

What's Wrong with the Refugee Convention?

Written by Phil Cole

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PHIL COLE, NOV 6 2015

At a time of a global and regional refugee crisis, you might think the last thing we should do is question the UN Refugee Convention. The UNHCR calculates that by the end of 2014 there were 19.5 million refugees globally, an increase of 2.9 million over 2013. If you add to that the 38 million internally displaced people that means there are 59.5 million forcibly displaced people worldwide.

But there are key problems with the Convention and it may be that now is precisely the time to raise them. The three main challenges are the scope of the definition, what protection it offers, and its status in international law.

The definition

We are all familiar with the definition of refugee used in the 1951 Refugee Convention and the 1967 Protocol. A refugee is someone who

owing to a 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 to or, owing to such fear, is unwilling to avail himself of the protection of that country.

The problem is that the vast majority of people we think of as refugees are not outside of their country because of fear of persecution for any of those reasons, but are simply fleeing violence – their home is no longer safe: for example it has become a war zone. That means the vast majority of those seeking shelter from violence are not, as far as the Convention is concerned, actually refugees.

The fact is that the The Office of the United Nations High Commissioner for Refugees, mandated to lead and co-ordinate action to protect refugees and resolve refugee problems worldwide, does not use the Convention definition but works with a wider view of “persons of concern” – a general term used to describe all people whose protection and assistance needs are of interest to the UNHCR.

And it would seem that most governments who consider cases of asylum do not stick to the letter of the Convention definition but work with a wider understanding of who can be a refugee. But the fact remains that the Convention as it stands allows states to interpret who is a refugee more or less broadly, and while they may apply the broad understanding to asylum seekers from one region they may well apply a much more strict understanding to asylum seekers from another region.

There are other definitions available. For example the The Cartagena Declaration on Refugees is a non-binding agreement which was adopted by the Colloquium on the International Protection of Refugees in Latin America, Mexico and Panama, held at Cartagena, Colombia in 1984 and enlarges the refugee definition to include

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

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And the Organization for African Unity also adopted a wider definition:

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

These regional definitions are much closer to UNHCR practice and indeed our everyday understanding of what it is to be a refugee.

However, another problem with all these definitions is that in order to be a refugee you have to be able to cross a national border. Otherwise you are an Internally Displaced Person, and as we have seen there are twice as many IDPs globally than refugees – people struggle to escape their national territory. It seems crazy that your recognition as a refugee with the rights that attach to that status is dependent on whether you have crossed a border, and once more the UNHCR's 'persons of concern' simply discards that distinction.

And finally, as far as the Convention goes, you are only a refugee once a state has granted you that status. Until that moment you are an asylum-seeker. And so once more the vast majority of people fleeing violence in the world today are not, according to the UN Convention, refugees – they are people seeking refuge.

Protection

But when what rights *do* attach to that status? The only effective right is that of non-refoulement: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This means states cannot expel people who have the right to be recognized as refugees to their country of origin OR to any state where they may be subject to persecution.

However, all this amounts to is the right not to be sent back into danger once you have escaped it—it is, crucially, not a right to escape danger in the first place. Non-refoulement places a negative obligation on states not to harm, but no positive obligation to assist. It also allows states to only grant temporary shelter until the refugees can return. What is required is a positive right to immigrate and establish a new life in another country – the idea of *safe passage* – and the right to permanent settlement, rather than simply a temporary status which can always be revoked whenever the government decides it is safe for you to go home.

International law

Finally, there is the status of the UN Convention in international law – quite simply, who has ratified it and who hasn't? This becomes very important if we focus on the Syrian crisis. As well as the 7.6 million IDPs in Syria, 4.1 million have crossed the border since 2012. The vast majority of these remain in the region – 1.9 million in Turkey at the last count, 1.1 million in Lebanon, 630,000 in Jordan and 249,000 in Iraq.

What is often overlooked is the fact that Lebanon, Jordan and Iraq have never ratified the 1951 Convention, and therefore all those displaced people have no right to be recognized as refugees. Turkey has ratified the 1951 Convention but not the 1967 Protocol. This means that as the original Convention only applied in Europe (the 1967 Protocol made it global) Turkey only recognises refugees from Europe. Again, none of those who have fled there from Syria or elsewhere have the right to be recognized as refugees in Turkey.

In the end, the perspective from Europe is that the Middle East region is filled with refugees who become migrants once they cross into Europe, but the alternative view is that the region is filled with desperate people who only have the chance to become refugees once they cross into Europe.

What the current crisis has shown is that the UN Refugee Convention and the rights and obligations which flow from

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it are inadequate and need to be fundamentally revised. The danger is, of course, that if we open the definition up for re-negotiation, powerful states with an interest in limiting freedom of movement will seek to make it less, rather than more, generous. But the examples of the Cartagena and OAU definitions show that maybe we should be more optimistic about the capacity of states to recognize the basic decency of granting human beings safety.

About the author:

Professor Phillip Cole Lectures in Politics and International Relations at the University of the West of England, Bristol. He is co-author of *Debating the Ethics of Immigration: Is There a Right to Exclude?* (OUP, 2011)