

The American University in Cairo

School of Global Affairs & Public Policy

RECOGNIZING GRAVE SOCIO-ECONOMIC RIGHTS ABUSES

AS

VALID REFUGEE CLAIMS UNDER INTERNATIONAL

REFUGEE LAW

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for
the LLM degree in International & Comparative Law**

By

Ramy Moustafa

May 2019

The American University in Cairo
School of Global Affairs and Public Policy

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DEDICATION

I dedicate this paper to the lives we lose every day because of poverty. I hope justice will be served soon. I also dedicate this paper to my beloved colleague Zahraa Mubarak who passed away during the process of writing this paper. May your soul rest in peace my dearest friend.

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Ramy Moustafa

Supervised by Professor Jason Beckett

ABSTRACT

Article 14 of the Universal Declaration of Human Rights recognizes the right of every person to seek asylum from persecution in other countries. Accordingly, the United Nations adopted the Convention relating to the Status of Refugees in 1951. The Convention, in its first article, sets the definition of the term refugee. It also establishes a criteria that decision makers should follow in order to determine if someone is a refugee. Since the implementation of the Convention, writers and practitioners have regularly been using an approach that maintains a dichotomy between economic migrants and political refugees. This dichotomy is regularly used by decision makers to reject entire classes of applicants on the basis that their claims reflect economic migrant status rather than refugee status. The current situation of global destitution has pushed many people from poor countries to flee to more developed countries where they apply for asylum in order to find protection. These applicants have started to make claims that have begun to challenge the boundaries of the Refugee Convention and question the validity of the traditional dichotomy between economic migrants and political refugees. This paper identifies the conceptual and analytical challenges presented by claims based on economic and social deprivation. It assesses how to overcome these challenges by using a creative interpretation of the Refugee Convention based on recent developments in international human rights law. The central argument of this paper is that in spite of, the traditional dichotomy made between economic migrants and political refugees by legal scholars, the Refugee Convention is capable of accommodating many more claims based on social or economic deprivation. To prove this argument, the paper analyzes each element of the refugee definition and shows how socio-economic-based claims can fulfill the requirements of a refugee claim.

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I - Introduction

In the last few decades, the world has witnessed many global crises including wars, armed conflicts, revolutions against dictatorial regimes and natural disasters. These crises have put millions of people in devastating living conditions of poverty and destitution that pushed them to flee their countries and seek asylum in other places in the hope of finding peace and protection. These people have been mainly moving from poorer countries in the East and South towards more developed and wealthier countries in the West and North creating what is currently called “the refugee crisis.”¹ The phenomenon of refuge from destitution and economic deprivation poses many difficult legal and policy challenges for refugee-receiving countries. The main questions raised in this context are: How should these countries respond to claims based on economic and social deprivation? What are the main international legal principles that could constrain the receiving states’ authority in rejecting these claims?

The 1951 Refugee Convention is regarded as the key instrument in public international law for protecting refugees. This Convention articulates the main conditions that must be fulfilled in order to recognize someone as a refugee. It also poses many legal obligations on state parties regarding the proper treatment asylum-seekers should receive during the process of determining their refugee status from the moment they reach these states’ lands until they leave it. Since the Refugee Convention was implemented, there has been a traditional position in the field which maintains a dichotomy between “economic migrants” and “political refugees” the former falling outside the application of the convention. Claims based on economic and social deprivation have routinely been rejected by many domestic refugee courts in different legal systems. They have also been rejected for a long time by the United Nations High Commissioner for Refugees (UNHCR). Nevertheless, recent developments reflected in

¹ This term has been continuously used by many countries and UN agencies to describe the current situation of mass displacement of people that caused huge waves of migrants and refugees moving from a country to another seeking protection and relief. *See*, The United Nations, Global Issues: Refugees, 2019, available at: <https://www.un.org/en/sections/issues-depth/refugees/>, *See also*, Care, Global Refugee Crisis, 2019, available at: <https://www.care.org/emergencies/global-refugee-crisis>. I believe that the term “crisis” does not properly mirror the current situation taking place in the Mediterranean Sea, however, this term has been frequently used by European elites for their own political benefit to intimidate and convince their populations that they are under imminent threat from the movements of migrants and refugees heading to Europe. The actual crises are taking place in Syria where millions have fled their country as a result of war and poverty. Moreover, in Yemen, 24 million have been displaced in the last few years because of the Yemeni war. Furthermore, the catastrophic situation of refugees and migrants inside Africa as millions of refugees and migrants have been fleeing Burundi, Central African Republic, and South Sudan escaping armed conflicts and destitution.

the literature reveal many scholarly voices arguing against the traditional view that adopts this simplistic dichotomy. Moreover, recent case law shows the willingness of many courts to consider economic-based claims as falling under the context of the Refugee Convention. The question remains at this point is whether economic and social deprivation can constitute a valid claim for refugee status or claims must be based on civil and political rights violations?

This question is particularly pressing for three main reasons. First, the last two decades have seen significant advances regarding issues related to the interpretation of the Refugee Convention, especially, when it comes to the recognition of new claims that had rarely been recognized previously. Decision makers have increasingly started to accept the integral connection between international refugee law and other fields of law such as international human rights law. Such development has expanded the definition of the term “refugee” and allowed accommodation of new types of claims previously thought to fall outside the Refugee Convention such as claims based on domestic violence and female genital mutilation as forms of persecution.² These advances also include economic and social deprivation if proper interpretation and connection can be established between both fields of law. Second, these developments in the field of international refugee law join with other developments in the field of international human rights which recognize economic and social rights as being of equal value and importance compared to civil and political rights. Such advances should be examined and thoroughly discussed. Third, many commentators have argued that in order for socio-economic claims to be recognized, the definition of refugee must be amended, re-formulated or a new protocol added to the Refugee Convention recognizing such claims.³ Nevertheless, it is rare to find literature uses the definition in its existing form and argues that it is capable of responding to these claims by addressing the conceptual and theoretical challenges regarding the concept.⁴

² See, Deborah Anker, *Boundaries in the Field of Human Rights*, at 138.

³ See, for example, Arthur C. Helton and Eliana Jones, ‘What is Forced Migration?’ (1999) 13 *Georgetown Immigration Law Journal* 521, 526 at 526.

⁴ Michelle Foster was one of the first scholars to adopt this idea. In her book, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, Foster gives a very persuasive analysis to the Refugee Convention and its ability accommodate new claims based on economic and social deprivation.

This paper explores the legal challenges created by the phenomenon of refuge from destitution and economic deprivation. It engages with the question of whether the 1951 Refugee Convention in its existing form is capable of recognizing claims based on economic and social deprivation. In order to do so, the paper challenges the traditional dichotomy between economic migrants and political refugees which has been widely accepted by legal scholars and practitioners to date. It argues that the Convention can accommodate claims based on economic deprivation with proper interpretation based on recent developments in international human rights law. It also identifies the conceptual and analytical challenges that may arise from these claims and assesses to what extent these challenges can be resolved or overcome via different creative interpretations of the Refugee Convention. Moreover, this paper examines each element of the refugee definition and the extent to which economic claims can fulfill those elements; it follows the same approach used in any refugee status determination assessment, which starts by assessing the element of well-founded fear then the element of persecution and finally establishes “the causal link” between them and the remaining conventional grounds.

This paper does not engage with the analysis of whether the definition of the term “refugee” which is already established in the Refugee Convention should be amended or reformulated in order to accommodate new claims based on economic and social deprivation. It argues, otherwise, that the definition in its current form is capable of absorbing these claims. To establish my claim, this paper examines recent developments in the fields of international refugee law and international human right law. There are other fields of law that could be relevant to my argument such as international treaty law and international migration law, nevertheless, they will not be extensively examined in this paper.

The topic of this paper can be discussed from many angles and perspectives such as the pure political analysis which questions how decision makers should engage politically with people seeking asylum with claims based only on economic deprivation. Development can be another perspective one can use to discuss this topic as many literature have engaged with theories about how refugees and migrants should be integrated as an important development mechanism receiving states can take advantage from. This question has been raised lately in 2018 to elaborate on the decision of German chancellor Angela Merkel to accept the resettlement of 10.000 refugees to

Germany. Nevertheless, this paper's scope engages with the question of refugees and economic deprivation from a merely legal perspective; it provides a creative interpretation to the Refugee Convention and asks for the implementation of this interpretation by decision makers in refugee hosting states. The paper can be seen as an important reference judges and other legal practitioners which they can use while determining refugee status for refugees with economic and social claims.

This paper is divided into six chapters. Chapter II explores the history of the refugee crisis. It indicates the movements of refugees and migrants from the West and South to the North and East and the reasons behind these movements. It focuses on the current situation of migration through the Mediterranean Sea and how refugee-receiving states have dealt with that situation in a way that brought up the use of the term "the boat people" to describe the devastating conditions these migrants and refugees face during their flight to Europe. Following, the chapter elaborates on the situation of poverty in the world. It establishes a logical relationship between the rates of poverty in some countries and the numbers of people displaced in these countries in order to show how destitution and economic deprivation are the main motives behind the huge movements of refugees and migrants we are witnessing today.

Chapter III provides the legal framework governing the definition of refugee. It starts with explaining the traditional dichotomy between economic migrants and political refugees. Following, it explores various legal definitions under international law such as migrant, refugee, voluntary migration and involuntary migration. The chapter also describes the process of refugee status determination (RSD) which is conducted by domestic refugee courts and the UNHCR to determine whether a person should be considered as a refugee. Finally, it explores the inclusion criteria for refugee status consisting of the elements of the refugee definition such as alienage, well-founded fear, persecution and the five conventional grounds.

Chapter IV elaborates the reasonableness of taking international human rights law as an appropriate framework for interpreting the Refugee Convention. It first explores recent literature calling for a more objective and universal standard for interpreting the Refugee Convention. It then argues that international human rights law is the most appropriate standard to be adopted for interpretation. The last section of this chapter explores the situation of economic and social rights in the field of international human

rights law. It elaborates on traditional views which categorize rights and put civil and political rights at a higher level than social and economic rights. Two of these approaches are examined at the end of this chapter: Carlier's hierarchal approach and Hathaway core obligation approach.

Chapter V challenges the legitimacy of putting rights into hierarchies by exploring recent developments in the human rights field that has proved that all rights should be treated equally and considered on the same level. It then analyzes the main elements of the refugee definition and to what extent economic and social deprivation can be a valid claim for refugee status. It argues that socio-economic right violations could amount to persecution by presenting recent developments in the field and reflected in the literature that support this argument. Moreover, it establishes the causal link between economic persecution and the five conventional grounds and how recent developments in the field of international human rights law have allowed many courts to invent new grounds based on economic and social deprivation.

II – Background

A. Brief History of Global Politics and its relation to the Movements of Refugees and Migrants

In the last century, refugees and migrants have taken much of the global attention. International disasters have led to devastating outcomes; two world wars resulted in the killing of millions of civilians, and internal armed conflicts have led millions to flee their homes with their relatives to find a safe place to live. In addition, Natural disasters have forcibly displaced huge numbers of people to different areas of their home countries and led others to leave for other countries. Altogether, dictators ruling poor countries has caused major violations of people’s fundamental rights, which have left them no option but to seek the protection of other countries.

For the past two centuries, the West has directed its attention to the east and the south: They recognize that in order to maintain their wealth they need to take natural resources from other countries that do not have the military or political capacity to defend themselves. They take such resources in return for providing protection to those countries. When these resources have moved north and west, the countries of the east and the south fell into extreme poverty and destitution.⁵ Furthermore, dictators who used to ease the process of shifting resources to the West have oppressively ruled the people of their countries and committed major massacres against those who tried to oppose them. They made sure to maintain security in their countries by oppressing people and force them to stay silent.

This all has led to massive movements of populations around the globe. These movements or flows - as some writers call them – have alerted wealthier countries that these flows will be heading toward them, which is actually what has happened.

In 2017, the United Nations High Commissioner for Refugees (UNHCR) issued a shocking report determining the numbers of people displaced worldwide.⁶ This report states that there are more than 68.5 million forcibly displaced persons around the globe; 25.4 million are refugees who fall under the mandate of UNHCR and UNRWA, 3.1

⁵ See Beckett J. “Creating Poverty” Hoffmann and Orford (ed.s) *The Oxford Handbook of International Legal Theory* (2016), p 5. In this article Beckett illustrates how far the North and West have always depended on East and South resource flows to make their development. He also argues that Public International Law was structured in a way that ‘incentivizes’ this process and the creation of poverty. See also, Beckett J. *The Deceptive Dyad*.

⁶ UN High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2017*, 19 June 2017, available at: <https://www.refworld.org/docid/5b2d1a867.html> .

million are still seeking asylum and not yet granted refugee status, while 40 million are internally displaced in their home countries.⁷ The report points out that the majority of refugees come mainly from five countries: Syria, Afghanistan, South Sudan, Myanmar and Somalia and that is due to the crisis these countries are going through in recent years.⁸

Additionally, the International Organization for Migration (IOM) issued its global report in 2018 indicating that latest statistics estimate the number of migrants around the world to be over 244 million, which is 3.3% of the world's population.⁹ The same organization indicated in its report in 2000 that the total number of migrants was around 155 million people, which means that in the last 18 years the number of migrants has increased by 89 million.¹⁰ There are various reasons for the migration stated in these and other reports: There are two main categories: push and pull factors. Push factors for migration include violence and war, poverty, unemployment, natural disasters and family separation. Pull factors are things as seeking safety and freedom, jobs, food availability, family reunification and a better quality of life.¹¹ From those categories, we can find two main kinds of migration, voluntary migration through which the person seeks a higher quality of life and involuntary migration in which the person is forced to leave the country of habitual residence.

B- The Boat People and the Situation of Refugees in the Mediterranean Sea

The current situation taking place in the Mediterranean Sea has grabbed the attention of the whole world. Hundred thousands of refugees and migrants have been trying to cross the sea to Europe through boats, risking their and their families' live. This has created a new crises for refugees and migrates who are seeking international protection. The stories of these migrants and refugees are symbols of the injustice world we are living in today.

The term "boat people" originally referred to the thousands of Vietnamese who fled their country by sea following the collapse of the South Vietnamese government in

⁷ *Id.*

⁸ *Id.*

⁹ International Organization for Migration (IOM), World Migration Report 2018, 2018, available at: <http://www.iom.int/wmr/world-migration-report-2018>.

¹⁰ *Id.*

¹¹ Justice For Immigrants, Root Causes of Migration, February 2014, Available at: <https://justiceforimmigrants.org/what-we-are-working-on/immigration/root-causes-of-migration/>.

1975. They escaped in small vessels with no protection or arms leaving them prey to pirates. During this time, many suffered from dehydration, starvation, and death by drowning. Since then, the term has been applied to the waves of refugees who have attempted to reach the United States by boat from Cuba and Haiti and also to Afghan and other refugees seeking asylum in Australia. After more than 40 years, the crisis remains ongoing but this time in the Mediterranean Sea.

According to UNHCR, in only the last five years, nearly two million refugees and migrants have arrived in European lands by boats through the Mediterranean Sea. Most of them have arrived in Italy, Cyprus and Malta.¹² These figures show that in 2015 a refugee crisis was occurring, as in one year more than a million refugee and migrant had reached Europe.¹³ That happened before the European Union in 2016 started to take actions imposing restrictions on the arrivals and making deals with countries such as Turkey, Morocco, Libya and Egypt to regulate migration flows and raise security restrictions on the irregular migration.¹⁴ According to UNHCR statistics, in those five years and around 18000 people had died or were still missing while attempting to cross the Mediterranean Sea during the process of their migration.¹⁵

The current situation of refugees, asylum seekers and migrants in Italy is devastating and is getting worse day-by-day. The International Organization of Migration (IOM) announced that according to available statistics, more than 2000 migrants died from drowning in the Mediterranean Sea while they were heading to Italy in 2017. It was predicted that this number would rise in 2018 and it did.¹⁶ The main reason behind this crisis is the new procedures the Italian government has started to take against migrants. In November 2018, the Italian government ordered the seizure of the migrant rescue ship Aquarius. The ship had joined in many successful operations of rescuing migrants and refugees from drowning into the sea. The government claimed that the clothes worn by migrants on their voyage from Libya to Italy could have been contaminated by HIV,

¹² The Guardian, What is the current state of the migration crisis in Europe?, November 2018, available at: <https://www.theguardian.com/world/2018/jun/15/what-current-scale-migration-crisis-europe-future-outlook>.

¹³ *Id.*

¹⁴ Reliefweb, European Leaders Pursue Migration Deals with North African Countries, Sparking Concerns about Human Costs, December 2017, available at: <https://reliefweb.int/report/world/european-leaders-pursue-migration-deals-north-african-countries-sparking-concerns-about>.

¹⁵ UNHCR, Operational Portal of Refugee Situation, Mediterranean Situation, available at: <https://data2.unhcr.org/en/situations/mediterranean>.

¹⁶ *Supra note 7.*

meningitis and tuberculosis and that it took such procedures to protect its citizens from these dangers.¹⁷ The ship was operated by Médecins Sans Frontières (MSF) and SOS Méditerranée, both charity organizations who had played a pivotal role in the rescue of refugees and migrants in the past decade. The seizure of the ship was not the only sanction that has been imposed. Furthermore, 24 people from the team working on the ship were prosecuted by the Italian Prosecution, MSF was fined nearly a half million euros for their operations and their bank accounts were frozen in Italy upon such charges.¹⁸

In 2015, Sergio Mattarella was elected president of the Italian Republic with the support from right and mid-right wing parties. Since then, Mattarella has openly declared new policies to be applied against refugees and migrants reaching the Italian shores through the Mediterranean Sea. Such policies have extended to procedures taken by the Italian navy and border guards to push back numerous migrants' rescue vessels back to sea and stand as an obstacle against them reaching their destination. In February 2017, the Italian government signed an agreement with the Libyan government, endorsed by the other European Leaders, to train, equip and finance the Libyan coastguard in return for their support in combatting irregular migration –essentially– to stop vessels before reaching the Italian shores.

This agreement has been taken seriously by Libya to the extent that after several months, thousands of migrants and asylum seekers have been detained in detention camps designated only for irregular migrants under inhumane conditions. UNHCR and IOM have been struggling to reach such detainees and evacuate them after several agreements with the Libyan government.¹⁹ UNHCR specifically, has released different statements condemning the actions carried against the asylum seekers heading to Libya and putting the responsibility on both Italian and Libyan governments.²⁰

¹⁷ The Guardian, Italy orders seizure of migrant rescue ship over 'HIV-contaminated' clothes, November 2018, available at: <https://www.theguardian.com/world/2018/nov/20/italy-orders-seizure-aquarius-migrant-rescue-ship-hiv-clothes>.

¹⁸ *Id.*

¹⁹ The Guardian, Deaths at sea expose flaws of Italy-Libya migration pact, July 2018, available at: <https://www.theguardian.com/world/2018/jul/23/mother-and-child-drown-after-being-abandoned-off-libya-says-ngo>.

²⁰ UNHCR, UNHCR evacuates vulnerable refugees out of Libya as fighting resumes, October 2018, available at: <https://www.unhcr.org/news/press/2018/10/5bc8494b4/unhcr-evacuates-vulnerable-refugees-libya-fighting-resumes.html>.

Such a pact has led several victims and survivors to file numerous cases against the Italian government before the European Court of Human Rights (ECHR) alleging that this agreement had stopped them from reaching Italy and seeking asylum there and forcing them to return to Libya against their will where they have been subjected to inhumane conditions, beatings, rape and starvation.²¹

Such policies reached their peak in 2018 when Matteo Salvini took office as Italy's interior minister. Salvini was the first official to shamelessly declare that Italy would no longer commit to its obligations towards refugees and migrants. In one of his speeches he boldly stated: Open doors in Italy for good people and a one-way ticket for those who come to Italy to create commotion and think they will be taken care of. 'Send them home' will be one of our top priorities.²²

The problematic issue in Salvini's statements in my point of view is not that his declaring to push away migrants and refugees and going against the non-refoulement principle, the refugee convention and other human rights instruments, rather, main problem is that during his speeches he insisted on drawing a distinction between migrants and refugees, claiming that almost all the people held back in Libya and other North African countries are actually economic migrants whom if let into Italy they would take the place of other vulnerable "political refugees" who deserve protection. Such falsehoods spread by the Italian media have led to the Italian public negative opinion towards the idea of offering refuge and state protection. This has pushed several human rights organizations such as Girasoli to issue statements sympathizing with the public while condemning the Italian public policy; for instance Calogero Santoro the head of Girasoli stated: "Fake news about migrants have spread all over Italy during the last campaign. My concern is the future of asylum seekers, people who are eligible for refugee status. What will happen to them under [Salvini's] League?"²³

²¹ Queen Mary University of London News, Italy's deal with Libya regarding migrant 'pull-backs' faces legal challenge, May 2018, available at: <https://www.qmul.ac.uk/media/news/2018/hss/italys-deal-with-libya-regarding-migrant-pull-backs-faces-legal-challenge.html>.

²² Al Jazeera, What's next for Italy's immigrants under the populist government?, June 2018, available at: <https://www.aljazeera.com/indepth/features/italy-immigrants-populist-government-180603130547425.html>.

²³ The Irish Times, Italy vows to send home undocumented immigrants, June 2018, available at: <https://www.irishtimes.com/news/world/europe/italy-vows-to-send-home-undocumented-immigrants-1.3517841>.

Moreover, other North African countries have joined the agreements with the EU to crackdown on flows of refugees heading to Europe; Spain and Algeria, for instance, have made an agreement whereby Algeria would make a concerted efforts to establish camps for refugees and migrants trying to use its domestic waters to reach Spain and other European countries.²⁴ In exchange, Spain would give economic support to raise the efficiency of the Algerian coast guards and to build those camps intended to receive large numbers of refugees and migrants.²⁵ Many human rights organizations have indicated the mass violations Algeria has committed towards refugees and migrants in the past few years. Beside arresting and detaining people who try to cross to Europe and send them to camps in remote areas where they face inhumane and degrading treatment by police authorities, Algerian police round up sub-Saharan migrants in streets and deport them back to their countries and other countries such as Niger and Mali.²⁶ Since 2015, Algeria has repatriated more than 27000 sub-Saharan refugees and migrants to their home countries and to other countries of asylum. Most of those refugees have received ill-treatment, and faced violence, and many have been killed during this process.²⁷

The crisis of refugees in the Mediterranean Sea has become much broader and more devastating than can be imagined. The Italian stance I previously explained is just one of many contributing factors in such a crisis. The UNHCR has recently published its latest report observing the crisis from different perspectives.²⁸ It has stressed in several parts of its report that these flows of refugees would never stop until countries meet their obligations towards international human rights law.²⁹ It identifies poverty as one of the root causes of the crisis. It indicates that nearly all asylum-seekers heading to Europe are from four African countries: Eritrea, Congo, Sudan and Nigeria since those countries all have gone through severe economic crises that have left thousands of

²⁴ Reliefweb, Spain and Algeria agree on joint migration crackdown, while at Algeria's southern border deported migrants perish in the desert, May 2018, available at: <https://reliefweb.int/report/algeria/spain-and-algeria-agree-joint-migration-crackdown-while-algeria-s-southern-border>.

²⁵ Qantara, Europe and Algeria: The trust deficit, 16 February 2018, available at: <https://en.qantara.de/content/europe-and-algeria-the-trust-deficit>.

²⁶ Human Rights Watch, Algeria: Surge in Deportations of Migrants, October 2017, available at: <https://www.hrw.org/news/2017/10/30/algeria-surge-deportations-migrants>.

²⁷ European Council on Refugees and Exiles, Algeria: mass deportations of African migrants, March 2018, available at: <https://www.ecre.org/algeria-mass-deportations-of-african-migrants/>.

²⁸ UNHCR, Desperate Journeys: Refugees and migrants arriving in Europe and at Europe's borders from January – December 2018, January 2019, available at: <https://www.unhcr.org/desperatejourneys/>.

²⁹ *Id* at 11.

internally displaced persons that moved internally and others who have left to neighboring countries in order to escape poverty and find humane living conditions.

Looking at the statistics one can easily notice that the number of refugees and migrants heading to Europe are increasing year-by-year regardless of the increasing deaths risks through traveling by sea because of the new restrictions and procedures taken by European states. It is obvious that the deteriorating human conditions such as the lack of water, food, shelter, healthcare, education, and occupation in several African countries have pushed masses of citizens to prefer risking their lives than slowly dying of hunger and destitution.

IOM in its latest report has indicated how poverty and socio-economic rights violations have always been the main root causes for migration especially mixed migration which means that the flows of migrants are influenced by multiple drive.³⁰ It explains the role of economic rights violations in pushing people to leave their countries and head for other countries where can they hope to find better living conditions.³¹ What is interesting in this report is that it indicates from various perspectives how motives of migration and persecution can intersect. It is commonly found that political upheavals, tribal and ethnic tensions, religious extremism, internal armed conflicts, and serious violations of civil and political rights are commonly accompanied by serious socio-economic rights violations as well. This intersectionality highlights how difficult it is to distinguish between “pure” economic claims from “civil and political” claims.

C- The Situation of Poverty in the World with Focus on Africa

In this part, I would give an overview of the situation of poverty in the world with a focus on the poverty rates in Africa. I should also present some statistics regarding the annual death rate for people living in extreme poverty and destitution who die for the reason that the devastating living conditions resulted from the lack of food, clean water, health care, education and shelter. My main focus will be on Africa in order to analyze a prime reason for the immense waves of migration and refuge that is hitting Europe through the Mediterranean Sea. I believe this part is inseparable to my paper and essential in order to have a clear image of the situation of population movements around

³⁰ *Supra* note 4 at 50-51.

³¹ *Ibid.*

the world and give another perspective of how Socio-Economic violations can lead to shocking outcomes.

According to recent statistics published by the World Bank, more than 10 percent of the world's population are living in extreme poverty which is less than 1.90 USD a day.³² It is important to mention that the 1.9 dollar line has been drawn by The World Bank depending on the concept of the Purchasing Power Parity (PPP) which sets the currency baseline depending on the baskets of goods and services. The determination of this poverty line depends mostly on the price of services which are not commonly available to the poor in countries we would focus on, which renders this standard arbitrary and does not reflect the actual situation of poverty.³³

In 2015, the number of people living in destitution had reached 736 million people including 47 million living in East Asia, 7 million in Europe and Central Asia and 413 million living in Sub-Saharan Africa which is Africa. It is clear from the statistics that more than half of the people living in extreme poverty are from Africa.³⁴ Focusing on a few African countries, we can see that the statistics are remarkably shocking; for instance, in Nigeria, with a total population of 196 million, the amount of people living in extreme poverty exceeds 92 million which is nearly the half of the population. In the Democratic Republic of Congo, the total number population is around 83 million, with nearly 60 million living in extreme poverty which is 71.5% of the population. In Sudan, there are about 10 million Sudanese citizens living in destitution. Eritrea is not any better than its fellow African countries, as nearly 40% percent of its population are living in extreme poverty that is nearly 2.2 million citizens.³⁵ Other African countries face similar statistics. Africa has the highest poverty rates even compared to Asia which has a larger population rates and number of natural disasters and South America which has similar security and armed conflict conditions.

In the unfair world we are live in today more than 830 million are chronically undernourished, and 1.1 billion do not have access to safe water and 2.6 billion lack

³² The World Bank, Understanding Poverty, 2019, available at: <https://www.worldbank.org/en/topic/poverty/overview#1>.

³³ *Supra note 1*, see also Francisco Ferreira, The international poverty line has just been raised to \$1.90 a day, but global poverty is basically unchanged. How is that even possible?, October 2015, available at: <http://blogs.worldbank.org/developmenttalk/international-poverty-line-has-just-been-raised-190-day-global-poverty-basically-unchanged-how-even>.

³⁴ *Id.*

³⁵ World Poverty Clock, World Poverty Rates, 2019, available at: <https://worldpoverty.io/>.

access to basic sanitation.³⁶ Furthermore, around 2 billion people which is nearly one third of the total world population lack access to essential drugs, 1 billion have no adequate shelter and 2 billion do not have electricity. Over 790 million adults are illiterate which increases the percentage of unemployment and increases the crime rate. The statistics are worse for children. More than 250 million children around the world between the ages of 5 and 14 do wage work with 8.4 million being in “unconditionally worst” forms of child labor that involve slavery, forced recruitment in armed conflicts, forced labor, forced prostitution and pornography.

Moreover, statistics show that poverty kills more than 18 million people annually which is more than one third of all human deaths. Those deaths are easily avoidable through better nutrition, clean water and better healthcare.³⁷ That amounts to 300 million deaths in the last 17 years, which exceeds the number of deaths caused by wars, civil wars, and government repression. It also shows how important economic and social rights are if compared to civil and political rights. Recent reports have suggested that more than 2.5 million people die every year in Africa due to lack of health care. Most of them are preventable through public health intervention.³⁸ Food is another disaster. Nearly 9 million people die every year of hunger, which means that every hour more than 1000 people die from lack of food.³⁹ What is also striking is that children suffer the most in this equation with more than 3 million deaths every year.⁴⁰ Africa is on the top when it comes to the number of people dying from starvation as more than 333.2 million people are living in severe food insecurity.⁴¹

D- Socio-Economic Rights in Refugees Countries of Origin

There is a connection between the economic and social rights conditions of states and the number of people seeking protection in other states which explains the huge waves

³⁶ OHCHR: Thomas Pogge, Poverty and Human Rights Summary, available at:

https://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf .

³⁷ *Id. See also*, Jason Beckett, Faith and Resignation: A Journey through Public International Law, 2012, P 5.

³⁸ The Lancet, Mortality due to low-quality health systems in the universal health coverage era: a systematic analysis of amenable deaths in 137 countries, November 2018, available at:

[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)31668-4/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31668-4/fulltext).

³⁹ Mercy Corps, Quick facts: What you need to know about global hunger, October 2018, available at:

<https://www.mercycorps.org/articles/quick-facts-what-you-need-know-about-global-hunger> .

⁴⁰ Food Aid Foundation, Hunger Statistics, 2019, available at:

<https://www.foodaidfoundation.org/world-hunger-statistics.html> .

⁴¹ World Hunger, Africa Hunger and Poverty Facts, 2018, available at:

<https://www.worldhunger.org/africa-hunger-poverty-facts-2018/>.

of refugees and migrants heading to Europe. In the next part I will give a brief summary of the situation of human rights in Eritrea and Congo with a focus on economic rights, so you can see how such violations can affect people, pushing them to flee their countries.

In Eritrea for instance, recent reports show that beside massive civil and political rights violations, Eritreans have been subjected to significant violations of their economic and social rights. It has been reported that citizens have been living under very harsh economic conditions during the last years, with high poverty rates and low standards of living young Eritreans are forced to work for the state according to military service rules. All males from the ages of 18 to 50 are eligible for military or “national” service. This service consists of six months for military training and a year for development projects conducted by the state.⁴² After service comes to an end, the state has the right to re-recruit any person into the military for long periods and oblige him or her to work on industrial or agricultural projects for the state with very low wages.⁴³ Furthermore, the healthcare conditions in Eritrea have been deteriorating for decades; many Eritreans are infected with diseases and the healthcare system is not sufficiently protect all citizens.⁴⁴

Like Eritrea, the Democratic Republic of Congo has witnessed one of the largest humanitarian crises in Africa in the past few years. With bloody political oppression, more than 140 active armed groups and very deteriorating living conditions, more than 4.5 million Congolese were displaced from their homes and more than 130.000 people have fled the country seeking protection and refuge in other countries.⁴⁵ Beside the political and civil aspects of oppression, it is important to mention that Congo is one of the poorest nations of Africa; regardless being one of the richest countries with natural sources, more than 70% of the nation are living below poverty line.⁴⁶ Congo’s Education conditions are also deteriorating; 3.5 million children of primary school age

⁴² Amnesty International, Amnesty International Report 2017/18 - Eritrea, 22 February 2018, available at: <https://www.refworld.org/docid/5a99390ba.html> .

⁴³ UN Office of the High Commissioner for Human Rights (OHCHR), Statement by Ms. Sheila B. Keetharuth, Special Rapporteur on the situation of human rights in Eritrea at the 37th session of the Human Rights Council, 12 March 2018, available at: <https://www.refworld.org/docid/5aabbf954.html> .

⁴⁴ World Health Organization, Eritrea Country Profile, 2019, Available at: https://www.who.int/gho/countries/eri/country_profiles/en/ .

⁴⁵ Human Rights Watch, World Report 2019: Democratic Republic of Congo, December 2018, available at: <https://www.hrw.org/world-report/2019/country-chapters/democratic-republic-congo> .

⁴⁶ The World Bank, Country Profile: Democratic Republic of Congo, 2019, available at: <https://www.worldbank.org/en/country/drc/overview> .

do not attend schools.⁴⁷ In terms of healthcare, the Congolese government has paid little attention to it; epidemics have grossly spread in the country and many deadly diseases have been neglected resulting in thousands of deaths every year.⁴⁸

As we have seen, the situation of refugees and migrants crossing to Europe through the Mediterranean Sea is very devastating as European states have used North African countries to stay as an obstacle before those refugees apprehending them from reaching European shores. This has resulted to mass violations to the rights of those refugees. Furthermore, the connection between the numbers of people fleeing to Europe and the situation of poverty in the world have been established to prove that these people fleeing their countries are mostly escaping death of poverty and destitution. The next chapter will look at the legal framework of refugee and migration conventions, and the definitions of many legal terms such as migrant, refugee, voluntary and involuntary migration. The process of refugee status determination is also explained showing how complicated it is to determine if asylum seekers should be recognized as refugees or not.

⁴⁷ USAID, Democratic Republic of Congo: Education, February 2018, available at: <https://www.usaid.gov/democratic-republic-congo/education> .

⁴⁸ Medecins Sans Frontieres, Democratic Republic of Congo: Condition still critical, November 2011, available at: <https://www.msf.org/democratic-republic-congo-condition-still-critical> .

III - The International Legal Framework Governing the Distinction between Refugees and Migrants

A. The Dichotomy between 'Migrant' and 'Refugee' under Public Policy

States policies have underpinned the rejection of entire classes of applicants on the basis that their claims are of an economic nature rather than a political. The first are seen as economic migrants not refugees, and as a result they are entirely prohibited from seeking asylum in these states. For instance, the US policy towards Haitians fleeing in the 1980s saw them as economic migrants and not political refugees.⁴⁹ Moreover, the repatriation of Vietnamese refugees by Hong Kong in the 1980s was based on the same assumption.⁵⁰ Moreover, the decision of China to return thousands of North Koreans with an agreement concluded with their government for being economic migrants.⁵¹ Modern history has many more examples for states denying refuge for entire classes of people depending on the assumption that they are economically motivated.

In the past few years, the same argument has been used repeatedly against refugees, for example: in 2016 Frans Timmermans, the EU Vice President has claimed that 60 percent of the migrants who come to Europe are coming for economic reasons and then they are not considered refugees under international refugee law.⁵² In Italy, the new government has decided to deport more than 500.000 people claiming that they are migrants with 'economic reasons' and not refugees, so the Italian government has the right to deport them back to their home countries.⁵³ While in the US, President Donald Trump has threatened to prosecute migrants coming from Mexico, he claims that the

⁴⁹ Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 *Brook. L. Rev.* 841 (1994). Available at: <http://brooklynworks.brooklaw.edu/blr/vol60/iss3/1> .

⁵⁰ Diller, Janelle Marie, *In Search of Asylum: Vietnamese Boat People in Hong Kong* (1988). IN *SEARCH OF ASYLUM: VIETNAMESE BOAT PEOPLE IN HONG KONG*, Indochina Resource Action Center, 1988. Available at SSRN: <https://ssrn.com/abstract=1806663> .

⁵¹ Human Rights Watch: *The Invisible Exodus: North Koreans in the People's Republic of China*, November 2002, available at: <https://www.hrw.org/report/2002/11/19/invisible-exodus/north-koreans-peoples-republic-china> .

⁵² *The Independent*, *Six out of 10 migrants to Europe come for 'economic reasons' and are not refugees*, EU Vice President Frans Timmermans says, January 2016, available at: <https://www.independent.co.uk/news/world/europe/six-out-of-10-migrants-to-europe-come-for-economic-reasons-and-are-not-refugees-eu-vice-president-a6836306.html> .

⁵³ CNBC, *'Pack your bags,' Italy's new leaders tell 500,000 illegal migrants — but it'll cost them*, June 2018, available at: <https://www.cnbc.com/2018/06/04/pack-your-bags-italys-new-leaders-tell-500000-illegal-migrants--but-itll-cost-them.html> .

flows coming to the US consists of economic migrants and once they pass the borders they become irregular migrants and the government has the right to prosecute them.⁵⁴

In the world we are living in today, many western countries have been repeatedly trying to find an escape from their obligations under international refugee law in order to be able to stop such flows of people from reaching their lands. The media in western refugee-receiving countries has been intimately fighting to prove the existence of the dichotomy between economic migrants and refugees; they do so in order to impose tougher measures against asylum seekers with economic and social claims.

This debate going around the world on whether the waves of people crossing to Europe through the Mediterranean Sea are migrants or refugees and whether states are obliged to protect them or have the right to just return them is a fervent debate. Some policy makers have insisted that they are migrants so according to international law there is no legal obligation to harbor them, others contend that they are refugees and they should be protected and if not it would be a gross violation to international refugee law.

At the same time media platforms have struggled with whether to call them refugees or migrants, UNHCR published an article asking governments and media to be careful while using both expressions when referring to the waves heading to Europe. It prefers to call them “groups of refugees and migrants,” as it is impossible to affirm which group they may be part of. People who join those waves, may have mixed motives for leaving their countries. They are escaping persecution, wars, armed conflicts, natural disasters, and many other reasons.⁵⁵

As highlighted by the UNHCR, it is impossible to assert whether a group of people are migrants or refugees, to do so, it requires subjecting these people to an exceedingly long process to determine their eligibility for refugee status under international refugee law. In the next section the legal definitions of refugee and migrant terms are presented to show how blurred the distinction is. Then in the last part, the process of refugee status

⁵⁴ The Economic Times, Trump administration vows to prosecute migrants in future, December 2018, available at: <https://economictimes.indiatimes.com/news/international/world-news/trump-administration-vows-to-prosecute-migrants-in-future/articleshow/66889673.cms> .

⁵⁵ UNHCR, UNHCR viewpoint: ‘Refugee’ or ‘migrant’ – Which is right? 27 August 2015, available at: <https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> .

determination under the practice of UNHCR and other regional refugee courts is discussed.

B. Legal Definitions: Refugees vs. Migrants

In this section I will discuss in detail the legal definition of the terms refugee and migrant under international law. I will examine different legal instruments and their definition to these terms in order to prove how complex the situation could be in order to determine whether the person is a migrant and deserves refugee status or a migrant that should follow migration procedures. This complexity would help to pave the way before challenging the traditional dichotomy between the terms.

1. The Definition of the Term ‘Refugee’

There is no unanimous definition for the term ‘refugee’ among states. This term has been defined by different international and national legal instruments, such as the 1951 Refugee Convention, the Organization of African Unity (OAU) Convention and the Cartagena Declaration.

Article 1 A (2) of the 1951 Refugee Convention defines the refugee as:

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.”⁵⁶ This convention is considered by many scholars and practitioners as the cornerstone of the international refugee law, it is signed and ratified by 146 states around the world, and have been used as the main guideline for the UNHCR and many refugee courts in determining refugee status.

The Organization of African Unity adopted the 1969 Refugee Convention, known as the OAU Convention, which extends the definition set by the 1951 Refugee Convention by adding 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 or the whole of his country of origin or nationality, is compelled to leave his place of

⁵⁶ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html> .

habitual residence in order to seek refuge in another place outside his country of origin or nationality.”⁵⁷

Alike the OAU Convention, the 1984 Cartagena Declaration extends more in the definition of refugee, it states that refugees also include persons who flee their country "because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.”⁵⁸

It is clear from the above-mentioned different definitions to the term “refugee” from three different refugee conventions that there is no unanimous definition for such term, it is the state responsibility to decide whether to extend the umbrella of protection to include new groups of refugees or to use the narrow approach for defining this term.

2. The Definition of the Term ‘Migrant’

While there is also no clear definition of the term ‘migrant, International Organization of Migration defines the term migrant as

“Any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.”⁵⁹

The United Nations, on the other hand, defines the term as “An individual who has resided in a foreign country for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate.”⁶⁰ The two definitions seems to be very extensive and blur, as they did not identify the main reasons behind immigration, or even set a distinction between voluntary and involuntary migration.

The UNHCR has highlighted in its guidelines how the distinction between the terms “migrant” and “refugee” is blurred as the examination of many cases has indicated that

⁵⁷ Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, available at: <https://www.refworld.org/docid/3ae6b36018.html> .

⁵⁸ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: <https://www.refworld.org/docid/3ae6b36ec.html> .

⁵⁹ International Organization of Migration (IOM), Key Migration Terms, available at: <https://www.iom.int/key-migration-terms#Migrant> .

⁶⁰ IOM, Glossary on Migration, International Migration Law Series No. 25, 2011, available at: <https://publications.iom.int/books/international-migration-law-ndeg25-glossary-migration> .

mostly the economic measures states are taking against individuals, can be directed to them based on racial, religious, political or political discrimination which could amount to persecution under the definition of the 1951 Refugee Convention. Therefore, it defines the term ‘migrant’ simply to be,

“[A] person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.”⁶¹

By doing so, the guidelines restricts the application of the definition of migrant to only voluntary reasons, it disregarded the situation by which a person can involuntarily leave his country, that is because involuntary migration and refuge are very similar in many aspects. In addition, it stresses that a migrant is that person whose motives are only economical, so those with mixed motives cannot be regarded as migrants.

From the previous definitions set by international instruments, it is clear that both terms intersect in several aspects. The criteria for determining a refugee is immensely complicated and has a set of condition the applicant must satisfy in order to recognize as a refugee. Even within international instruments, there are some variations, for instance, the OAU Convention and the Cartagena Declaration set broader definition than that mentioned in the 1951 Refugee Convention in order to include more asylum-seekers and recognize them as refugees.

On the other hand, international instruments define the term ‘migrant’ in a broader sense it includes every person who is fleeing his or her country of origin or the country of habitual residence for various reasons. Some of them are beyond the individuals will, while others are by his own free will.

The main difference between both terms is that according to International law, states are obliged to accept asylum-seekers who have refugee claims to cross their borders. States must also take all necessary measures to protect those refugees and refrain from returning them back to their home countries. While for migrants, states have the right to impose their own migration policies, which mostly impose restrictions like visa procedures and security check. To sum up, in the case of refugees states are obliged to

⁶¹ UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV. 3, available at: <https://www.refworld.org/docid/4f33c8d92.html> .

accept and protect them, while in case of migrants, states have the right to reject them for different reasons depending on their own policies.

3. Voluntary Migration vs. Involuntary Migration

The International Organization of Migration has formulated a clear definition for the term “voluntary migration” which depends more on defining the other type on “involuntary migration or forced migration.” And that any migrant who does not fall under such a category is deemed to be voluntarily migrating. With a simplified definition of voluntary migration may posit that it is the action whereby migrants have the free choice whether to migrate or not. In this type, people mostly choose to migrate to enhance their living conditions, financial capabilities and social class in the country they are migrating to. We can also find an equivalent definition to the term “voluntary migrant” in the general definition IOM proposes for the term ‘migrant,’ as it states

“The term migrant is usually understood to cover all cases where the decision to migrate was taken *freely* by the individual concerned for reasons of “personal convenience” and without intervention of an external compelling factor; it therefore, applie[s] to persons, and family members, moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family.”⁶²

The tricky word in this definition is the word “freely.” How can we know if the choice was freely taken or the migrant had no other option to choose from? Is the choice a subjective matter that depends on the feelings of the migrant? Is not the state of fear different from one person to another? There are countless other questions regarding the definition of voluntary migration academics have been asking for the decades, however, until now there has been no consensus on how to define the word “voluntary.”⁶³

Furthermore, the IOM has tried to define the term ‘Involuntary Migration / Forced Migration in its glossary. The definition the Organization has proposed is not as clear as we can expect as it depends on a subjective element which cannot be clearly defined or educed. It defines it as:

“A migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes

⁶² International Organization of Migration, Glossary on Migration, International Migration Law Series No. 25, 2011, available at: <https://www.iom.int/key-migration-terms>.

⁶³ Marta Bivand Erdal & Ceri Oeppen (2018) Forced to leave? The discursive and analytical significance of describing migration as forced and voluntary, Journal of Ethnic and Migration Studies, available at: <https://www.tandfonline.com/doi/citedby/10.1080/1369183X.2017.1384149?scroll=top&needAccess=true> .

(e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects).”⁶⁴

Many academics talk about voluntary and involuntary migrants as separate categories. They start with the theory of “voluntariness” and when a person is voluntarily migrating to another land or is forced to do so.⁶⁵ Other distinguished academics have insisted that it is impossible to recognize both categories as clearly. They prefer to call the waves heading to Europe as “mixed migration” as people may have mixed motives that drive them to leave their countries. Some of those motives are purely voluntary, others purely involuntary and some are mixed between both.⁶⁶ The theory of ‘voluntariness’ has been argued among writers; some of them have taken the expansive view while others have adopted a narrower interpretation depending on their humanitarian view. The expansive interpretation which has been adopted by writers such as Katy Long, who follows Nozick’s minimalist approach to rights, considers a person free if their minimal rights such as the right to life, liberty and property are not threatened but rather protected.⁶⁷ Other writers such as Olsaretti argue that freedom and voluntariness do not necessarily intersect as “a choice is voluntary when it is made in the context of acceptable alternatives or if the lack itself of alternatives is acceptable to the person making the choice.”⁶⁸

As we can see, there is no consensus among states, institutions and writers on the distinction between the terms ‘refugee’ and ‘migrant’ as we can notice the definition IOM has adopted to the term ‘migration’ includes refugees and asylum-seekers. Furthermore, the definition of ‘forced migration’ is extremely close to the definition of the term ‘refugee’ in both people are escaping major events that can threaten their lives, liberties or properties. UNHCR itself has indicated in its guidelines that it is so tricky and arduous to indicate whether people fleeing to Europe are considered migrants or refugees, as to do this the state or the UNHCR should have long individual meetings with them and listen to their claims in order to determine their refugee status. In the next and final section of this chapter, I will elaborate about the process of refugee status

⁶⁴ *Supra note 64.*

⁶⁵ *Supra note 65.*

⁶⁶ Kumin, J. 2014. “The Challenge of Mixed Migration by Sea.” *Forced Migration Review*, 45: 49–51.

⁶⁷ Long, Katy. (2013). *The point of no return: refugees, rights, and repatriation*. Oxford: Oxford University Press.

⁶⁸ *Supra note 65* at 986.

determination (RSD), how it is conducted and conditions that should or should not be met for an asylum seeker to be considered as a refugee.

C- Refugee Status Determination

According to the 1951 Refugee Convention, states carry the burden of exercising the refugee status determination process of asylum seekers calling for their protection. A small number of states fulfill their obligation and fully carry out the RSD process while others depend on UNHCR to undertake the process and recognize refugees. The RSD process is not explicitly stated as one of the roles of the UNHCR under its mandate, however, it is implicitly inferred in under Article 8 of the statute.⁶⁹ Since then, the UNHCR has established its own guidelines for status determination which is followed by all of its agents and officers worldwide. Those guidelines have also been followed by domestic courts in formulating their own guidelines.

According to UNHCR guidelines, the RSD process has two main stages; the first stage is concerned with the facts of the case as claimed by the applicant, while the second stage applies the definitions set by the 1951 Refugee Convention and the 1967 Protocol to determine the eligibility of the claim for falling under the protection of the international refugee law. The second stage is divided into two processes, the inclusion process and the exclusion. The inclusion process depends on the inclusion clauses in the Refugee Convention and must be satisfied by the applicant to be considered a refugee. On the other hand, the exclusion process which is conducted after the inclusion, contains the conditions by which if the applicant satisfies any of them he should be excluded or the Convention ceases to apply to him. In the next and final part of this chapter the Inclusion criteria is discussed.

1. The Inclusion Criteria for the Refugee Status

For a person to be recognized as a refugee he must fulfill the criteria set by the 1951 Refugee Convention, in article 1 (a). The definition of the term ‘Refugee’ in the Convention has four elements; the first element in the Alienage element which requires the applicant to be outside of his country of origin or habitual residence. Secondly, there is the element of the “well-founded fear of being persecuted” and this element is

⁶⁹ UN High Commissioner for Refugees (UNHCR), Providing for Protection: Assisting States with the assumption of responsibility for refugee status determination - A preliminary review , March 2014, PDES/2014/01 , available at: <https://www.refworld.org/docid/53a160444.html>.

separated into two elements; the fear itself which has a subjective and objective perspective and persecution. Most writers consider “persecution” as a separate element as it is the hardest element to fulfill in the Refugee criteria. To do so, the actors of the persecution –whether state actors, individuals or both – must be determined.

If the applicant fulfills the first three elements he still has to fulfill the fourth and final one which is “the five conventional grounds.” The applicant has to show that he is outside of his country because he has a fear of being persecuted, and this persecution was directed against him on one or more conventional grounds which are race, religion, nationality, membership in a particular social group or political opinion. The four elements for determining refugee status are considered the main cornerstones of the 1951 Refugee Convention. On the surface, they may seem straight forward, but there are many different interpretations among scholars, practitioners and courts. In the next part, the most common interpretations for each element is presented, in order for us to understand the complexity of defining and distinguishing between refugees, migrants and others who are not eligible for both statuses.

a) The Alienage

The first element of the Refugee criteria is “Alienage.” For a person to be considered a refugee, he should be outside of his country of nationality of habitual residence. According to UNHCR guidelines, this condition is the first to look for when determining refugee status as it notes that, “for a refugee claim being outside the country of the claimant nationality is a general requirement and there is no international protection for a person as refugee within the jurisdiction of his country of nationality or habitual residence.”⁷⁰ The next three elements follow this element. The applicant’s fear of persecution must be connected in one way or another to his country of origin or the country of his habitual residence when the first is not determinate.⁷¹

b) Well-Founded Fear

Well-founded fear is the second element for refugee status determination. It is one of the key elements in the definition of Refugee. From the expression itself we can find that two parts: the fear of the applicant and that the fear should be well-founded. There have been several scholarly interpretations of this element. Most of them have put the

⁷⁰ *Supra note* 63 at 88.

⁷¹ *Ibid* at 89.

process of determining the fear in a bipartite or combined approach. In interpreting the term we can find that it contains two main factors: the subjective and the objective. The subjective factor of the well-founded fear is the applicant's state of mind and his or her personal experience of fear. It means that the judge or the RSD officer should examine the previous experiences the applicant has gone through and how those experiences have had an impact on him in a way that put him in a state of fear. The objective factor is the availability of information in applicant country of origin that confirms the threats the applicant has faced or may face in the future if he returns to his country. The UNHCR follows the bipartite or combined approach which necessitates the satisfaction of both conditions. This requires introducing the applicant, his family, and relatives' previous experiences that led them to live in fear. Afterward, the available country of origin information (COI) proving that the situation in the applicant's country of origin gives rise to a valid fear of staying or returning back to this country.⁷²

Beside the bipartite or combined approach many scholars posit that only the objective element can sufficiently satisfy such an element, creating what is called "the objective approach." Hathaway and Foster for instance have affirmed that the state of mind of the applicant should have nothing to do with the objectivity of fear, as "The concept of well-founded fear is inherently objective. It denies protection to persons unable to demonstrate a real chance of present or prospective persecution, but does not in any sense condition refugee status on the ability to show subjective fear."⁷³ Zimmermann agrees with the perspective of Hathaway and Foster, but he sees that the subjective factor should be assessed also and should be seen only as an additional factor to the objective. That if not satisfied it should not affect the determination of refugee status of the applicant.⁷⁴

It should be noted that, there is no connection between the well-founded fear of being persecuted and the presence of the applicant in his country of origin, which means that the fear of persecution may arise while the applicant was outside of his country of origin, so there is no legal condition the applicant should have witnessed some events

⁷² *Ibid* at 38.

⁷³ Hathaway, James C. "Is there a Subjective Element in the Refugee Convention's Requirement of 'Well-Founded Fear'?" W. S. Hicks, co-author. *Mich. J. Int'l L.* 26, no. 2 (2005): 505-62, p 507.

⁷⁴ Zimmermann, "The 1951 Convention relating to the Status of Refugees and its 1967 Protocol" (2011).

in his country to have a fear of persecution, as Goodwin-Gill indicates in his writings.⁷⁵ According to UNHCR, there are several cases in which the applicant legally and smoothly leaves his country, afterward, the situations and circumstances of his country change in a way that may put his life in a threat if he returns, in this case, the applicant will be considered as a “*Refugee sur place*.”⁷⁶

c) Persecution

Persecution is the third element that must be fulfilled in the process of refugee status determination. It is tricky as it has been used to widen or narrow the application of the Refugee Convention. There is no universal definition for the term “persecution,” as none of the international law instruments – including the 1951 Refugee Convention – have explicitly defined it.⁷⁷ The UNHCR, for instance, in its advisory opinion about defining the term ‘refugee’ states that, “the concept of persecution was intentionally not defined by the drafters of the 1951 Convention and the drafter’s original intention was to allow for a sufficient degree of flexibility in order to encompass all future types of persecution by the term.”⁷⁸

The UNHCR and various scholars have most commonly used both articles 31 and 33 of the Refugee Convention to interpret the term, as it refers to persecution as it “is only taking place where the applicant’s ‘life or freedom’ is being threatened, on account of race, religion, nationality, political opinion or membership of a particular social group.”⁷⁹ Furthermore, UNHCR extends this definition to also include any serious human rights violation that is based on any of the five conventional grounds.⁸⁰ However, we differentiate between the terms ‘persecution’ and ‘discrimination,’ as the latter does not always put the person’s life and freedom into a threat, but UNHCR has determined that “a persistent pattern of consistent discrimination will amount to

⁷⁵ Goodwin-Gill, G. S., & McAdam, J. (2007). *The refugee in international law*. Oxford: Oxford University Press. p 40.

⁷⁶ *Supra note* 63 at 94-98.

⁷⁷ *Id* at 216; Hathaway, J., & Foster, M. (2014). *The Law of Refugee Status*. Cambridge: Cambridge University Press, p 182.

⁷⁸ UN High Commissioner for Refugees (UNHCR), UNHCR Advisory Opinion on the Interpretation of the Refugee Definition, 23 December 2004, p 8 available at: <https://www.refworld.org/docid/4551c0374.htm>.

⁷⁹ *Supra note* 78 at 221; UNHCR Handbook at 51.

⁸⁰ *Id.*

persecution on cumulative grounds.”⁸¹ It also set a distinguishes between ‘persecution’ and ‘prosecution’ as the latter is considered in the application of the penal code in the case of committing crimes, however, the prosecution may turn into persecution if laws are being applied in a discriminatory manner by the state.⁸²

Leading scholars and practitioners in the field of International Refugee Law have not yet reached a uniform interpretation of the element of persecution. However, most of them mainly agree that persecution consists of two major elements; the first element is the severe harm or threat, while the second element is the lack of state protection regarding this harm. The differences between scholars arise rests on how to identify and weigh the harm that may amount to persecution. Zimmermann, for instance, suggests that “the notion of ‘persecution’ is interwoven with the protection of human rights [...] persecution often been referred to as the severe violation of human rights accompanied by a failure of the State to protect the individual.”⁸³ Hathaway and Foster agree with Zimmermann that persecution requires both serious harm and lack of state protection, but Hathaway indicates that the test of “serious harm” requires a violation of one or more human rights.⁸⁴ They both posit in their writing that the ‘human rights based approach’ is the only valid approach for interpreting the term “persecution” as serious harm generates from human rights violations, so “reliance on international human rights law to identify serious harm relevant to finding an individual to be at risk of “being persecuted” is both principled and practical.”⁸⁵ On the other hand we can see leading writers such as Goodwin-Gill and Jane McAdam who see relying on International Human Rights Law as invalid, as rapid developments in IHRL “take[s] the concept of persecution far beyond the grounds spelled out in the Refugee Convention.”⁸⁶

⁸¹ UN High Commissioner for Refugees (UNHCR), Self-Study Module 1: An Introduction to International Protection. Protecting Persons of Concern to UNHCR, 1 August 2005, p 56 available at: <https://www.refworld.org/docid/4214cb4f2.html> .

⁸² UNHCR handbook at 14.

⁸³ *Supra* note 78.

⁸⁴ Hathaway, J. (2012). Refugees and asylum. In B. Opekin, R. Perruchoud, & J. Redpath-Cross (Eds.), *Foundations of International Migration Law* (pp. 177-204).

⁸⁵ *Supra* note 29 at 193.

⁸⁶ Goodwin-Gill, G. S., & McAdam, J. (2007). *The refugee in international law*. Oxford: Oxford University Press. p 93.

d) The Five Conventional Grounds

The fourth element of the inclusion criteria for refugee status determination is the connection between the applicant's well-founded fear of being persecuted and the five conventional grounds stated in Article 1A (2) of the 1951 Refugee Convention. This Convention has made this causal link compulsory in order to render a claim of refugee status recognizable. It is an important element because most applicants can prove the elements of fear and persecution but cannot connect them to the conventional grounds. The grounds stated in the Convention are race, religion, nationality, membership of a particular social group or political opinion. Thus, the applicant's fear of the state of persecution must happen "for the reason of" one or more of these grounds. As with the previous elements the interpretation of this causal link has not been settled by legal scholars and practitioners though, there have been several theories presented to interpret the term "for reason of." The UNHCR has adopted an approach called 'contributing clause' and Michelle Foster follows it as well. This approach means that it is not a must that one of the grounds is directly leading the applicant to be persecuted, rather it is enough to establish that this ground has contributed to the applicant's fear of persecution.

Unlike the expansive approach the UNHCR has adopted, some domestic courts and writers have followed the "but for test" which is an extremely narrowly structured approach. It means that the applicants would not have faced persecution or the threat of it "but for" the existence of the conventional ground. In other words, if the applicant is from a certain clan and is persecuted and he has a well-founded fear, we can determine that "but for" his membership in such a clan, he would not have faced such persecution.⁸⁷ Other writers have adopted the "motivation approach" which means "to determine the 'real motivation for the actions of the persecutor'" because the 'potential persecutor intends to harm the applicant on the basis of the applicant's (real or perceived) relationship to one of the 1951 Convention's grounds'.⁸⁸ Finally, some writers such as Hathaway have adopted the "bifurcated approach" that persecution has two elements which are serious harm and failure of state protection, a connection is established if at least one of those elements is fulfilled based on the conventional

⁸⁷ *Supra* note 78 at 327.

⁸⁸ *Ibid.*

grounds. In other words, if it can be established that the applicant has faced harm because of one of the grounds, or even if he has not but the state refuses to protect him for a reason based on conventional grounds, the nexus is established.

As we have seen in this chapter, how complex the process of identifying the person to be a refugee or a migrant can be. To do so, I have presented different legal definition for both terms which explained the blurred relation between them. In addition, the Refugee Status Determination (RSD) which is conducted by refugee courts and UNHCR to determine whether the person is considered to be a refugee or not is explained. These process to be completed, the applicant must fulfill the four elements of the refugee definition, those elements are: alienage, a well-founded fear, persecution and the connection of them all to one or more of the five conventional ground which are race, religion, nationality, membership of a particular social group or political opinion. In the next chapter, the violations of socio-economic rights will be discussed and whether they can fall under the context of the International Refugee Convention or not.

IV - Understanding International Refugee Law under the Framework of International Human Rights Law

In the last decade, international refugee law jurisprudence has evolved to bringing new interpretations of the 1951 Refugee Convention. As I mentioned earlier, the Convention is silent when it comes to defining some legal terms such as well-founded fear, persecution and the five conventional grounds which constitute the main elements of the refugee definition. Satisfying these elements set by Art. 1A (2) of the Refugee Convention are crucial for determining whether a person should be considered a refugee or not. International Refugee Law academics and practitioners have reached different interpretations of those terms. Every interpretation relies on a different context. In this chapter, my main focus is on the International Human Rights Law approach as it has long been debated and contested by different legal scholars. Additionally, it is the most appropriate approach for arguing about economic and social rights violations amounting to persecution in respect to the Refugee Convention.

The human rights approach in interpreting the Refugee Convention was first advocated by Vernant in 1953. He suggested that the term “persecution” should be interpreted as “severe sanctions and measures of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights.”⁸⁹ At the time, Vernant’s methodology in interpreting refugee law terms was revolutionary, as he shed the light on one of the most important human rights instruments in history – the UDHR– which had not yet been recognized as obligatory under customary international law.⁹⁰ This analysis was not widely accepted by the community of international law until 1991, when Hathaway presented his analysis which proposed that the term ‘persecution’ is best understood as “sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”⁹¹ He established that in order to understand the graveness and seriousness of any harm by amounting to persecution, one should assess the harm under the framework of human rights, specifically, under the International Bill of Rights consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic,

⁸⁹ Grahl-Madsen, *The status of Refugees in International Law*, p. 193.

⁹⁰ Foster, Michelle. (2007). *International Refugee Law and Socio-Economic Rights: Refuge From Deprivation*. Cambridge; New York: Cambridge University Press, p. 27.

⁹¹ James C. Hathaway, *The Law of Refugee Statues*, pp. 104-5.

Social and Cultural Rights.⁹² Hathaway's interpretation has been deemed very progressive by many writers, as it made it easier for the Convention to encompass more claims than had ever been recognized by domestic courts. For instance, gender-based violence is now recognized by courts and scholars to be considered a form of persecution because of the human rights approach which has revealed how much women around the world suffer as a result of it.⁹³ Many other commentators and writers have joined Hathaway in his interpretation such as Goodwin-Gill,⁹⁴ Helene Lambert⁹⁵ and Jacqueline Bhabha.⁹⁶

The human rights standard has not been only used to analyze the term "persecution," but legal scholars and domestic courts have consistently used it to interpret the conventional grounds, specially, the "membership of a particular social group" ground. For instance, the Federal Court of Australia has considered using Article 16 (3) of the Universal Declaration of Human Rights to define the "family" as a particular social group under the Refugee Convention.⁹⁷ In addition, those standards have been used to establish whether the applicant's voluntary acts could give rise to a well-founded fear.⁹⁸ Furthermore, they were also used to assess the availability of state protection and the availability of an internal flight alternative (IFA) for the applicant whereby he/she can be safe from persecution.⁹⁹

The UNHCR reflects on the human rights approach in many of its publications and guidelines. In its Handbook the connection between human rights violations and persecution is established. For instance, in distinguishing between persecution and punishment, it stipulates that "recourse may usefully be had to the principles set out in the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded."¹⁰⁰ The connection was further mentioned in UNHCR

⁹² *Ibid.*

⁹³ Deborah Anker, *Boundaries in the Field of Human Rights*, at 138.

⁹⁴ Goodwin-Gil, *The Refugee in International Law*, p.67.

⁹⁵ Helen Lambert, *The Conceptualization of: Persecution: by the House of Lords: Horvath v. Secretary of State for the Home Department*, 2001, *International Journal of Refugee Law*.

⁹⁶ Jacqueline Bhabha, *Boundaries in the Field of Human Rights*, p 165.

⁹⁷ *See Ministry for Immigration and Multicultural Affairs V. Sarrazola (No.2) (2001) 107 FCR 184*

⁹⁸ *See Haines, Hathaway and Foster, Claims to Refugee Status Based on Voluntary but Protected Actions.*

⁹⁹ *See Hugo Storey, The Internal Flight Alternative Test: The Jurisprudence Re-Examined*, 1998, *International Journal of Refugee Law* 499 at 528-31.

¹⁰⁰ UNHCR Handbook (1992), 31 May 2006, para. 60; see also para. 51.

Executive Committee Conclusions (ExCom), Guidelines in International Protection and many interventions in domestic courts proceedings.¹⁰¹ We can also see The Conference of International Refugee Law Judges, in which the Director of International Protection has pressed the importance of human rights, stating that “human rights law should and must provide the broad and objective indicators against which the term “persecution” can be interpreted.”¹⁰² It is clear that the UNHCR has decided to take the progressive approach held by many scholars and commentators in order to employ a more persuasive and clear interpretation of the Refugee Convention.

A. International Human Rights Law Instruments and Their Connection to Refugees

Over the past two decades, legal scholars have introduced new developments in international human rights law, recognizing its efficiency in interpreting the elements of the “refugee” definition under the 1951 Refugee Convention. They have tried to adopt the human rights-based approach to ensure a more universal and objective application of the Convention, which should lead to more uniformity and consistency in decision making regarding who qualifies for international protection under refugee law.¹⁰³ Deborah E. Anker for instance is one of the first writers to recognize the evolution of international refugee law under the human rights law framework. She explains the steps by which international human rights law started to recognize and understand “gender-based” persecution, and adopt this analysis in cases of female genital mutilation and sexual violence.

These significant developments that have occurred in the last three decades have affected the application of international refugee law.¹⁰⁴ For instance, the UNHCR in 2002 published guidelines regarding gender-based persecution and other refugee claims related to this issue.¹⁰⁵ It also has published many guidelines relating to female genital

¹⁰¹ *Supra note* 90 at 32.

¹⁰² Erika Feller, Address to the Conference of the International Association of Refugee Law Judges, (2000-2001) 15 *Georgetown Immigration Law Journal* 381 at 383.

¹⁰³ Marouf, F., & Anker, D. (2009). Socioeconomic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law. *American Journal of International Law*, 103(4), 784-796.

¹⁰⁴ Deborah E. Anker, Refugee Law, Gender and the Human Rights Paradigm, 15 *HARV. HUM. RTS. J.* 133,136 (2002).

¹⁰⁵ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, available at: <https://www.refworld.org/docid/3d36f1c64.html> .

mutilation and sexual violence recognizing for the first time those women who are subject to such violations to fall under the conventional ground of “particular social group.”¹⁰⁶ These guidelines are a starting point for many other domestic guidelines published by refugee courts and tribunals which recognize such claims as “gender-based” to fall under the Refugee Convention. This was not the case before the developments that took place in the international human rights law field.

Many scholars have tried to use the same approach to prove that international refugee law recognize asylum seekers with claims based on socio-economic persecution. They believe that it has become obvious that IHRL now recognizes many violations of social and economic rights to be considered as being persecution. Therefore, adopting the human rights framework can lead to the recognition of refugees who have been subjected to a severe violation of their rights to food, health, housing, education and employment.¹⁰⁷

B. Reasonableness of using the Human Rights Framework to Interpret the Refugee Convention

As we see many legal scholars and commentators have agreed to rely on the human rights approach in order to have a better understanding and solid interpretation of the legal key terms set by the Refugee Convention. The important question to ask what the justification behind choosing an external standard for interpreting the Refugee Convention actually is? Jurisprudence including court decisions have indicated that although the international treaty is applied domestically, but it must be interpreted as “consistently and uniformly as possible.”¹⁰⁸ In the case of *R v. Secretary of State for the Home Department*, Lord Steyn explained how courts could have an interpretation for the terms of the Refugee Convention, he indicated that, “In practice it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in so doing it must search, untrammelled by notion of its national legal culture, for the true autonomous and international meaning of the treaty. And there can

¹⁰⁶ See UN High Commissioner for Refugees (UNHCR), Guidance Note on Refugee Claims relating to Female Genital Mutilation, May 2009, available at: <https://www.refworld.org/docid/4a0c28492.html>, See also UN High Commissioner for Refugees (UNHCR), Refugee Protection and Sexual Violence No. 73 (XLIV) - 1993, 8 October 1993, No. 73 (XLIV) - 1993, available at: <https://www.refworld.org/docid/3ae68c6810.html>.

¹⁰⁷ *Supra note* 103 at 785-786.

¹⁰⁸ *Supra note* 90 at 36.

only be one true meaning.”¹⁰⁹ The court also has stated that “the 1951 Refugee Convention, like other multilateral treaties, had one true autonomous interpretation which must be decided upon as a question of law. In the absence of a ruling from the International Court of Justice under Art 38 of the 1951 Refugee Convention, national courts had to identify the one true interpretation.”¹¹⁰ In this way, the court has indicated that it and other courts should identify the true interpretation for the provisions of the Refugee Convention.

1. To a More Objective and Universal Standard

Judges have continuously tried to find a more objective standard to interpret the Refugee Convention by; many of them have indicated the dangers that can emanate from leaving judges to decide whether what the applicant is facing amounts to persecution or not based on subjective parameters and based on their own discretionary power.¹¹¹ This objective standard has been explicitly identified by the English Court of Appeal in *Sepet v. Secretary of State for the Home Department*, in which one of the judges posited that, “however wide the canvas facing the judge’s brush, the image he makes has to be firmly based on some conception of objective principle which is recognized as a legitimate source of law.”¹¹² Courts have also emphasized the idea of “universal standards,” in other words, looking for the “international meaning” of the Refugee Convention.¹¹³ The UNHCR has also followed the same path of seeking universal rules and norms governing the interpretation of the Refugee Convention and governing the process of Refugee Status Determination. As the High Commissioner for Refugees has emphasized that “the UNHCR has constantly sought to bring about a certain measure of uniformity in the elaboration of eligibility criteria with a view to ensuring that all applicants are treated according to the same standards.”¹¹⁴

¹⁰⁹ R, ex parte Adan v Secretary of State for the Home Department, Appeal decision, [2000] UKHL 67, [2001] 2 AC 477, [2001] available at: <https://www.asylumlawdatabase.eu/en/case-law/uk-court-appeal-19-january-2000-secretary-state-home-department-ex-parte-adan-r-v-secretary>.

¹¹⁰ *Ibid.*

¹¹¹ *Supra note* 94 at 36-9.

¹¹² UK -Sepet & Anor v Secretary of State for Home Department [2001] EWCA Civ 681, [2000] EWCA Civ 11 para. 66.

¹¹³ *See*, for example, R v. Secretary of State for the Home Department, ex parte Osungo (English Court of Appeal (Civil Division), Buxton LJ, 21 August 2000), at para. 9; cited by Foster, Michelle. (2007). International refugee law and socio-economic rights.

¹¹⁴ UNHCR, Report on International Protection, UN Doc. A/AC.96/527 (1996) available at: <https://www.unhcr.org/excom/unhcrannual/3ae68c654/addendum-report-united-nations-high-commissioner-refugees.html>.

Besides the UNHCR stating an objective standard and universal interpretation would serve justice among applicants, courts have given another reason which depends on the expected the outcome of the case. In Australia, the Refugee Review Tribunal (RRT) has indicated that applicants have the right to foresee the result of their applications. This would only happen if judges' application of law and the interpretation of its provisions were consistent and unified. It states that: it is "important that so far as possible decision-makers adhere to objective concepts capable of universal application and susceptible to the jurisprudence of international bodies, so that uniformity can be applied and applicants are able to have a better idea of whether their claims are likely to succeed."¹¹⁵ The use of the objective standard would be more consistent with the nature of the principle of refugee as the claims of the asylum-seekers may hugely vary from one to another; the kinds of threats they are facing are different; the nature of the agents of persecution whether they are states or individuals are not the same, and the fear they have to stay or to return to their countries is based on their background and the cultures they come from.

Unlike most domestic courts and dominant jurisprudence adopting the objective view, the US jurisprudence eschews it and instead uses a more subjective perspective. It is clear from its decisions that it depends more on vague and flexible terms to interpret the term "persecution." For instance, the Ninth Circuit in 1998 defined persecution to be "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive,"¹¹⁶ On the other hand, the Seventh Circuit later in 2000 established that persecution is understood as any harm or punishment for religious, political or other illegitimate reasons that "rises above the level of mere harassment,"¹¹⁷ In 2002 it changed its perspective adding that the illegitimacy of the reasons leading to the harm should be seen from the perspective of the US legal system.¹¹⁸ It is clear from reading such cases that courts have depended on the subjective notion of "offensiveness." Such notion depends on the subjective assessment of every judge which is far away from the adoption of any objective model.

¹¹⁵ RRT Case No. V94/01570, [1995] Australia: Refugee Review Tribunal, 28 February 1995 at 4 cited by Foster, Michelle. (2007). International refugee law and socio-economic rights: refuge from deprivation.

¹¹⁶ *Korablina v. Immigration and Naturalization Service*, 158 F 3d 1038 (9th Cir. 1998), at 1043.

¹¹⁷ *Tesfu v. Ashcroft*, 322 F 3d 477 (7th Cir. 2003), at 477.

¹¹⁸ *Begzatowski v. Immigration and Naturalization Service*, 278 F 3d 665 (7th Cir. 2002), at 668.

Many legal scholars have indicated the dangers behind adopting the subjective approach. For instance, Hathaway and Foster stipulate that following such an approach leads to devastating outcomes when it comes to gender-related persecution, as judges would depend on their cultural backgrounds in determining refugee status.¹¹⁹ They indicate many cases in which courts have rejected granting refugee status to homosexuals as they could have easily avoided persecution if they had managed to hide their sexuality or limit their sexual practices.¹²⁰ In one of those cases decided by the Federal Court of Australia, a homosexual applicant was denied protection based on the same argument. The court state: “The evidence is that [the applicant] can avoid a real chance of serious harm simply by refraining from making his sexuality widely known - by not saying that he is homosexual and not engaging in public displays of affection towards other men. He will be able to function as a normal member of society if he does this.”¹²¹ Judges also have used the subjective approach to reject many women applicants claiming refugee status who based their applications on gender-based discrimination by justifying it according to the applicant’s culture or religion. For instance, in the *Matter of Johnson*, the immigration court denied the claim of a woman from Sierra Leone who left her country because she feared that her relatives would practice female genital mutilation (FGM) on her young daughters. The reasoning was shocking as the immigration judge stated that ‘while some cultures view female genital mutilation (FGM) as abhorrent and/or even barbaric, others do not.’¹²² Thus, in doing so the court depended in a more subjective approach which is the cultural background of the applicant, which –if widely used– would lead to devastating consequences.

2. Choosing Human Rights as an Objective Standard for Interpreting the Refugee Convention

It is clear that the subjective approach is very risky when it comes to determining refugee status. This is why many scholars and practitioners have asked for an objective and uniform standard to depend on while interpreting the terms of the Refugee Convention. The question pertaining here is whether international human rights law is

¹¹⁹ *Supra note 90* at 38.

¹²⁰ See R. Haines, J. Hathaway and M. Foster, 2003. 'Claims to Refugee Status Based on Voluntary but Protected Actions' *International Journal of Refugee Law* 15: 430–443.

¹²¹ "Applicant LSLS" v Minister for Immigration & Multicultural Affairs [2000] FCA 211, FCA 211, Australia: Federal Court, 6 March 2000, para. 6 available at: https://www.refworld.org/cases,AUS_FC,3ae6b7620.html .

¹²² *Matter of Johnson*, No. A72 370 565, 28 April 1995, at 3, 12.

the appropriate standard to follow when interpreting the Refugee Convention or not. To answer this question going back to the general rules governing treaty interpretation set by the public international law is necessary. One of the main treaties governing the process of drafting, concluding and interpreting treaties is The Vienna Convention on the Law of Treaties (VCLT).¹²³ This convention provides a guide for interpreting the 1951 Refugee Convention. The main obstacle before this process is that, technically speaking, the Vienna Convention should not be applied in interpreting the Refugee Convention as the latter was drafted 18 years earlier, and Art. 4 of the Vienna Convention states,

“Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, *the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.*”¹²⁴

It is agreed upon between legal scholars and practitioners that the VCLT is part of customary international law, which means that it should be applied to all treaties and is binding to all states. This view was supported by the International Court of Justice (ICJ) in its decision in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, in which the court affirmed that in spite the treaty being concluded between the two countries in 1955, it should be interpreted according to the rules set by the VCLT, which is part of customary international law.¹²⁵ This stance was reaffirmed in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, in which the court also indicated that the treaty between both countries should be interpreted according to the rules set by the VCLT.¹²⁶

The main article that governs the process of treaty interpretation is Art. 31 of the VCLT, which is entitled “General Rule of Interpretation.” It states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose.*”¹²⁷

¹²³ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html>.

¹²⁴ *Id* art. 4.

¹²⁵ See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, 3 Feb 1994, ICJ Rep 6 para 41 available at: <https://www.icj-cij.org/files/case-related/83/083-19940203-JUD-01-00-EN.pdf>.

¹²⁶ See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, 1995 I.C.J. 6 (Feb. 15) para. 33 available at: <https://www.icj-cij.org/files/case-related/87/087-19950215-JUD-01-00-EN.pdf>.

¹²⁷ *Supra note* 123 art. 31.

Determining the context of the Refugee Convention is not an easy task to do, especially that we need to determine first the “object and purpose” of this convention. The dominant perspective among scholars is that the determination of the object and the purpose of any treaty can be done by referring to its preamble. This view has been supported by many courts working in the human rights field, such as, the European Court of Human Rights in *Golder v. the United Kingdom*, in which the court asserted that, “[A]s stated in Article 31 para. 2 of the Vienna Convention, *the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed.*”¹²⁸ There have been many conflicting views regarding the object and purpose of the Refugee Convention. One of them sees the Convention’s aims as pursuing “a human rights inspired purpose.” The second perspective believes that the convention aims to protect individuals and that is a humanitarian purpose. Finally, there is a view that perceives the convention to resolve mutual problems between state parties.¹²⁹ The most convincing approach for me is the one which perceives the convention to be inspired by the purpose of human rights and that is for many reasons.

Taking the view of human rights, it is clear when we read the first two paragraphs of the 1951 Refugee Convention preamble that the drafters of the Convention explicitly expressed the importance of the protection of the rights and freedoms of all humans. They also referred to the Universal Declaration of Human Rights, which allows us to presume the importance of such legal instrument at this time, and how drafters were influenced by it. The preamble of the Refugee Convention highlights that,

“CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that *human beings shall enjoy fundamental rights and freedoms without discrimination,*

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees *the widest possible exercise of these fundamental rights and freedoms.*”¹³⁰

Many national jurisdictions have adopted the human rights approach while interpreting the Refugee Convention. They depend on the same argument that the preamble provides

¹²⁸ *Golder v. United Kingdom* (1975) European Court of Human Rights (ser A); (1979) 1 EHRR 524 at para. 34, available at: <http://www.cienciaspenales.net/files/2016/10/12golder-eng-prohibicion-del-abuso-del-derecho.-prohibicion-de-las-interpretaciones-extensivas-de.pdf> .

¹²⁹ *Supra note* 90 at 40-9.

¹³⁰ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

explicitly the importance of human rights and the instruments relating to it. For instance, the Refugee Review Tribunal in Australia in *Applicant A and B v. Minister for Immigration and Ethnic Affairs* has affirmed such approach by stating,

“The appellants seek no more than the enforcement of Australia's domestic law. That law affords them certain rights if they can establish that they are "refugees" within the Convention definition. *That definition is, in turn, to be understood as written against the background of international human rights law*, including as reflected or expressed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.”¹³¹

It is clear from the court decision that the judges have drawn on the ICCPR in reaching a more consistent interpretation of the refugee definition. It is also clear that many courts and tribunals have relied on the ICESCR as both covenants enjoy wide membership by states. Many writers and commentators have also indicated the progressive amount of cases in which domestic courts have relied on international human rights instruments in interpreting the Refugee Convention.¹³² The courts have also explicitly highlighted in its guidelines many human rights conventions and covenants relating to the case at hand, even if the country has not signed or ratified.¹³³ The United Kingdom in its Gender Guidelines refers to the Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. In spite of the UK not being a signatory state of it.¹³⁴ Furthermore, the same guidelines refer to the Convention on Consent to Marriage and Minimum Age for Marriage and Registration of Marriages. Such a convention is only signed by 49 states.¹³⁵ In addition, Hathaway has acknowledged the use of the Convention on the Elimination of All Forms of Discrimination Against Women (‘CEDAW’) by many courts to establish to how extent the discrimination the applicant suffers amounts to persecution.¹³⁶

¹³¹ *Applicant A and B v. Minister for Immigration and Ethnic Affairs* (1996) 190 CLR 225 at 296.

¹³² See Foster, *International Refugee Law and Socio-Economic Rights*, at 64. See also, Hathaway, *The Relationship between Human Rights and Refugee Law*, p. 87; see also Anker, *Boundaries in the Field of Human Rights*.

¹³³ *Id.*

¹³⁴ UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317.

¹³⁵ UN General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962.

¹³⁶ *Supra note* 118.

C. Economic and Social Rights vs. Civil and Political Rights

I have determined how the human rights approach is the best fit for serving the universal and objective standard for interpreting the refugee convention, especially the term ‘persecution,’ by determining whether the violation of any right can amount to persecution or not. It is also important to recognize socio-economic rights and their role in the model of human rights and whether they fall at the same level in hierarchy as civil and political rights or are inferior to it. To do so, it is important to discuss two dominant models that determine how socio-economic rights violations can amount to persecution. The first approach was developed by Jean-Yves Carlier which is called “the three scales” or the “normative hierarchical approach” as Michelle Foster used to refer to it.¹³⁷ The second approach is the “hierarchy of obligation” theory developed by James C. Hathaway. Both theories carry their own weight among legal scholars and practitioners but in my view the application of both of them is problematic.

1. Jean-Yves Carlier’s Hierarchical Approach

In the hierarchical approach, Carlier proposes that for decision makers to determine whether a person should be granted refugee status or not, they should answer one main question which is: whether there is a risk of persecution if the applicant returns to his or her country. To answer this question the decision maker which is the court or the UNHCR staff should break it into three sub-questions or “three scales”. Those questions are, at what point does the risk exist, at what point does persecution exist? “[And] at what point is the risk of persecution sufficiently established.”¹³⁸ Those questions must be addressed in order to assess the refugee’s claim. The most important question for us here to answer is the second question pertaining the existence of persecution, as we need to know how Carlier can determine the level of violation that amounts to persecution. Carlier sees persecution as “the degree of breach of basic human rights amounting to persecution.”¹³⁹ He distinguishes between civil and political rights and considers it in a higher position than the “quantitative and qualitative” severity of the violation does not matter. On the other hand, the economic, social and cultural rights violations should be very severe in order to consider them as a persecution, he states,

¹³⁷ *Supra note* 90 at 112.

¹³⁸ Jean Yves Carlier, ‘General Report’ in Carlier, Vanheule, Penˆa Galiano and Hullman (eds.), *Who is a Refugee?* p. 685. Cited by: Michelle Foster, *International Refugee Law and Socio-Economic Rights*.

¹³⁹ *Ibid* p. 687.

“The more fundamental the right in question is (right to life, physical integrity, freedom . . .), the less quantitatively and qualitatively severe the treatment need be. The lower the priority attributed to the violated freedom (economic, social or cultural rights), the more quantitatively and qualitatively severe the treatment must be.”¹⁴⁰

It is clear from the theory that Carlier puts civil and political rights in higher a position than economic, social and cultural rights. This approach has been rarely used by refugee courts and tribunals in an explicit way, however, it has been used more implicitly when they used to reject claims of an economic or social nature on the grounds that it the violation is not enough to amount to persecution.¹⁴¹

2. Hathaway’s Core Obligation Approach

Unlike Carlier, James Hathaway refuses to use the three scale normative approach, he invented a new model of hierarchy depends on states’ obligations in relation to different human rights instruments. He adopts another conceptual approach. As Foster call it “hierarchy of obligations.” This approach is complicated to a certain extent as it establishes a four-tier structure that when followed we can determine if the violation amounts to persecution or not, regardless of the type of right that has been violated.¹⁴² Marouf and Anker give a simplified interpretation of the “hierarchy of obligations” theory and its four tiers. The first tier is the rights stated in the UDHR and explicitly mentioned in the ICCPR as binding with no derogation permitted; the violations to any of those rights should automatically constitute persecution. The second tier includes the same rights as those in the first tier but with derogation permitted in the case of public emergency. In this case, if it is proven that there was no actual connection to an emergency or the state was abusing its powers, then those violations amount to persecution. The third tier comprises those rights in the UDHR and codified in the ICESCR. The violation of those rights amount to persecution if “the state ignores these interests despite the fiscal ability to respond,” or if the violations are grave and extreme enough that they results in the deprivation of life or cruel, inhumane and degrading treatment. The fourth tier includes those rights in the UDHR that are not codified in the ICCPR or ICESCR. The violation of those rights cannot be considered as persecution.¹⁴³

¹⁴⁰ *Ibid* p. 703.

¹⁴¹ *Supra note* 90 at 113.

¹⁴² Hathaway, J., & Foster, M. (2014). *The Law of Refugee Status*. Cambridge: Cambridge University Press. at 109.

¹⁴³ *Supra note* 103 at 787-788.

In Hathaway's approach it is clear that he puts the economic and social rights in the third category inferior to civil and political rights. This approach has been prominently accepted by most of the courts in the United Kingdom, Canada and New Zealand, as judges have repeatedly and explicitly manifested this theory in their judgments of various cases while determining whether any violation to a human right amounts to persecution. There is a clear difference between this model and the theory of Carlier explained above. The first deals with the violation of rights from the perspective of the 'nature of state obligation' towards those rights, while the second, deals with the hierarchy of rights as if there is a "normative priority" to some of them over the other.¹⁴⁴

It is clear that both Carlier and Hathaway's approaches categorize economic and social rights as inferior to civil and political rights. This is the same approach that most common law courts have adopted in the determination of refugee status. I reject both approaches as I believe that economic and social rights should be at the same level as civil and political rights when it comes to refugee status determination. I do also believe that claims of refugee status are more complex than determining it according to a fixed model of hierarchies. As the applicant is likely to have mixed fears of persecution that can be connected to different conventional grounds. Those fears can reflect some political rights violations that automatically affect him financially. For instance, the applicant may have his properties confiscated by the government for expressing his political opinion, so his right to free speech is violated as well as his right to property and shelter. In the next chapter, I will speak more about economic and social rights violations and to what extent they can be considered persecution under the Refugee Convention with examples from the precedents of some refugee courts and tribunals. Moreover, I would establish a connection between economic deprivation and the Refugee Conventional Grounds according to recent development in both literature and judicial practices in order to close the chain of refugee status determination.

¹⁴⁴ *Supra* note 90 at 120.

V- Socio-Economic Claims under International Refugee Law

This chapter, challenges both Carlier's and Hathaway's hierarchal approaches with new developments in the field of international human rights law and state practices. I elaborate on some economic and social rights and to see to what extent their violations can amount to persecution. Finally, I establish a connection between economic deprivation and the different refugee conventional grounds under a more developed understanding of refugee law with a focus on the fifth ground the applicant's membership to a particular social group.

A. The History of the adoption of the Hierarchal Approach

The adoption of a hierarchal approach has been very popular among scholars and legal practitioners since the implementation of both the ICCPR and the ICESCR by most of the states around the world. There is a historic distinction between both categories of rights which was started during the Cold War and after the rights articulated by the UDHR were divided into two categories of rights. The first group related to the ICCPR which was supported by the North and the West and the ICESCR which was supported by the East and the South. Afterwards, many writers from the states supporting the first category have been discussing which category of rights should prevail over the other, and whether there is a hierarchy between both categories. They also have discussed whether certain rights should be given more attention and importance over the others. Those writers argue that civil and political rights should be on a higher level. They refer to civil and political rights as the "first generation of rights," while socio-economic rights are inferior to them and referred to as the "second generation rights."

Arguments have been raised to justify this categorization of rights and their hierarchies. One contends that civil and political rights are liberal by nature as they only impose negative obligations on the state. Furthermore, states should refrain from any actions that violate these rights or reduce their benefit to the people. On the other hand, economic and social rights are by nature positive rights, which require states to take positive actions to assure their implementation. For some, civil and political rights do not require state expenditures as they only require the state to refrain from violating them. Unlike economic and social rights, they demand enormous expenditure as they are positive rights that require positive actions by the state to be implemented. Finally, some writers argue that civil and political rights are justiciable, which means that any

violations of them can be easily challenged in courts, while economic and social rights are not justiciable due to their complex nature requiring judges to do extensive economic research to prove that states have not fulfilled their duties under international human rights law. All of those arguments are in the process of being challenged in modern literature. In the next section various perspectives of literature that tackle such arguments will be presented.

B. Challenging the Legitimacy of Putting Rights into a Hierarchy

There are strong challenges to the arguments of categorizing rights into distinct levels of hierarchy. Throughout the past few decades many scholars and treaty bodies' practices and guidelines have challenged the dominant view that civil and political rights are negative rights that only require state to refrain from taking actions that violates them, while economic and social rights are naturally positive rights that require states to carry out actions to implement them. Reading the preambles and the articles of both covenants we can easily say that for a state to implement such provisions, there should be both negative and positive actions taken from its side. This is also clear when we examine the Human Rights Council's General Comments regarding the implementation of the ICCPR. In General Comment 31 regarding legal obligation under article 2, para. 1, the HRC stresses the point that respecting all rights requires positive actions on the state's side to insure their implementation. It states that, "the legal obligation under article 2, paragraph 1, is both negative and positive in nature."¹⁴⁵

Moreover, in General Comments regarding some civil rights such as the right to life, the HRC has stressed that respecting such rights requires positive actions to be taken by the state. It states that, "the Committee has noted that the 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.*"¹⁴⁶ The same approach has been taken towards the prohibition of torture and cruel treatment or punishment. General Comment 20 posits that, "It is the duty of the State party to afford everyone protection through legislative and other

¹⁴⁵ UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 6.

¹⁴⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, para. 5.

measures as may be necessary against the acts prohibited by article 7.”¹⁴⁷ We can see also General Comments regarding the right to a fair trial and public hearing,¹⁴⁸ the right to vote,¹⁴⁹ right to equality between women and men;¹⁵⁰ in all of the general comments published by the HRC, we can find stress on the positive actions required by the state to implement those rights.¹⁵¹ Finally, the HRC has articulated it explicitly concerning the interpretation of art. 24 of the ICCPR regarding the rights of the child. It states,

[...] every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children and to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labor or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means.¹⁵²

On the other hand, the economic and social rights stipulated by the ICESCR require states to take some negative actions by refraining to intervene in the implementation of some of those rights, such as the right to join trade unions and the prohibition of discrimination in the application of all economic and social rights. The UN Committee on Economic, Social and Cultural Rights (CESCR) has stipulated in many of its general comments on the rights adopted by the ICESCR that states should refrain from interfering directly or indirectly in the enjoyment of such rights, such as the right to water.¹⁵³ That is also seen in other general comments regarding the rights to education, housing, health and food.¹⁵⁴

This leads us to the second argument which states that economic and social rights are more aspirational than rights as they require gross government expenditure unlike the civil and political rights which do not affect national income and expenditure. The first response to such an argument is discussed in the last section categorizing rights into

¹⁴⁷ UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 2.

¹⁴⁸ UN Human Rights Committee (HRC), CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984

¹⁴⁹ UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service.

¹⁵⁰ UN Human Rights Committee (HRC), CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10.

¹⁵¹ *Supra note* 90 at 160.

¹⁵² UN Human Rights Committee (HRC), CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989, para. 3.

¹⁵³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11, para. 21.

¹⁵⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comments No. 13 at para. 47, 7 at annex IV, 14 at paras. 48-9 and 12 at para. 15.

negative and positive rights, and how this should be regarded as a misconception. Moreover, some writers have indicated that civil and political rights cost states enormous levels of expenditure annually in order to be fulfilled. For instance the right to a free trial requires the state to spend huge amounts of money to guarantee the efficiency of its judicial bodies. Furthermore, the right to vote requires the state to spend enormous amounts of money to guarantee free and transparent elections. Paul Hunt in his book, *Reclaiming Social Rights: International and Comparative Perspectives*, takes New Zealand as an example. He paints a vivid picture of the spending by the New Zealand government to maintain and protect civil and political rights.¹⁵⁵

Finally, there has been a strong argument among scholars that civil and political rights are justiciable unlike socio-economic rights. The debate of “justiciability” has received considerable attention from legal scholars and practitioners in the last few decades.¹⁵⁶ E.W.Vierdag for instance has argued that the implementation of economic and social rights requires policy choices by the government; such choices and decisions are beyond the jurisdiction of the judiciary as judges would be interfering in the work of the executive authority if they are given the ability to decide on those matters.¹⁵⁷ Furthermore, there have been many arguments that economic and social rights are vague and their violation is difficult to identify, as judges are not be capable of determining the state obligations regarding the implementation of the Covenant.¹⁵⁸ These arguments have been made by many writers for the past few decades, and they have become increasingly invalid according to recent developments in the field of international human rights law. For instance, the UN Economic Committee has identified in many of its general comments, “the minimum core obligation,” which determines the minimum effort each state should exert in order to maintain economic and social rights, otherwise, it is responsible for committing violations against its people. Moreover, the UN General Assembly has recently adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) which is similar to the optional protocol adopted for the ICCPR. It allows victims of economic and social rights violations to present their claims on the

¹⁵⁵ Hunt, Paul. *Reclaiming Social Rights: International and Comparative Perspectives*. Paul Hunt Dartmouth Aldershot ; Brookfield, VT 1996, pp. 57-61.

¹⁵⁶ *Supra note* 90 at 162.

¹⁵⁷ Vierdag, E.W: *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, NYIL, vol. IX, 1978.

¹⁵⁸ *Supra note* 90 at 162-4.

international level if they are unable or unwilling to access their countries' judicial path.¹⁵⁹

In response to this ongoing debate concerning which category of rights should prevail over the other, I reject the concept of placing rights into hierarchies by putting economic and social rights in a place that is inferior to civil and political rights. There have been many arguments made which justify such an approach although they have been challenged by many legal critics and reflected in judicial decisions which stipulate that all rights should be on the same level of importance. The Vienna Declaration and Programme of Action, which was approved by more than 170 countries, states that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁶⁰

All rights shall be on the same level of importance; there should not be any hierarchy among rights. This point of view has been adopted by many scholars and legal practitioners in the last few decades and has been supported by the general comments of treaty bodies such as the Human Right Committee and the UN Committee on Economic, Social and Cultural Rights, as I mentioned before.

C. Challenging the Applicability of Recognizing Socio-Economic Claims for Refugee Status

As I have discussed in the last three chapters, there has been a huge debate between legal scholars and courts around how to assess claims of an economic nature under the Refugee Convention. Some of those scholars have tended to follow a more expansive approach by adopting international human rights law as a framework for interpreting the Refugee Convention and I stand with this argument. However, other scholars have

¹⁵⁹ While arguing the justiciability of socio-economic rights, one should put into consideration Paul O'Connell's substantive critique he discusses in his paper "The Death of Socio-Economic Rights." In this article, O'Connell argues that although many constitutional courts around the world have explicitly showed their willingness to recognize and protect socio-economic rights, but their approval to their countries' adoption of neo-liberal policies "signals the end" of a meaningful protection to such rights.

¹⁶⁰ UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para. I (5).

preferred to adopt a more restrictive perspective and reject the recognition of economic and social rights violation as claims for refugee status.

Those who argue for a more restrictive approach to economic claims have mainly adopted three arguments. Those arguments have been advanced by and cogently addressed by David Martin one of the leading refugee law scholars in the US, who has also joined in drafting many laws related to immigration and refugee policy in the US. Firstly, Martin argues that the main purpose of the Refugee Convention is ‘to assign a scarce resource, namely, asylum.’ Asylum in itself should not respond to need in social and economic rights perspective, because the applicant’s country is commonly receiving relief and development aid, therefore, we should not ask countries which are providing economic aid to other countries to also spend on their citizens seeking asylum for economic purposes. However, if the country of origin refuses to receive aid from other developed countries, in this case, we should consider that decision as a kind of resistance and therefore in that instance this action is of a political nature. So the applicant’s claim will be considered on political grounds and not on a social and economic basis.¹⁶¹ In contrast to this view, Goodwin-Gill and McAdam identify the purpose of the Refugee Convention from the preamble of the Universal Declaration for Human Rights in order to achieve the widest exercise of rights and freedoms, setting aside Martin’s argument of economic relief and assistance.¹⁶²

Secondly, Martin contends that “the institution of asylum is not coterminous with human rights policy.”¹⁶³ He further argues that the refugee convention is not “to express sympathy, to note human rights abuses whenever they appear, or to register disapproval of a practice.”¹⁶⁴ He believes that IRL should not encourage individuals to escape their countries; on the contrary, they should witness, share and join the communal struggles of their home countries.¹⁶⁵ Kate Jastram seems to agree with Martin in some points and disagree on others. Jastram argues that it is not realistic to

¹⁶¹ Jastram, Kate, *Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution* (2010) at 159-160. *CRITICAL ISSUES IN INTERNATIONAL REFUGEE LAW: STRATEGIES TOWARD INTERPRETIVE HARMONY*, J. Simeon, ed., Cambridge University Press, November 2010. Available at SSRN: <https://ssrn.com/abstract=1559479>

¹⁶² Goodwin-Gill, G. S., & McAdam, J. (2007). *The refugee in international law*. Oxford: Oxford University Press.

¹⁶³ *Supra note* 161 at 160.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

believe that IRL should cover all human rights violations; it is not one of its core essentials. However, she believes that adopting Martin's concept would lead to devastating consequences for refugees; as they will have an obligation not only to prove that they are not abusing the asylum system, but also to play a 'heroic' role and prove they are not putting their own interest above their countries' interests selfishly.¹⁶⁶

The third argument Martin raises is that asylum is a scarce political resource and that expanding economic claims will negatively affect it. He argues that asylum is a political tool, which has limits of protection; therefore lowering the threshold to include economic claims would take many numbers at the expense of those who have real 'civil and political' claims and in need of protection.¹⁶⁷ McAdam on the other hand seems to disagree; he sees those restrictive interpretations as Martins' are invalid. He believes that excluding some groups from protection will not eliminate those groups; otherwise, it will simply create new categories of unprotected persons.¹⁶⁸ Kate Jastram also agrees with McAdam at this point.¹⁶⁹ Thus we can clearly see that some commentators such as Martin has been trying to provide various arguments to demolish the idea of recognizing socio-economic claims as eligible for refugee status.

D. Economic and Social Rights Violations as Persecution

The important question that arises now after proving that all rights are equal is whether violations to economic and social rights amount to persecution or not, and if yes, whether there are any judicial practices regarding this implementation. After going through the literature related to international refugee law and socio-economic rights, and after examining various court decisions issued from many high courts around the world, I confidently respond affirmatively to both questions. In the next part, I would elaborate on socio-economic rights and their relation to persecution focusing on two main rights which are: the right to education and the right to health. Both rights have been extensively discussed by many national courts and by the UNHCR in its most recent guidelines regarding refugee status determination.

¹⁶⁶ *Ibid* at 161.

¹⁶⁷ *Ibid* at 162.

¹⁶⁸ McAdam, Jane. *Complementary protection in international refugee law* / Jane McAdam Oxford University Press Oxford 2007.

¹⁶⁹ *Ibid*.

1. The Right to Education and Persecution

There are many provisions in international law instruments that recognize and implement the right to education at different educational levels. The two main provisions that broadly elaborate on this right is the ICESCR in Art. 13 and the CRC in art. 28. Both provisions state using similar terms that the right of education should be granted to all people at different stages of education without discrimination. They also state that at the primary level of education, it shall be compulsory and available free to all,¹⁷⁰ while for the secondary education it “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”¹⁷¹ Finally, at the higher education level it, “shall be made accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”¹⁷² The (CESCR) committee has stressed in many of its general comments the vital importance of the right to education and its relation to human dignity and the “development of human personality.” It considers such a right as one of the “minimum core obligations” that every state should abide by.¹⁷³ The committee in the very beginning of its general comment no. 13 clearly states:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children *can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labor and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.* Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.¹⁷⁴

After recent developments in the field of human rights law, the vital necessity of the right to education has become obvious at all levels. That is due to the considerably

¹⁷⁰ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, art. 28 (1)(a); see also, UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, art. 28 (1) (a).

¹⁷¹ *Ibid*, ICESCR, art. 13 (2) (b).

¹⁷² *Ibid*, ICESCR, art. 13 (2) (c).

¹⁷³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant), 10 May 1999, E/1992/23, para. 2.

¹⁷⁴ *Supra note* 154, para. 1.

amount of work carried out by human rights groups and activists around the world show how children globally suffer from the violation of the right to education. Most children are prohibited from going to school and in most cases there is a discriminatory factor related to this prohibition. For instance, Human Rights Watch has indicated in its report, *Failing Our Children: Barriers to the Right to Education* that “[All over the world] that children suffer discrimination in gaining access to education, based on their race, ethnicity, religion, or other status.”¹⁷⁵ It also indicates in another report how girls are more commonly excluded from the process of education than boys at early age, especially if one of their family members is ill. For example, in case of Kenya where AIDs is a widespread disease, only 6 percent of the girls reach grade five of primary education.¹⁷⁶

Many court decisions also show that many children experience bullying at school at a very early age for many reasons including their religion, ethnicity and color. For instance, in one of the cases presented before the Refugee Review Tribunal of Australia (RRT), a Sabeen Mandaean child from Iran who belongs to a minority religious group, testified being excessively bullied by his fellow Muslim colleagues and teachers at school, who tried to convert him to Islam. He also testified that Muslim men and children tried to avoid touching him or sharing food with him, as he is regarded to be less clean than other children from other religious backgrounds. The Tribunal in this case agreed that those acts of bullying based on grave discrimination against people from the child’s religious group should be regarded as acts of persecution against him, as it would hinder him from finishing primary school and would have a serious psychological impact on him.¹⁷⁷ Another judgement from the same Tribunal argued that the “[d]iscriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution.”¹⁷⁸

There is another well-known example of a court decisions based on the asylum-seeker’s membership of a particular social group. The Refugee Protection Division (RPD) of the

¹⁷⁵ Human Rights Watch, *Failing Our Children: Barriers to the Right to Education*, September 2005, p.24.

¹⁷⁶ Human Rights Watch, *In the Shadow of Death: HIV/AIDS and Children’s Rights in Kenya*, June 2001, p.12.

¹⁷⁷ RRT Case No. N03/46534, [2003] RRTA 670, Australia: Refugee Review Tribunal, 17 July 2003, p. 14.

¹⁷⁸ RRT Case No. V95/03256, [1995] RRTA 2263, Australia: Refugee Review Tribunal, 9 October 1995, para. 47.

Immigration and Refugee Board of Canada (IRB) ruled in one of its cases that a gypsy girl from Hungary, who had been bullied at school by her colleagues and her teachers recognized that her chances of finishing her primary school education were “greatly diminished” because of the discriminatory practices she was subjected to. They explained that in this case the prevention of education was based on discrimination against her on the ground of her membership to “a particular social group” amounting to persecution, so the girl was recognized to be a refugee.¹⁷⁹

There is no question that after the most recent developments in the field of economic and social rights, the violation or denial of the right to education amounts to persecution in the sense of international refugee law and the determination of refugee status. This view was supported by UNHCR in its guidelines: “It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, *or his access to normally available educational facilities.*”¹⁸⁰ It also indicates in its guidelines regarding gender-based persecution the same: discrimination against women when it reaches the level of their prevention from education amount to persecution.¹⁸¹ The same approach has been followed by many states and is reflected in those states’ guidelines regarding the refugee status determination process (RSD). It established that the violation of the right to education should be considered as an unbearable act of ill-treatment especially when it is perpetrated in a discriminatory manner, thereby constituting persecution.¹⁸²

2. The Right to Health and Persecution

One of the most important economic and social rights is the right to health. It intersects with many other rights like the right to education, the right to water and the right to food. As indicated in chapters two and three the world has long witnessed high rates of poverty, the declining status of health care seen in the increasing number of deaths

¹⁷⁹ *Supra note 90* at 219.

¹⁸⁰ UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV. 3, para. 54.

¹⁸¹ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, para. 14.

¹⁸² *Supra note 90* at 223.

resulting from serious and sometimes non-serious infection. Those deaths could have been avoided if governments had provided better health care for its citizens. The right to health was stated explicitly in Art. 12 of the ICESCR, Art. 25 of the UDHR, Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, art. 11 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women and art. 24 of the Convention on the Rights of the Child. As the CESCR has established in General Comment no. 14 regarding the right to health: “Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”¹⁸³ Similar to the right to education, the economic committee confirmed that with regard to the right to health, states have a “core obligation” to enjoy the satisfaction of such right, by providing the minimum essential levels of health care to its citizens.¹⁸⁴ It places core obligations on every state including “ensur[ing] the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.”¹⁸⁵

Many refugee courts and tribunals have relied on the “minimum core obligations” set by the ICESCR to grant asylum-seekers refugee status based on the violation of their right to health. For instance, in the previously mentioned court decision issued by the Refugee Review Tribunal of Australia (RRT) concerning a Sabeen Mandaean child from Iran who belongs to a religious minority group. The court found that such a group also faced persecution regarding lack of proper medical treatment, as doctors and nurses abstained from helping them because of their “alleged uncleanliness.”¹⁸⁶ This point was also made by some US courts regarding people with disabilities from Burkina Faso. Some courts have established that disabled persons are subject to a severe violation of their right to health amounting to persecution.¹⁸⁷

After reviewing many courts decisions and scholarly writing, it is clear that the right to health is gaining increasing attention from legal scholars and practitioners. As a result, most courts have started to recognize the denial of medical treatment in most cases to

¹⁸³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 1.

¹⁸⁴ *Id* at para. 43.

¹⁸⁵ *Id* at para. 43 (a).

¹⁸⁶ *Supra* note 176 at 21.

¹⁸⁷ *Supra* note 90 at 226.

be life-threatening, and in itself sufficient to amount to persecution rendering the victim eligible for refugee status. As the RRT has proposed, “[d]enial of access to medical facilities of itself is such a denial of fundamental human rights that it amounts to persecution.”¹⁸⁸ One of the most successful recent claims affirmed by courts in the US, Canada and Australia, are those claims related to applicants with HIV disease from Africa. They consider patients with such a disease in many African countries as being subject to social stigma and ostracism, commonly practiced by family members and friends. In the US, for instance, an immigration judge ruled that poor ill persons from Mali are more exposed to persecution as they are not be able to spend money for medical treatment. He stated that “country conditions indicated that only individuals with wealth and large sums of money can access treatment and avoid stigmatization.”¹⁸⁹

Adding to the right to education, is the right to food. Recent court and human rights commissions’ decisions have been paying greater attention to the right to food and how countries violating this right lead to devastating outcomes towards their people. In *SERAC and CESR Versus Nigeria* the African Commission on Human and Peoples’ Rights issued its well-known decision which condemned the actions of the Nigerian state toward Ogoni communities, who were seen as political opponents to the government. Those communities have been subjected to discrimination based on imputed political opinion. As a result, the government confiscated their lands to exploit for oil. The Commission found that the destruction of Ogoni farmlands, rivers, crops and animals had created “malnutrition and starvation among certain Ogoni communities,” which the Commission viewed as a massive violation of the rights of health and food that amounted to persecution.¹⁹⁰

It is clear after examining recent case laws and scholarly writings that recent human rights developments have directly impacted the field of international refugee law; scholars have increasingly started to adopt international human rights law as the most appropriate framework to work from when it comes to having a more objective and universal application of the Refugee Convention and a more accurate interpretation of its terms. As a result, economic and social rights have been recognized by legal practitioners and scholars to be on the same level with civil and political rights. This is

¹⁸⁸ *Supra note* 168 at para. 44.

¹⁸⁹ *Supra note* 90 at 229.

¹⁹⁰ *Ibid* at 233-5.

after the historical tradition adopting a hierarchal approach towards rights, which recognize economic and social rights to be inferior to other rights. Furthermore, court practices reflect an evolution in judges' understanding of the severity of economic and social rights violations and the impact of them on people's lives which could be more devastating than the violations of civil and political rights. This new understanding is reflected in many of their most recent judgements regarding the violation of the right to education, health, water and food amounting to persecution under the Refugee Convention.

E. Connecting Economic Deprivation to the Refugee Conventional Grounds

As I have previously discussed in this chapter, recent developments in the field of international refugee law are considered to a new understanding of the concept of persecution depending on other developments in international human rights law. Economic and social right violations have been considered by many refugee courts and tribunals to amount to persecution under the Refugee Convention. It is now important to close the chain and elaborate on the last element by establishing the connection "the causal link" between the applicants' fear of persecution and the five conventional grounds mentioned in the Refugee Convention, which is essential for any applicant to be recognized as a refugee.

The conventional grounds mentioned in the 1951 Refugee Convention is the last element in determining refugee status. Applicants fear economic deprivation that amounts to persecution must establish that this deprivation was or will be imposed on them because of their race, nationality, religion, political opinion or membership in a particular social group. I previously elaborated on several court decisions that established a clear connection between economic deprivation or social rights violations and the race, religion and political opinion such as: the Sabeen Mandaean in Iran who were found eligible for refugee status as they are socially persecuted for their religion. Furthermore, the Ogoni communities in Nigeria who are economically persecuted for their race and political opinion for opposing their government. The ground of nationality has been used rarely in refugee claims and this applies also to persecution based on civil and political rights violations as well.

In this section, I focus on the fifth and last ground which is membership in a particular social group (MPSG) because most recent developments in the field of international

refugee law are based on this ground.¹⁹¹ The MPSG ground has proven to be very successful in including new types of refugee claims in the last few decades. Unlike other conventional grounds, this ground has effectively expanded the convention's interpretation to protect new groups of people who were not previously considered by courts. It has also been previously used by many writers and courts to recognize gender-based persecution and consider different groups like women living in specific patriarchal societies, and members of the LGBT communities persecuted for their sexual orientation in different countries around the world.¹⁹²

Interpreting the MPSG ground has been one of the most controversial topics in the field of international refugee law in the last two decades; many writers have excessively discussed the proper interpretation of this ground.¹⁹³ This controversy even has extended to reach the UNHCR and as noted in its recent guidelines, it has also raised a debate between courts in different legal systems.¹⁹⁴ In the last few years, there has been one approach that has dominated, which is the protected characteristics approach “*ejusdem generis*.” This approach was first articulated by the US Board of Immigration Appeals (BIA) in the Matter of Acosta,¹⁹⁵ and has also been adopted by many courts in Canada, New Zealand and the UK.¹⁹⁶ Applying this approach to the Refugee Convention, the BIA has ruled that,

Persecution that is directed toward an individual who is a member of a group of persons all of *whom share a common, immutable characteristic*. The shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership . . . Whatever the common characteristic that defines the group, *it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience*.¹⁹⁷

The UNHCR has followed the same approach towards defining the MPSG ground It states in the Summary Conclusions that: “A particular social group is a group of persons

¹⁹¹ *Supra note 90* at 292.

¹⁹² See Deborah E. Anker, Refugee Law, Gender and the Human Rights Paradigm, 15 HARV. HUM. RTS. J. 133, 136 (2002).

¹⁹³ See James C. Hathaway, Michelle Foster, Membership of a Particular Social Group: Discussion Paper No. 4 Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland, New Zealand, October 2002, International Journal of Refugee Law, Volume 15, Issue 3, July 2003, Pages 477–491,

¹⁹⁴ *Id* at 279-80.

¹⁹⁵ Matter of Acosta, A-24159781, United States Board of Immigration Appeals, 1 March 1985, para 10.

¹⁹⁶ *Supra note 90* at 296.

¹⁹⁷ Hathaway, J., & Foster, M. (2014). The Law of Refugee Status. Cambridge: Cambridge University Press. p 160.

who share a common characteristic other than their risk of being persecuted, and which sets them apart. *The characteristic will ordinarily be one which is innate, unchangeable, or which is otherwise fundamental to human dignity.*”¹⁹⁸ Accordingly, many courts following such approach have been able to identify new social groups based on their economic conditions or social background. In the next section, I will elaborate more on recent developments in judicial practices by which courts have identified new social groups with a more on economic class and occupation.

1. Economic Class as a Particular Social Group

In this part, I will discuss whether economic deprivation can generate new social groups under the recent common interpretation of the MPSG ground under the Refugee Convention. In the last two decades courts have had conflicting views regarding whether to recognize economic class and poverty as a PSGs or not -in other words- whether being part of a certain economic class or being poor and economically impoverished are innate and immutable characteristics or not. On the one hand, we can see many Canadian decisions including the Federal Court of Appeal (FCA), which has held that “the poor” can be considered as a distinctive social group under the Refugee Convention. In *Sinora v. Minister of Employment and Immigration*, the applicant claimed refugee status based on his membership of a particular social group “the poor in Haiti.”¹⁹⁹ The court indicated that poor people in Haiti are indeed considered to be a PSG and granted the applicant the refugee status under this ground.²⁰⁰ Moreover, many decision-makers in many jurisdictions have considered applicants’ claims from the Midgan caste in Somalia. For instance, in a recent decision, New Zealand RSAA has recognized such claim and determined that applicants from such caste are always economically impoverished compared to members of other clans as they are “often kept as slaves by other clans.”²⁰¹

Furthermore, in *UNN (RE)*, the RPD determined refugee status for a Colombian applicant for being poor. The court indicated that the applicant was targeted and discriminated against because of his race and his socio-economic status, which makes people like him more subject to murder or torture by gangs. The court concluded in its

¹⁹⁸ Cambridge University Press, Summary Conclusions: Membership of a Particular Social Group, June 2003, para 5.

¹⁹⁹ *Sinora v. Minister of Employment and Immigration* [1993] FCJ No. 725.

²⁰⁰ *Id* at para 2.

²⁰¹ Refugee Appeal No. 71509/99, RSAA, 20 January 2000, at 2.

decision that: “Street children, poor young black men, and other ‘undesirables’ are common targets. [...] I find that the claimant suffered from discrimination amounting to persecution because of his race and socio-economic group.”²⁰² Canadian courts have also considered new groups to fall under the same ground. For instance, “poor campesinos in El Salvador”²⁰³ and “impoverished young women from the former Soviet Union recruited for exploitation in the international sex trade.”²⁰⁴

Moreover, in the UK the Immigration Appeal Tribunal (IAT) in *Ogbeide v. Secretary of State for the Home Department* in which the applicant a Nigerian girl was subjected to human trafficking, has indicated that “young girls from Nigeria whose economic circumstances are poor” are considered a PSG.²⁰⁵ In the US also, the Newark Asylum Office has indicated in many of its decisions that “low-income individuals with HIV” are considered a PSG.²⁰⁶ It is clear from the previous decisions that many courts have used the “protected characteristics” approach to extend the Refugee Convention’s scope of protection by including new groups which were never considered or protected.

On the other hand, we can find many other decisions which reject claims for refugee status based on economic deprivation. They indicate that poor economic class may not be recognized as PSG. These decisions were mainly based on the lack of the immutability condition under the protected characteristics test. In *UKS (Re)*, the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) has rejected the application of a Salvadorian applicant who claimed that he was persecuted in his country for being a young poor male returning from the US. The RPD indicated that: “being a male is innate, and being young is not changeable other than by the natural ageing process. *Being poor, however, is neither innate nor unchangeable.*”²⁰⁷ The Board has also rejected another application of a Jamaican woman who claimed that she was persecuted and targeted by criminals in her country for being poor, and based its decision on the same argument that poverty is a changeable characteristic.²⁰⁸ Furthermore, the New Zealand Refugee Status Appeals Authority

²⁰² UNN (Re), No. V95-00138, [1997] CRDD No. 12, 16 January 1997, at paras. 1314, cited in: Foster, Michelle. (2007). *International refugee law and socio-economic rights: refuge from deprivation*. Cambridge; New York: Cambridge University Press, p. 306.

²⁰³ WBT (Re), No. V98-00787, [1997] CRDD No. 119, 4 June 1999.

²⁰⁴ YCK (Re), No. V95-02904, [1997] CRDD No. 261, 26 November 1997, at para. 4.

²⁰⁵ *Supra note 90* at 307.

²⁰⁶ *Id.*

²⁰⁷ No. T96-02313, [1997] CRDD No. 223, 9 May 1997, at para. 70.

²⁰⁸ ANK (Re), No. TA1-19010, [2002] CRDD No. 172, 26 August 2002, at para. 5.

(RSAA) asserted in one of its decisions that: “poverty per se is not immutable, nor is it so fundamental to the identity of the members that they ought not to be required to change it.”²⁰⁹

After reading those cases which dismiss “the poor” from being recognized as a PSG, it is clear that these decisions were grounded in an unrealistic assessment of the reasons behind poverty and economic disadvantage and that is for two main reasons: firstly, in none of those cases did the court assess the situation of the poor applicant in his or her country in order to reach the conclusion that his poverty was changeable and not immutable. Secondly, judges in their decisions have had a wrong presumption that poverty is a changeable characteristic, which is very unrealistic as according to the world’s current situation of poverty, which I discussed in the second chapter, it is clear that the poverty rate in most developing countries continues to rise and the economic conditions of the people are getting worse not vice versa.

2. Occupation as a Particular Social Group

In this section, I discuss whether people who share a common occupation can qualify to a PSG under the understanding of the Refugee Convention according to recent developments in literature and case law. It is important to reflect on occupation namely as practical experience in the field has proved that many oppressive regimes have been targeting people with certain occupation for various reasons. For example, their occupation can be seen against the dominant religion of the country such as people working on women’s rights field. Other people can be persecuted as their occupation is regarded as a political tool for opposing the ruling regime like people working in the human rights field. Many writers have indicated the hardship of connecting occupation to the ground of MPSG, as in many cases such claims have failed to pass the “immutable characteristic” test and that was clear in many court decisions.²¹⁰ However, recent case law has proven the courts’ have become more willing to consider such group as a PSG.

Many writers such as Hathaway, Foster, Daley and Kelley have indicated that one’s fear of being persecuted for the reasons of his/her employment or occupation is

²⁰⁹ Refugee Appeal No. 71553/99, RSAA, 28 January 2000, at 9.

²¹⁰ *Supra note* 90 at 313.

protected under the Refugee Convention.²¹¹ By applying the “immutable characteristic” approach, we can establish that since freedom of employment is a basic right according to art. 6 of the ICESCR and art 23 of the UDHR, people who are persecuted for their occupation or are forced to leave or change their occupation should be considered as a PSG. Many courts have considered many claims which has depend on occupation as a social group. For instance: in the case of *R v. Secretary of State for the Home Department, ex parte Ouanes*, the applicant who is an Algerian woman working as a midwife for the government claimed that she has a well-founded fear of being persecuted by fundamentalists for providing advice to women regarding contraception. She also claimed that the Algerian government was unable and unwilling to protect her from these fundamentalists who impose threats to her life.²¹² The UK Court of Appeal ruled in favor of the applicant granting her asylum as it considered midwives working in Algeria as a PSG and eligible for refugee status under the Refugee Convention. The court stated in its judgement that: “[T]he characteristic that defines the social group must, in situations such as the present, be one that the members should not be required to change *because it is fundamental to their individual identities or conscience.*”²¹³

Furthermore, in *Nouredine v Minister for Immigration and Multicultural Affairs* the applicant who was an Algerian woman working in beauty industry claimed that she has been persecuted by Muslim extremists for her work, as they see it as an immoral industry that should be eliminated which imposed threats on her life.²¹⁴ The Australian Federal Court of Refugees (FCR) held that the applicant is eligible for refugee status and considered beauty workers in Algeria as a PSG who deserve protection under the Refugee Convention.²¹⁵

On the other hand, in *Minister for Immigration and Multicultural Affairs v Zamora* the Australian Federal Court of Refugees (FCR), rejected the claim of an Ecuadorian man who claimed that his occupation as a tour guide made him part of a PSG. The court noted that: “Quite apart from the risk of using persecution or the fear of persecution as

²¹¹ See Foster, Michelle. (2007). *International Refugee Law and Socio-Economic Rights*, p 313; See also, Hathaway, *The Law of Refugee Status*, p. 168; See also, Daley and Kelley, ‘Particular Social Group’, p. 170.

²¹² *R v. Secretary of State, Ex parte Ouanes*, United Kingdom: Court of Appeal (England and Wales), 7 November 1997, available at: https://www.refworld.org/cases,GBR_CA_CIV,3ae6b626c.html .

²¹³ *Ibid.*

²¹⁴ (1999) 91 FCR 138 (‘Nouredine’); cited by: Walker, Kristen, *Damned Whores and the Border Police: Sex Workers and Refugee Status in Australia*, 31 *Melb. U. L. Rev.* 938 (2007).

²¹⁵ *Ibid* at 143-4.

a defining feature, in many cases an occupational group will not satisfy the requirement that it be recognized within the society as a group, even though it may fairly be said that the members of an occupational group have common characteristics not shared by their society.”²¹⁶ Furthermore, in *Matter of Acosta*, the BIA held that a group of taxi drivers did not qualify the ground of PSG as they did not meet the immutable and protected characteristics. It states that: “the members of the group [the taxi cooperative] could avoid the threats of the guerillas either by changing jobs or by cooperating in work stoppages.”²¹⁷

It is clear after reading previous cases that some courts have started to recognize occupation as a PSG, however that is not the case with other courts which continually rejected similar claims based on the argument that occupation is not immutable and that the claimant could have easily relinquished his or her occupation in order to avoid persecution. I disagree with the latter argument for two reasons: firstly, courts by adopting such an approach strictly, dismiss the fact that changing occupation puts much hardship on the applicant, as he/she may have lived his whole life doing that job; and presuming that he can easily shift from one occupation to another is unreasonable and would put the applicant on higher risk of economic deprivation. Secondly, requiring the applicant to leave his or her occupation conflicts with his basic right to work and freedom of employment which would amount to a violation of his social and economic rights.

²¹⁶ Zamora (1998) 84 FCR 458 at 464; cited by: Foster, Michelle. (2007). International Refugee Law and Socio-Economic Rights.

²¹⁷ Matter of Acosta, A-24159781, United States Board of Immigration Appeals, 1 March 1985, para 56.

VI – Conclusion

As many regional refugee courts have started to recognize many asylum claims based on economic and social deprivation in the last two decades, there is still no consensus between them regarding the validity of such claims under the interpretation of the Refugee Convention. Some legal scholars and practitioners have realized how international human rights law is the most suitable framework to provide a proper interpretation for the Convention, as it contains the objective and universal principles decision makers can use to determine refugee status for asylum-seekers. This approach has produced many new developments in the field of international refugee law. Gender-based violence is now regarded as persecution by most regional courts and even noted by the UNHCR in its guidelines.

Nevertheless, claims based on economic and social deprivation are more complex and are harder to be recognized for many reasons. First, the recognition of these claims challenges the traditional dichotomy set between economic migrants and genuine political refugees. Such a dichotomy has always been used by academic writers and courts since the drafting of the Refugee Convention in 1951. Second, the approach raises many security and financial complications for states as most people now regarded as “irregular migrants” would be recognized as refugees and this places a legal obligation on these states to give them safe entry and protection. Third, economic and social rights have always been categorized and seen as inferior to civil and political rights for many reasons such as: the former being positive rights that require states to allocate expenditures to protect them; however the latter are negative rights that only require states to abstain from taking any action that might violate them. Moreover, civil and political violations are justiciable as they can be easily contested before courts. This is unlike economic and social rights violations that in order to be contested judges requires to evaluate the performance of the executive authority to protect these rights, which is not their duty to do so and goes against the principle of the separation between authorities.

This paper contests the traditional perspective of categorizing rights which promote the prevalence of some rights over others. It argues that recent developments in the international human rights law field show the invalidity of this categorization as many

states and human rights tribunals have started to realize that all rights are interconnected; any violation of one right also results in the violation of other rights.