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21ST-CENTURY REFUGEES: UNCOVERING THE HUMAN RIGHTS GAP
by J. Mauricio Gaona*

INTRODUCTION

Starvation, migrant smuggling, human trafficking, labor exploitation, detention, physical abuse, rape, gang and drug-cartel violence, psychological trauma, torture, abandonment, and dire humanitarian conditions are some of the most archetypical risks refugees and asylum seekers (including millions of children) encounter today. These risks are present not only in the countries migrants flee from but also in the countries they pass through and, increasingly, in host countries. Since its inception, however, refugee protection has focused mostly on the risks migrants face in their home countries, neglecting far more endemic risks affecting the security, human dignity, and wellbeing of forced migrants around the world.

The emergence of these risks in host countries raise pressing questions on legal gaps exposing refugees to human rights violations or, as I describe it, “the Human Rights Gap.” Yet no legal scholarship truly conceptualizes — much less categorizes — the practices and regulations fostering these risks. As such, the main inquiry of this Article is this: Does refugee protection consider the human rights risks that migrants, who are already fleeing persecution or conflict, encounter in the 21st century? If not, should modern refugee protection include such risks?

It is the contention of this Article that when the law no longer mirrors the purpose of its creation (protecting migrants), but rather the unintended reality of its moral decadence (targeting migrants), the law thereby conceived loses its social institutional role while becoming a tool of oppression. When such an oppression subjugates the human dignity of the most vulnerable, the law becomes, in itself, the most powerful tool to foster human suffering.

Drawing on a novel classification of the risks that refugees encounter in the 21st century, this Article aims to expose — and hopefully will lead efforts to correct — critical legal gaps prompting State and non-State actors to neglect refugees’ most basic human rights and international legal protections.

This Article is divided in two sections. Section I concerns the security and human rights risks forced migrants encounter in their journey to safety while becoming refugees. Section II explores the risks refugees and asylum seekers confront once their claims in designated or intended host countries are decided.

I. EVOLVING RISKS: BECOMING A REFUGEE

Under international refugee law, once the preliminary legal determination of subjective (well-founded fear) and objective (persecution) elements is made, individuals forced to leave their home countries due to a credible fear of persecution and who, due to such fear cannot or are unwilling to return to their home countries, have the right to seek refugee or asylum protection.1 Although this

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rule of international law finds different applications and interpretations in domestic immigration law, international refugee protection conveys nonetheless a minimum level of human rights protection (human dignity) afforded by nation-states and the international community to individuals fleeing persecution or conflict.

I use the term “security and human rights risks” to identify the risks 21st-century refugees face from the moment they are forced to leave their home country to the moment their protection claims are decided — which, I argue, extends to risks associated with their migratory status and journey for safety, along with their rejection and exclusion in host countries. These risks, in short, concern the security of the migrant from a multidimensional perspective circumscribed by a threefold agency threat: specifically, the persecutor agent (State or non-State actor) causing the person to migrate, incidental agents benefiting from the migrant’s precarious situation (migrant smugglers, human traffickers, drug cartels, illegal armed groups, terrorist organizations), and settlement agents (immigration authorities) whose practices, systems, and policies further endanger the wellbeing and security of migrants.

Becoming a refugee in the 21st century has become a security and human rights risk. This process exposes forced migrants not only to human rights violations such as sexual exploitation and human trafficking, but also to a myriad of security risks threatening their physical, mental and moral integrity including torture, psychological trauma, and others. In fact, whether a migrant’s protection claim in a host country is granted or denied, these evolving risks emerge.

Evolving risks are the risks migrants face while becoming refugees. This includes both risks associated with the triggering event of persecution or the conflict forcing the migrant to seek protection abroad, and risks related to the transition that migrants experience from the moment they leave their home country to the moment they arrive at their intended or designated host country. In effect, under international refugee law, the term “refugee” does not require a formal declaration of refugee status for the migrant to be considered a refugee. Article 1 of the 1951 Refugee Convention states that the term refugee refers to “any person 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, or owing to such fear, is unwilling to avail himself of the protection of that country defines a refugee as the individual.”

Assuming that refugee protection is exclusively limited to the moment when such protection is granted would contradict what refugee protection aims to accomplish. Namely, protecting migrants against persecution — which begins neither with their arrival to their final destination nor when the protective status is granted or denied. I argue that denying refugee protection on the grounds that refugee status has not been granted would violate Article 31 of the Vienna Convention on the Law of Treaties, which requires treaties such as the Refugee Convention be interpreted “in good faith in

2 Unlike the United States, several legal systems across the world have internalized the notion of “human dignity” either within the scope of equality rights or as a fundamental right. See, e.g., Canadian Charter of Rights and Freedoms, s. 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Canadian Charter]; GRUNDENGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law] art. 1, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 (last amended March 28, 2019) (Ger.) [hereinafter GRUNDENGESETZ]; NIHOKKU KENPO [KENPO] [Constitution], art. 24 (Japan); COSTITUZIONE [COST.] art. 3 (It.); CONSTITUTION OF IRELAND 1937 art. 40; COSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1.

3 See Refugee Convention, supra note 1, art. 13 (highlighting in its Preamble the international community’s commitment vis-à-vis refugee protection).


5 Refugee Convention, supra note 1, art. 14.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

A. Causal Risks

I define causal risks as the dangers that force individuals to migrate outside their home country and become refugees. These risks relate to the very elements preceding the legal determination on the migrant’s claim or status (well-founded fear and persecution).

Causal risks encompass a wide range of dangers connected to the type of persecution or conflict forcing the migrant to escape their home country — including non-State actors’ violence (e.g., gangs in El Salvador,7 guerrillas in Colombia,8 drug cartels9 in Mexico, terrorist organizations in Syria), State actors’ persecution (e.g., political repression in Venezuela,10 chemical attacks11 in Syria), ethnic/religious conflicts (e.g., persecution of Muslims in Myanmar,12 persecution of Christians13 in Nigeria), and famine (e.g., Yemen, Somalia, South Sudan),14 overwhelming environmental impact (e.g., Bangladesh,15 Nauru16 island) as well as gender (e.g., women in Honduras)17 and sexual-orientation persecution (e.g., LGBTQ persecution in Russia).18

I contend that each one of these risks must be considered in order to properly determine refugee protection. Causal risks, in particular, are determined by the danger each migrant experiences. This means that the objective-subjective assertion of causal risks is circumscribed to the legal viability of the cause-event forcing migrants to leave (and not want to return) their home country. Under international refugee law, moreover, these preliminary triggering-effect conditions constitute the factual basis immigration authorities use to assess the legal viability of refugee and asylum claims.

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On the one hand, the danger migrants face must be established through an *objective legal standard*. That is, anyone facing similar events (persecution or conflict) would objectively appreciate the particular danger as imminent risk forcing the person to seek protection abroad. This *objective standard* relates to the factual persecution or conflict the migrant faces, which presupposes an objective connection between the event of persecution and the migrant’s particular situation (*objective assessment*).\(^\text{19}\) This, in turn, requires the claimant to prove a “clear probability of persecution”\(^\text{20}\) where the claimant is the intended target or a victim of conflict. It is worth noting that persecution grounds have been statutorily (race, religion, nationality, political opinion) and judicially defined (membership of a particular social group), while the grounds of persecution associated with conflict derive from well-known situations of danger portrayed as conflicts in modern society (e.g., civil war, famine, ethnic cleansing, religious persecution, gender discrimination). Still, refugees may also encounter other types of persecution based on their personal views or positions, the decisions they make, or the nature of the conflict they confront.

On the other hand, *causal risks* must further meet a *subjective legal standard* based on a well-founded and credible fear of persecution,\(^\text{21}\) which aims to facilitate a coherent connection between objective and subjective circumstances of persecution leading to the migrant’s ultimate decision to seek protection abroad. In fact, the legal assessment that immigration officials make on refugee and asylum claims hinges on a critical disquisition concerning the migrant’s perception, apprehension, plausibility, and account of persecution.\(^\text{22}\) This means that the migrant must connect the need to escape from and the unwillingness to return to their home country by showing how the persecution or conflict threatens the migrant in particular. Although this legal assessment may vary from one jurisdiction to another, the well-founded fear must be credible, timely, and factually and individually connected to the alleged persecution or conflict (*subjective assessment*). To that end, the triggering event of persecution must be such that anyone in the migrant’s situation would have been forced to leave the country. The 1951 Refugee Convention\(^\text{23}\) — and most domestic legal systems\(^\text{24}\) — require connection between these two elements by imposing on claimants the need to prove that their “fear of persecution” is particularly related to the persecution from which they fled.\(^\text{25}\)

\(^{19}\) For example, the High Court of South Africa requires refugee claimants to prove “well-grounded apprehension of harm” showing no other satisfactory remedy. See Al v. Director of Asylum Seeker Management (Department of Home Affairs), 22059/18 [2019] ZAWCHC 114, South Africa’s High Court (2019) at \(\text{pp} \) 25-27 (S. Afr.).


\(^{21}\) James Hathaway argues that the legal standard (“test”) is exclusively objective as the fear is merely anticipatory (if returning), not psychological. See JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS at 100-110 (2d ed. 2014).

\(^{22}\) See, e.g., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), Policy Memorandum 602-0162 (July 11, 2018) at 7.

\(^{23}\) Refugee Convention, supra note 1, art. 1(A)(2).


B. Transitional Risks

I define transitional risks as those that forced migrants encounter from the moment they flee their home country to the moment their refugee status or asylum claims are granted. These risks are associated not only to logistical or economic limitations refugees often face in their journey for safety, but also to incidental risks arising out of increasingly dysfunctional and hostile systems of reception of refugees and asylum seekers in the 21st century.

I maintain that transitional risks may subject refugees and asylum seekers to unexpected or greater danger than they would otherwise face should a more organized system of reception be in place. This encompasses risks that refugees experience while confronting State and non-State actors before reaching their destination: specifically, violence, kidnapping, rape, starvation, torture, and migrant-smuggling-related risks (e.g., sexual violence, torture, death). Migrant smuggling, in particular, has become one of the world’s most profitable criminal enterprises.

The case of North-Triangle asylum seekers from El Salvador, Honduras, and Guatemala is illustrative. The territorial expansion of this region’s two main gangs, MS-13 and Barrio 18, has forced women and children to leave these countries due to widespread violence. On their arrival to the southern border

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26 See Mexico’s Immigration Control Efforts, CONG. RSCH. SERV., IN FOCUS at 1 (Feb. 2020), https://fas.org/sgp/crs/row/IF10215.pdf (reporting police corruption and abuses against migrants in Mexico).
28 Id. at 19 (reporting cases of rape of Somali refugees by migrant smugglers in Libya); Juliana Oliveira Araujo et al., Prevalence of Sexual Violence among Refugees: A Systematic Review, 53 REV. DE SAÚDE PÚBLICA 10 (2019) (describing sexual violence against refugees based on a cross-referenced, bibliographic and global study).
29 Migrant smugglers in Africa hold migrants in temporary locations where they face starvation. See DESPERATE AND DANGEROUS, supra note 4, at 27.
30 Id. at 28.
31 Id.
of Mexico, however, many of these migrants\textsuperscript{34} face abuse\textsuperscript{35} and discrimination.\textsuperscript{36}

Other refugees face similar security risks across the world. For example, prostitution has proliferated across the Colombia-Venezuela border (Cúcuta)\textsuperscript{37} as guerrilla groups have seized the opportunity to recruit Venezuelan migrants crossing the border (Arauca).\textsuperscript{38} Sexual violence against migrants also occurs in South Africa\textsuperscript{39} and Europe.\textsuperscript{40}

\section*{II. Emerging Risks: Being a Refugee}

I define emerging risks as those intrinsically related to the legal status and condition of being a refugee in the 21\textsuperscript{st} century, which I argue derive from the embedded effects of modern dehumanization\textsuperscript{41} and exclusion of migrants, refugees, and asylum seekers.\textsuperscript{42}

\subsection*{A. Status-Related Risks}

Status-related risks refer to the risks arising out of the migrant’s expressed intent “to become a refugee” and the resulting immigration status (“refugee status”) leading to their prosecutorial treatment (confinement, detention). The prosecutorial treatment of migrants (detention beyond

\begin{footnotesize}
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\item Human trafficking networks operating in Mexico (e.g., the “Meléndez” gang) are known to target migrants crossing rural areas near Puebla, Tlaxcala, Oaxaca, and Mexico City. \textit{Atrapan a Jefe de Banda de Trata de Personas en Puebla y Tlaxcala, Municipios} (Mar. 27, 2020), https://municipiospuebla.mx/nota/2019-02-13/izucar-de-matamor-ros/atrapan-jefe-de-banda-de-trata-de-personas-en-puebla-y-tlaxcala (Mex.).
\item See Gianna Robbers et al., \textit{Sexual Violence against Refugee Women on the Move and within Europe}, WORLD HEALTH ORG. at 26-28 (2016).
\item See, e.g., Helen Davidson, \textit{Australia’s Politicians Have Promoted Xenophobia: UN Expert, The GUARDIAN} (Nov. 18, 2016), https://www.theguardian.com/australia-news/2016/nov/18/australias-immigration-policies-have-promoted-xenophobia-un-expert.
\end{enumerate}
\end{footnotesize}
administrative purpose) often takes place in the host country, not for a crime the migrant committed but for the migrant’s intent to become a refugee or asylum seeker in the host country. Some host countries are further criminalizing the very presence of migrants in their territory while portraying asylum claims as “illegal acts” punished by detention, exclusion, or summary deportation. I maintain that the systematic and institutionalized detention (e.g., United States, Australia, Libya, Hungary, Greece, Serbia, Croatia) of refugees and asylum seekers constitutes a palpable expression of migrants’ ongoing criminalization. This criminalization (status/migratory intent), notwithstanding personal liberty concerns, violates both constitutional protections under domestic law and human rights protections under international law.

Detention of migrants and refugees is prevalent across the world. In fact, detention is one of the most archetypical status-related risks refugees confront today. For example, though the average length of detention of migrants in Canada has decreased in the last few years (from twenty-six days in 2014-2015 to thirteen days in 2018-2019), the number of migrants in detention in this country increased 5.1% in the 2018-2019 fiscal year (8,781 migrants). The United States, in particular, has built the world’s largest detention system for migrants and asylum seekers. The United States detains annually 316,391 migrants including women and children; that is, an exponential growth rate of twentyfold from 1979 to 2019.

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44 See Revised Deliberation no. 5 on Deprivation of Liberty of Migrants, U.N. HUM. RTS. COUNCIL — WORKING GROUP ON ARBITRARY DETENTION at 9-11 (Feb. 7, 2018) (stating that seeking asylum is a “universal right,” for which irregular entry and stay in a country “should not be treated as a criminal offence”).

45 See, e.g., Canadian Charter, supra note 2, s. 7 (regulating the right to “liberty and security of the person”); Grundgesetz, supra note 2, arts. 2(2) and 11(2) (establishing “[the freedom of a person] as an inviolable principle and its physical restriction to limited circumstances”); S. Afr. Const., 1996, art. 12(a), (b) and (e) (providing the “[freedom and security of the person] while proscribing detention without just cause and trial, along with cruel punishment and inhuman treatment); see also CONSTITUCIÓN ESPAÑOLA art. 17(1), Nov. 29, 1978, BOE-A-1978-31229 (guaranteeing the “[right to liberty and security of the person”) to any person (“toda persona”), not just Spanish citizens). Likewise, the Constitution of Malaysia guaranties the liberty of the person based on the notion of personhood, not citizenship. See MALAYSIA Fed. Const. art. 5, Aug. 31, 1967 (stating the liberty of the person as a fundamental liberty while providing strict guidelines to prevent arbitrary detention).

46 See UDHR, supra note 43, art. 3; ICCPR, supra note 43, art. 9(1).

47 See Global Detention Project, supra note 43. In the United States, only asylum seekers entering legally are exempted from detention (“affirmative process”). Id.


50 Id.
Prolonged detention of migrants frequently occurs in dire humanitarian conditions. For instance, following a crackdown order on illegal migration, authorities in Thailand detained more than 200 asylum seekers from Vietnam, Cambodia, and Pakistan in 2019 (including more than fifty children separated from their parents).51 There are reports of prolonged detention (even for years) of Rohingya refugees in Saudi Arabia.52 Likewise, thousands of Venezuelan migrants have been denied asylum protection in Curacao and imprisoned following government citation of “irregular migrant status.” In the process, detainees suffer gross human rights violations.53

The reception of refugees and asylum seekers is also increasingly prosecutorial. For example, under Australia’s Migration Act, the police are authorized to question (§ 188) and detain (§ 189) non-citizens having no visa to enter or remain in Australia.54

Another increasingly common status-related risk concerns the often-cited “crackdown” on refugees and asylum seekers. For example, police harassment and arbitrary detentions of Rohingya refugees in India55 are forcing these refugees to leave India as they find themselves often unprotected within the so-called zero-line zone along the India-Bangladesh border.56 In Morocco, moreover, the crackdown on refugees (viewed as “illegal migrants”) has led to human rights violations, law enforcement abuses, and the gradual abandonment of thousands of sub-Saharan refugees.57

B. Exclusion Risks

Exclusion risks refer to risks arising out of the social, legal, and cultural exclusion of migrants in host countries. These risks are externalized through local populations showing various forms of discrimination,58 exclusion,59 and violence60 towards migrants. Here, notably, the socioeconomic exclusion of refugees constitutes a major exclusion risk.

59 See, e.g., Ignacio Correa-Velez et al., ‘We Are Here to Claim Better Services than Any Other: Social Exclusion among Men from Refugee Backgrounds in Urban and Regional Australia, 26 J. OF REFUGEE STUD. 163, 163-86 (2012) (proposing a different approach on resettlement of refugees based on social-exclusion study).
60 See, e.g., HRW 2019, supra note 51.
Notwithstanding progress made towards the assimilation of refugees in some countries,\(^{61}\) the trend of socioeconomic exclusion of refugees and asylees is pervasive. In Greece, for instance, less than 15% of migrant children hosted on the islands of Samos and Lesvos and only one in two on the mainland have access to education.\(^{62}\) In South Korea, a petition signed by more than 700,000 citizens requested that the government review or eliminate the legal protection (상세 보기 [Visa-Free Policy]) accorded to Yemeni refugees\(^{63}\) hosted on Jeju Island\(^{64}\) — this notwithstanding, the Republic of Korea has been a party to the 1951 Refugee Convention and 1967 Protocol Relating to the Status of Refugees since 1992.\(^{65}\) Of the 480 asylum applications filed by Yemeni nationals in Korea in 2018, the government only granted two,\(^{66}\) and of the 6,015 total asylum applications filed that year by all other nationals, the government only granted ninety-one.\(^{67}\) This trend is found in Hungary as well, which granted asylum protection to only fifty-four claimants out of 3,119 in 2018.\(^{68}\) Likewise, Japan, a signatory to the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees, only accepted seven asylum applications from Syrian nationals between 2011 and 2016.\(^{69}\) In Turkey, the lack of proper documentation (mülteci kayıt kartları [refugee registration cards]) for Syrian refugees is affecting these migrants’ mobility and ability to find jobs and integrate into the country’s labor market, fostering their socioeconomic exclusion across Turkey.\(^{70}\)

Finally, one of the most palpable ongoing exclusion risks is abandonment. Reports on refugees deserted during the pandemic caused by COVID-19 have uncovered the state of indifference and neglect towards their security, human dignity, and well-being.\(^{71}\) To begin with, only very few countries have included within their vaccine distribution plans refugees and asylum seekers.\(^{72}\) Moreover, the lack of a coordinated international response to the pandemic,

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\(^{62}\) HRW 2019, supra note 51, at 231.

\(^{63}\) See 정원내 [“Petition”], 제주도 불법 난민 신청 문제에 따른 난민법, 무사중 입국, 난민신청허가 폐지/개헌 정원내 [“Petition for Abolition-revision of the Refugee Act, Visa-Free Entry, and Refugee Application Permission Due to the Illegal Refugee Application Issue in Jeju Island”] (2018), https://www1. president.go.kr/petitions/269548?navigation=best-petitions [petition contents under the title “정원내] [S. Kor.].

\(^{64}\) Id.


\(^{67}\) Id.

\(^{68}\) Id.


the number of refugees and asylum seekers on the move,\textsuperscript{73} and the supply deficiency of the vaccine in most host countries and refugee camps could make refugee populations across the planet the perfect target for COVID-19 variants’ development\textsuperscript{74} — which could further accentuate their institutional, legal, social, and economic exclusion.

\textbf{CONCLUSION}

There is a critical and defining legal gap in modern refugee protection concerning the evolving and emerging human rights risks that 21\textsuperscript{st}-century refugees encounter. Extending from increasingly complex causes of persecution/conflict and treacherous journeys to prosecutorial treatment of migrants and criminalization of refugee status/intent, there is, moreover, a growing number of human rights risks affecting the security, human dignity, and well-being of refugees and asylum seekers across the world. This Article advances a novel conceptualization and classification on those risks.

Unfortunately, many of the dangers refugees nowadays encounter (transitional, status-related, and exclusion risks) are not considered in current international refugee law. What is more, both domestic and regional regulations and policies have become triggering events either fostering or accelerating these risks. Accordingly, this Article finds that the modern protection of refugees must acknowledge and progressively consider these risks in regulations, practices, and policies in order to eliminate the greatest risk in today’s world: being a refugee in the 21\textsuperscript{st} century.


\textsuperscript{74} So far, COVID-19 variants — that is, random genetic replications/mutations of the virus known to be more contagious — have been found in England, South Africa, Nigeria, and Brazil, along with thousands of worrisome trails of mutation across the planet. For example, just one variant found in the United Kingdom in September last year known as “B.1.1.7” has already produced 23 mutations leading to an increase of contamination of 70\%. See Investigation of Novel SARS-CoV-2 Variant: Variant of Concern, \textit{PUB. HEALTH ENG.}, Technical Briefing no. 5, at 3 (Dec. 1, 2020) [updated Jan. 14, 2021].