

# THE INTERNATIONAL ASYLUM SYSTEM: HISTORY OF FORMATION AND CONTEMPORARY CHALLENGES

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*Рассматривается историческая ретроспектива формирования международной системы защиты беженцев, в основе которой лежит Конвенция 1951 г. о статусе беженцев, выделены некоторые проблемы современной ситуации, касающиеся международной защиты (вопросы трактовки понятия «беженец» и роли УВКБ ООН в современном мире). Сделан вывод, что исторические и современные реалии диктуют необходимость начала обсуждения реформы международной системы защиты беженцев.*

*The article is devoted to consideration of the historical retrospective of the international system of refugee protection (international asylum system) based on the 1951 Convention relating to the Status of Refugees. The authors also identify several problems within the contemporary situation with the international protection. Questions of the “refugee” term definition and the UNHCR role in contemporary world are distinguished. The authors come to the conclusion that historical and current realities dictate the necessity to start discussing the reform of the international asylum system.*

*Ключевые слова: беженец; вооруженный конфликт; Конвенция 1951 г. о статусе беженцев; лицо, ищущее убежища; международная система защиты беженцев; мигрант; УВКБ ООН.*

*Keywords: armed conflict; asylum seeker; international asylum system; migrant; refugee; UNHCR; 1951 Convention relating to the Status of Refugees.*

The United Nations Convention Relating to the Status of Refugees (henceforth: 1951 Refugee Convention) [8] is nowadays a cornerstone lying in the heart of the international asylum system. However, 65 years have passed since the moment of its adoption. The latest global events evidence that the changing geopolitical reality raises new questions before the international community. As an example here we can give the European Union, which only in 2015 accepted on its territory over a million of people willing to change their lives often applying for the refugee status on the territory of one or another EU state [18]. The Common European Asylum System previously was based on the principles stipulated in the 1951 Refugee Convention, however, later on widening and detailing several provisions on the background of existing realities, it became even contradictory to some of them [see, for example: 4].

Recently, researchers have been saying that the Convention provisions are not designed to solve refugee problems in the contemporary world [4; 11–13; 19]. In order to trace the reasons for such a systematic crisis while tackling refugee problems, it would seem reasonable to consider historical conditions in which the international asylum system was developing. The authors set the goal of the article to study the historical retrospective of the international asylum system formation, as well as to identify several problems in the contemporary situation with the international protection.

While preparing this article, the authors analyzed both Russian-language [20; 28; 34; 35] and English-language [4; 11–13; 19] resources. The first ones touched upon, predominantly, the historical aspect of formation of the international refugee protection system. The foreign literature, mainly, English-language resources, focus more profoundly on the problematic of theoretical approaches towards the

definition of the “refugee” term and other forms of the international protection. It is worth noticing that the authors of the article actively appeal to legislative base [1; 2; 5; 7; 23; 29] as well as official statistics [14; 16; 18; 26; 33] in order to provide suggestions and conclusions.

A resonant event which put the issues of the Refugee Convention revision on the international agenda became the statement made by the Prime Minister of Denmark Lars Løkke Rasmussen in December 2015 on the background of the drastic increase in the number of asylum seekers in Denmark. He claimed that the 1951 Refugee Convention must be revised in order to specify the rights of refugees in the first safe country which borders they crossed. He also stated that the European Union is ready to lead efforts on the revision of the Convention [32]. The United Nations High Commissioner for Refugees (UNHCR) came with the response where it announced an official position of the Agency on this issue. According to it, the 1951 Refugee Convention and its 1967 Protocol “have saved millions of lives and as such are one of the key human rights instruments that we rely upon today. The 1951 Refugee Convention is a ‘milestone of humanity’ developed in the wake of massive population movements that exceeded even the magnitude of what we see now. At its core, the 1951 Refugee Convention embodies fundamental humanitarian values. It has clearly demonstrated its adaptability to changing factual circumstances, being acknowledged by courts as a living instrument capable of affording protection to refugees in a changing environment”. UNHCR also notes the fact that the greatest challenge to refugee protection is most certainly not the 1951 Refugee Convention itself, but rather ensuring that states comply with it. The real need is to find more effective ways to implement it in a spirit of international cooperation and responsibility-sharing [24; 32].

The 1951 Refugee Convention was adopted during the period after the World War II in 1951. However, formation of the basic principles of refugee protection, terms and concepts started earlier, within the period of the First World War, which brought about with its devastating consequences 1.5 mln refugees and displaced persons distributed all over the world [15]. The League of Nations established a number of organizations and developed series of arrangements in order to settle newly arising problems: Arrangement of 12 May 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees [2], Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees [1], Convention of 28 October 1933 relating to the International Status of Refugees [10], Provisional Arrangement of 1936 concerning the Status of Refugees coming from Germany [22], Convention concerning the Status of Refugees coming from Germany of 10 February 1938 [9]. The last one provides for the definition of the term “refugee” with respect to particular groups of population who may have been persecuted in case of returning back home. Having started from development of identity certificates and travel documents, arrangements on refugee protection have gradually become more large-scaled and comprehensive including wider range of questions such as ordering of their legal status, providing access to work and protection from refoulement.

The World War II provoked the largest movements of people. According to approximate estimates, in May 1945 there were over 40 mln displaced persons wandering around Europe, not counting down the Germans who ran away from deployment of the Soviet troops [20, p. 84]. Many of them were located in refugee camps disseminated all over Western Europe, and governments considered these camps as unwanted economic burden and potential source of social disorders. Simultaneously, economies of Northern and Southern America, Australia and Southern Africa were sharply in need of additional work force, particularly, in a newly constructed industrial sector. Besides this, 11.3 mln persons were residing in Germany, having been previously hijacked as forced laborers in Germany [30, p. 15]. During the war mass movements of people also happened outside Europe, including millions of Chinese displaced in the Chinese districts occupied by Japan.

The United Nations established in 1945 since its inception admitted that the task to assist refugees is a complicated international problem, and the international community should take a collective responsibility for those people forced to flee from persecutions. Thus, in 1946 during its first session the UN General Assembly adopted a resolution which laid the foundations of the UN activities on refugee protection. It was emphasized in the document that no refugees or displaced persons owing to well-founded fear of being persecuted and unwilling to return back to their country of origin may be forced to do it [23].

Unwillingness of many refugees to return to their countries of origin became one of the main problems of the after-war period. In the UN itself the question of repatriation became a high-priority issue, constantly provoking the most drastic contradiction among the UN Security Council members. They touched upon the very core of ideological differences dividing in those days the USSR and USA. These questions referred to the fact, whether persons should have the right to choose their country of residence by themselves, flee from persecutions and openly express their opinion [30, p. 18].

In the fall of 1948 the specially established International Refugee Organization (IRO) started to implement practical operations on resettlement of displaced persons. Each of them had to specify in details motives of their unwillingness to return to their countries of origin and formally explain their refusal affirming it with facts evidencing the present threat of persecutions on racial, national, religious grounds or family circumstances or based on political objections or other circumstances admitted by IRO and non-contradictory to the UN principles [7].

USSR, BSSR and USSR voted in the UN against the IRO Constitution and didn't participate in the Organization activities having considered it as an instrument of Anglo-American policy against their interests. The Soviet representatives in the UN claimed that camps for refugees and displaced persons in the West became centers of anti-Soviet propaganda designed to detain hundreds of thousands of Soviet citizens and to use them as a cheap labour force. That's why position of the countries attributed to the Soviet bloc, which representatives voted against the establishment of the IRO, remained permanently negative [34, p. 7]. And though the IRO activities were limited with providing assistance only to the European refugees, it became the first international body comprehensively involved into all aspects of this problem. The Organization's functions covered repatriation, personality identification, transportation, resettlement and maintenance at a new place. However, this multifunctional dimension disguised a clear shift of priorities in the politics – from repatriation to resettlement of persons from the countries where they already found asylum to third countries [35, p. 70].

At the same time, it is necessary to take into consideration that while establishing a legal and organizational basis for solution of refugee problems, Western countries were guided not only by humanitarian considerations. Under the ideological reasons they were forced to identify the personality of each one, who had arrived from the territory of Eastern Europe. Under economic and political reasons, they facilitated resettlement of a huge number of refugees from the destructed countries of Europe to those countries of the New World which were in need of labour force.

Later on, IRO was actually substituted by the United Nations High Commissioner for Refugees

established on December 14, 1950 under the UN General Assembly Resolution [29]. Having been created as a subsidiary non-political and humanitarian body of the United Nations, the Agency received responsibilities to provide international protection to refugees and assistance to governments in search of long-term solutions to this problem.

This was followed by signing the Convention Relating to the Status of Refugees on July 28, 1951, which is currently the principal instrument of the international asylum system. Adoption of the Refugee Convention became a critical moment in the international practice of refugee status determination. For the first time in history a universal definition of the term “refugee” was introduced [8].

However, at the end of the 1940s mass movements of population appeared also outside Europe. Thus, in a result of the division of the country and creation in 1947 of two separate states – India and Pakistan – 14 mln people turned to displaced persons: 8 mln Muslims ran away from India to Pakistan, and 6 mln Hindu – from Pakistan to India [26, p. 33].

At the end of the 1950s –1960s Europe finally stopped being the center of refugee problem. This period is characterized by the collapse of colonial empires. At this very time the epidemic of refugee crisis shifted from Europe to Africa. Armed conflicts, ethnic clashes and wars constantly broke out in the countries liberated from colonial domination and which became independent. As a result of these events, millions of persons were forced to leave native places, many of them moved to neighboring countries, which in that period already faced problems of instability and weakness in economic development. Thus, for example, at the beginning of the 1960s violence which spread all over the territory of the Great Lakes in Central Africa after Congo, Rwanda and Burundi had become independent resulted in mass violence and people fleeing from the region [30, p. 48]. Unfortunately, refugee problem which appeared in the 1960s on the African continent hasn't been solved yet, as far as new hotspots constantly arise on religious, ethnic and socio-economic grounds, and the strategy of “overtaking development” demonstrated its inconsistency.

In connection with appearance of similar situations, there has come a necessity to expand the application of the Refugee Convention provisions towards new refugees [8]. Protocol relating to the Status of Refugees was developed in 1967. After consideration by the UN General Assembly it was open to accession on January 31, 1967 and entered into force on October 4, 1967. Adhering to the Protocol, states take up obligations to apply the main provisions of the Refugee Convention in accordance with stipulated in it “refugee” definition but without time and territorial constraints of the Convention.

Besides the 1951 Refugee Convention and 1967 Protocol, there are also regional instruments of international refugee protection. Here can be given examples of OAU Convention Governing Special

Aspects of Refugee Problems in Africa of 1969 [21] and Cartagena Declaration on Refugees of 1984 [3]. Texts of the number of regional instruments include definitions which extended the term “refugee” set in the Refugee Convention.

Hereby, the 1950s may be considered as the first years of the international asylum system formation. UNHCR became the central structure in this system. And the 1951 Refugee Convention – a basic instrument.

Nowadays the following questions lie at the core of the problem of regulating refugee issues: who should be counted as a refugee, and what is the role of UNHCR in contemporary and quickly changing conditions.

There is an opinion that the current situation is not fully reflected in the definition of the term ‘refugee’ given in the Refugee Convention [see, for example: 11, 19]. It would be reasonable to provide here this definition. According to the Convention, “refugee is a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” [8].

It is worth noting that during the discussion of the Convention Western states divided in opinion whether it should be applied to all or exclusively to European refugees. Some stood for wider geographical definition of the term “refugee”, and others, including the USA, were in favour of more limited definition and, in general, application, taking into consideration their unwillingness to take financial responsibility for the future migrant flows. As a result, the point that the Convention should become mainly the instrument of tackling the problems of European refugees gained the victory. The United States didn't sign the Convention and didn't take up any obligations until 1968 [28, p. 13]. At the same time, UN adopted the 1967 Protocol removing time and geographical constraints [8].

Within the recent times, it has been an impression that the Refugee Convention doesn't comply with the current international situation and doesn't take into account interests of several categories of persons in need of the international protection.

Thus, for example, the Convention does not apply to many vulnerable groups such as persons fleeing from wars and destructions. There are a lot of hotspots and local conflicts in the world which contribute to the increase in the number of forced migrants. The majority of them leave their homes, because armed conflicts demolished their houses and peaceful lives, and there is a very low possibility that they will return. The 1951 Refugee Convention says about persecution on different grounds. And what

to do if civilians, women, children, elderly people are killed just because they live on the territory of conflicting states? Why do they have to prove that they are persecuted and they actually need the international protection?

It is interesting that the circumstances of war or interethnic conflict are mentioned in the refugee definition in the CIS Agreement on Aid to Refugees and Forced Migrants from 24 September 1993. The Agreement contains not only obligations of the refugee receiving state, but also the refugee country of origin [5].

Also questions of assisting persons forced to flee from their homes because of ecological disasters or manmade catastrophes appear more frequently on the international agenda. On the background of the recent United Nations Climate Change Conference in Paris (30 November – 12 December 2015) an active discussion started around so-called ecologic migrants or climate refugees, which are predicted to reach 200 million people by 2050 [13]. We suggest it would be reasonable to incorporate into the Convention variants of solving this problem, which wasn't relevant at the time when the Convention was adopted [17; 21].

We also cannot ignore the issue of forced migrants attempting to reach the shores of Western Europe in unsafe boats and vessels. According to the Global Trends Report on Forced Displacement in 2015, conflicts and insecurity contributed to global forced displacement of population, which reached its peak in 2015. More and more asylum seekers desperately use their chance to reach the European shores. The majority of them undertakes this dangerous effort in search of the international protection, fleeing from wars, violence and persecution in their countries of origin. Each year such movements continue multiplying the number of victims. In 2015 1 015 078 persons risked their lives in order to reach the shores of Europe across the Mediterranean by boats. Maximum is registered in October 2015. The biggest flow moves to Greece (mainly, from Egypt and Turkey), Italy (from Tunisia, Algeria, Libya and Egypt). Many asylum seekers also move later on to Italy from Greece, where they'd received negative response on their asylum claim. Also Spain experiences particular pressure, as far as it hosts a lot of migrants from Morocco [25]. In fact, the 1951 Refugee Convention doesn't provide for the right to receive assistance to forced migrants travelling by sea until they reach shores of the signatory state to it. The Convention also doesn't set any requirements in respect to equal distribution of responsibility among states, which is, without any doubts, important in the current situation.

The Convention doesn't take into account interests of asylum seekers, i. e. persons being amidst the process of the refugee status determination procedure. These persons are also in need of the international protection, but as far as they still do not have any legal status, they don't possess particular

rights like officially recognized refugees. In such a way, it turns that asylum seekers do not provoke public sympathy in comparison with the "obvious" (as you can see in the media) refugees [19].

Such "under-inclusiveness" of the Refugee Convention, indicated in the examples above, limits international assistance to those who have suffered or live in fear of suffering political persecution. It becomes clear that vulnerable members of the international community today simply need a special regime of the international protection which will extend the scope and include those who have, at minimum, the moral but not yet a legal right to asylum.

In case of reforming the international asylum system the definition of the term "refugee" should be inclusive (to include persons, for whom migration is the only way to observe their fundamental rights). But here it becomes important to more carefully consider each individual case in order to avoid the excessive inclusiveness and additional burden for the states.

Along with the refugee status, there are also other forms of the international protection, such as complementary protection. It is applied for description of the status provided to persons in need of the protection on other grounds rather than those set in the 1951 Refugee Convention. This protection is provided to persons who after returning back to the country of origin may face the threat of human rights violation, or to those who flee from the country with civil war/armed conflict. Several states, for example, provide protection to persons fleeing from ecological disasters (Sweden, Denmark to some extent, Finland and the United Kingdom), as well as to persons deserting from the army and may, as a result, face unreasonably severe punishment (the Czech Republic, Denmark, Finland, Germany, Latvia, Lithuania, Poland) [6].

Speaking about the current role and significance of the UNCHR, we can say that it is limited, to some extent: the Agency today is mainly endowed with supervisory and consultative functions. At the same time it is weakly engaged into provision of the real assistance. The Convention obliges states to cooperate with UNHCR while implementing its functions and contribute to fulfilling its task on monitoring of the Convention application [29]. States carry the main burden. In 2015 86 % of UNHCR mandated persons were located in the countries with middle or low income levels, which are not far from the conflict regions. Pakistan and Lebanon take the lead on the list of the countries which received the biggest number of refugees (2.5 mln) in 2015 [14]. These states are financially incapable to provide with assistance all those in need of protection. And taking this fact into account, this contradiction is doubtless.

Moreover, examining the question on UNHCR financing, it is worth noting that referring to the information provided as of April 30, 2016, the USA, European Union and Japan, which is interesting, take the lead in this issue. Thus, in 2016 Japan provided 165

mln USD dollars to UNHCR budget [33]. At the same time, according to statistics, Japan is rather reluctant in providing refugee status, despite the record number of asylum applications registered in 2015 (7586). Refugee status was provided only to 27 persons [16]. Herewith, there might be observed a tendency that industrially developed countries to some extent “buy off”, because the expenditure on real asylum seekers staying in the country is much higher than costs on financing UNHCR operations. Moreover, UNHCR is proving its inconsistency in the situation with migration crisis in Europe. Having turned into observation and consultative body, UNHCR is standing aside from the real assistance to refugees, leaving states alone to deal with this problem. Resettlement of asylum seekers in refugee camps and providing assistance in the form of essential products, mainly, exacerbates the problem than helps to solve it. Extension of the UNCHR mandate might be useful in this context. Here it would be also reasonable to provide an example of the biggest refugee camp in the world Dadaab situated on the border between Kenya and Somalia. About 300 000 people are living in it. Currently, the Kenyan government has decided to close up the camp, as far as it was estimated that its maintenance is a hard economic burden for the country, it contributes to worsening of the criminal environment and appearance of ecological problems in the region.

Already in 2013 a three-side agreement on voluntary repatriation of Somalia refugees, which constitute the majority of camp residents, was concluded between the governments of Kenya, Somalia and UNHCR. However, this process is moving ahead really slow [27].

Summing up, it is necessary to emphasize that the historic retrospective of the international asylum system formation reflects the full complexity of the process of its creation and improvement. However, this process has succeeded (example – 1967 Protocol relating to the Status of Refugees). Contemporary situation is implying that there is now another need to improve it. The authors of the article don't claim that this must be done “here and now”. It is only all about that UN should start discussing it within its frameworks. It is clear, that a new document should be adopted by the UN General Assembly Resolution, and taking into consideration the fact that nowadays 193 are members of this organization, this process will be rather complicated and long. We also should take into account the fact that both refugee hosting countries and refugee countries of origin are interested in the reform. And there is also an inspiring fact that António Guterres, newly-elected UN Secretary-General who previously was the United Nations High Commissioner for Refugees, understands problems of persons who became involuntary participants of armed conflicts.

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