

What is the main issue with the 1951 refugee convention and how can it be solved?

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INTRODUCTION

Taking refuge was once a shared experience for all of humanity. For why else the entirety of the current human species, homo sapiens, traces back in lineage to the inhabitants of Africa roughly 250,000–350,000 years ago (1). These early ancestors did not leave their homeland to seek pleasure. They left searching for a place to live because something has threatened their right to life (2,3). Of course, there were no enshrined human rights back then, and there was no agreed-upon definition for who is or is not a refugee. People just ventured into the unknown.

Nowadays, there are systems that precisely define who can seek asylum and enjoy the rights associated with refugee status. The structure of asylum systems can differ depending on country and region, though all of them stem mainly from one treaty (4). The Convention Relating to the Status of Refugees (5), as I will argue early in this essay, has been mostly a helpful yardstick in managing the world's largest refugee crisis. In addition to codifying the rights of asylum seekers and refugees in law, the Convention provided a clear framework for classifying who is deserving of international protection. The drafters forged the refugee definition in the first and perhaps

its most consequential article as a first key step to ensuring adequate protection to people escaping persecution.

When applying the eligibility criteria as set out in article 1(a) of the Convention, however, there appears to be a critical problem that frequently results in the rejection of the applicants. Reviewing one analysis of over 1000 rejected asylum cases in several countries such as France and Germany, one can quickly notice that the most common reason for rejection (reaching up to 75% of cases in some countries) was credibility (6). Since credibility is about verifying the truthfulness of the claim, the issue seems to revolve around deception. Simply put, the authorities reject the majority of asylum seekers because they perceive them as liars.

By the end of this essay, it will become more apparent how lying can be associated with an incorrect application of the Convention definition. However, before demonstrating such a point, I will need to discuss why lying is worthy of our attention and not other aspects of the Convention. I will end this essay by providing one possible solution to the problem of lying.

WHY LYING IS THE MAIN ISSUE WITH THE CONVENTION?

Clarifying common misunderstanding of article 1(a)

The Convention Relating to the Status of Refugees, or simply the Convention, was drafted in 1951 in response to the refugee crisis that followed World War II events (7). The United Nations High Commissioner for Refugees (UNHCR) acted as the custodian of this treaty following Resolution 428 (V) of 1950 by the UN General Assembly, which gave UNHCR statutory

powers to regulate what was considered then the biggest refugee crisis ever in history (8).

The UN designed the UNHCR office and the Convention to be temporary, and in no way was it considered conceivable that the numbers of refugees in the 1950s would double in 2020 (7). Indeed, the UNHCR's mandate had to be renewed every three

years until 2003, when the General Assembly extended the mandate “until the refugee problem is solved” (9). Given that the Convention came in response to the mass migration of Europeans caused by World War II, the concept of a refugee today may be different from what the drafters had in mind. From the origins of the Convention, we can explain why it can be not fully inclusive to the issues facing our world today, e.g., issues relating to climate change or generalised violence. Although much improvement in this area is needed, it is worth pointing out that climate-induced migrants can be refugees. Albeit that does not apply to everyone, only those who face abuse because of who they are or what they believe in (e.g., New Zealand courts found that black people, but not white people deserve international protection (10)). Also noteworthy is the fact that people who are unable to return home due to generalized violence or events seriously disturbing public order are still recognised as

refugees and are protected by UNHCR as part of the extended refugee definition (11).

Indeed, the Convention is able to capture most experiences that displace people. To demonstrate why this is the case, I will provide a brief inspection of the logic behind the definition. The below discussion was drawn from the Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (12). The RSD Handbook is the authoritative text considered by most governments for interpreting the Convention and its subsequent 1967 protocol—which essentially provided the minor modification of removing the temporal rule that was part of the 1951 definition (13).*

1. Membership in a particular social group

The Convention is a collection of legally binding articles for states to protect such individuals who experience a well-founded fear of persecution for race, religion, beliefs, nationality, political opinion, or membership in a particular social group (MPSG) (5). All of these ‘five grounds’ allow room for inclusion to a vast number of persecution experiences, but to avoid what could be a lengthy discussion, I will limit this paragraph to the MPSG (8, p. 24, 93-98). It is particularly noteworthy because it opens up for a balanced inclusion of uncommon forms of persecution. Suppose unmarried Ali and Salma go for a beverage in Saudi Arabia and Salma’s mother knew

about it. As per custom (14), Salma’s mother may restrict her fundamental rights such as freedom of expression or movement and may even subject her to a form of torture, e.g., physical maltreatment, verbal abuse, or both. Although such treatment would be in breach of several non-derogable human rights enriched in legally binding international law instruments (15–19), the persecution of Salma is not for reasons relating to her race, religion, beliefs, nationality or political opinion. Nevertheless, the connotations around single women spending time with men in Saudi Arabia (14) may mean that she can be viewed as an immoral person and consequently be

* The 1951 Refugee Convention official definition was as follows: “*As a result of events occurring before 1 January 1951 and owing to wellfounded 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.” [emphasis added]

persecuted. Speaking generally, girls like Salma—and anyone else persecuted for reasons related to core aspects of their identity—can obtain their refugee status.

2. The five grounds

One could argue against using such limiting criteria to define persecution (e.g., for a recent criticism, see 18), but the five grounds serve as a crucial element to assessing risk. Only when something about a person, such as their beliefs, religion, or political opinion (which can sometimes be imputed) identifies them from a population, then that person can be at a foreseeable risk of harm. Random events have a low likelihood of happening. But when the event is intentional, the chances of risk can become reasonably probable insofar as to warrant measures of protection (for detailed discussions, see the following landmark cases 19,20). That is not to say that the targeted risk is always clear to establish but that truly random events are, by definition, unlikely. The caveat here is that a mere link to the five grounds is only an indication of the likelihood of a danger happening and does not guarantee that the risk is persecutory in nature. One can benefit from being discriminated against, after all (e.g., a person with a higher wealth average is experiencing positive discrimination inasmuch that it increases his or her total income net value).

3. Rejection despite previous persecution

Sadly, people can experience persecution but still face rejection. Although this is not common, the reasoning for such decisions in some instances can be justified. For better or worse, the Convention that addressed the plight of the millions displaced throughout Europe during World War II was not designed to provide moral redemption. It was set in place as a practical tool to ensure protection for individuals if and when their states fail. For this reason, the Convention only concerns itself with the future (8, p. 224). This is perhaps why the drafters used the word “fear” in well-founded fear of persecution and not, say, “sadness” or

“disappointment”. While the wellfoundedness of the fear can sometimes appear too vague, it simply consists of two elements: the objective and the subjective (8, p. 19-20). The latter is relatively straightforward to prove because it is generally assumed that no one would be forced to leave their homeland unless for something frightening (8, p. 19-20). The objective part, which is mostly evidence to corroborate the applicant’s claim, serves to exclude insanity—which alone would not make someone a refugee (8, p.19, particularly paragraph 41).

4. Borders

A final essential part of the Convention that is subject to intense debate speaks to something that is becoming less relevant: borders. To be a refugee, you must be “outside the country”. Many critics of this phrase would argue that the world is different from what it used to be about 70 years ago when the Convention was first signed. Their arguments stand on the premise that leaving one’s country might not necessarily be vital to define what constitutes persecution worthy of international protection (e.g., 9, 18). A person who moves inside his or her own country is substantively in the same situation as a person who leaves the country. Both require help, and in some instances, internally displaced people are in more dire situations (think of a desperate woman with young children or an older person who cannot move).

Yet, prominent scholars in international law vindicate the Convention for excluding people inside their country. For instance, Professor James Hathaway, the world’s leading expert on refugee law argued that the “purpose of the document is to let someone who is outside a place where she has a political claim to be enfranchised by a new state. If someone experiences persecution inside their own country, they are a human rights victim, but they are not disenfranchised at least in formal terms from the political project.” [edited slightly for clarity] (24) It is also important to remember that, unlike internally

displaced people, those outside their country are whom the international community has unimpeded access to. They can claim rights not just ask for charity because being outside of one's own state allows them to be within the capacity of the world to reach. While it should not be consequential on its own, the idea of borders may also be necessary to maintain state sovereignty. One would expect in effect to open up a Pandora's box of political upheaval if countries were suddenly allowed to label people refugees in nations that oppose them politically.

Understanding how lying results in a misapplication of article 1(a)

1. The dilemma of migrants versus refugees

With such a conclusion, we can embark on our next issue: how can we tell refugees from other groups such as migrants, both of whom could have as much incentive to leave their homeland. Suppose there was a person who sells hummus in Jordan, and he travels for England. Realising that hummus business in England is more lucrative and having learned about the right to apply for asylum, that person might consider applying for refuge in England. While the experiences that produce migrants and refugees are closely linked, we can intuitively conclude that selling hummus is not a valid reason for obtaining international protection. Indeed, every refugee experience is that of migration, but the opposite is not true.

Our Jordanian asylum seeker may choose to fabricate a claim based on an MPSG as a gay person. To discern economic motives from a fear of persecution he must present evidence to an official body authorised to recognise asylees with refugee status (25). Since the claim is fabricated, he may not be able to provide sufficient evidence. But that alone

5. A conclusion on the Convention

A careful examination of the Convention's criteria does allude that it is inclusive to most people deserving of international protection. To be clear, I do not suggest that the Convention does not need to be improved but that it is overall well-reasoned and in large inclusive. Since the earlier statistic in the introduction showed that most rejections happen because of credibility, we can also conclude that the inclusion criteria appear to be relatively well-understood. As such, it produces less of a systemic issue when thinking about the application of the Convention.

cannot be grounds for rejection (8, p. 43-44). Following a real refugee-like experience, most individuals fleeing real persecution do not have time to collect evidence and facts. Facts and evidence are the last thing someone would want to think about when their home is threatened.

2. Credibility determination and false rejections

In many cases, the only available evidence is the person's recall of their experience: their memory. What makes matters worse is that there is no law that determines how credibility should be assessed for refugees (26). Stories that are plausible, consistent both internally and externally (i.e., generally known facts), as well as detailed and specific are assumed to be believable (26). Yet, a cursory review of the psychological literature on how memory work would show the myriad of ways flaws can occur when determining credibility this way (e.g., see 24, which provides an expanded list of the psychological factors that could undermine credibility decisions). Still, when considering the complexity of verifying a claim—and that people are frequently displaced in large numbers ergo requiring immense resources by host countries that are usually poor—one may conclude that practicality could be a good enough reason to assess

credibility this way. It may be the case that the Jordanian asylum seeker will be rejected following the undetailed, fragmented story that he is likely to tell. While there is the chance that he might be accepted, we could safely ignore this possibility because, at least, no harm was caused. However, too often, truthful asylum seekers are also rejected using the same methods used to detect liars. Therefore, such a practical system that assesses credibility is most deserving of criticism not because of its inability to catch liars but for its failure to detect the truth.

Cases of asylum seekers rejected on credibility are rarely published, but examples can be obtained from academic studies. Jorge Soto Vega was an asylum seeker who left Mexico as a young man after being beaten up and abused by his community for his homosexuality (28). While he won his case on appeal, he was initially rejected for being unable to prove he was “gay enough” to face future persecution (28). What to blame for such erroneous decisions is the way credibility determination happens. Michael Kagan, who played a leading role in the establishment of refugee legal aid programs that assist asylum-seekers applying for refugee status determination through UNHCR basis the problem of credibility “on [a] personal judgment that is inconsistent from one adjudicator to the next, unreviewable on appeal, and potentially influenced by cultural misunderstandings” (13, p. 367).

Gay men suffer from discrimination, marginalisation, or isolation, which could compel them to conceal or perhaps altogether deny their identity in order to evade such treatment (27). Other psychological problems such as shame or self-denial from concealing one’s sexual identity could accrue to an inability to provide a full account of one’s sexuality (27). When they feel reluctant to disclose the full extent of their persecution, gay men may choose to state that their gender identity as imputed to them or make an unrelated claim to their sexual orientation

(27). Also, the demeanour of being gay is not always consistent with stereotypical assumptions due to cultural differences (27).

3. The safeguards that do not provide safety

It may help to note that asylum systems provide a few safeguards to prevent false rejections. For example, people who arrive in any country experiencing a severe post-traumatic stress reaction or a disorder (e.g., PTSD) and cannot or are unable to recall what they have gone through must be recognised as refugees (30). While it varies on average per region, there is the principle of the benefit of the doubt, which is routinely exercised in assessing individuals’ accounts (26). Furthermore, the legal par for what is conceived as credible is not as high as other court settings. In criminal courts, the words ‘beyond reasonable doubt’ describes evidence that the perpetrator is guilty (26), but in refugee law it is enough to be on the whole believable (26). Some areas could raise doubts in the asylum seeker’s story, even considerable ones, but that person is still recognised, or at least they should be.

Unfortunately, those truthful asylum seekers continue to be rejected on the grounds of credibility despite these measures. Worse still, the results of such erroneous rejection can be devastating to the individual mentally. People who seek refuge are already at a high risk of mental health problems because of the trauma they endured by wars and conflicts (31,32). The uncertainty created by the insecure residency status further exacerbates the stress and the trauma they endured (33). Therefore, it is no surprise that asylum seekers who are awaiting decisions (34–36), especially those rejected (37), are at heightened risk of developing a severe mental illness. Such suffering can be aggravated when the outcome of the case is negative. Since mental ill health can significantly impact memory functions (38), it can also contribute to rejection (39). While the high rates of psychopathology alone indicate that authorities are failing to recognise those in need of international

protection (33), the reality is that we cannot rely solely on poor mental health to identify refugees. We need a reliable and accurate method that tolerates no errors.

4. The importance of knowing the truth

Before revealing such a method and answering the question of “how can we tell a lie”, we might even ask if knowing the truth is, if at all, important. If a person’s economic situation was so difficult to a point where they felt they needed to leave the country, why should we stop them? Many humanitarians and leading scholars argue that we should not (25). This point is certainly worthy of our attention. But even if we consider migrants as eligible for refugee status, the issue of lying can be nonetheless significant because of another group.

HOW TO SOLVE THE PROBLEM OF LYING

Why lying is hard to solve

Lying has been a topic of discussion among many scholars. While there are disagreements on some elements on what constitutes a lie (41), the census is that it is a deliberate attempt to mislead (42–44). Indeed the issue with lying has little to do with the definition and more with its detection. Decades of research have shown that the average person’s ability to detect a lie is no better than a random coin-flip (45). Amusingly, the same data shows that because humans are biased and frequently rely on cognitive cues that are inherently wrong, the coin-flip can in some instances be more reliable.

Even when interviewers are trained to use “diagnostic” cues to catch attempts to deceit (e.g., learning about certain emotions or facial expression), such training is rarely successful. When it is, we usually see mild or insignificant gains in accuracy (41). One reason for this is that these cues are usually ambiguous and are also not exclusive to liars (46). For example, truth-tellers do show signs that are typically associated with lying, such as nervousness. This dilemma explains

We have talked about distinguishing migrants from refugees, but there is another important group of people who are undeserving of international protection: criminal refugees (40). Those people are refugees in the sense that they are outside of their homeland due to a well-founded fear of persecution relating to the five grounds. Yet, they are undeserving of refugee status because they have committed egregious acts that are criminal and disproportionate to the risk they face upon returning home. In a sense, they are both victims and perpetrators. Knowing the truth here is crucial to countries that want to preserve their security and other refugees who would then see their attackers being rewarded by the same system trying to protect them (40)

why techniques such as the Reid’s Behavior Analysis Interview routinely fail to identify truth-tellers from liars, since it focuses on eliciting emotions from people (47). And it is still the subject of controversy whether any technique that evokes emotions can be strategically targeted to catch liars, whether there are actually questions that can increase nervousness among liars but not truth-tellers (48). What makes the problem even harder to solve is that both liars and truth-tellers share the same motive: not wanting to be seen as a liar (49).

Techniques to solve the issue of lying

Nevertheless, one thing is sure; lying is cognitively more demanding than telling the truth (47). While a lie could be formulated before an oral testimony, it is nearly always the case that new information will arise during the interview that the liar will gain from the interviewer’s behaviour or questions. These cues require constant monitoring, and the liar must ensure to cohesively assemble his or her invented story or else risk being perceived as incredible. As the interview stretches in time and more information is obtained this monitoring will eventually become exceedingly

difficult. In addition to visual imageries, the liar must ensure that the narrative fits with other sensory experiences (e.g., sound, touch, smell). For a truth-teller, keeping up with the narrative may not be as significant of a problem. However, as we will see shortly, there are exceptions.

The above reasoning indicates that an effective way to catch liars would be to dial up the cognitive demands associated with telling the story. This could be done by asking people to tell the story in reverse (50). Such a strategy could be useful in compromising any previous training the liar might have engaged in. Since reverse narration is unnatural, it can impose serious cognitive demand on the liar, who would now be unable to use schemas or other mental shortcuts to tell the story. However, narrating a story in a new is not always easy for vulnerable individuals especially persons with mental health problems. We can also expect that the instruction to be sometime seen as too odd by persons who do not have a high education level (and hence might not understand what is being requested). Thus, the technique may produce inconsistencies even for truth tellers.

If reverse-narration seems to be unyielding, one can maintain eye contact (51). Because eye contact can be distracting to people, it too could increase the cognitive load on the interviewee narrating a story. A controlled experiment comparing the effectiveness of eye contact on detecting lies showed that an eye-gazing technique could significantly improve the ability to catch a lie (52). Still, direct eye contact as a technique to detect liars can have its limitations. It is a shared experience to feel intimidated when someone stares you in the eye. And differences in individuals' sensitivity to eye contact can be attributed to biology. One study on monkeys showed that the ability to maintain eye contact could be linked to higher serotonin levels (53). Other research using functional magnetic resonance imaging (fMRI) on people

diagnosed with PTSD demonstrates that direct eye gaze could overstimulate the brain (54).

1. Maximising the techniques' reliability

These techniques and many others such as asking unanticipated questions (49) and the so-called devil's-advocate approach (55) can effectively detect lies. However, they are not perfect. In best cases, they can catch 75% of truth-tellers (49), which also means they miss 25%. It is precisely when these tools are most needed that the stakes of knowing the truth are at their highest. A rejection error of 1% within a refugee population of millions will send thousands to their death. Motivation to know the truth should always be guided by a fear of error rather than a need to succeed.

To further maximise accuracy rates, these techniques may be deployed not on their own but in tandem within an overall strategy. The strategic use of evidence (SUE) is one such overarching approach (56). The first step in the SUE method is to obtain reliable and specific evidence (e.g., footage of the suspect's car). Instead of revealing the evidence to the person, who if a liar could fabricate a story on the spot, the interviewer must ask questions around the evidence. Starting with an open-ended question, e.g., "What did you do last Monday's afternoon?" and then following up with closed-ended questions, e.g., "Did you or anyone else drove your car?" the interviewer will then weigh the interviewee's responses with the evidence. If the interviewee began to show inconsistencies, the interviewer may then strategically deploy the aforementioned cognitive-load techniques on major points of contradiction, e.g., by asking the interviewee to reverse-order the story, by ensuring direct eye contact, or both. Up to this stage, studies have shown that the SUE method produces 85.4% accuracy (56). Once again, there remains too much error.

To further reduce error, the interviewer must subsequently drop-feed the interviewee with some of the evidence they possess without disclosing

everything. For example, by telling them that “We have footage showing that your car was driven on Monday”. The liar would then attempt to fabricate another story that detaches him from the evidence, say, by proposing that he was not the person driving the car. If the interviewer reimplement the cognitive load techniques again, they would create a situation that is increasingly difficult to control to the liar who must now maintain all of his previous story with the new evidence under unexpected pressures. Eventually, the interviewer must disclose all the evidence. For even at this stage, the interviewee may be truthful and, as a result, could provide a reasonable explanation that pulls all the consistencies together. However, if he is a liar, he is likely to lie again consequently increasing the inconsistencies or confess as guilty. If upon evaluation there appear no other confounding variables (such as mental illness, misunderstandings, etc.), the interviewer would ensure an accuracy rate closer to 100%. This is an accuracy rate that can be accepted.

2. Ensuring the techniques’ reliability

This solution is not new, and authorities such as the UK home office (57) and the UNHCR (58) do train their staff on how to obtain credibility using evidence-based methods such as the PEACE model (which integrate the cognitive-load techniques and the SUE approach). The PEACE model was developed in the early 90s as a collaborative effort between law enforcement and psychologists in the UK (59). It is an investigative interviewing method that divides the interview life cycle into five basic steps: ‘preparation and planning’, ‘engage and explain’, ‘account clarification and challenge’, ‘closure’, and ‘evaluation’ (60).

Each phase is essential for a successful interview. However, with regards to the argument being made in this essay, we may only need to discuss the third stage. The ‘account clarification and challenge’, is where the interview cycle reaches its apex in terms of collecting and verifying information. This

is done through probing, clarification and challenging the responses. Thus, it is here where the SUE strategy alongside other techniques of increasing the cognitive load are usually deployed. In this phase, interviewers structure their questions through a spiral, i.e., asking all questions about a topic before closing it and moving on to the next topic. Additionally, to avoid biased answers, the interviewers use a hierarchical pyramid of reliability, whereby they start with open-ended questions before moving on to closed questions.

Yet, methods such as the PEACE model do not require only training; they need more time and appropriate resource allocation to obtain evidence. Staff may not have the opportunity to implement such tools when they are stressed to meet deadlines (61). Even when resources and time are given, issues in using all of these methods could arise. This is particularly the case when interviewing individuals about their trauma—which, by virtue of context, is the type of memory that is most common among asylum seekers.

Broadly speaking, the nature of traumatic memory induces an avoidance strategy because of the negative emotional content (62,63). To avoid overwhelming pain, applicants can be expected to systematically avoid any questions triggering their trauma. This also means that approaching topics via the questioning spiral, in which the interviewer attempts to ask their questions in such a way to close the topic before moving on to the other, cannot be reliable in obtaining traumatic experience because it ignores the avoidance strategy. The hierarchical pyramid of reliability appears ineffective for probing traumatic memories as well. The open-ended questions may not always be suited as they prompt a wider set of memory triggers, when sometimes a directed set of questions is needed to better deal with the avoidance strategy.

Therefore, since the PEACE model rely primarily on its ‘account clarification and challenge’ phase for invoking the retrieval processes, it remains at a desynchrony with the underlining avoidance strategy characteristic traumatic memories recall. An effective mechanism for accessing trauma-related experiences would build upon a pendulum-like technique, whereby an interviewer would expose the applicants gradually to questions associated with traumatic events. The premise here is that if questions about a specific topic are spread out across the interview alongside the other topics, the pain levels experienced would be evened out. By spreading the pain, a pendulum-like technique for probing would reduce the avoidance strategy and consequently allow for a more reliable retrieval. The pendulum-like method to explore traumatic memory has not yet been tested empirically, and thus more researcher in this area is needed.

A CONCLUSION AND A CALL TO ACTION

When discussing definitions, it is easy to forget that we are talking about real people who experience terrifying experiences. A refugee is someone who is restrained, blamed for something he never did. Blamed for being forced to leave his home, his family, his life—and yes, at least for a while, it was primarily males who sought refuge across an international border (64)—but she is often the forgotten victim

because for the most part she could not leave her own home. Although they run the risk of dehumanising people, definitions are critical to have. In many instances, they provide clarity. At their best, definitions can act as a compass, providing the authorities with several potential directions from which to make a life-altering decision.

We have had the same definition for close to 70 years now. Although it is a relic of the Cold War, it remains relevant in encapsulating all kinds of persecution experiences particularly through its MPSPG clause. That could include gender (inc. spousal assault), economic class, social origins, and sexual orientation—things that the drafters never imagined in 1951. All of what the Convention says is that if someone meets the definition, being genuinely at risk of critical abuse because of who they are or what they believe in, that they have the right to live life in dignity, until or unless they can go home.

The Convention does not need to be changed, but the way we do the Convention. As I have shown, with regards to applying the definition the critical gap appears not within the law but with how people are being assessed for credibility. This is largely a consequence of a poor understanding of memory and human behaviour. The 1951 Convention does not need lawyers; it needs psychologists.

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