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Food Deprivation: A Basis for Refugee Status?

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IT IS COMMONPLACE TO SPEAK OF THOSE IN FLIGHT FROM FAMINE, OR OTHERWISE migrating in search of food, as "refugees." Over the past decade alone, millions of persons have abandoned their homes in countries such as North Korea, Sudan, Ethiopia, Congo, and Somalia, hoping that by moving they could find the nourishment needed to survive. In a colloquial sense, these people are refugees: they are on the move not by choice, but rather because their own desperation compels them to pursue a survival strategy away from the desperation confronting their home communities.

In legal terms, however, refugee status is defined in a significantly more constrained way. The key standard, set by the United Nations Convention relating to the Status of Refugees of 1951,[1] as supplemented by the Protocol relating to the Status of Refugees of 1967,[2] limits refugee status to 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. . . (Convention, *supra* n.1, at Art. 1([A][2]).

As interpreted, this definition sets five substantive hurdles: departure from one's own country; the existence of a forward-looking risk; serious human rights risk; a causal connection between risk and at least one

of the five enumerated forms of civil or political status; and failure of the home state to remedy the threat. There are also clauses that define when refugee status comes to an end (for example, when protection is restored in the home state) and when it must not be recognized due to undeservingness (for example, in the case of international criminals).

As demanding as this Convention refugee definition clearly is, there is a logic to its stringency. Any person who meets this definition *in fact*—whether or not she has undergone a formal process of status assessment—is entitled to arrive without authorization in any of the nearly 150 countries that are parties to the Convention (Convention, *supra* n.1, at Art. 31[1]). Until and unless fairly determined by the host country not to be a refugee, she cannot be returned directly or indirectly to her home state for the duration of the risk. And perhaps most important of all, she is entitled to the benefit of a truly extraordinary catalog of internationally guaranteed rights that enable her to live in dignity while in exile: civil rights, socioeconomic rights, and rights that enable pursuit of a solution to her refugeehood (see Hathaway 2005).

In short, while the broad, colloquial definition of a refugee may engender empathy or even charity, the narrower legal definition of a refugee is a source of entitlement. Whereas a common-sense refugee pulls at our heartstrings, a Convention refugee is a rights-bearer.

The question addressed here is whether persons in flight from famine or otherwise migrating in search of food may claim the benefit of this more constrained but dramatically more empowering legal form of refugee status. Or are they outside that definition, such that they must simply hope that others will come to their aid?

The most obvious barrier to Convention refugee status is the need to have left one's own country as a condition precedent to refugee status. While the ethicality of this constraint has been debated in the refugee studies literature,[3] its standing in international law is not open to question. As determined by Lord Justice Simon Brown in the English Court of Appeal, in the context of the claim by a Roma citizen of the Czech Republic still in the Prague Airport to be entitled to refugee rights,

> in an ideal world there would no doubt be provision for states to facilitate the escape of persecuted minorities. . . . I am satisfied, however, that on no view of the 1951 Convention is this within its scope (*R. European Roma Rights Centre and Others v. Immigration Officer at Prague Airport,* [2003] EWXA Civ 666 [Eng. CA, May 20, 2003], at paras. 37, 43; approved in this regard by the House of Lords in *R. v. Immigration Officer at Prague Airport et al, ex parte Roma Rights Centre et al,* [2004] UKHL 55 [UK HL, Dec. 9, 2004], at paras. 13–17).

So-called internally displaced persons (IDPs) are, of course, entitled to claim the same general human rights as all persons inside their own country.[4] In Africa, a regional convention moreover expands the scope of human rights to which IDPs are entitled.[5] But the rights set by the Refugee Convention are specifically designed to counter the disadvantages of involuntary *alienage*, not to compensate for involuntary movement as such. It thus makes sense that refugee rights, conceived as they are to allow someone forced to live in a foreign country to secure a measure of enfranchisement in that foreign state, have been limited to such at-risk persons who are in fact outside their own country.

For those victims of famine or other forms of food deprivation who do manage to cross a border, there are two main conceptual challenges to securing Convention refugee status. First, is the risk faced one that is fairly defined as a risk of "being persecuted"? And second, even if it is a persecutory harm, when can it be said that the risk faced is "for reasons of race, religion, nationality, membership of a particular social group, or political opinion"?

As classically understood, the 1951 Convention refugee definition would likely not be terribly sympathetic to the claims of persons in flight from famine or food deprivation.

First, as the still in force *Handbook* issued by the United Nations High Commissioner for Refugees (UNHCR) in 1979 suggests, "[t]here is no universally accepted definition of 'persecution,' and various attempts to formulate such a definition have met with little success"

(para. 51).[6] States often applied a subjective lens to assess whether a given risk rose to the level of persecutory harm, and in practice were more predisposed to accept claims of risk to physical security or basic civil rights than those grounded in threats to socioeconomic well-being—a position clearly at odds with recognizing absence of food as sufficient to establish refugee status.

Second, the "for reasons of" or "nexus" clause was often interpreted by states to require some evidence of particularized intention on the part of the persecutor grounded in the race, religion, nationality, social group, or political opinion of the victim.[7] This approach set a very challenging evidentiary hurdle given the unlikelihood of the persecutor clearly announcing his motives. But at least as important, it restricted refugee status to those whose intentional *victimization* could be ascribed to one of the Convention grounds, thus failing to recognize refugee status in the case of those who, within a situation of generalized risk such as famine, did not benefit from state protection because of their race, religion, or other protected ground. In other words, if a person without food could say "only" that the government had failed to assist her because she was a member of a minority group or because she was perceived to be opposed to the government, she would not be recognized as a refugee under international law.

The good news is that over the course of the past two decades there has been a major judge-led challenge to many traditional ways of thinking about the refugee definition—including both the meaning of "being persecuted" and the purport of the "for reasons of" clause (Hathaway 2003). Since there is sadly no single international authority charged with issuing definitive interpretations of refugee law[8]—as there is, for example, under nearly every other UN human rights treaty—it has been left largely to national judges interpreting domestic laws incorporating the UN refugee definition to fill the void. These decisionmakers have often engaged in a "transnational judicial conversation" (Helfer and Slaughter 1997, 371–372) in which they have sought to update the meaning of the Convention refugee definition

in a way that brings some degree of coherence to the international protection regime as a whole. In a seminal decision, the House of Lords determined that

> the Refugee Convention must be given an independent meaning. . . without taking color from distinctive features of the legal system of any individual contracting state. In principle, there can only be one true interpretation of a treaty. . . .
>
> In practice it is left to national courts, faced with the material disagreement on an issue of interpretation, to resolve it. But in doing so, it must search, untrammeled by notions of its national legal culture, for the true autonomous and international meaning of the treaty (*R. v. Secretary of State, ex parte Adan*, [2001] 2 AC 477 at 516–17).

This search for autonomous and international meaning has led courts carefully to consider, and often to adopt, the reasoning of their counterparts engaged in refugee status assessment in other jurisdictions. As recognized by Justice Allsop in a powerful dissenting opinion in the Full Federal Court of Australia,

> [c]onsidered decisions of foreign courts, in particular appellate decisions, should be treated as persuasive in order to strive for uniformity of interpretation of international conventions. . . . It is desirable that obligations of the host states under an instrument such as the [Refugee] Convention be consistently interpreted in order that there be uniformity of approach not only as to host state rights and obligations, but also as to the derivative legal position of refugees thereunder (*NBGM v. Minister for Immigration* [2006] 150 FCR 2006 at para. 158).

Though this judicial drive to achieve principled, common ground was traditionally most advanced in states of the common law (English law-based) tradition, the civil law states of the European Union are now increasingly looking to common, international standards as well (see Lambert 2009). And while the United States remains the least engaged of common law countries on this front, both administrative guidelines and some judicial decisions have now championed a common, internationalist approach to understanding the Convention refugee definition (see Anker 2011, 176).

This judicial renovation of refugee law has opened the doors to a more principled and thoughtful understanding of refugee law in ways that have direct relevance to the claims of those in flight from famine or other forms of food deprivation. First, there is now general agreement that core norms of international human rights law—the body of law designed by states to define impermissible harms—should be the principled point of reference for understanding how to identify a risk of being persecuted. Pioneered by courts in Canada and the United Kingdom (see in particular *Ward v. Canada*: [1993] 2 SCR 689 at 733; and *Horvath v. Secretary of State* [2001] 1 AC 489 at 495), the link between human rights law and persecutory harm in refugee law is now formally binding on all states of the European Union as well (*Council Directive* 2011/95/EU, OJ L 337/9 ["Qualification Directive"], at Art. 9). While less well developed in the United States, even there a leading court determined that "[w]hether the treatment feared by a claimant violates recognized standards of basic human rights can determine whether persecution exists" (*Stenaj v. Gonzalez* [2007] 227 F.3d 429 at paras. 12–14; see also *Abay v. Ashcroft* [2008] 368 F.3d 634 at 638–639). A similar position is taken in US guidelines on the adjudication of gender-specific claims to refugee status (Department of Homeland Security 2009, 21).

In implementing this link between "being persecuted" and international human rights law, refugee law has increasingly taken on board the view that all human rights are properly understood to be equal and indivisible (Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 [June 12, 1993], at para. 5; this declaration was

endorsed by 171 states). Specifically, it is not the case that a risk to civil and political rights can be said to be "serious harm," but a risk to socio-economic rights—also codified in international law, and of equal legal authority—cannot. Thus, interpretation of "serious harm" for refugee law purposes should take account of risks to, inter alia, the internationally guaranteed right to food, a critical aspect of the right to an adequate standard of living set by the Covenant on Economic, Social, and Cultural Rights:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, *including adequate food*, clothing, and housing, and to the continuous improvement of living conditions (International Covenant on Economic, Social, and Cultural Rights, GA Res. 2200A (XXI), adopted December 16, 1966; entered into force Jan. 3, 1976, henceforth "Economic Covenant," at Art. 11) [emphasis added].

To be clear, the existence of this right does not mean that every person departing his country in search of food is a refugee. For example, a US court sensibly determined that a Salvadoran denied access to the government's discounted food regime did not face the risk of a persecutory harm: while the situation reduced his food options, those limits did not rise to the level of gravity required to be persecution (*Saballo Cortez v. Immigration and Naturalization Service* [1984] 761 F.2d 1259 at 1264). On the other hand, it has been recognized that "denial of famine relief in anti-government areas" may constitute persecution (*Chan v. Canada* [1992] 42 ACWS 3d 259); that the "taking of harvests of those perceived as 'enemies,' rather than those perceived as allies" might found a claim to be at risk of persecution (*Hagi-Mohammed v. Minister for Immigration* [2001] FCA 1156 at para. 7); and that "discriminatory exclusion from access to food is capable itself of constituting persecution" (*RN [Returnees] Zimbabwe CG*, UKAIT 00083 [2008] UKAIT 00083 at para. 249). In the latter decision, which took up the issue of the use of

food as a weapon, the United Kingdom's Immigration Appeal Tribunal recognized refugee status on the grounds that

> the government of Zimbabwe has used its control of the distribution of food aid as a political tool to the disadvantage of those thought to be potential supporters of the MDC. This discriminatory deprivation of food to perceived opponents, taken together with the disruption of the efforts of NGOs to distribute food by means of the ban introduced in June 2008, amounts to persecution of those deprived of access to this essential support (para. 250).

Even in the United States, there is clear evidence of an openness to recognizing food-based persecution, with the Board of Immigration Appeals having determined that an applicant

> need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution. . . . Government sanctions that reduce an applicant to an impoverished existence may amount to persecution even if the victim retains the ability to afford the bare essentials of life (*In re TZ* (2007) 251 I&N Dec. 163 at 172–3).

Assuming, then, that food deprivation will, at least in extreme cases, be sufficiently serious to qualify as a form of persecution, what of the second relevant challenge—showing that the risk is "for reasons of" one of the five Convention grounds? This is, of course, most commonly a concern where famine or food deprivation seems to be a generalized problem in the place of origin. The problem here has traditionally been the view—sadly still generally taken in the United States—that there must be a nexus between a Convention ground and the *intentions of the persecutor*—in other words, did the person or organization want to starve the applicant *because* she is black, a woman, a political opponent? Absent

evidence of such narrowly framed persecutory intent, a refugee claim assessed under this rubric would fail.

Yet here too there has been quite extraordinary progress in at least some jurisdictions. Building on the judicial recognition that the causal connection required by international law is not actually to "persecution" (understood as the direct act) but rather to "being persecuted" (that is, the predicament of being at risk) (*Minister for Immigration v. Kord* [2002] 125 FCR 68 at para. 2; see also *Minister for Immigration v. Khawar* [2002] 210 CLR 1 at para. 108), courts have increasingly determined that the nexus requirement can be satisfied in either of two ways. First, the nexus requirement is met in the classical situation in which the persecutor is indeed motivated to harm by a Convention factor—clearly that intention, based for example on nationality or religion, explains why the applicant is in trouble (see text *supra*, at fn.7). But modern jurisprudence recognizes that this is not the only way such a connection could be established. Even if the risk of food deprivation is itself generalized, some people might nonetheless be at risk for a Convention reason if the state *fails to protect her* (individually, or as part of a group) for a Convention reason (see, for example, *Horvath v. Secretary of State* [2001] 1 AC 489 at 497–8). In other words, a person from whom protection is withheld for a Convention reason is as much in the predicament of "being persecuted" for a Convention reason as is the person initially targeted for harm for a Convention reason.

The logic of this position was eloquently explained in a seminal decision of the House of Lords:

> [S]uppose the Nazi government . . . did not actively organize violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbors. A Jewish shopkeeper is attacked by a gang organized by an Aryan competitor. . . . The competitor and his gang are motivated by business rivalry and the desire to settle old personal scores. . . .

> Is he being persecuted on ground of race? . . . [I]n my opinion, he is. An essential element in the persecution, the failure by the authorities to provide protection, is based upon race. It is true that one answer to the question "why was he attacked?" would be "because a competitor wanted to drive him out of business." But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew he would receive no protection because he was a Jew" (*R. v. Immigration Appeal Tribunal, ex parte Shah* [1999] 2 AC 629 at 653–4).

This evolution in thinking about the "for reasons of" requirement is important for those fleeing food deprivation. There will, of course, be cases like the Zimbabwean situation noted above, in which a government seeks to punish perceived opponents by means of a targeted policy of food deprivation. But perhaps more commonly, there will be cases in which there is no evidence of an active, discriminatory intention to withhold food, but rather only of a government's *failure to respond* to generalized famine or other food deprivation on a nondiscriminatory basis. While such cases would fall outside the classical approach to the nexus clause—after all, the risk of starvation arose from generalized, not discriminatory, causes—the bifurcated approach provides a second means to satisfy this requirement by recognizing that a discriminatory failure to remedy a risk is equally the basis for refugee status. Because the link to a "failure" of state protection is all that must be shown under the bifurcated approach, it is sufficient to show that the government simply could not be bothered to protect a portion of the at-risk group—reasoning, for example, that because they are "only" women or indigenous persons they were not worthy of an expenditure of government resources. In such circumstances, the failure of protection is causally connected to a Convention ground and refugee status should be recognized.

These critical developments—the anchoring of "being persecuted" analysis in international human rights law, including socio-

economic rights such as the right to food; and the broadening of our understanding of the "for reasons of" clause to include not only those targeted for a Convention ground, but also those failed by their state for such a reason—do not, of course, mean that all victims of famine or food deprivation able to cross an international border are Convention refugees. There will still be cases where the nature of the food deprivation cannot honestly be said to infringe the right to an adequate standard of living, thus falling outside the scope of "serious harm" relevant to a finding that a risk rises to the level of "being persecuted." And even more commonly, there will be situations in which there is not only no intention to deprive a person of food for a Convention reason, but where not even the failure of the home state to respond to that risk can be seen as discriminatory. While the African regional norm may provide access to refugee status in even such cases,[9] it remains the case that the international refugee definition binding on most states will not require recognition of refugee status.

But contemporary understandings of refugee status nonetheless enfranchise a not insignificant number of persons compelled to flight across a border by reason of food scarcity. There is today a solid basis to claim Convention refugee status at least where serious denial of food results from using food as a weapon or otherwise actively seeking to punish or harm people—for example, because of their race or religion; as well as where a generalized and serious insufficiency of food is met with a discriminatory response by the state based on, for example, sex or political views. With Convention status comes Convention rights, and with Convention rights comes the empowerment to rebuild one's life in security, and with dignity.

NOTES

1. Adopted July 28, 1951, entered into force April 22, 1954, UNTS 137 ("Refugee Convention" or "Convention").
2. Adopted January 31, 1967, entered into force October 4, 1967, 606 UNTS 267 (referred to herein as "Refugee Protocol" or "Protocol").

3. See in particular the Symposium in the 2007 *Journal of Refugee Studies* (20: 349 ff.), containing responses by Roberta Cohen, Howard Adelman/Susan McGrath, and Josh DeWind to J. Hathaway, "Forced Migration Studies: Could We Agree Just to 'Date'?"
4. See United Nations "Guiding Principles on Internal Displacement," UN Doc. E/CN.4/1998/53/Add.2, Feb. 11, 1998.
5. African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, adopted October 26, 2009, entered into force December 6, 2012. Regrettably, the treaty provides little by way of meaningful enforcement of the obligations formally assumed.
6. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UN Doc. HCR/IP/4/Eng/REV.3; henceforth *Handbook*); reissued in 2011.
7. In the United States, the leading precedent of *Immigration and Naturalization Service v. Elias Zacarias* (1992) 502 US 478 (USSC, Jan. 22, 1992) takes this position. See also *Ram v. Minister of Immigration and Ethnic Affairs* (1995) 30 ALR 213 (Aus. FFC, June 9, 2000 at 12), reflecting the traditional (though since discredited) Australian approach.
8. States are required to "cooperate" with UNHCR in its institutional role of "supervising the application" of the Convention: Convention, *supra* n.1, at Art. 35. The agency, however, has no authority to mandate any particular interpretation of the Convention refugee definition. See Hathaway (2013).
9. The Convention Governing the Specific Aspects of Refugee Problems in Africa, UNTS 14691, entered into force June 20, 1974, at Art. 1(2), which extends refugee status to inter alia persons forced to flee all or part of their country of origin due to "events seriously disturbing public order," and which leaves open the possibility that the reason for the risk faced may be indeterminate.

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