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COMMENTARY

The neglected colonial legacy of the 1951 refugee convention

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The formal human rights framework, as we know it today, was devised in the middle of the twentieth century. It was based on the idea that there was a need for some legal constraints on (non-colonized) states' sovereignty, in order to prevent a repeat of the atrocities committed in Nazi Germany. Refugee rights were an integral part of this because many of those who fled the Nazi regime found that once they had crossed an international border they had, in the words of Hannah Arendt, "lost the right to have rights" (Arendt, 1979). That is because, until this point, rights, where people had them, were tied to citizenship, making the uprooted and stateless effectively without recourse to rights or justice. The Convention Relating to the Status of Refugees (1951 Convention) was meant to rectify this. It enshrined the right to seek asylum in international law for those displaced in Europe prior to 1951. It was adopted at the United Nations (UN) Conference of Plenipotentiaries on 25 July 1951 following UN-internal discussions.

Though the 1951 Convention is remembered by some as a key moment for refugees globally, and it was agreed at the UN, which is an international body, it was in fact limited in scope, only applying to those displaced *in Europe before 1951*. The limited applicability of the Convention was not accidental. From the beginning, human rights have been subject to the changing political interests of the most powerful states at the UN. In the late 1940s and early 1950s, when human rights were first being enshrined as principles in international law, the most powerful states at the UN were colonial empires (e.g. France, Britain) and settler-colonial states (e.g. the USA, Australia) who organized their territories and political communities along with principles of racial hierarchy, which ran contra to the whole idea of human rights. These states were therefore highly resistant in private, if not in public, to the institutionalization of a regime, which might extend rights to all human beings, irrespective of their country of origin or the colour of their skin (Anderson, 2003; Mayblin, 2017; Simpson, 2004).

Some colonial states also went to great effort to constrain the scope of the Convention, but they were challenged consistently at the negotiations especially by states that had recently gained independence, such as India and Pakistan. Representatives of these states made vocal objections to any territorial or nationality-based

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restriction on refugee rights. They did this using the language of anti-colonialism, and with sustained reference to the many refugee crises, which were unfolding around the world at that time (Mayblin, 2017). In fact, most participating states – also colonial powers – were critical of the focus on European refugees and referred to refugees from additional regions and countries, including the Middle East, India, Pakistan, the Republic of Korea, and China. They therefore repeatedly and explicitly highlighted the global scope of forced migration and the need for international protection throughout the drafting process. At the UN General Assembly (UNGA), for example, the delegate of Chile called the proposed refugee definition focussing on Europe “unfair and lamentably short-sighted,” while the delegate of the Netherlands described it as an arbitrary limitation (UN Doc. A/C.3/SR.325). Moreover, the delegate of India emphasized the needs of refugees in India and argued that the UN “should try to help not only special sections of the world's population, but all afflicted people everywhere. Suffering knew no racial or political boundaries; it was the same for all” (UN Doc. A/C.3/SR.332).

Such powerful statements echo the frustration and “disillusionment” (Oberoi, 2001, 41–42) of those states at the UN that wanted the convention to truly be global – and the debates showed results. The UNGA adopted the definition without the word Europe in resolution 429(V) in 1950 endorsed by 41 states to 5 nos and 10 abstentions (UN Doc. A/PV.325). At the conference in 1951, however, participants reintroduced, and, eventually inscribed, the focus in the Convention – although more states favoured a universal definition (Krause, 2021). Some states’ insistence on the restriction to European refugees reveals how they deliberately subordinated, marginalized and even entirely ignored refugees outside of European states – particularly (de)colonized ones. This is also reflected in the final definition referring to events in Europe or elsewhere. While Europe is made central, all other parts of the world are made merely “elsewhere.”

Although only four states had signed the Convention with the refugee definition focussing solely on Europe (Congo, Madagascar, Monaco, Turkey), the issue of protection remained limited. In the following decades, displacements primarily occurred in states outside of Europe due to events after 1951 – decolonization and struggles for independence in Africa, for example. Those displaced did not meet all criteria of the Convention's refugee definition, and the United Nations High Commissioner for Refugees required authorization by the UNGA to provide assistance. It took the UN until 1967 to respond by adopting the Protocol Relating to the Status of Refugees (“Protocol”) and, therewith, removing the spatial and temporal focus (Davies, 2007). This Protocol was introduced primarily because of increasing pressure and vocal petitioning to the UN by newly decolonized countries, not because the powerful members of the UN had concerns about its geographical and temporal limitations (Holborn, 1975).

Despite the adoption of the 1967 Protocol, many decolonized states remain(ed) critical of the European bias, and consequently established regional treaties and regulations (Abuya, 2005). African states adopted the OAU (Organisation of the African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969; Asian and North African states the Bangkok Principles on Status and Treatment of Refugees in 1966 (revised in 2001); and Central American states, Mexico and Panama the Cartagena Declaration in 1984. While some of these draw on the 1951 Convention, all focus on creating regional systems that meet the specific needs, and some explicitly lean against the colonial legacy that gave rise to the 1951 Convention. Indeed, despite being the key pillar in the global refugee regime, some of those states that host the majority of the world's refugees tend not to be signatories to the UN Convention and/or Protocol.

Moreover, some of the founders and early signatories to the Convention tend to have implemented measures limiting its effectiveness (see Chimni, 2009; Fitzgerald, 2019). From the perspective of Western countries, during the first four decades of the refugee regime, Cold War priorities dominated. People seeking asylum in those countries that had been colonial powers in 1951 were assumed to be white, male, European, and fleeing so-called socialist countries. Whether they were fleeing because of individual persecution or mixed motives related to poverty and “seeking a better life” was not a matter of interest. When, in the late 1980s, and accelerating into the 1990s and 2000s, different cohorts of asylum seekers began to arrive on European soil, they were construed as “new asylum seekers” (Chimni, 1998). At this point, “the nature and character of refugee flows in the Third World

were represented as being radically different from refugee flows in Europe since the end of the First World War" (ibid, 351). "Third world refugees" clashed sharply with the image of the "normal" refugee, and this difference was seen by Western states as diminishing their claims for asylum. This difference has led to a range of measures (FitzGerald, 2019) that some have conceptualized as an erosion of the right to seek asylum. Alison Mountz (2020) argues that the extent of the enforcement archipelago now represents the death of asylum. Indeed, some states have threatened to withdraw from the Refugee Convention.

Understanding the history of the Refugee Convention and Protocol is important at several levels. First, understanding the drafting history of these treaties equips us with information on the states that participated in the formulation of the treaty, the debates that occurred and how the issues that arose were addressed. From this information, one is able to appreciate the language in the various clauses contained in the treaties. These data also provide useful pointers to explain why some people in need of protection were excluded from the final document, in spite of vocal argument for their inclusion. Recognizing the colonial context to the emergence of the refugee regime has implications for how we interpret this contemporary moment in which – whether eroded or dead – the right to seek asylum is in grave peril in the former colonial and settler-colonial powers of Europe, North America and Australasia. In part because it means that efforts at excluding people who are seeking asylum from such host states today, rather than being recent denigrations, are entirely historically consistent. The change is that all human beings now have recourse to these rights and should be able to claim them. But the logic underpinning the exclusionary agenda is distinctly colonial. In recognizing the legacies of colonialism today, we might also recognize the "geopolitics of knowledge production" (Chimni, 1998) and potentially undo the effects of silencing such histories in academia.

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