, already enjoying the benefits of nationality as a “whole package” excludes the necessity of refugee status in the same State; or committed serious

63 UNHCR, 2019, pp. 111–139; Chetail, 2019, pp. 169–177.

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).

In terms of the last excluding criterion, Art. 1(F) of the Refugee Convention, in *Pushpanathan v Canada*<sup>64</sup> 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 *Pushpanathan v Canada*, the applicant arrived in Canada seeking refugee status from his country of origin, namely Sri Lanka. However, before his asylum claim was settled in Canada, he had been convicted of conspiracy to traffic 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. Key Elements of the Definition of Refugee: The Cessation Criterion**

As far as the cessation clause<sup>65</sup> is concerned, it underlines the temporary nature of the Convention protection. Art. 1(C) of the Refugee Convention provides that:

‘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’.

64 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 63.

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

The provisions under Art. 1(C) enumerates the reasons for the termination of refugee status. When the rationale of refugee status is no longer justifiable, 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 in circumstances in his country of origin.<sup>66</sup>

#### **4. Refugee Rights under the Refugee Convention**

The status of a refugee is determined by their rights and obligations, which are intrinsic to the concept of refugee rights. The universal rights of refugees are derived from two primary sources: international human rights law and the Refugee Convention. The latter delineates the fundamental minimum standards for the treatment of refugees, as well as their own obligations towards the host State. In regard to their obligations, refugees are required under Art. 2 of the Refugee Convention to observe the laws and regulations of their country of asylum, and to also respect measures taken for the maintenance of public order. As Hathaway spells out, their rights are derived from the Refugee Convention, and result in obligations on the side of host States. Despite the considerable evolution of human rights law since 1951, the Refugee Convention rights remain highly pertinent. Over the past seven decades, numerous human rights conventions have been adopted, establishing legal safeguards and fundamental protections for refugees. The necessity for these two-layered protective measures is multifaceted. Firstly, it is evident that a significant proportion of refugee-specific issues are not encompassed within the purview of general human rights legislation. Secondly, economic rights in general, are defined as duties of progressive implementation and may legitimately be denied to non-citizens by less developed countries. Thirdly, it is important to note that not all civil rights are guaranteed to non-citizens. Indeed, the majority of those which do apply to them can be withheld on the grounds of their lack of nationality during national emergencies. 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.<sup>67</sup> Nevertheless, international human rights laws confer additional rights upon refugees under the Refugee Convention, and the application and interpretation of this convention by both international and national courts facilitates the refinement of standards pertaining to refugee rights, thereby responding to contemporary challenges.

The Refugee Convention defines the set of rights that derives from refugee status, which can be considered as another fundamental pillar of international refugee law. Access to convention protection is based upon two further criteria: the recognition as to whether the asylum seeker is a refugee, and whether the asylum seeker is

<sup>66</sup> Béres, 2024, pp. 100–101.

<sup>67</sup> Hathaway, 2021, p. 173.

protected by the principle of non-refoulement.<sup>68</sup> Whilst Shacknove defines the core criteria of refugee status as asylum, material relief and permanent resettlement,<sup>69</sup> Chetail identifies the essence of refugee status with the criteria of entitlement and standard of treatment.<sup>70</sup> Additionally, Molnár integrates protection status within the Refugee Convention as follows: 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 group, or political opinion; recognised refugees should be provided with travel documents; and Contracting States should either provide refugees equal treatment with their own nationals (e.g., freedom of religion, access to justice, labour and social security rights, and intellectual property rights) or definitely not provide refugees with less favourable treatment than provided for other foreigners (e.g., housing, self-employment, independent professions, and acquisition of property).<sup>71</sup>

In detail, the Refugee Convention provides the following refugee rights:<sup>72</sup>

**Table 1.** Refugee rights<sup>73</sup>

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

The Refugee Convention sets three standards for the treatment of refugees. There are rights where all refugees enjoy the same treatment accorded to nationals. These are, for instance, freedom of religion, access to justice or the right to elementary education. There are other rights where refugees get the same treatment accorded to nationals of a foreign country under similar circumstances. For example, the right to appropriate work or the right to association belong to this group of rights. And there

68 Chetail, 2014, p. 23.

69 Shacknove, 2016, p. 276.

70 Chetail, 2019, pp. 177–179.

71 Molnár, 2016, p. 48.

72 For a comprehensive analysis, see: Zimmermann, 2011.

73 Author's own work.

is a third category of rights where refugees are not treated less favourably in general than aliens in the same circumstances, for example the right to housing or the right to freedom of movement.<sup>74</sup>

As has been demonstrated above, the approach of the Refugee Convention to refugee rights is not the one that is regularly provided under human rights instruments, like the other conventions and covenants of the UN, for example the ICCPR. The system of refugee rights is not based on an enumeration of States' obligations equally applicable to all refugees. Instead, those who drafted the Refugee Convention made an attempt to unlock additional rights as the bond would strengthen between the refugee and the asylum State. Subsequently, the structure of 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 attachment to the asylum State.<sup>75</sup> The UK Supreme Court noted in *R (ST, Eritrea) v. Secretary of State for the Home Department*,<sup>76</sup> where focus was on the age assessment of an Eritrean asylum seeker who presented himself to the police claiming that he was sixteen years old since. Except under limited circumstances, it is unlawful for the Home Department under UK domestic law to detain unaccompanied minors,

‘[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’.

In accordance with the textual analysis of the Refugee Convention, the following levels could be distinguished. Firstly, the most basic set of rights or core rights that 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. Thirdly, other rights inhere only when the refugee is lawfully or habitually within the asylum State's territory. Fourthly, there are some applicable rights when the refugee lawfully stays within the asylum State's territory; and finally, a few rights accrue only upon satisfaction of a durable residency requirement.<sup>77</sup>

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’.<sup>78</sup> However, Hathaway describes this “assimilative path” as a doctrinal reconstruction that is not demonstrated by the *travaux préparatoires*, and accordingly, Chetail observes, ‘albeit

74 Chetail, 2014, p. 42.

75 Hathaway, 2021, pp. 174–175.

76 *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, 21 March 2012), para. 21.

77 Béres, 2024, pp. 102–106.

78 Hathaway, 2021, p. 177.

attractive, this conceptualization of the refugee status as an assimilative process remains an a posteriori and essentially doctrinal reconstruction'.<sup>79</sup>

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 an asylum State's territory is also under the *de jure* or *de facto* jurisdiction of the asylum State; a refugee who is lawfully or habitually within the asylum State's territory has also entered into the asylum State's territory; a refugee who is lawfully staying is also lawfully or habitually within the asylum State's territory; and finally, a refugee satisfying the durable residency requirement is also lawfully staying within the asylum State's territory. Consequently, it is a primary and especially significant issue to define the nature of the refugee's attachment to the asylum State.<sup>80</sup> As the UK House of Lords highlighted in *Secretary of State for the Home Department v. AH (Sudan)*,<sup>81</sup> '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'.<sup>82</sup> 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 relocate internally 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. In "level 1" the addressees of rights are asylum seekers who are assumed to be of temporary presence and the sole purpose of their entitlements is to make it possible to examine their applications. In "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, in "level 3" rights encourage asylum States to naturalise refugees in the closure of the refugee's life cycle.

## 5. The Principle of Non-Refoulement

The ultimate pillar 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'.

79 Chetail, 2019, p. 181.

80 Hathaway, 2021, pp. 174–175.

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

82 *Ibid.*, para. 32.

According to the contemporary interpretation of non-refoulement, Art. 33, thereto no reservations are allowed to be attached under Art. 42<sup>83</sup> of the Refugee Convention and under Art. VII(1) of its Protocol, embodies a *lex specialis* as part of the set of rules of international refugee law compared to further human rights instruments.

Beyond any 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 as ‘the cornerstone of international refugee law’.<sup>84</sup> As Gammeltoft-Hansen has established, ‘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’.<sup>85</sup> 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 by a particular State.<sup>86</sup> Indeed, it means that where a particular State is not prepared to grant asylum for a person who is in need for 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 be endangered based on race, religion, nationality, membership of a particular social group or political opinion.<sup>87</sup> The prohibition of refoulement provides the obligation 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, in other words a ‘reasonable degree of likelihood that the persecution will occur’.<sup>88</sup>

Non-refoulement differs from asylum in 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 asylum is a right of them, which at the same time means that it is not a right of the individual.<sup>89</sup> As a consequence of this normative separation, the Refugee Convention, except its Preamble,<sup>90</sup> does not comprise any provision on asylum, and

83 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.

84 San Remo Declaration on the Principle of Non-Refoulement (September 2001).

85 Gammeltoft-Hansen, 2011, p. 44.

86 Weis, 1995, p. 342.

87 Lauterpacht and Bethlehem, 2003, p. 76.

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

89 Chetail, 2019, p. 190.

90 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.’

this kind of silence was intentional on the side of the drafters of the Refugee Convention. The statement of the delegate of the UK at 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’.<sup>91</sup>

Nevertheless, there are unalienable interactions between a State’s obligation of non-refoulement and its 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, since in practice, before removing an asylum-seeker from State’s territory, the assessment of non-refoulement shall be conducted by the respective State under any 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 of non-nationals when there is a real risk of their persecution. According to contemporary jurisprudence, the legal nature of such an act is irrelevant, and it might be executed in deportation, extradition, maritime interception, non-admission at a border, transfer, rendition, etc.<sup>92</sup> Subsequently, the essence is not the act but its consequence, i.e., putting the dignity, life, or liberty of the person in danger, is. At the same time, refoulement is different from expulsion or deportation since these terms cover a more formal process whereby a lawfully residing non-national may be required to leave a State or be forcibly removed.<sup>93</sup> The prohibition of refoulement encompasses not only the prohibition to return 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, on the one hand, meets the “inclusion criteria” of the refugee definition provided under Art. 1(A)(2) of the Refugee Convention, and on the other hand, does not fall under the scope of the “exclusion criteria” (see the comprehensive analysis above).<sup>94</sup> Additionally, the prohibition of refoulement applies not only to refugees but also to asylum seekers, which can be primarily explained with the declaratory nature of refugee status. The UNHCR established that

‘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

91 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.

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

93 Goodwin-Gill and McAdam, 2021, p. 466.

94 UNHCR, 2007.

application might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established'.<sup>95</sup>

Thus one can 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 regards to the benefits from non-refoulement protection for the duration of the asylum procedure, unless proven otherwise. As Goodwin-Gill and McAdam remarks, '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'.<sup>96</sup> Consequently, non-refoulement is of special significance for asylum seekers: since they may be potential refugees, they should not be returned or expelled while their asylum application is pending.

The asylum-seeker's application 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*<sup>97</sup> and *Hirsi Jamaa and Others v. Italy*<sup>98</sup> that non-refoulement is activated from the moment that the person concerned intends to enter the border of another country, i.e., it not only protects those who are already staying in the territory of a particular country from being removed. In *Amuur v. France* 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 Paris-Orly airport. The applicants arrived in France by aeroplane after fleeing Somalia due to fearing for their lives there. However, the Minister of the Interior refused them the right to entry and the applicants were sent back to Somalia. As far as *Hirsi Jamaa and Others v. Italy* is concerned, the case concerned 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 Human Rights Committee (hereinafter: 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'.<sup>99</sup> Therefore, non-refoulement has a so-called extraterritorial scope meaning that 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.<sup>100</sup> 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, language was chosen which leaves no doubt as to their

95 UNHCR 'Note on International Protection: Submitted by the High Commissioner' (31 August 1993) UN Doc. A/AC.96/815, para. 5.

96 Goodwin-Gill and McAdam, 2021, p. 469.

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

98 *Hirsi Jamaa and Others v Italy*, ECtHR, No. 27765/09, 23 February 2012.

99 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.

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

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 refugees back 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.

Even though non-refoulement has a relatively broad scope of application, it is not an absolute term under the Refugee Convention. During the drafting the Refugee Convention, the 1951 Conference of Plenipotentiaries raised concerns related to the absoluteness of the prohibition of non-refoulement,<sup>101</sup> therefore the final text of Art. 33(2) provides that

‘the benefit of the present provision may not, however, be claimed by a refugee who 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 relates to 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: ‘convicted by a final judgment’ suggests effective remedies were exhausted; ‘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 ‘constitutes a danger to the community of that country’ suggests that due to the risk of subsequent offence the person is dangerous for the host country.<sup>102</sup>

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.<sup>103</sup>

Although under Art. 33(1) of the Refugee Convention a return to the State where persecution has occurred is prohibited, a return to any other State which has led to restrictions applied by host States such as the “first country of arrival rule” and the “safe third country rule”, is not prohibited. This approach often entails “chains of deportation” leading to refugees finding themselves in the first State where they arrived after having fled their homeland.<sup>104</sup> Additionally, some States practice “extra-territorial refoulement” and intercept refugees on the high seas to keep them outside

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

102 Chetail, 2019, pp. 189–190.

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

104 Hernández, 2019, pp. 431–432.

territorial waters. In *Sale v. Haitian Centers Council*, the US Supreme Court<sup>105</sup> found that intercepting Haitians in high seas and returning them to their home State was lawful, however, the Inter-American Commission on Human Rights (hereinafter: IACommHR) in the same case (Haitian Interdiction Case)<sup>106</sup> 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, the ECtHR declared a similar bilateral agreement between Italy and Libya, concluded in 2012, unlawful in *Hirsi Jamaa and Others v. Italy* (see above for a more detailed account).

## 6. Concluding Remarks

The present chapter has concentrated on the framework of interpretation of the core provisions of the Refugee Convention, with particular regard given to the definition of “refugee”, the contents of the refugee status, 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. In particular, it construes and applies the most significant concepts of the Refugee Convention within the normative context prevailing at the time of its interpretation. This is to say, it does so with consideration to the different human rights instruments (UDHR, ECHR, ICERD, ICCPR etc.) adopted since its entry into force. Furthermore, as the drafters of the Refugee Convention did not establish a treaty body or a human rights monitoring mechanism to provide an authentic interpretation of the document, due consideration has been devoted to respecting international and national judicial and committee case law, such as that of the ECtHR, IACtHR, HRC, IACommHR, the Canadian, UK and US supreme courts. This chapter has demonstrated, following an analysis of the definition of refugee, that international protection is tailored to a very limited category of refugees. Therefore, the Refugee Convention is unable 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) (for example, due to armed conflicts, famine, extreme poverty, climate change, etc.). It is also noteworthy that the Refugee Convention does not constitute a human rights treaty that would guarantee unalienable and unconditional rights concomitant with refugee status. While the recognition of refugee status is declaratory in nature, the rights that stem from being a refugee are not unalienable or unconditional. The acquisition of refugee rights is contingent upon recognition, and these rights cease to apply upon the termination of refugee status. Furthermore, refugee rights are incremental in nature,

105 *Sale v. Haitians Centers Council* (1993) 509 US 155.

106 *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.

that is to say, as the bond strengthens between the refugee and the asylum state, the more the Refugee Convention provides for refugees. The concept of non-refoulement, which serves as the cornerstone of international refugee law, has been found to be subject to limitations in terms of its scope within the framework of the Refugee Convention. However, the progressive development of the doctrine of international human rights law has resulted in the broadening of its interpretation to encompass an absolute dimension, thereby extending its reach beyond the provisions set out in Art. 33(2) of the Refugee Convention. As demonstrated in this chapter, despite the numerous textual limitations of the Refugee Convention, it has been employed as a vital instrument for safeguarding those in genuine need. While its concept may be outdated, judicial interpretation has sought to maintain the Refugee Convention as a living instrument.

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