

Global Migration

and International Law

»»» by Jaya Ramji-Nogales

For the past few years, stories about migrants have dominated news headlines. From Syrians fleeing across the Mediterranean Sea in rickety boats to Central Americans undertaking treacherous desert journeys, stories of migrants seeking protection, freedom, and economic security abound. How receiving countries should treat these migrants is a question of great controversy, and one that has arguably won and lost elections around the world. International law provides some answers to this question, though its responses are neither as thorough nor as effective as one might hope.

International refugee law, which comes from powerful binding treaties, protects a narrow subset of migrants who meet its strict, and somewhat outdated, definition. That treaty law has little to say about the process by

which refugees are determined to meet its definition. Most scholars of refugee law agree that the definition itself needs updating, but the process of changing the definition is long and risky, as it could end up restricting rather than expanding the group of migrants eligible for protection.

One key concept that is missing from contemporary migration law is the idea of safe transit. Currently, many migrants must risk death and submit themselves to financial and sometimes physical exploitation to gain entry into a country in which they can seek protection. This does not make sense for the migrants, who pay enormous sums of money to undertake these risky journeys—that is, if they are lucky and capable enough to be able to leave their home country. The absence of safe transit also does not make sense for host states, who receive migrants based on

geographic proximity rather than carefully considered policy reasons, such as protecting the vulnerable or bringing in skilled workers.

A History of Refugee Law

The concept of asylum, or protecting the stranger fleeing persecution, dates back at least to ancient Greece and has roots in the Koran and the Old Testament. In recent history, most scholars would point to the 1951 United Nations Convention Relating to the Status of Refugees as the cornerstone of international refugee law. Though there were earlier efforts, through the League of Nations and the United Nations, to create an international refugee definition, the Refugee Convention was the first successful attempt to do so. The Refugee Convention is now one of the most widely adopted human rights treaties; 148 of 193 member states of the Unit-



ed Nations have bound themselves to uphold the provisions of this law.

The Refugee Definition

Drafted in the wake of the Second World War, the Convention responded to the situation of Jewish refugees after the Holocaust and also aimed to protect political dissidents fleeing the Soviet Union. It defines a refugee as a person with a

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion [who] 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.¹

There are several important aspects to this definition. First, the refugee must have left the country in

which she fears persecution; crossing an international border is a preliminary requirement. In a similar vein, the refugee must be unable or unwilling to seek protection from her country of nationality. Refugee law was created to enable the international community to protect those who do not have a country to protect them. This approach reflects the structure of international law more generally, allocating the primary responsibility for rights protection with the country of nationality and stepping in only when that country cannot or will not protect its citizens.

Notably, the definition does not require that the refugee establish conclusively that she will be persecuted on return to her home country, but rather that she has a well-founded fear of persecution. The United States Supreme Court has interpreted this requirement to mean that a person with a 10% chance

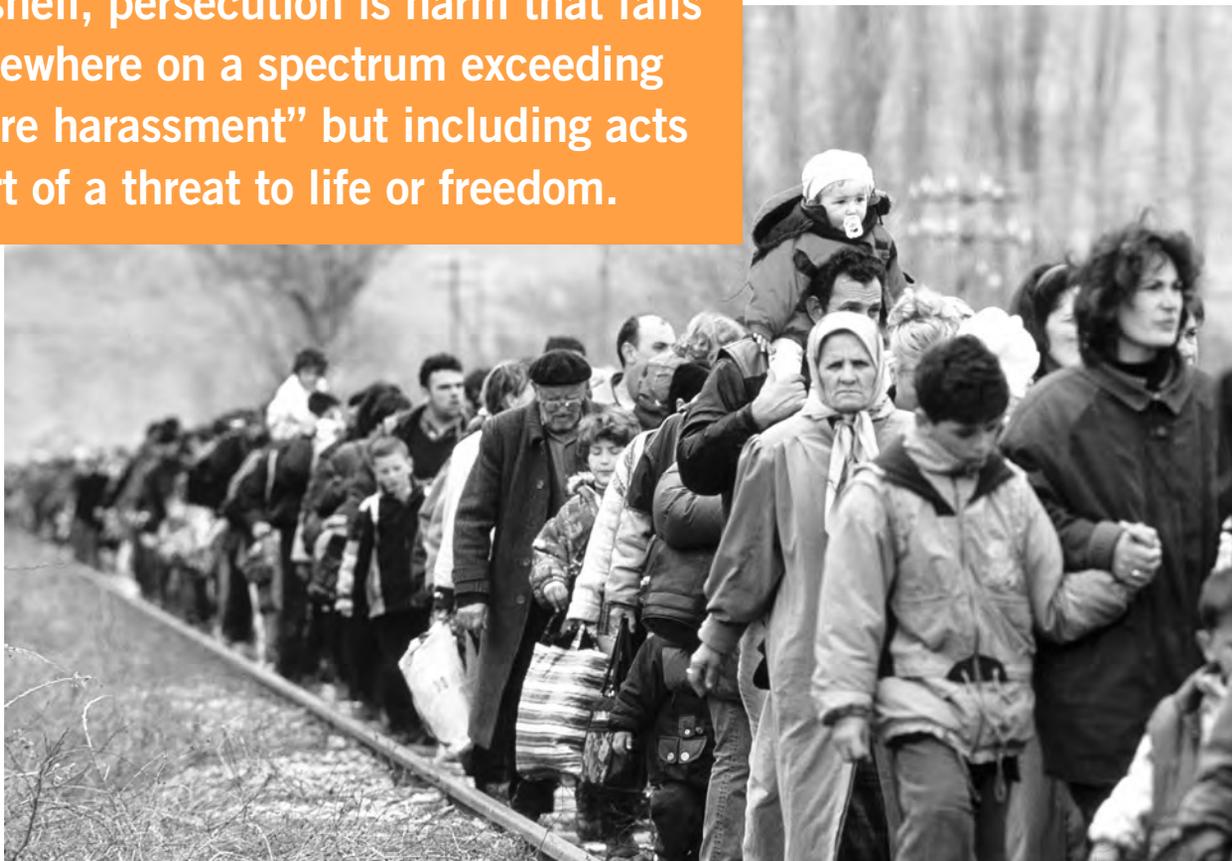
of persecution should be considered a refugee.² The definition of persecution is constantly evolving as wrongdoers invent new forms of harm. In a nutshell, persecution is harm that falls somewhere on a spectrum exceeding “mere harassment” but including acts short of a threat to life or freedom. Persecution can take many different forms, including severe economic harm and acts that the perpetrator believes will be



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Refugees from Kosovo on March 1, 1999.
Photo courtesy of the United Nations.



beneficial to the refugee, such as forced “conversion” of LGBTQ individuals or female genital mutilation.

The key to the definition is being able to fit into one of the five grounds for persecution. Political opinion is one of the most common grounds; individuals such as Nelson Mandela who face imprisonment and other harms for expressing their political beliefs would fall into this category, which also includes less well-known political activists. Religion is another often-cited basis for persecution; Jews fleeing Nazi Germany are an example of religious refugees. Race and nationality are less commonly used but might include groups such as the ethnic Chinese in Indonesia. The particular social group

ground was designed to be expansive and has been interpreted to include categories that might not have been recognized in 1951, such as sexual orientation and domestic violence. This category is still evolving through court decisions.

For individuals who meet this definition, the Refugee Convention further requires that countries who have signed onto the treaty may not “expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories” where she fears persecution.³ (There are exceptions for individuals who pose a serious threat to national security or public order.) This rule is known as the international legal principle of *non-refoulement*.

In 1984, the principle of *non-refoulement* was extended to protect individuals fleeing torture through the United Nations Convention Against Torture and Cruel, Inhuman, or Degrading Treatment or Punishment. That treaty prohibits countries from returning an individual who would face

severe pain or suffering, whether physical or mental, [intentionally inflicted to obtain] information or a confession, [to punish, intimidate, or coerce him or for any discriminatory reason], [at the hands of or] with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include

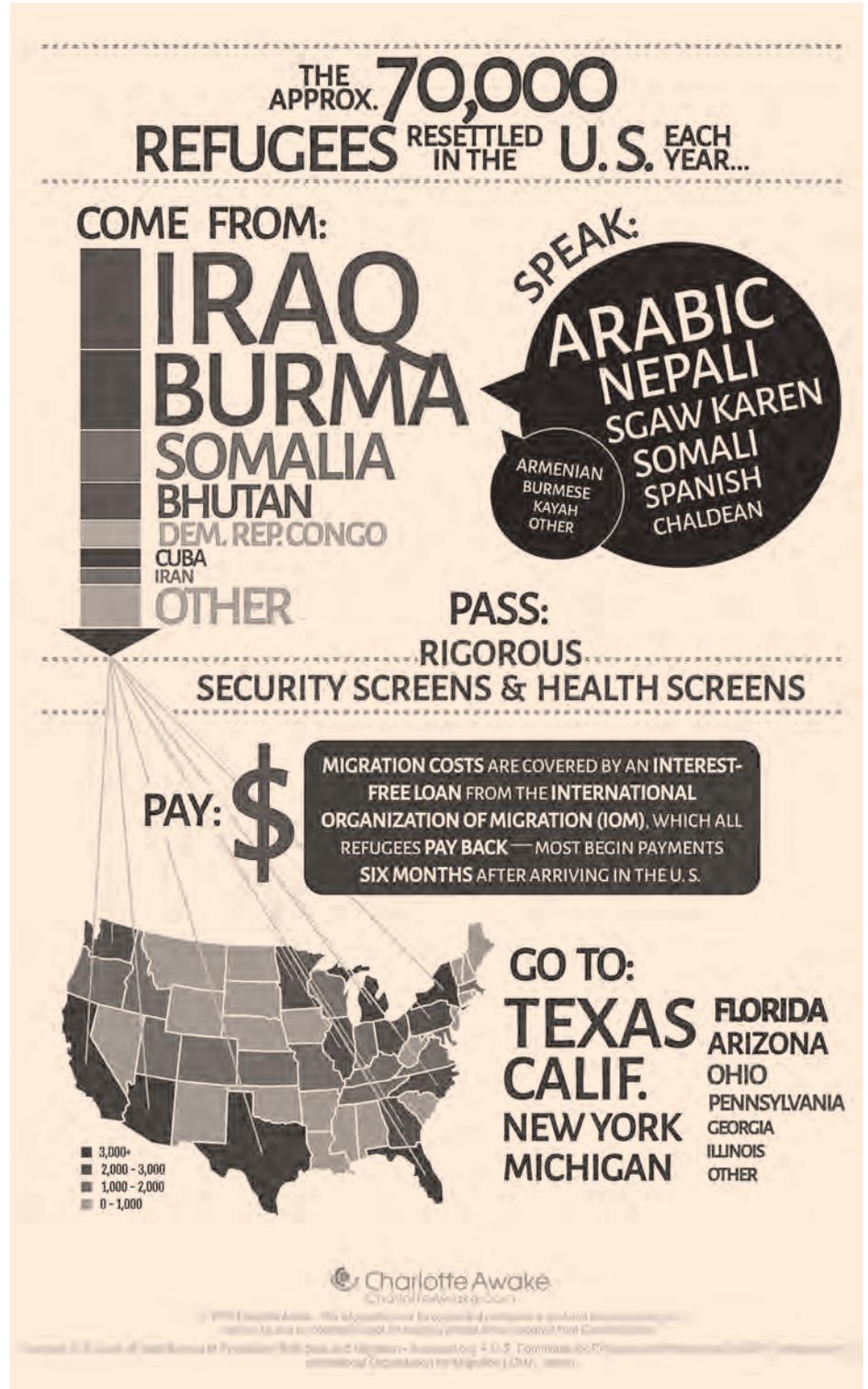
pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴

The Convention Against Torture is adopted even more widely than the Refugee Convention; 162 of 193 United Nations member states have bound themselves to obey the treaty. In one way, the definition is more inclusive than the Refugee Convention definition, as it requires only that the applicant demonstrate a risk of harm; it does not require establishing that the harm is due to membership in one of the five categories. In another way, the definition is less inclusive than the Refugee Convention definition, as it requires the applicant establish that a government official took part in or at least agreed to the harm. In any case, the addition of the Convention Against Torture expands the principle of *non-refoulement*.

Asylum Seekers and Refugees: What's the Difference?

An individual who meets the refugee definition technically becomes a refugee as soon as she leaves her country of nationality—as soon as she steps foot across an international border. This theoretical categorization does not do the refugee much good in the abstract, however. In order to obtain protection in the form of lawful immigration status, a refugee must be recognized as a refugee by a host country. In the United States, this can happen in two ways, as an asylum seeker or as a refugee.

An asylum seeker is an individual who arrives at a border of the United States or enters the United States and asks for refugee protection. If she is within the United States, she may seek asylum affirmatively, filing a claim while they have lawful immigration status or before being apprehended by the Department of Homeland Security. Affirmative asylum seekers present their case to a specially trained asylum officer at one of eight asylum offices around the country. Applicants who



Sources: Charlotte Awake; U.S. Department of State Bureau of Population, Refugees, and Migration; U.S. Committee for Refugees and Immigrants; International Organization for Migration, 2015.

are not granted asylum at the asylum office may appeal their case to an immigration court, which is part of the Department of Justice. Asylum seekers who do not have lawful immigration status and are apprehended by

the Department of Homeland Security before applying for asylum must file their claim defensively, meaning that they start out in immigration court; they don't get the chance to present their case to an asylum officer.



Learning Gateways

Should the United States Accept More Syrian Refugees?

Students analyze a political cartoon to consider the United States' role in the ongoing Syrian refugee crisis and then review resources to discuss the role of the United States in historical refugee crises.



Learning Targets

- Analyze a political cartoon as a primary source, including evaluating an argument.
- Consider the United States' role in the contemporary Syrian Refugee Crisis.

Standards Connections

National Civics Standards

9. Understands the importance of Americans sharing and supporting certain values, beliefs, and principles of American constitutional democracy.
11. Understands the role of diversity in American life and the importance of shared values, political beliefs, and civic beliefs in an increasingly diverse American society.

Common Core State Standards

CCSS.ELA-Literacy. RH.11-12.2. Determine the central ideas or information of a primary or secondary source; provide an accurate summary that makes clear the relationships among the key details and ideas.

Sources: National Standards © 2000, Mid-Continent Research for Education and Learning; Common Core State Standards © 2010, National Governors Association Center for Best Practices and Council of Chief State School Officers.

GRADES: 9–12

DURATION: 20 minutes

Materials

Available at www.insightsmagazine.org

Discussion Questions

1. What is happening in the cartoon? What characters are represented?
2. Have you seen or read news stories about the story that is represented here?
3. What legal processes did the refugees in the cartoon follow to be resettled in the United States?
4. What is the tone of the cartoon? What message do you think the cartoonist is trying to convey? What indicators do you see to support this?
5. Do you agree with the cartoonist's message? Why?

Resources for Extended Discussion

The following videos offer brief, engaging discussions of what a refugee is, how that status is different from “migrant” or “asylum seeker,” and explores the process that refugees entering the United States must complete before resettling.

- “What Does it Mean to be a Refugee?,” by Benedetta Berti and Evelien Borgman, TED-Ed, June 16, 2016 <https://www.youtube.com/watch?v=25bwiSikRsl>
- “Screening Syrian Refugees,” narrated by Jeh Johnson, attn., November 24, 2015 <https://www.youtube.com/watch?v=aQUIxQ6TFZc>

The following articles and charts provide additional background on the current refugee crisis and historical refugee crises. Discussion might explore data related to the current refugee crisis, where refugees in the United States come from and where they resettle, and how Americans' attitudes about refugee resettlement have changed (or not) over time.

- “Syrian Refugees in the United States,” by Jie Zong and Jeanne Batalova, Migration Policy Institute, January 12, 2017 <http://www.migrationpolicy.org/article/syrian-refugees-united-states>
- “Key Facts About Refugees to the United States,” by Jens Manuel Krogstad and Jynnah Radford, Fact Tank, Pew Research Center, January 30, 2017 <http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/>

Finally, asylum seekers without proper documents who are caught close to the border less than two weeks after they entered are placed into what's called "expedited removal." The border patrol officer who apprehends the asylum seeker must ask four questions designed to determine whether the applicant has a fear of returning home. If she does express a fear of return, the border patrol officer sends her to an asylum officer for a "credible fear" interview, in which the officer determines whether she has a plausible asylum claim. If so, she is sent to immigration court to present her asylum claim; if not, she may appeal to an immigration judge but likely faces deportation.

For all asylum seekers, if they lose their case in immigration court, they can appeal to the Board of Immigration Appeals, which is also part of the Department of Justice. If the asylum seeker loses before the Board, she can appeal to the federal Courts of Appeals, moving their adjudication process for the first time out of the executive branch into the judicial branch. Asylum seekers who lose in the federal Court of Appeals may appeal to the United States Supreme Court, but such cases are rarely granted.

Refugees, in contrast, undergo a determination process abroad. These are individuals who have fled their country of nationality and landed in a third country. Refugees are often confined to refugee camps while they await what is known as a "durable solution"—in essence, a permanent home. The United Nations High Commissioner for Refugees undertakes the initial determination of whether the individual meets the refugee definition. If she does, for a very fortunate few, the UNHCR will refer their case to the United States or another refugee resettlement country. A refugee officer from the Department of Homeland Security will then travel to the refugee camp to interview the refugee and her family to ensure that she meets the refugee definition.

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Above: Refugees at the Kara Tepe refugee camp in Lesbos, Greece, June 18, 2016; below: United Nations Secretary General Ban Ki-Moon and his wife, Yoo Soon-taek, visit the Auramotalo asylum center in Vantaa, Finland, on December 9, 2015. Both photos courtesy of the United Nations.

At this stage, refugees undergo extensive background checks to ensure that they do not pose a national security risk. This process, which can take from eighteen months to two years, involves three biometric checks through Department of Homeland Security databases as well as the databases of the Department of Defense and the FBI. Refugees also undergo two to three biographic

checks, again through the DHS system as well as the Department of State and the National Counterterrorism Center. Refugees face the most extensive security check process of any immigrant coming to the United States.

While these specific processes are unique to the United States, most countries that have signed onto the Refugee Convention have an asylum process.



Afghan refugees on December 1, 2001. Photo courtesy of the United Nations.



Discussion Questions

1. Why do you think the international community works to protect asylum seekers and refugees? What reasons might a country have for signing on to an international refugee convention?
2. Do you think refugees have a right to safe transit? What would that right entail? What benefits would it have for the refugees and their host countries?
3. What is the distinction between refugees and economic migrants? Do you think economic migrants should be offered certain legal protections? What might be appropriate?

Fewer countries resettle refugees, and they generally rely on the assistance of UNHCR, but again their domestic resettlement process differs from that of the United States.

Global Migration and International Refugee Law

How does all of this relate back to the topic of global migration? Though refugee law and the principle of *non-*

refoulement have played an important role in protecting many individuals from serious harm, they are increasingly unable to address contemporary migration flows. Where does this problem come from? Why is refugee law inadequate in the modern era? The answer to these questions returns to concepts discussed in the introduction to this article.

There are at least two fundamental shortcomings of refugee law in managing global migration. The first, as you may have guessed, is the absence of safe transit as a right or even as a concept. Only a few fortunate refugees—in 2015, 107,100 of 16.1 million total refugees in the world—will be able to avail themselves of resettlement. The rest face the choice of languishing in refugee camps, most of which offer inadequate housing, sanitation, and nutrition, not to mention severely limited educational and employment opportunities, or making their way to a country in which they can seek asylum. Unsurprisingly, many choose the latter, but must take exceedingly dangerous journeys to arrive at the borders of those countries. A more effective global legal system might enable refugees to have their

claims processed before they travel to their host country, enabling the creation of safe transit systems.

The second problem is the limited definition of a refugee. Many news sources distinguish between refugees and economic migrants, implying or explicitly arguing that the latter should not be allowed to migrate. This strict approach assumes that there is a clear and substantial difference between individuals who move to seek protection and those who seek employment. But the line between refugees and economic migrants is often not that clear. Remember that international refugee law constructs strict categories of migrants, some of whom are eligible for lawful status because they fall within these legal boundaries. Yet there are migrants who don't fit within any of those categories who suffer serious harm and need protection, such as individuals fleeing civil war or widespread gang violence. And refugees, as the drafters of the Refugee Convention recognized, need to work in order to support themselves and their families. People do not fit easily into boxes, especially when those boxes do not map accurately onto their lived experience.

In short, international refugee law faces serious challenges in the contemporary world. The underlying idea of assisting those who are fleeing harm should be upheld, but it may be time to revisit both the definition and the process of refugee protection. **IN**

1. 1951 United Nations Convention Relating to the Status of Refugees at Art. 1(A)(2), available at <http://www.unhcr.org/en-us/3b66c2aa10>.

2. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

3. 1951 United Nations Convention Relating to the Status of Refugees at Art. 33, available at <http://www.unhcr.org/en-us/3b66c2aa10>.

4. 1984 United Nations Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment at Arts. 1, 3, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.