

EVOLUTION OF THE LEGAL FRAMEWORK FOR REFUGEE PROTECTION: AN EXAMINATION OF INTERNATIONAL AND REGIONAL PERSPECTIVES

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Abstract

Doubtless, the existence and continuity of violence and conflict primarily gave rise to, and has continued to contribute to the perpetuation of the concept of refugeehood. However, through the years, this concept has evolved, pushing beyond the bounds of conflict and presenting more intricate dynamics. Accordingly, adopting the doctrinal research methodology, the article focused on the evolution of the framework for refugee protection, with the aim of examining notable developments on the subject within the international and regional spheres. It also sought to see how the existing framework has been able to accommodate emergent issues in this regard. Consequently, the article found that the current regime for refugee protection does not necessarily envisage or make provisions for relatively novel situations or distinct categories of refugees. In light of its findings, the article recommended the need for enhanced international cooperation, and emphasized the need for States to continually devise innovative ways to accommodate persons whose interests may not be captured under existing laws.

Keywords: Refugee, Refugeehood, Refugee Protection, Climate Refugee, Conflict

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1.0 Introduction

In spite of the existence of a constructive framework for the maintenance of international peace and security, the continued drive and desire of States towards self-preservation; the quest for hegemony; the heterogeneity of States reflected in the different perspectives on varying issues of politics, human rights, economic policies and advancement; as well as cultural and religious divides, all of which stir up tensions and intolerance even within States, makes it all the more difficult to prevent friction or discordance between States.

Eventually and in most cases, such dissensions, left unchecked, may deteriorate into widespread violence and prolonged conflicts. Further, since some of these conflicts may be fueled by ethnic, religious, or political reasons, it may inevitably lead to the persecution of individuals or a group thereof. Consequently, driven by violence of an overwhelming magnitude, or by persecution/the fear of it, a displacement of persons seeking protection and security outside their nations of origin may occur and this, has largely underpinned the issue of refugeehood. However, other emergent issues have arisen through the years, evoking concerns on the need to extend the scope of refugee protection beyond the familiar constructs of conflict, othering, and varying forms of persecution.

Hence, adopting a historical approach, the article follows the evolution of refugeehood from as far back as 1922 up to 1989, comparing and contrasting definitions of the term 'refugee' as well as notable developments in this regard from both international and regional viewpoints. In this regard and seeing that the earliest measures for refugees were propelled by the First World War, discussions on various Arrangements and Conventions are situated within significant points in

history spanning across the First World War (the Great War), the Second World War and the Cold War.

1.2 Arrangements and Conventions Adopted Between the Brackets of the Great War and the Second World War

Although limited in scope, the following Arrangements and Conventions were the first set of measures and protections for refugees ignited by the First World War and aimed at adopting a pragmatic approach to the refugee issue at the time. These arrangements dealt with specific groups of refugees with a focus on limited matters such as the issue of travel documents and subsequently issues such as personal status, exemption from reciprocity, legal assistance and right to work.¹ While these arrangements have been replaced in the current time², it is imperative to examine them nonetheless since they are referenced and incorporated into subsequent instruments.

1.3 The Arrangement of 5 July 1922 with Regard to the Issue of Certificates of Identity to Russian Refugees

While this arrangement did not explicitly give a working definition for the term “Russian Refugees”, it however described the holder of the certificate of identity as “A person of Russian origin not having acquired another nationality.”³

¹ The Term “Refugee” <https://www.aalco.int/8thsession/Part%207.pdf> accessed 1 December 2023

² Article 37 of the Convention Relating to the Status of Refugees of 1951 provides that the Convention replaces, as between parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Arrangement of 15 October 1946.

³ n. 1

1.4 The Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees of 12 May 1926

This arrangement adopted the following definition of the term ‘Russian Refugee’: “...Any person of Russian origin who does not enjoy, or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republic and who has not acquired another nationality.” On the other hand, ‘Armenian Refugees’ are defined as “Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy, or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.”⁴

1.5 Arrangement of 30 June 1928

By this arrangement, the measures previously taken and which were exclusive to the Russian and the Armenians now extended to the Turkish, Assyrian, Assyro-Chaldean and assimilated refugees.

Ultimately, it can be inferred from the aforementioned arrangements that a refugee was a person who:

- (a) Belongs to any of the nationalities or ethnic origins referenced under the arrangements or who previously belonged to such nationalities or ethnic origins;
- (b) Does not or no longer enjoys the protection of the State which he previously belonged to; and
- (c) Has not acquired another nationality.

⁴ *ibid.*

2.0 Legal Framework

2.1 The Convention Relating to the International Status of Refugees of 28 October 1933

The Convention was designed to complement and consolidate the work of the League of Nations done on behalf of refugees at the time. The Convention appears to have adopted the definitions under the arrangements of 12 May 1926 and 30 June 1928. Article 1 of the Convention provides that it is: "...applicable to Russian, American and Assimilated refugees as defined by the arrangements of 12 May 1926 and 30 June 1928 subject to such modifications as each Contracting Party may introduce in this definition at the moment of signature or accession."⁵

While this definition referenced earlier agreements, unlike its previous counterparts, Contracting Parties were allowed to "cherry-pick" refugees which invariably put them at a greater disadvantage since Contracting Parties could, through the modification clause, decide which category of refugees from the 1926 and 1928 arrangements they could allow on their soil. Great Britain for instance limited the arrangement to Russian, Armenian and assimilated refugees no longer enjoying the protection of their country of origin at the date of accession while Czechoslovakia only regarded as refugees within the meaning of Article 1 only such persons who formerly possessed Russian or Turkish nationality, lost it before 1 January 1923 and have not acquired another nationality.⁶ However, this had a hidden advantage since Contracting Parties could, through their modifications, expand and amplify the scope or category of persons who qualified for their protection within the confines of Article 1. In 1945 for

⁵ *ibid.*

⁶ n. 1

instance, the definition was expanded in France to include Spanish refugees.⁷

It appears that the open-endedness of the definition under Article 1 of the Convention was a ripple effect of the League of Nation's constant struggle to "keep the peace" through diplomatic and flexible measures, that allowed States at the time to exercise their statehood with no interference, or with little and in most cases delayed intervention, despite evident disregard and violation of the tenets of the League of Nations. In other words, the League of Nations was more of an onlooker than an umpire that mostly sat on the fence or tried to play safe at all times.

Ultimately, the Convention shared a similarity with the previous arrangements since its attention was also focused purely on national or ethnic origins.

2.2 The Convention Concerning the Status of Refugees Coming from Germany of 4 July 1936 and 10 February 1938

The Provisional Arrangement Concerning the Status of Refugees Coming from Germany was signed on 4 July 1936. For the purpose of the 1936 arrangement, the term 'refugee coming from Germany' was deemed to apply to "any person who has settled in that country who does not possess any nationality other than German nationality, and in respect of whom it is established in law or in fact that he or she does not enjoy the protection of the Government of Reich."⁸

⁷ *ibid.*

⁸ *ibid.*

For the purpose of the 1938 Convention, the term ‘refugees coming from Germany’ applied to:

- (a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government;
- (b) Stateless persons who not covered by previous Conventions or agreements who have left German territory after being established therein and who are proved not to enjoy in law or in fact, the protection of the German Government. Persons leaving Germany for reasons of purely personal convenience were excluded from the definition.⁹

By the additional Protocol of 14 September 1939, the definitions in arrangements of 4 July 1936 and in the Convention of February 1938 were extended to refugees coming from Austria.¹⁰

Though the Arrangement of 1936 and the Convention of 1938 were similar to other arrangements to the extent that they shared the construction of definitions with recourse to select nationalities and ethnic origins, they differed to a large extent. First, both emphasized a verification of protection largely absent from previous arrangements and which was subsequently adopted in the 1945 extension of the 1933 Convention Relating to the International Status of Refugees to include Spanish refugees in France. The texts of the previous arrangements only referenced a person “who does not or no longer enjoys the protection of the State he belonged to” with no express requirement for the verification of this position. Whereas the 1936

⁹ *ibid.*

¹⁰ *ibid.*

and 1938 arrangement expressly required that the absence of protection must be established in law or in fact.

Additionally, the 1938 Convention, unlike its forerunners also introduced two distinct situations: (1) Dispossession of nationality i.e. a situation where a person used to possess German nationality but is no longer a national and (b) Persons who are outrightly stateless and whose qualification for subsequent protection rests on habitual residence in a previous State (although the construction used by the Convention is “Stateless persons...who have left German territory after being established therein”). Also, the 1938 Convention precludes persons leaving Germany for personal convenience from being considered as refugees within the context of the Convention; an element not present in previous arrangements.

3.0 Perceptions of Refugeehood Post World War II: Onset of the Cold War, Decolonization and other State-Specific Realities

3.1 International Perspectives: Retrospective and Progressive Approaches to Refugeehood

A. The Constitution of the International Refugee Organization (IRO) of 1946

Similar to previous arrangements and Conventions, the Constitution of the International Refugee Organization (hereinafter referred to as the IRO Constitution) also offered definitions for refugees by categories.¹¹ However, situating its definition of refugeehood primarily within the context of the Second World War and its aftermath, it laid down certain

¹¹ n. 1

broad criteria not covered by previous instruments and which invariably formed a foundation for the Statute of the Office of the United Nations High Commissioner for Refugees of 1950 and the Convention Relating to the Status of Refugees of 1951. For instance, it was the first instrument to extend its reach to include issues of race, religion and political opinion in defining the term ‘refugee’.¹²

Exploring a most interesting angle which was not previously embodied in the previous arrangements or Conventions, the IRO Constitution makes provisions for a special category of persons who alongside women are mostly susceptible and vulnerable to exploitation and other harsh effects of war and conflict – Children. It provides that: “The term ‘refugee’ also applies to unaccompanied children who are outside their countries of origin. Such children, 16 years of age or under, shall be given all possible priority assistance, including normally, assistance in repatriation in the case of those whose nationality can be determined.”¹³

While the foregoing provision is not expressly laid out in the Statute of the Office of the United Nations High Commissioner for Refugees of 1950 and the Convention Relating to the Status of Refugees of 1951, nonetheless, it can be inferred that it is an aspect given due consideration since both the Statute and the Convention assimilate the definitions of the term ‘refugee’ under the Constitution of the IRO, albeit in a retrospective manner. Accordingly, the provisions of the Statute and the Convention extends to persons who were previously considered as refugees under the Constitution of the IRO (which will then include children), but it makes no special or specific provisions for children outside this.

¹² IRO Constitution 1946, s A(1)(a-c)

¹³ Ibid. s A(4)

Further, the IRO Constitution in considering conditions under which refugees and displaced persons will become the concern of the Organization references valid objections of persecution or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions, provided that these opinions are not in conflict with the principles of the United Nations as laid out in the Preamble of the Charter of the United Nations.¹⁴ Objections of a political nature judged by the Organization to be ‘valid’ and compelling family reasons arising out of previous persecution or compelling reasons of infirmity or illness are also considered.¹⁵

It appears that the foregoing informed the “well-founded fear of persecution” criterion which is inserted into the definitions provided by the Statute of the Office of the United Nations High Commissioner for Refugees of 1950 and the Convention Relating to the Status of Refugees of 1951, although the latter references membership of a particular group as grounds for persecution in addition to the reasons of race, religion, nationality, or political opinion already captured in the Constitution of the IRO.

B. Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR) 1950

The UNHCR is a United Nations’ agency established after the Second World and is positioned as the foremost organization steering international action for the protection of refugees, forcibly displaced communities and stateless people. The United Nations General Assembly adopted the Statute of the UNHCR on 14 December 1950 and while the Statute does not

¹⁴ IRO Constitution 1946, s C(1)(a)(i)

¹⁵ IRO Constitution 1946, s C(1)(a)(ii)(iii)

expressly offer a definition for the term ‘refugee’, the meaning of the term is implicitly provided for under Section 6 of the Statute which outlines the functions of the UNHCR.

Worth noting, is the fact that the Statute technically has both a retrospective and reparative effect since the decisions previously taken by the International Refugee Organization (which might have disqualified a person from being given refugee status) are not only referenced but are also to be construed in the light of the provisions of the Statute. Interestingly, it appears that the preclusion of refugee Status for “personal reasons” referenced in the Statute was extracted from the Convention Concerning the Status of Refugees Coming from Germany of 10 February 1938, although the words used in the latter are “personal convenience”. Additionally, the concept of statelessness and refugee status attained through habitual residence equally referenced in section 6 of the Statute was first considered in the 1938 Convention.¹⁶

Further, the Statute goes on to lay out some exceptions which allude to the fact that beyond the element of persecution, great emphasis is placed on the inability of the refugee’s State to afford him protection from such persecution. This therefore gives the impression that the element of persecution does not exist in isolation. The intending refugee must be able to prove that the country of nationality or habitual residence is unable to offer him protection from such persecutions. In *Canada (Attorney General) v Ward*¹⁷ The Supreme Court of Canada explained that: “The claimant must

¹⁶ Although the 1938 Convention couches it as “Stateless persons...who have left German Territory after being established therein.”

¹⁷ [1993] 2 S.C.R. 689, 30 June 1993 (Supreme Court of Canada) as cited in Status Determination and Protection Information Section, United Nations High Commissioner for Refugees, ‘UNHCR Compilation of Case Law on Refugee Protection in International

provide clear and convincing confirmation of a State's inability to protect, absent an admission by the national's State of its inability to protect that national. Except in situations of complete breakdown of State apparatus, it should be assumed that the State is capable of protecting a claimant."

In *Horvath v Secretary of State for the Home Department*¹⁸ it was held that:

In the context of an allegation of persecution by non-state agents, the word 'persecution' implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of his persecutors. [...] The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather, it is a practical standard, which takes proper account of the duty which the state owes to its own nationals."

Accordingly, the Statute expressly states specific grounds upon which the High Commissioner's competence will cease to apply to the person's listed

Law' (March 2008) <https://www.refworld.org/pdfid/47dfc8e32.pdf> accessed 3 December 2023

¹⁸ [2000] INLR 15, 6 July 2000 (UK House of Lords) as cited in Status Determination and Protection Information Section, United Nations High Commissioner for Refugees, 'UNHCR Compilation of Case Law on Refugee Protection in International Law' (March 2008) <https://www.refworld.org/pdfid/47dfc8e32.pdf> accessed 3 December 2023

in Section 6 (A) (i) (ii) including instances where a person voluntarily re-avails himself of the protection of the country of his nationality.¹⁹

C. Convention Relating to the Status of Refugees 1951

It appears that one of the primal objectives of UNHCR Statute, the Convention Relating to the Status of Refugees of 1951 (hereinafter referred to as the 1951 Convention) and its 1967 Protocol, was the consolidation of existing efforts and arrangements. The Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol are recognised by the UNHCR as the only global legal instruments, expressly covering the most crucial aspects of a refugee's life, canvassing for the same or at least a minimum of the treatment enjoyed by other foreign nationals in a given country or nationals of a country. It also harps on the international scope of the refugee problem and the imperative of international solidarity and cooperation in resolving the issue.²⁰ The Convention makes copious reference to the provisions of the UNHCR Statute including definitions, cessation clauses and exclusion clauses but not without slight variations.

Although the Convention shares similarities with the pre-existing arrangements to the extent that it gives due consideration to the presence or otherwise of a State's protection, similar to the provisions of the UNHCR Statute, it goes beyond the reasons of nationality or ethnic origin which were the sole focus of the previous arrangements and extends its reach to race, religion, membership of a particular social group or political opinion. Akin to the UNHCR Statute, the mere presence of these reasons is not

¹⁹ Statute of the Office of the UNHCR 1950, s 6(A)(ii)(a); s 6(A)(ii)(b); s 6(A)(iii)(c); s 6(A)(iii)(d); s 6(A)(iii)(e); s 6(A)(iii)(f)

²⁰ United Nations High Commissioner for Refugees 'The 1951 Convention Relating to the Status of Refugees' (September 2011) <https://www.unhcr.org/sites/default/files/legacy-pdf/4ec262df9.pdf> accessed 4 December 2023

sufficient to qualify a person as a refugee. Rather, there must exist a well-founded fear of being persecuted for any of the foregoing reasons. Consequently, the existence of the fear is not sufficient, it must be a fear that is backed up with established and verifiable facts and reasons.

Hence, in *Chan v Minister for Immigration and Ethnic Affairs (MIEA)*²¹ The Court held that ‘well-founded fear’ involves both a subjective and objective requirement. There must be a state of mind – fear of being persecuted and a basis – well-founded for the fear. Accordingly, the definition will be satisfied if an applicant can show genuine fear founded upon a ‘real chance’ of persecution for a Convention stipulated reason. Also, in *Korablina v Immigration and Naturalization Services*²² the United States Court of Appeals for the 9th Circuit noted that persecution may be found by cumulative, specific instances of violence and harassment toward an individual and his or her family members.

Another area of similarity shared by the pre-existing arrangements, the UNHCR Status and the 1951 Convention is the absence of protection offered by a former State of origin or habitual residence, as well as the non-acquisition of a new nationality. Accordingly, it is inferred that a person is ordinarily expected to avail himself of or should as of right, enjoy the protection of a State he belongs to or lives in. It is also believed that the Convention has the luxury of this presumption since unlike the arrangements which were made for the purpose of expediting the resettlement of persons at a time of great volatility of States and uncertainty of peace, the Convention was adopted at a time when States were

²¹ (1986) 169 CLR 379 at 396 as cited in ‘Well-Founded Fear’ (November 2023) https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20Refugee%20Law/Chapter3_WFF.pdf accessed 3 December 2023

²²No. 97-70361, 158 F 3d, 23 October 1998 (US Court of Appeals for the 9th Circuit)

recovering from the debilitation of the previous wars (the First and Second World War). While the United States and the Soviet Union were in the heat of the Cold War, other unaffected States enjoyed a measure of peace sufficient enough to forge more detailed structures and protective frameworks at the time.

Although more refined and extensive in scope and definition, the 1951 Convention seems to bear vestiges of the Convention Relating to the International Status of Refugees of 28 October 1933 with respect to the option of modification. Hence, while the Convention precludes States at the time of signature, ratification or accession from making reservations to Article 1 which deals with the definition of the term ‘refugee’,²³ nonetheless, it gives States the leeway to decide what they considered as “events occurring before 1 January 1951”.

It however for this purpose offers States only two options as follows: Events occurring before 1 January 1951 shall be understood to mean either events occurring in Europe before 1 January 1951 or events occurring in Europe or elsewhere before 1 January 1951 and each contracting State shall make a declaration at the time of signature or ratification, specifying which of these meanings it applies for the purpose of its obligation under this Convention.²⁴ Also, any Contracting State which has adopted the first alternative may at any time extend its obligations by adopting the other alternative and this is to be done by a means of a notification addressed to the Secretary-General of the United Nations.²⁵ Consequently, the 1951 Convention limits any attempt at cherry-picking to its retrospective

²³ Article 42

²⁴ Article 1 (B) (1) (a-c)

²⁵ Article 1 (B) (2)

inclines, with discrimination of refugees in any other form or manifestation asides this being outrightly prohibited.

An additional point of similarity shared between the 1951 Convention and the 1933 Convention is the attempt to consolidate definitions and perspectives under previous arrangements. The preamble of the 1951 Convention expressly states the desirability to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope and protection accorded by such instruments by means of a new agreement. Lastly, a common factor shared by the 1951 Convention and the Conventions and arrangements previously considered is the prohibition of double protection such that a person cannot be accorded refugee status where they have acquired a new nationality and enjoy the protection of the new nationality.

D. Protocol Relating to the Status of Refugees of 31 January 1967

The primary intent of the 1967 Protocol was to expand the scope of the 1951 Convention. Accordingly, Article 1 (1) of the Protocol states that:

The term ‘refugee’ shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951...” and words “...as a result of such events”, in article 1 (A) (2) were omitted.

Article 1 (3) adds that “the present Protocol shall be applied by the State hereto without any geographical limitations, save that existing declarations made by States already parties to the Convention and in accordance with Article 1 (B) (i) (a) of the Convention shall, unless extended under Article 1 (B) (2) thereof, apply also under the present Protocol. Thus, by virtue of

its Protocol, the 1951 Convention possesses the distinct quality of operating outside the confines of time/geographical location.

Although in its Preamble, the Protocol alludes to the fact that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may not fall within the scope of the Convention which covers only those persons who become refugees as a result of the events occurring before 1 January 1951. Yet, neither the Protocol nor the Convention expressly identifies these novel situations or affords protection to distinct categories of refugees which may emerge therefrom.

In the case of *Ioane Teitiota v New Zealand*²⁶ for instance, a citizen of the Pacific Nation of Kiribati who claimed that the effects of climate change in Kiribati forced him to leave his habitual place of residence, was denied asylum as a “climate refugee”. The Human Rights Committee found that this denial was not unlawful since there was no imminent threat to his life. Its decision notwithstanding, the Committee seemed to offer some hope for the possible recognition of climate refugees in the future when it noted that climate change actually poses a serious threat to life, and that the principle of non-refoulement can be applied in such a situation.²⁷

The importance and urgency of expanding the scope of refugee protection to those displaced by climate change was further amplified in a 2022 Report presented to the Human Rights Council, by the United Nations Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change wherein he noted that of the 59.1 million people

²⁶ CCPR/C/127/D/2728/2016 (7 January 2020) UNHRC

²⁷ Blandine Garot-Jacquey, “Climate refugees: Towards recognition of their legal status?” (December 18 2023) <https://rwi.lu.se/blog/climate-refugees-towards-recognition-of-their-legal-status/> accessed 29 March 2025

that were internally displaced across the world in 2021, majority were displaced by climate-related disasters. He added that the number of such displacements exceeded displacements occasioned by armed conflict.²⁸ Climate change is therefore a contributory factor or determinant for the drastic increase in migratory flows, causing millions of people facing economic, social and existential threats to flee their homes year in, year out.²⁹

4.0 Regional Perspectives on Refugee Protection

A. Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (hereinafter referred to as OAU Convention) reflects an African-centric approach to the issue of refugees and embodies the peculiar situation of African Countries in the wake of decolonization and the mass flights of individuals occasioned by the desire to escape oppression.³⁰ While it adopts in part the definition of the 1951

²⁸ United Nations Human Rights Office of the High Commissioner, 'Intolerable Tide of People Displaced by Climate Change: UN Expert' (June 2022) <https://www.ohchr.org/en/press-releases/2022/06/intolerable-tide-people-displaced-climate-change-un-expert> accessed 25 April 2024

²⁹ Nicole Munns & Gabriel Katz, 'Climate and Conflict-Induced Migration and Modern Slavery: Challenges and Opportunities for Action' (*Modern Slavery Issue Brief*, March 2023) <https://justiceandcare.org/app/uploads/2023/03/Justice-and-Care-Issue-Brief-Migration-Climate-and-Conflict-Mar23.pdf> accessed 29 April 2024

³⁰ International Federation of Red Cross and Red Crescent Societies 'The Legal Framework for Migrants and Refugees: An Introduction for Red Cross and Red Crescent Staff and Volunteers' (2017) <https://www.rcrc-resilience-southeastasia.org/wp->

Convention³¹, it offers an extended definition that gives vent to the realities of African countries which were confronted with colonialism and apartheid.³²

Accordingly, Article I (2) provides that “the term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.” It appears that for this category, no proof of well-founded fear of persecution is required or proof of verification of protection by a State.

B. Cartagena Declaration on Refugees 1984

There are differing views on whether or not a dichotomy exists between migrants and refugees. Accordingly, there is a continued debate in the international community regarding the use of the word “migrants” in reference to refugees.³³ Weighing in on this debate, in 2004, Erika Feller (Former Deputy High Commissioner for Protection at the UNHCR) submitted thus:

If persons are defined as migrants by virtue of the fact that they move from their own country to another, regardless of the reasons and their needs, then refugees are migrants. If however, the cause of flight are the defining feature, together with the framework of

[content/uploads/2018/07/The-legal-framework-for-migrants-and-refugees-Dec-2017-V3.pdf](https://ajleejournal.com/content/uploads/2018/07/The-legal-framework-for-migrants-and-refugees-Dec-2017-V3.pdf) accessed 4 December 2023

³¹ Article I (1) of the OAU Convention is a reiteration of Article 1 (2) of the 1951 Convention as amended by its 1967 Protocol

³² n. 30

³³ *ibid.*

*rights and responsibilities within which the flight has to be managed, then there is a clear distinction between the two categories of persons.*³⁴

Consequently, the foregoing statement, when viewed against the backdrop of practical and legal problems facing refugees and the existence of a separate and comprehensive legal framework on their status and attendant issues, lend credence to the distinctiveness of refugeehood and the need to deal with this category of persons outside the migrant bubble. In this regard, the Cartagena Declaration on Refugees, (a non-binding regional instrument adopted in 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia), has as one of its commitments, the need to adopt the terminology established in the 1951 Convention and the 1967 Protocol with a view to distinguishing refugees from other migrants.³⁵

The Declaration has its principles rooted in the Contadora Act on Peace and Cooperation which is equally based on the 1951 Convention and the 1997 Protocol and like the OAU Convention, it acknowledges the devastating

³⁴ *ibid.*

³⁵ With respect to giving distinct consideration to the plight of refugees, worth mentioning is Protocol No. 1 annexed to the Universal Copyright Convention (UCC) as revised at Paris on 24 July 1971 Concerning the Application of that Convention to the Works of Stateless Persons and Refugees; the Agreement Relating to Refugee Seamen of June 1973 and its Protocol. The Agreement Relating to Refugee Seamen defines “Refugee Seamen” as “any person, who being a refugee according to the definition in paragraph 2 of Article 1 of the Protocol Relating to the Status of Refugees of 31 January 1967 is serving as a seafarer in any capacity on a mercantile ship, or habitually earns his living as a seafarer on such a ship.” Likewise, the Protocol No. 1 Concerning the Application of the UCC to the Works of Stateless Persons and Refugees extends protection to stateless persons who have their habitual residence in a State Party to the UCC as revised at Paris on 24 July 1971. Accordingly, for the purposes of the 1971 Convention, stateless persons and refugees shall be assimilated to the nationals of that State where they are established.

effects and harsh realities confronting Central America following the outbreak of violence in the 1960s arising from political and military upheaval. This was closely followed by the displacement of persons fleeing massive human rights violations by dictatorial governments in the 1970s and 1980s.³⁶

Although the Cartagena Declaration subscribes to the definitive elements of a refugee as set out in the Convention relating to the Status of Refugees of 28 July 1951 and its 1967 Protocol, it also adopts the precedence of the OAU Convention of 1969 and the definition of the term ‘refugee’ laid out in the Convention with slight modifications as follows:

*...Persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*³⁷

Consequently, the Cartagena Declaration enlarges the scope to include generalized violence, internal conflicts and massive violation of human rights. Unlike the OAU Convention, it is irrelevant that these circumstances affect either a part or the whole of a person’s country of origin, all that seems necessary is the existence of these circumstances and the fact that they endanger the lives of a person or hamper their safety and freedom.

Beyond the scope of the 1951 Convention which acknowledges variables that are mostly people-dependent (e.g. a person’s race, religion, nationality, political opinion, or membership of a particular social group), the Cartagena Declaration envisages situations that are mostly unpredictable and of a

³⁶ n. 30

³⁷ Part III, Paragraph 3

manifest and generalized nature such that they are independent of an individual group. In this regard, it would appear that the apparent nature of the circumstances contemplated by the Declaration jettisons the difficulty of justifying with good evidence or strong reasons, the decision to leave a country (the criterion of a well-founded fear of persecution laid out by the 1951 Convention).

Further, perhaps perceiving that the disturbances noted in the Declaration ordinarily introduce a level of volatility within a State that threatens not only the security of citizens but even the very existence of the State, the Declaration does not seem to dwell much on the ability or inability of a State to protect persons seeking to flee as a criterion for according individuals refugee status.

Although the Cartagena Declaration is a non-binding instrument, it proves to have a reasonable influence over the policies and legislations adopted throughout Latin America. However, while most Latin America countries have infused the provisions of the Cartagena Declaration into their domestic legal frameworks, the widened scope of “refugee” under the Declaration which includes fleeing mass violation of human rights has not been given due recognition or accepted outside Latin America.³⁸

5.0 Conclusion

The article critically assessed various definitions of a refugee from the international and regional perspectives from as far back as 1922 and found that the existence and continuity of violence and conflict (and its attendant consequences) within and between States invariably sustains and perpetuates refugeehood. While it is impressive that the definition of the

³⁸ n. 30

term 'refugee' and the rights accruing to this category of persons has evolved over time, it is clear that the various manifestations and contours of war across the board and the new situations it creates gives an element of dynamism to the concept. Accordingly, there are possibilities where the existing regime does not necessarily envisage or make provisions for relatively novel situations or distinct categories of refugees. For instance, besides the displacements that can be occasioned by climate change as a distinct phenomenon, there are also interactions between conflict and climate change, all of which may invariably give rise to an increase in climate refugees. Hence, in addition to enhanced international cooperation, it is imperative for States to continually devise innovative ways to accommodate persons who in view of the underlying issues informing their displacement, are ordinarily meant to be considered as refugees, and whose interests may not be captured under existing laws.