

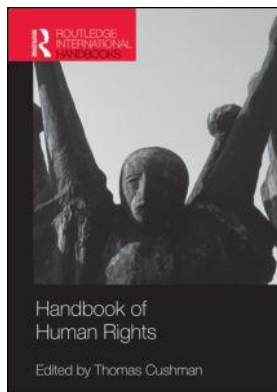
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Thomas Cushman

### **The rights of refugees**

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Hakan G. Sicakkan

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# The rights of refugees

*Hakan G. Sicakkan*

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Refugees are special kinds of foreigners who interact with states in a unique way. Their interactions with states are distinct from other state–individual relations that political and legal theories delineate because they are neither inter–state relations nor center–periphery, state–citizen or citizen–citizen relations. The postwar notion of state, which originates from the principles manifest in the Peace of Augsburg of 1555, Westphalia Treaty of 1648, and the Wilsonian principles of 1918, prescribes states’ right to determine who to let in and who to exclude from their territories. On the other hand, through the 1951 Geneva Convention relating to the Status of Refugees and its related 1967 Protocol, the liberal element of the very same ideology renders the states responsible for protecting refugees. By granting refugee status to foreigners, a state abandons its right to decide on their movements across its territory as well as its own discretion about how to treat foreigners. The state is also obliged by the Geneva Convention to guarantee civil and social rights to refugees. Therefore, the notion of refugee as defined in international law today is the only known phenomenon whereby a sovereign state and a person of foreign nationality, representing only his or her own person, interact with each other, to advance their claims for, respectively, *sovereignty* and *protection*.

## Development of the notion of refugee

“In everyday speech a refugee is someone who has been compelled to abandon his home” (Zolberg et al. 1989). This sociological feature of the refugee condition is crucial. However, throughout history, the meaning of the refugee concept has transformed as a corollary to the political realities. It is primarily the changing form and content of the association between the rulers and the ruled that has determined the meaning of the refugee concept. Empirically, the political dimension of the phenomenon is more characterizing than its sociological dimension.

Until the French Revolution, protection was given to *fugitives* on a private basis by those who were emphatic enough to identify with the persecuted. In ancient and medieval times, for instance, the utilization of temples and churches for protecting fugitives was known as sanctuary. Temples in Egypt, Greece, and Rome, for example, provided sanctuary. Sanctuaries served at that time as shelters for people escaping violence and states’ penalties. Forcible removal of or

violence to people in sanctuary was considered a sacrilege (Zolberg et al. 1989). In the European feudal states, refugees were royal family members and members of the landed aristocracy whose inherited “natural” rights were denied. As all rights were based on kin, slaves were excluded from protection, and nobles in trouble generally sought shelter in the lands of other nobles with whom they shared interests in terms of power relations, politics, or religious beliefs. Toward the end of the Middle Ages, estates began to replace the feudal organization, and serfs gradually gained mobility. Religious belonging started to become the new social stratification factor, and religious minorities’ situation gradually worsened in Europe. Spain, for instance, expelled the Jews and the Moors in the fifteenth century.

After the Reformation, religion became the major association between the rulers and the ruled. The Peace of Augsburg in 1555 adopted the principle of *Cuius regio, eius religio*, which established each prince’s right to determine whether Roman Catholicism or Lutheranism would be his subjects’ religion. The situation of religious minorities during the Wars of Religion in France, known also as the Huguenot Wars (1562–1598), exemplifies as well the conception of the refugee as bearer of a certain religious belief that was “undesirable” in a state. Such people were helped through military interventions and provisions of asylum by states that had an interest in protecting the respective religion. Spain, for example, intervened in France (1589–1598) in order to ensure that a Catholic should take over the French throne. In the sixteenth and seventeenth centuries, there were further flights to America from religious persecutions in Europe. The Peace of Westphalia in 1648 made the territorial boundaries more relevant to the refugee condition. In the eighteenth century, the exodus of *émigrés* during the French Revolution expanded further the refugee concept. After the fall of the Bastille in 1789, those who fled the bourgeois persecution were royalists from *all classes* (Zolberg et al. 1989). The term *émigré* connoted the political refugee who was persecuted for his or her political status or opinion.

During the interwar period (1918–1939), the refugee was a Russian opponent of Bolshevism or a member of an ethnic minority. In addition to approximately 1.5 million people fleeing the Bolshevik Revolution in 1917, many people belonging to ethnic minorities left their homes after the new Wilsonian international order was established. The interwar period was characterized by mass exchanges of minority populations between the new nation-states, such as the Turkish–Greek population exchanges. In the League of Nations treaties and arrangements of 1926 and 1928, the refugee was a person who did not enjoy the protection of the government of the country of his or her origin. A refugee was defined in 1926 as “any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality” (Goodwin-Gill 1985). During Japan’s invasion of China in the 1930s and 1940s, internally displaced people in China were referred to as “refugees” in American official communications (Lee 1996). Later, Article 1 of the 1933 Convention relating to the International Status of Refugees defined the refugee similarly.

Similar definitions were adopted for Armenian, Turkish, Assyrian, Assyro-Chaldean, and assimilated (Syrian or Kurdish) refugees. The decisive criterion in determining the refugee status in all these definitions was the presence or the lack of “protection” by the governments concerned (Lee 1996).

Other significant political events in the interwar period were Hitler’s accession to power in Germany in 1933, annexation of Austria in 1938 and Czechoslovakia in 1939, the Loyalist defeat in Spain in 1939, and anti-Semitic legislation in Eastern Europe. The refugees produced by these events, for example, Jews and Loyalists, were not sufficiently protected (slave labor, forced repatriation, etc.). After the Paris Conference held in 1938, with the participation of thirty-two countries, a permanent committee was established in London in order to achieve

progress in protection of these refugees. During World War II, the refugee was a Jew, who had no getaway.

The end of World War II constitutes the historical context of today's refugee concept. In 1946, the International Refugee Organization (IRO) identified "persons of German ethnic origin" who were expelled, or were to be expelled, from their countries of birth into the post-war Germany, as persons who are "not the concern of the Organization," something which follows the aforementioned historical trend of defining a refugee in terms of interplays between states, politics, dominant ideologies, and normative conceptions of what the link between citizens and states ought to be. Also, for the first time in history, the 1946 Constitution of IRO used explicitly the phrase "being outside the country of nationality" in the legal definition of a refugee. The 1951 Geneva Convention adopted the same criterion.

Another important feature of the postwar change in the refugee concept is that the 1951 Convention supplemented the earlier criterion in the 1933 Convention of "lack of protection by a state" with the requirement of "persecution," in which the state as persecutor or endorser of non-state agents' persecution was implicit. Seen in a historical perspective, with its (implicit) requirements of "state persecution" instead of "lack of protection by a state" and "being outside the country of nationality," the 1951 Refugee Convention represents a restrictive conception of the refugee:

Any person who, as a result of events occurring before 1 January 1951 and 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.

*(Art. 1A)*

The Geneva Convention was approved at a United Nations conference on 28 July 1951. There are now 147 signatories to either the Geneva Convention or the Protocol, or to both. Originally, the Convention aimed to protect the European refugees after World War II. Later, all regional and temporal limitations were removed by the 1967 Protocol in order to expand the Convention's scope. Indeed, the Geneva Convention, with the optional 1967 Protocol, is the basic international instrument of refugee law. The refugee law also comprises customary law, peremptory norms, some regional instruments, and some states' constitutional asylum laws, which in some cases define additional legal categories.

The regional instruments include the 1966 Bangkok Principles on Status and Treatment of Refugees adopted at the Asian-African Legal Consultative Committee in 1966, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees for Latin America, the 1976 Council of Europe's Recommendation 773 (1976) on the Situation of de facto Refugees, and the 2004 European Union's Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted.

Concerning alternative legal categories, whereas France, Germany, Portugal, and Spain keep their constitutional protection scheme separate from their national refugee definitions, which are in principle copied from the 1951 Geneva Convention, Greece and Italy merge the refugee convention with their constitutional-protection rules examination. States' alternative legal

categories are shaped by their own political histories (Sicakkan 2008): all European countries – i.e., France, Germany, Greece, Italy, and Portugal – that experienced liberation wars from authoritarian regimes during and after World War II have the category of “freedom fighters” in their constitutional asylum laws. Among the countries that have a constitutional asylum scheme, the only exception from this rule is Spain, which has itself had problems with ETA-based freedom fighters.

This depiction outlines the interplays between politics, state ideologies, and the refugee definition. The notion of refugee is premised upon the association between rulers and the ruled, just like the meaning of the citizen. As the diversity of associations between rulers and the ruled was augmented, the refugee concept extended. The 1951 Geneva Convention froze this historical process of extension, however, by defining the refugee as *the antonym of the postwar citizen*. As the associations between the ruler(s) and the ruled are apparently not a constant over time and space, any rigid definition of a refugee premised on a specific, singular association will be an incomplete descriptive category. Also across countries and regions, both historical and new formations of citizenship ideals represent different loyalty structures and a variety of associations between the state and the individual, and hence, different notions of refugee. Each state is, thus, likely to interpret the refugee concept based on its own historical or particular conception of the citizen.

### The rights of refugees

Convention refugees are to enjoy all the rights mentioned in the 1951 Geneva Convention. The main principle in the Convention determining which rights should be accorded to refugees is mentioned in Article 7, paragraph 1: “Except where this Convention contains more favorable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.”

However, the Geneva Convention also lists a range of provisions that give more favorable rights to refugees than aliens; in some cases, the Geneva Convention even asks the states to grant the same rights to refugees as their own citizens. The first column of Table 31.1 gives a list of the aliens’ rights that the Convention obliges the states to grant to refugees. The areas in which the Convention asks the states to treat refugees more favorably than other aliens are listed in the second column. It should be noted that the majority of the rights listed in column two relate to procedures of recognition of refugee status – with the exception of “naturalization rules.” In some other areas, the Convention advises the states to grant the same rights as their own nationals, which are listed in the third column.

Various countries extend the rights mentioned in the Geneva Convention. Extended rights can be classified under four categories: (1) cultural rights (mother tongue training, family reunification), (2) welfare and economic rights (health services, employment, job seeking, vocational training), and (3) residence and accommodation rights. In principle, the extension of refugees’ rights by states is a consequence of the rights that their own citizens are entitled to. Therefore, extended refugee rights vary from country to country. In any attempt to depict the rights of refugees, it is adequate to consider both the rights defined in the Geneva Convention and the countries’ own rights categories (Sicakkan 2008). However, my focus in this chapter is on the basic rights of refugees that are not country specific.

In practice, the refugee rights in Table 31.1 are interpreted in the light of a wide range of other relevant international legal instruments of human rights (Table 31.2). Indeed, the UNHCR’s Executive Committee affirmed that “the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the Universal

Table 31.1 Rights of refugees in the Geneva Convention

<i>The same rights as aliens in general</i>	<i>More favorable rights than aliens in general</i>	<i>The same rights as nationals</i>
Movable and immovable property (art. 13)	Exemption from reciprocity (art. 7)	Religious rights (art. 4)
Self-employment (art. 18)	Exemption from exceptional measures (art. 8)	Rationing – where applied to citizens (art. 20)
Exercise of liberal professions (art. 19)	Continuity of residence (art. 10)	Artistic rights and industrial property (art. 14)
Housing (art. 21)	Personal status, more particularly rights attaching to marriage (art. 12)	Rights of association, non-political and non-profit organizations and trade unions (art. 15)
Public education beyond elementary education (art. 22, par. 2)	Administrative assistance/representation towards third countries (art. 25)	Access to courts (art. 16)
Freedom of movement (art. 26)	Identity papers and travel documents (art. 27, art 28)	Wage-earning employment (art. 17)
	Transfer of assets to another country (in case of resettlement) (art. 30)	Elementary public education (art. 22, par.1)
	Unlawful entry or presence in the country (no penalty or unnecessary detention) (art. 31)	Public relief and assistance (art. 23)
	No expulsion – except national security/public order grounds (art. 32)	Wages, salaries, labor, and social security rights (art. 24)
	<i>Non-refoulement</i> (art. 33)	Fiscal charges (art. 29)
	Naturalization (art. 34)	

Declaration of Human Rights, is among the most basic mechanisms for the international protection of refugees” (UNHCR ExCom Conclusion No. 82). However, states’ strict entry requirements, carrier sanctions, border closures, detention of asylum seekers, and other measures to hamper access to asylum procedures render the right to seek and enjoy asylum hard to achieve in practice.

The list of legal instruments in Table 31.2 testifies to the fact that refugee rights are tightly connected with human rights in both normative and legal terms. These instruments aim to guarantee the right of seeking and enjoying asylum by defining the minimum objectives of asylum determination procedures and by identifying the exemptions from the general aliens’ laws that apply only to refugees and asylum seekers. Most importantly, the 1951 Geneva Convention and its related protocol oblige the states to give a fair treatment to all asylum seekers. The general objective of these rules is to ensure that refugees and asylum seekers be clearly distinguished from other aliens and that their applications for protection be fairly evaluated. These include (1) general rules concerning non-criminalization of asylum seeking, (2) exemption from the rules on identity, travel and visa documents, (3) exemption from the rules on detention, return and expulsion of aliens, and (4) exemption from the immigration laws and rules that may be too restrictive in some receiving countries.

The right of *non-refoulement* has over the years proved to be one of the most important legal instruments. Article 33 of the 1951 Geneva Convention on prohibition of expulsion or return (“*refoulement*”) states that: “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

Table 31.2 Basic rights regarding protection of refugees in various international and regional legal instruments

<i>THE RIGHTS OF REFUGEES</i>						
	<i>Seeking and enjoying asylum from persecution</i>	<i>Liberty and security of person (protection against detention and penalty for illegal entry)</i>	<i>Non-refoulement</i>	<i>Due process, including during refugee status determination</i>	<i>Freedom of movement, procedural rights in expulsion/prohibition against collective expulsion</i>	<i>Legal identity, status and documentation</i>
Geneva Convention	Art. 33	Art. 31	Art. 33	Art. 16	Arts. 26, 31, 32	Arts. 27, 28
UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers		All				
UNHCR Guidelines on Protection and Care of Refugee Children		All				
UNHCR ExCom Conclusions	Nos. 82, 93, 94, 97	Nos. 44, 72, 85	Nos. 6, 7, 22, 30, 85, 102	Nos. 8, 30, 87		Nos. 35, 49, 91
UNHCR ExCom Standing Committee on Detention of Asylum-seekers and Refugees: The Framework, the Problem and Recommended Practice		All				
UN Declaration on Territorial Asylum	UNGA Resolution 2312 (XXII)		UNGA Resolution 2312 (XXII)			
UN Rules for Juveniles Deprived of their Liberty		All				
UN Standard Rules for the Treatment of Prisoners		All				

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment	All					Arts. 27, 28
Convention relating to the Status of Stateless Persons					Art. 16	
Universal Declaration of Human Rights (UDHR)	Art. 14	Art. 9	Art. 5	Art. 11	Art. 13	
Human Rights Committee, General Comments		Nos. 8, 15, 21, 27	Nos. 20, 31		No. 27 (art. 12)	No. 17 (art. 24)
International Declaration on the Protection of All Persons from Enforced Disappearance			Art. 8			
International Convention for the Protection of All Persons from Enforced Disappearance			Art. 16			
Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions			Principle No. 5			
International Covenant on Civil and Political Rights (ICCPR)	Arts. 9, 10	Art. 7	Art. 14	Arts. 12, 13	Arts. 16, 24(2)	

(Continued)



Table 31.2 (Contd.)

THE RIGHTS OF REFUGEES						
	<i>Seeking and enjoying asylum from persecution</i>	<i>Liberty and security of person (protection against detention and penalty for illegal entry)</i>	<i>Non-refoulement</i>	<i>Due process, including during refugee status determination</i>	<i>Freedom of movement, procedural rights in expulsion/prohibition against collective expulsion</i>	<i>Legal identity, status and documentation</i>
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment			Art. 3			
Convention on the Rights of the Child (CRC)	Art. 22	Art. 37			Art. 10	Arts. 7, 8
Convention on the Elimination of All Forms of Racial Discrimination (CERD)				Arts. 5, 6	Art. 5	
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)					Art. 15(4)	
Guiding Principles on Internal Displacement						Principle 20
African Charter on Human and People's Rights	Art. 12(3)	Arts. 5, 6; and Art. 24 of the Protocol		Arts. 7 and 12(3)	Art. 12	Art. 5
American Convention on Human Rights (ACHR)	Art. 22(7)	Arts. 5, 7	Art. 22(8)	Arts. 8, 25	Art. 22	Art. 18

American Declaration of the Rights and Duties of Man (ADHR)	Art. XXVII			
Bangkok Principles on the Status and Treatment of Refugees	Art. III			
Charter of Fundamental Rights of the European Union	Art. 18	Arts. 3, 5	Art. 3	Arts. 2, 3, 4 of Protocol No. 4; Art. 1 of Protocol No. 7
European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)			Art. 6 of Protocol No. 7	
EAU Convention Governing the Specific Aspects of Refugee Problems in Africa	Art. II	Art. II(3)		Art. VI

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political opinion.” In addition to persons whose claims are pending, this rule has also saved lives in cases where the status of a person as a refugee was not easy to prove or determine. However, although states’ obligations of *non-refoulement* in human rights law are of absolute nature, article 33(2) of the Geneva Convention is stricter when stipulating that “a refugee for whom there are reasonable grounds for regarding as a danger for the country in which he is, or who ... constitutes a danger to the community of that country” may not claim the right of *non-refoulement*.

## States and their responsibility to protect refugees

When they are outside their country of origin, asylum seekers are basically subject to two kinds of law: (1) the 1951 Geneva Refugee Convention and (2) the receiving states’ immigration laws. The former defines states’ responsibilities to protect the refugees, and the latter manifests states’ sovereignty over their own territory. Whereas the former aims to oblige the states to allow entry and give protection to refugees, the latter functions as states’ tool for distinguishing between citizens and aliens. Scholars of refugee studies agree that the latter law has now won over the former – i.e., more often than ever before, states downplay their international responsibility to protect refugees and asylum seekers. In the present context of states’ frequent denial of refugee rights, recent research in refugee studies has shifted focus towards the problems of refugee protection, states’ asylum procedures, and a reformation of the Geneva Convention.

Concerning states’ asylum procedures, the majority of states *do* have asylum laws and institutions that conform to the 1951 Geneva Convention. One would therefore expect the outcomes of these national asylum laws and institutions to be similar. However, it has been shown that this is not the case (Holzer et al. 2000a, 2000b; Gibney and Hansen 2003; Gibney 2004; Neumayer 2005). How, then, is it possible for states to “lawfully” refuse a genuine refugee? The answer to this question lies in the relationship between states’ asylum recognition rates and their national asylum determination frames; it is, among other things, the small nuances in states’ asylum determination procedures – especially their procedures regarding asylum seekers’ access to asylum determination – and how they deal institutionally with asylum applications, that explain the fact that states can deny protection to genuine refugees without violating the Geneva Convention provisions directly (Sicakkan 2008).

As to the reformation of the Geneva Convention, since the 1980s the problematic international political situation around the protection of refugees has divided refugee studies researchers into two camps. The first, *reformists*, assert that it is no longer possible to convince states to reassume full responsibility for refugees; one should therefore devise a new international refugee regime or reformulate the present refugee laws in order to make refugee protection possible again (Garvey 1985; Hathaway and Neve 1997; Schuck 1997; Harvey 1998; Juss 1998). However, there are two main groups with conflicting views on the reformist side: One group of researchers on the reformist side – *realists* – argue that states could only be made responsible through a reformed refugee convention that is more sensitive to states’ interests (Hathaway and Neve 1997). Another group of reformists – *idealists* – envisaged a solution in an expansion of the refugee definition to include people fleeing new types of social and political conflicts (Loescher 2001).

The second camp, *conventionists*, on the other hand, argue that to reform the Geneva Convention in either direction will only dilute the original intentions behind it (Anker et al. 1998). They state that the present international refugee law and the refugee regime is a good enough protection tool, and that one should instead engage in efforts to convince states to reassume their responsibility for the refugees (Fitzpatrick 1996; Anker et al. 1998; Chimni 1998; Loescher 2001).

Roberts (1998) concludes in one of his essays that “Although the 1951 Convention as amended gives guidelines for good practice which remain valuable, there is not likely to be a standard concept of what refugees are and how they should be treated.” Loescher argues that:

If the Convention is to be reformed, changes should not aim to weaken the protection mechanism but rather to strengthen it. The priority should be to broaden the definition of refugee to recognize victims of civil wars, to ensure voluntary repatriation, and to formally recognize the right to seek asylum and obtain it. Since these developments are unlikely to occur – despite the professed human rights commitment of most Western states – it is essential to re-emphasize that the 1951 Convention properly applied, remains the essential underpinning of the refugee protection system.

*(Loescher 2001, p. 366)*

The reformulation projects and their critics have important internal differences. Although they agree on the inefficiency of the current refugee regime and share the common goal of an effective protection system, their ethical points of departure and the means they propose for protection are different. In the absence of better alternatives, there is little reason to disagree with Loescher’s view.

### **The citizen–alien paradigm and singular notions of refugee**

Harvey asserts that “Any single vision of a monolithic law will simply not be subtle enough for the dynamism and complexity of the issue” (Harvey 1999). Indeed, singular definitions of a refugee fail to recognize certain human sufferings that constitute the refugee condition. The problem with singular approaches is that they derive from states’ particular citizenship ideals, political visions, and images of person. This means that states’ operative definitions are derivatives of their own ideals of citizenship. The predicament is that different citizenship ideals construe different couplings between citizenship and refugeehood.

Human sufferings that are recognized as the fundament of the refugee condition vary. Whereas the freedom to use one’s mother tongue or the freedom of religion, for example, are considered as relevant criteria by some states based on their own historical citizenship ideals, these are not given emphasis in other states’ dealings with refugee issues. Germany and Greece, for example, give special treatment to co-ethnic refugees while the liberal–individualist states treat co-ethnics and others equally. In brief, the absence of freedom to express one’s belonging to an ethnic or religious group or to a nation or a culture is regarded as a real human suffering by some states, but this may not be equally meaningful in the context of the historical experiences of some other states (Sicakkan 2008). This is about what different states regard as worthy of protecting: autonomy of persons, cultures of communities, citizens and their civic belongings, or diasporic belonging of their co-ethnics.

The citizen–alien paradigm also introduces various sets of criteria for determining which refugee protection instruments are preferable. Some instruments are individual protection schemes (e.g. temporary or permanent political asylum), collective protection of groups (temporary or permanent), creation of safe zones in the regions close to conflict areas, efforts to eliminate the root causes of refugee flows, unilateral or multilateral preventive state actions, or diplomatic or military interventions in the conflict areas or countries that generate refugees. Citizenship ideals valorize these methods and tools of protection differently. While states with a liberal–individualist citizenship tradition usually prefer permanent individual asylum as the main

protection tool, states with a communitarian–collectivist history of citizenship tend to prefer temporary collective protection of refugee groups, while putting less emphasis on individual protection (Sicakkan 2008).

When refugeehood and citizenship are conceptually tied thus to each other, human sufferings that constitute the refugee condition are conceived in terms of the receiving states' citizenship ideals rather than in terms of actual human sufferings. By tying the notion of refugee to a citizen ideal, one risks detaching it from human rights. The coupling between citizenship and refugeehood also substantiates aporetic questions such as whether states should prioritize their obligations to their citizens or assume their responsibility for refugees. Only when the refugee is defined in terms of a citizenship ideal and "as a function of the interstate system" (Sassen 1999) can such questions be vindicated. Such coupling between citizenship and refugeehood is a consequence of the current dominance of the citizen–alien paradigm in approaches to state–individual relations.

### Towards a human-rights based notion of refugee

The alternative to the citizen–alien paradigm is a human rights–based notion of refugee. The question is not about states' having to choose between their citizens' and foreigners' claims; it is about choosing between *citizens' claims for a better life* and *refugees' claims for a life at all*. By conceptualizing the refugee in terms of citizenship, one trivializes this crucial point. When the question is put forth as a choice between *a better life* and *a life at all*, we are in the domain of human frailty (Buttle 2003; Elliot and Turner 2003), individuals' inalienable human rights, and the human sufferings that are caused by human rights violations.

The counter-argument is that this perspective misses the nuance between human rights and refugee rights. It has been argued that, although refugee rights derive from human rights, the Geneva Convention is only meant to cover a specific category of people and, in principle, it does not deal with all sorts of people whose human rights are violated. Also some pragmatic arguments have been advanced, claiming that a further extension of the refugee definition will paralyze the already inefficient refugee protection system (Hathaway and Neve 1997). Similar to the detachment in citizenship theories, also this analytical distinction between refugee rights and human rights further detaches the notion of refugee from human rights, but this time for the sake of efficiency and feasibility.

A notion of refugee that is entrenched in the idea of human rights makes *human suffering that cannot be avoided without another state's protection* the centre of the refugee definition, no matter what the reasons for persecution, discrimination, endangering, non-protection, or domination may be. Such a refugee definition should entail the following characteristics:

First, the consequence of giving *suffering* a central place is that not only race, ethnicity, religion, nationality, or political persuasion are relevant when deciding who the refugees are, but also other individual and collective factors such as sexuality, mobility, gender, generation, clan, family, and new forms of belonging.

Second, such a model emphasizes persons' real sufferings that can be avoided with another state's protection rather than the receiving or sending states' particularistic interpretations of the "reality." Therefore, this notion of refugee emphasizes the principle of non-protection or lack of protection by a state, which was more strongly integrated into the refugee concept before 1946, as strongly as the principle of persecution.

Third, the focus on *suffering* renders also the location of people irrelevant. People may suffer severely and subsist in the refugee condition wherever they are. The human-rights based notion of refugee tones down the emphasis in the 1951 Geneva Convention on the condition of

“being outside of the country of origin,” and seeks to open the possibility of applying for asylum independently of where people are.

Finally, the 1951 Geneva Convention places *fear* in the center of the refugee definition. Although fear may seem like a less socially constructed concept than suffering, it is not as universal a human feeling as assumed. The “universal” concept of *fear* increases the risk of excluding many context-dependent human sufferings that put people in refugee-like conditions. Instead of pretending to capture a universal feature of humans in a Hobbesian manner, the definition of refugee should be context sensitive. *Human suffering* should be emphasized as strongly as *fear* in the refugee definition.

Furthermore, protection principles such as collective versus individual protection or temporary versus permanent protection may each be useful in different situations. The human-rights based notion of refugee goes beyond the doctrinal protection regimes and opens the way to deploying a diversity of protection instruments that may be useful in different situations. Although each state considers some protection instruments as irrelevant, states also have their own repertoires of protection instruments that may be relevant in different refugee situations. A human-rights based approach requires merging the different tool-repertoires of the current states and deploying the available protection tools when they serve the goal of protection.

My above arguments invite a trip back to the spirit behind the 1951 Geneva Convention, which is based on humanitarian norms, human rights, and human frailty. The human-rights notion of refugee is based on an ontology which entails human suffering as the constitutive element of human frailty. This supports the ideals behind the Geneva Convention’s definition of a refugee against states’ particularistic (mis)interpretations of the refugee definition. This conception carries the notion of a refugee to where it really belongs – from a Westphalian discourse of state and citizenship, which is based on *the frailty of persons as “citizens,”* to a human rights discourse based on *the frailty of persons as “humans.”*

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