

BEYOND THE REFUGEE CONVENTION: A LOOK INTO THE RIGHTS OF REFUGEES

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The most widely accepted definition of a Refugee is a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. Apart from the Refugee Convention there are various other International Instruments that are referred to while determining the rights of refugees. This project seeks to analyze the rights of refugees critically and examine these rights keeping in mind the evolving changes in the International Legal System and requirement of a broader definition for Refugees.

Key Words: Refugee, Refugee Convention, Non-Refoulment, Rights, United Nations

INTRODUCTION

International law provides a narrow definition of the term refugee¹. Article 1(A)(2) of the 1951 Convention relating to the Status of Refugees², a refugee is defined as person “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” The Refugee Convention provides a broad range of rights in the country of asylum to the refugees.³ However, as argued by many there is a necessity for them to be present “lawfully” in the country of refuge.⁴ Unlike international human rights law which applies to all human beings, except where explicitly stated otherwise, international refugee law, notably the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, provides different gradations of treatment which is consequential to a person’s legal status.⁵ Goodwin-Gill gives

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¹ Walter Kalin and Jorg Kunzli, *The Law Of Human Rights Protection*, Oxford: Oxford University Press 2009.

² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html> [accessed 26 February 2013]

³ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; The Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]

⁴ Guy S. Goodwin-Gill, *The Refugee In International Law*, 2d ed. 1996, pp. 298-99 [hereinafter Goodwin-Gill]

⁵ UNHCR, “*Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems*”, Global Consultations on International Protection, 3rd Meeting, UN Doc. EC/GC/01/17, 4 September 2001, ¶3.

a framework of four kinds of rights on the basis of which rights may vary. These categories include 'simple presence', 'lawful presence', 'lawful residence', and 'habitual residence'.⁶ UNHCR we see that has agreed with such practice. At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum seekers.⁷ Most other rights are contingent upon status as a refugee or some other legal status. The question of what amounts to 'lawful residence' versus 'lawful presence' is unsettled. In principle, the term "lawfully in" could imply admission in accordance with the applicable immigration law for a temporary purpose, and should, therefore, apply to asylum-seekers who have been admitted into the asylum procedure. J.C. Hathaway⁸, argues that it cannot be reasonably concluded that refugees who submit to a refugee status determination procedure are not 'lawfully present'. According to Grahl-Madsen, 'lawful stay' is equivalent to 'lawful presence' of three months or longer.⁹ Goodwin-Gill¹⁰, argues that refugees lawfully staying 'must show something more than mere lawful presence', such as 'permanent, indefinite or unrestricted or other residence status, recognition as a refugee, issue of a travel document, [or] grant of re-entry visa.' A person who is a refugee has a number of important rights under the Refugee

Convention, including the right to seek asylum in a country outside their country of origin which has agreed to be bound by the Refugee Convention; the right not to be returned to the country where they have a well-founded fear of persecution; the right not to be discriminated against or penalised because they are a refugee; the right to equal access to the courts; freedom of religion and movement; the right to education and employment; and access to travel documents.¹¹

REFUGEE CONVENTION AND THE RIGHT OF NON- REFOULMENT

With its origins in refugee law,¹² the principle of non-refoulment prescribes that no person may be returned to any country where he or she is likely to face persecution or torture.¹³ To the extent that it relates to a risk of torture, the principle has attained the status of *jus cogens*¹⁴ according to some. The ECHR¹⁵ as well as the UN CRC¹⁶ have stated that the principle of non-refoulment flows directly from the prohibition of torture. Under the ICCPR, states may not in any manner 'remove a person from their territory where there are substantial grounds

⁶ G. Goodwin-Gill, *The Refugee in International Law*, Oxford University Press, 2nd ed., 1996, reprinted 1998, pp. 305- 307

⁷ UNHCR, "Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems", Global Consultations on International Protection, 3rd Meeting, UN Doc. EC/GC/01/17, 4 September 2001, at p.1, referring to ExCom Conclusion No. 82 (XLVIII) - 1997 on Safeguarding Asylum.

⁸ J.C. Hathaway, *The Rights of Refugees under International Law*, Ch.3.1.2

⁹ A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. II (A.W. Sijthoff-Leyden, 1972), p.374

¹⁰ Goodwin-Gill, pp. 309

¹¹ http://www.alhr.asn.au/refugee/kit/downloads/chapter_2.pdf

¹² Refugee Convention, Article 31

¹³ Goodwin-Gill, pp. 324

¹⁴ UNHCR Executive Committee, General conclusion on international protection, Concl. No.25, (1982), ¶ (b); Concl. No. 79, (1996) ¶ (d)

¹⁵ *Soering v. The United Kingdom*, Series A No. 161 ECHR (1989), ¶ 91

¹⁶ Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, U.N.Doc. CRC/GC/2005/16, (2005), ¶ 27-28

for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'.¹⁷ It must be verified that the country to which the asylum seeker is being expelled that he will enjoy treatment consonant with accepted international standards in the destination country.¹⁸ The right of non-refoulement is termed as the "corner-stone" of refugee law.¹⁹

The underlying criterion is that of effective control over the individual: if effective control over the individual changes from one state to another, the principle applies²⁰. The central provision for this purpose appears in Article 3 of the Convention against Torture and Cruel, Inhuman or Humiliating Treatment or Punishment²¹. The non-refoulement principle is a fundamental component of the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment²².

Indeed, the UN Human Rights Committee has stated that states parties to the International Covenant on Civil and Political Rights (ICCPR) may not in any manner 'remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed'²³. The European Court of Human Rights (ECtHR) has also deemed the non-refoulement prohibition to flow directly from the prohibition of torture and cruel and inhuman treatment in Article 3 of the European Convention on Human Rights (ECHR)²⁴. The UN Committee on the Rights of the Child has taken a similar position²⁵.

RIGHT AGAINST DISCRIMINATION

Since international and regional human rights instruments embrace both citizens and non-citizens, they extend protections to refugees and asylum seekers²⁶. Important International

¹⁷ HRC, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, U.N.Doc. CCPR/C/21/Rev.1/Add 13, 12 (2004)

¹⁸ UNHCR: ExCom, No. 58 (XL) (1989)

¹⁹ James C. Hathaway & John A. Dent, *Refugee Rights: Report On A Comparative Survey* 25, 31 (1995)

²⁰ Committee against Torture (CAT), Conclusions and Recommendations : United Kingdom of Great Britain and Northern Ireland – Dependent Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004, ¶4(b) and ¶5(e).

²¹ CCPR General Comment No. 20, ¶9, 10/3/92 found at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c112563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c112563ed004c8ae5?Opendocument); Chahal v United Kingdom, 108 ILR 385, at ¶75.

²² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/59/324, 1 September 2004 ¶28

²³ Human Rights Committee, General Comment No. 20, Prohibition of torture and cruel treatment or punishment, UN Doc. CCPR/C/21/Rev.1/Add 13, 26 May 2004, ¶12

²⁴ European Court of Human Rights (ECtHR), Soering v. The United Kingdom, Judgment of 7 July 1989, Series A No. 161, ¶91

²⁵ Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/16, 1 September 2005, ¶27–28.

²⁶ Ryszard Cholewinski, "Economic And Social Rights Of Refugees And Asylum Seekers In Europe", 14 Geo. Immigr. L.J. 709 1999-2000

Legal Instruments such as the International Covenant on Civil and Political Rights (ICCPR)²⁷ and the ECHR, apply to both nationals and non-nationals though they have a few exceptions.²⁸ The use of language such as "everyone," "all persons," and "no one" substantiate the point.²⁹ Their non-discrimination clauses require each state party to respect and ensure ("secure") the rights recognized therein to all individuals ("everyone") within its territory ("jurisdiction") without distinction ("discrimination") of any kind ("on any ground") such as race, color, sex, language, religion, political or other opinion, national or social origin ("association with a national minority"), property, birth or other status.³⁰

The Human Rights Committee (HRC) in its General Comment 15/17 on the Position of Aliens under the Covenant, the HRC asserted that: "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike"³¹

Rights are applicable on entry into the State.³² The ICCPR also contains a separate substantive equality clause in Article 26,³³ which is not restricted to the rights enumerated in the ICCPR and may therefore be applied to combat discrimination in areas outside the immediate scope of its provisions, including economic and social rights. Although there is no state obligation under the ICCPR to introduce social measures, the HRC has confirmed in a number of views that existing measures must be applied in a non-discriminatory fashion,³⁴ a position confirmed in a subsequent General Comment.³⁵ Article 26 extends also non-discrimination protection to socio- economic rights of non-nationals. The HRC found that unjustified differences in treatment on the basis of nationality in respect of pension rights constituted an infringement of the substantive equality clause.³⁶

²⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302

²⁸ ICCPR, Article 25; ECHR, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter ECHR] *as amended by* Protocol No. 11, May 11, 1994, Europ. T.S. No. 155., at 14, Article 16

²⁹ ECHR, Article 1; ICCPR, Article 10(1)

³⁰ ICCPR, Article 2(1); ECHR, Article 14

³¹ General Comment 15/27 on the Position of Aliens under the Covenant, U.N. GAOR, Hum. Rts. Comm., 41st Sess., Supp. No. 40, Annex VI, ¶1, 2, at 117, U.N. Doc. A/41/40 (1986) [hereinafter General Comment 1527]. Manfred Nowak, *U.N. Covenant On Civil And Political Rights: Ccpr Commentary*, ¶21, at xxiv (1993)

³² *Ibid.* ¶5-6, at 117.

³³ ICCPR, Article 26.

³⁴ *Communication No. 172/1984, Broeks v. Netherlands*, U.N. GAOR, Hum. Rts. Comm., 29th Sess., U.N. Doc. CCPR/C/29/D/172/1984 (1987)

³⁵ General Comment 18/37 on Non-discrimination, U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, Annex VI, para. 12, at 175, U.N. Doc. A/45/40 (1990) [hereinafter General Comment 18/37].

³⁶ *Communication No. 196/1985, Gueye v. France*, Hum. Rts. Comm. (1985)

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁷, there is no express provision for non-discrimination. However, Article 2(2) ICESCR is held to contain a non-discriminatory clause which is not exhaustive.³⁸ The provision reads: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*" In its concluding observations regarding Belgium's initial report, the ESC issued a recommendation that, "In view of the non-discrimination clauses contained in article 2(2) of the [ICESCR], the Committee strongly urges the Government to fully ensure that persons belonging to ethnic minorities, *refugees and asylum seekers* are fully protected from any acts or laws which in any way result in discriminatory treatment within the housing sector."³⁹

CIVIL AND POLITICAL RIGHTS

Right to Life

The right to life is an internationally recognized right.⁴⁰ The ICCPR describes it as an "inherent" right, giving it the status of customary international law.⁴¹ Some even argue that it has attained the status of a *jus cogens* norm.⁴² Article 6(1) of the ICCPR reads that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Also, Article 2(1) of the ECHR declares that "[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." The Human Rights Committee has emphasized that the right to life "is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation."⁴³ The HRC has made a broad interpretation of the right to life as, [T]he right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connexion [sic], the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.⁴⁴ "A broad and liberal understanding of

³⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]

³⁸ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 43rd Sess., Annex, Provisional Agenda Items 8 & 18, at 1, U.N. Doc. E/CN.4/1987/17 (1987), reprinted in 9 HUM. RTS. Q. 122 (1987),

³⁹ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium*, U.N. ESCOR, 10th Sess., 27th mtg. at para. 14, U.N. Doc. E/C.12/1994/7 (1994)

⁴⁰ B. G. Ramcharan, *The Concept and Dimensions of the Right to Life*, in *The Right To Life In international Law* 1, 2 (B. G. Ramcharan ed., 1985)

⁴¹ Halok A. Kabaalioglu, "The Obligations to 'Respect' and to 'Ensure' the Right to Life", in *The Right To Life In International Law* at 160, 161

⁴² B. G. Ramcharan, *The Concept and Dimensionsof the Right to Life*, in *The Right To Life In international Law* 1, 2 (B. G. Ramcharan ed., 1985)

⁴³ *General Comment 6(16) d/ article6*, U.N. GAOR, Hum. Rts. Comm., 37th Sess., Supp. No. 40, Annex V, para. 1, at 93, U.N. Doc. A/37/40 (1982).

⁴⁴ *Ibid.*

the right to life, therefore, envisages the taking of positive action by States parties to the ICCPR in the economic and social spheres.”⁴⁵ Concurrently, it also constitutes a significant step in the direction of realizing the principle of interdependence of civil and political rights with economic and social rights. Craig Scott, argues, in the light of this principle, that certain rights in the ICESCR should be able to “permeate” the ICCPR. Scott emphasizes the importance of the right to life in realizing interdependence between these two categories of rights: “[T]he ultimate test of interdependence is the interpretation placed on the right to life in ICCPR6(1). Does it remain a classic negative right or is there a more modern conception to appeal to? Can the Human Rights Committee foster an evolution of the concept to include the right to live with basic human dignity... Can such rights as the right to health, the right to food, or the right to shelter be interpreted into the ICCPR?”⁴⁶

Right against Torture and Inhumane, Degrading Treatment

Article 2 of the Convention against Torture⁴⁷ requires a State to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. Under the Convention against Torture, the term ‘torture’ is defined in Article 1 as, “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him [or her] or a third person information or a confession, punishing him [or her] for an act he [or she] or a third person has committed or is suspected of having committed, or intimidating or coercing him [or her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions”.

The relevance of the Convention against Torture and the work of the CAT in relation to refugee protection have not been lost on UNHCR as the Office issued an internal memorandum on the CAT in 1998. The memorandum summarises UNHCR's interest in this international human rights mechanism as follows: “As a rule, UNHCR's interaction with the human rights mechanisms generally, and the torture provisions in particular, should be linked to its mandate to protect from *refoulement*, all *bonafide* refugees and other individuals 'of concern' to the Office. Where the treaty mechanisms and the torture provisions can be used to prevent the *refoulement* of *bonafide* refugees or other cases of concern, then UNHCR will have a legitimate interest in those alternative and parallel systems”.⁴⁸ The case of *Tapia Paez v. Sweden*⁴⁹ concerned a Peruvian national and active member of the militant group *Sendero Luminoso* ('the Shining Path'), who was excluded from the grant of refugee status by the

⁴⁵ Ryszard Cholewinski, “Economic And Social Rights Of Refugees And Asylum Seekers In Europe”, 14 Geo. Immigr. L.J. 709 1999-2000

⁴⁶ Craig Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights”, 27 OSGOODE HALL L.J. 769, 875 (1989)

⁴⁷ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> [accessed 8 March 2013]

⁴⁸ IOMIFOM Nos. 57/98 and 61/98 of 28 August 1998, at para. 1.9

⁴⁹ Communication No. 39/1996.

Swedish authorities pursuant to Article IF of the 1951 Refugee Convention as he had been armed and engaged in crimes during his political activities in Peru. The Committee found that notwithstanding Mr. Tapia Paez's militant activities in his country of origin he fell under the protection of Article 3 as there were substantial grounds for believing he would be tortured if returned to Peru. In reaching this conclusion, the Committee noted that the nature of the acts in which the person engaged is not a relevant consideration in the taking of a decision in accordance with Article 3 of the Convention against Torture.

In *East African Asians v. United Kingdom*⁵⁰, the European Commission of Human Rights defined “degrading treatment” as, “degrading treatment in this context indicates that the general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action which lowers a person in rank, position, reputation or character, can only be regarded as degrading treatment in the sense of Article 3 where it reaches a certain level of severity.”⁵¹ It had also opined in an earlier case as to what constitutes degrading treatment as, “Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.”⁵²

Right to Liberty

Article 31(1) provides that States “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Article 31(1) of the 1951 Convention has also been taken to mean that the act of entering a country for the purposes of seeking asylum should not be considered an unlawful act. Article 31 of the 1951 Convention applies to asylum seekers. The term penalty has a wide application.⁵³ Thus detention without proper justification may attract penalty.⁵⁴ Although article 31(2) of the 1951 Convention does not identify in what circumstances restrictions on movement would be necessary, this provision must be read in light of article 12(3) of the ICCPR, which sets out the conditions in which the host State may limit the freedom of movement of those lawfully in the country. Article 26, provides that “[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within the territory subject to any

⁵⁰ *East African Asians v. United Kingdom*, App. Nos. 4403/70-4419/70, 4422170, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70. 4501/70 & 4526/70-4530/70 (joined), 78-A Eur. Comm'n H.R. Dec. & Rep. 5 (1994) (adopted by the Commission on Dec. 14, 1973).

⁵¹ *East African Asians*, 78-A Eur. Comm'n H.R. Dec. & Rep. at 55.

⁵² *The Greek Case*, 1969 Y.B. Eur. Conv.on H.R. 1, 186 (Eur. Comm'n on H.R.)

⁵³ Cholewinski, ‘Enforced Destitution of Asylum Seekers in the United Kingdom’ (1998) 10 IJRL 3; G. Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection’, in Feller, Türk & Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), 185; A. Edwards, ‘Tampering with Asylum: The Case of Australia’ (2003) 15(3) IJRL 192.

⁵⁴ G. Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection’, in Feller, Türk & Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), 185.

regulations applicable to aliens generally in the same circumstances.” Many States have made specific reservations to this article. Some States reserve the right to designate places of residence, generally or on grounds of national security, public order (ordre public), or the public interest.⁵⁵ In line with the gradations of treatment framework underlying the 1951 Convention, it is clear that this provision applies to recognised refugees, but it may also apply to asylum seekers who are lawfully within the territory, that is, those who have applied for asylum regardless of whether they entered the territory with or without authorisation. In sum, for those persons lawfully in the territory, restrictions on their choice of residence are not permitted.⁵⁶ Article 9 of the ICCPR protects individuals against arbitrary deprivation of liberty, whereas article 12 applies to restrictions on movement short of deprivation of liberty. In accordance with article 4 of the ICCPR, a State party may take measures derogating from its obligations under article 9 in time of public emergency. However, it may do so only to the extent ‘strictly required by the exigencies of the situation’ and ‘provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’⁵⁷ Any restrictions must be limited to the needs of the situation and cease as soon as the state of emergency no longer exists. Moreover, any derogation must not interfere with other non-derogable rights in the Covenant, such as the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR. In addition, the State party must inform other States parties to the ICCPR immediately of any such derogation.⁵⁸ In practice, detaining refugees and/or asylum seekers is rarely declared to be for reasons of public emergency.⁵⁹

Socio-Economic Rights

An interpretation of the ICESCR⁶⁰ shows the applicability to refugees and asylum seekers in certain cases.⁶¹ Even though there may be no clarity, we see that core obligations enshrined in the ICESCR are applicable.⁶² Many that argue it the economic and social rights with respect to refugees are progressive in nature unlike civil and political rights, which have an immediate application.⁶³ But we see that Article 2(1) of the ICESCR requires to “take steps”

⁵⁵ *Ibid.*

⁵⁶ Ophelia Field, Legal And Protection Policy Research Series: Alternatives To Detention Of Asylum Seekers And Refugees, Protection Operations And Legal Advice Section (Polas) DIVISION OF International Protection Services United Nations High Commissioner For Refugees.

⁵⁷ HRC General Comment No. 29 (2001) on Article 4: Derogations during a state of emergency, 31 August 2001 (adopted at 1950th meeting on 24 July 2001), CCPR/C/21/Rev.1/Add.11.

⁵⁸ Article 4(3), ICCPR

⁵⁹ Ophelia Field, Legal And Protection Policy Research Series: Alternatives To Detention Of Asylum Seekers And Refugees, Protection Operations And Legal Advice Section (Polas) DIVISION OF International Protection Services United Nations High Commissioner For Refugees.

⁶⁰ ICESCR

⁶¹ This was reiterated by the Executive Committee in its Conclusion No. 82: “... the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments.”

⁶² Matthew C. R. Craven, *The International Covenant On Economic, Social And Cultural Rights: A Perspective On Its Development* 170, 173-74 (1995).

⁶³ Ryszard Cholewinski, “Economic And Social Rights Of Refugees And Asylum Seekers In Europe”, 14 Geo. Immigr. L.J. 709 1999-2000

which is immediate in nature.⁶⁴ It reads “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. Article 2 (1) vests upon parties the requirement to take necessary steps “to the maximum of its available resources.” In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁶⁵ The phrase in Article 2(1) “to the maximum of its available resources” was “intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.” “Deliberately retrogressive measures,” such as, for example⁶⁶, the reduction of social assistance payments to asylum seekers and refugees, or a move away from cash support to support in kind, “would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”⁶⁷ We also see that the “non-discrimination” provision embodied in Article 2(2) of the ICESCR has immediate application.⁶⁸

A few economic and social rights enshrined in the ICESCR, such as the right to an adequate standard of living, which encompasses rights to adequate food and housing⁶⁹ and the right to social security,⁷⁰ have also been characterized as containing various levels of obligation, including the state obligation to “be the provider.” Craig Scott argues that there is an “organic interdependence” between this right and the right to life in Article 6(1) ICCPR in that the latter can be interpreted to include the former.⁷¹ This interpretation generates an “implicit overlap” between the two provisions. Article 11 (1) reads, “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” and Article 9 reads, “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance”. It is of importance to refugees and asylum seekers because, “Asylum seekers, refugees and displaced persons do not have the same opportunity as others to achieve an adequate standard of living on the basis of their own efforts. They therefore require, to a larger extent than the

⁶⁴ *Ibid.*

⁶⁵ General Comment 3, The Nature of States Parties Obligations (Art.2, para.1 of the Covenant), U.N. Comm. on Econ., Soc. & Cult. Rts., 5th Sess., at para. 2, U.N. Doc. E/1991/23 (1991).

⁶⁶ Ryszard Cholewinski, “Economic And Social Rights Of Refugees And Asylum Seekers In Europe”, 14 Geo. Immigr. L.J. 709 1999-2000

⁶⁷ *Justice, Immigration And Asylum: Human Rights Impact Assessment* 8-9 (1998).

⁶⁸ General Comment 3, *The Nature of States Parties Obligations* (Art.2, para.1 of the Covenant), U.N. Comm. on Econ., Soc. & Cult. Rts., 5th Sess., at para. 2, U.N. Doc. E/1991/23 (1991).

⁶⁹ ICESCR, Article 11(1)

⁷⁰ ICESCR, Article 9

⁷¹ Craig Scott, “The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights”, 27 Osgoode Hall L.J. 769, 852-59 (1989) at 780-81

ordinary public, direct provisions, until conditions are established in which they can obtain their own entitlements”.⁷² Article 9 in a narrow sense talks about social security.⁷³ According to Scheinin, Article 11(1) emphasizes, “social assistance and other need-based forms of social benefits in cash or in kind to anyone without adequate resources.”⁷⁴ A right to social assistance is provided to those “lawfully within” the territories of a state under the European Social Charter⁷⁵, which is also applicable to asylum seekers.⁷⁶

CONCLUSION

The Refugee Convention is one of the cornerstones of the larger human rights system for protecting vulnerable persons and yet it is also a very narrow instrument, protecting a very specific group of persons. This duality is reflected in refugee protection generally where, on the one hand, states appear to believe in a moral, humanitarian imperative to protect individuals seeking refuge, yet, on the other hand, they are reluctant to permit entry to all those persons falling under their responsibility. When we consider the contemporary definition of refugee, and how customary international law may supplement the definition of refugee, we see this same division of interests. If we were motivated strictly by human-centered interests, we would find a broadening of the definition, although perhaps with limited state compliance. If we were motivated strictly by state-centered interests, we might find a narrowing of the definition, although perhaps abandoning desperate individuals truly in need.⁷⁷ The Refugee Convention has not been amended either explicitly or through practice to provide for a revised definition of refugee; however, customarily it is interpreted in an expansive fashion, relying heavily on its object and purpose. The qualification as a refugee may have been supplemented beyond the express terms of the Convention.⁷⁸

It has been argued that the definition of refugee does not exist under customary International law but only under treaty law.⁷⁹ Most scholars of international refugee law have concluded as much. In particular, as far as the European Union is concerned, Kay Hailbronner has concluded, “The assumption of an international legal obligation to grant protection to victims of war, civil war and general violence must still be considered as “wishful legal thinking”.⁸⁰ Similarly, the American Society of International Law has concluded that there is no customary international law obliging states to provide protection to individuals who fall

⁷² Asbjorn Eide, *The Right to an Adequate Standard of Living Including the Right to Food*, in *Economic, Social And Cultural Rights: A Textbook* 89, 105 (Asbjorn Eide et al. eds., 1995).

⁷³ Martin Scheinin, *The Right to Social Security*, in *Economic, Social And Cultural Rights: A Textbook*, at 159, 159.

⁷⁴ *Ibid.* at 163

⁷⁵ The European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35

⁷⁶ Committee Of Independent Experts, European Social Charter, Conclusions XII-4, at 62 (1996)

⁷⁷ William Thomas Worster, “The Evolving Definition of the Refugee In Contemporary International Law”, 30 *Berkeley J. Int'l L.* 94, 2012

⁷⁸ *Ibid.*

⁷⁹ Memorandum from the U.N. Secretariat on Expulsion of Aliens, U.N. Doc.A/CN.4/565 (July 10, 2006) (citing *The Movement of Persons across Borders*, 23 *Stud. Transnat'l L. Pol'y* § 13.02, 100 (Louis B. Sohn & T. Buergenthal, eds., 1992)); Richard Plender, *International Migration Law* 393 (rev. 2d ed. 1988)).

⁸⁰ *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* 13 (D. Bouteillet-Paquet ed., 2002); Pirrko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* 287 (1997).

outside the strict terms of the Refugee Convention.⁸¹ Hence we see that there is no strict uniformity with respect to the refugees. Apart from the Refugee Convention, other international legal instruments are required to be considered as well while dealing with refugees. We also see an increasing requirement to expand the definition of the term 'refugee' to include in its ambit the new developments and thereby a closer nexus with human rights.

⁸¹ Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law, Thursday, April 18: Morning, Amer. Soc'y of Int'l L. Proc. Apr. 17-20, 1991, 90 Am. Soc'y Int'l L. Proc. 545.