Refugee Law and Legal Double Consciousness

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Abstract: This paper probes the historical development of what is an abiding paradox within refugee law: while a universal refugee definition was codified by the United Nations in 1967, it falls far short of accounting for the drivers of displacement that prevail within the Global South. This paradox emerged from Cold War era-politics that shaped the refugee into a decidedly European figure, chiefly through the inclusion of a "colonial applicability clause" that limited the applicability of the Refugee Convention to Europeans fleeing the events of World War II. Decades after the clause was lifted, both the legal architecture of asylum and the rhetoric employed by leaders within the Global North remains seeped within this colonial legacy. I argue, however, that historical analysis reveals more than just the perpetuation of colonial meaning-making. Rather, as meeting transcripts from the Convention drafting process illuminate, delegates' support of, and opposition towards, the clause revolved around either justifying or laying bare the aforementioned paradox respectively. I posit "legal double consciousness" as a framework through which resistance to the clause by Southern delegates can be understood; ultimately, from this framework can be gleaned the distinctive epistemic clarity that those excluded by refugee law have into its workings—thereby rendering their knowledge production integral to conceptualizing truly universal refugee protection in the present.

Introduction

"One region in the world was ripe for the treatment of the refugee problem on the international scale. That region was Europe. One problem was ready to form the subject of an international convention, namely, the problem of the European refugees. All refugee problems could not be dealt with in the same convention…"
-Robert Rochefort, Representative of France, Nineteenth Meeting of the Conference of Plenipotentiaries (November 26, 1951)

"*…The Conference's task was not to broaden the obligations undertaken by the various countries, but to confer legal status on refugees already within the territories of Contracting States. If the principle of international solidarity was to be respected, the scope of the Convention must be extended to include all refugees irrespective of their origin."*
-Mostafa Bey, Representative of Egypt, Twentieth Meeting of the Conference of Plenipotentiaries (November 26, 1951)

When gang members showed up at Manuel's door in El Salvador, he was just eighteen years old (Nelson and Habbach, 2019). As he had anticipated, they were looking for his older brother, Daniel, who repeatedly refused to join them. Manuel was forced to watch as they took Daniel away—his mangled body was found in a nearby canal the next day. Knowing that he would be targeted next, Manuel joined the hundreds of thousands of Salvadorians fleeing gang violence and eventually sought refuge in the United States. Crucially, though, gang violence does not fall neatly within the scope of the protection provided by the 1967 Protocol Relating to the Status of Refugees[1]. Therefore, for Manuel to secure refugee status, he must tell his story in accordance with the five grounds of persecution that the Protocol does lay out—namely, persecution based on race, religion, nationality, political opinion. and membership in a particular social group.

As legal scholars have enumerated at length (Chimni, 2008; Odhiambo-Abuya, 2005; Goodwin Gill, 2001; Chetail, 2014; Madureria, 2014) the protections that the 1951 Convention and 1967 Protocol offer to refugees and asylum seekers fall far short of accounting for the drivers of displacement that prevail across the Global South. Among several instantiations of these shortcomings, the five aforementioned grounds position the *individual* as the subject of persecution at the hands of decidedly *state* actors. This model of refugee protection does not address mass displacement resulting from gang violence, climate change, and, notably, colonialism and its aftermath, each of which disproportionately impact members of the Global South (often as a direct result of actions by powerful states within the Global North). Additionally—and in direct tension with the Universal Declaration of Human Rights—the Convention and Protocol offer no protection for cultural, social, and economic rights, nor do they provide any safeguards against gender-based violence.

For refugees from the Global South, this deficit in legal protection exists concurrent with the highly exclusionary asylum regime of the Global North—which renders non-Western refugees "unprecedented", intractable, and, often, illegitimate. This is illustrated with wrenching

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[1]The 1967 Protocol amended the 1951 Refugee Convention, which is the legal basis of international refugee protection—it delineates the refugee definition and outlines the rights, protection, and assistance that those who are labelled refugees are entitled to. Through the "territorial applicability clause," the 1951 Convention explicitly protected only European Refugees fleeing World War II. The 1967 Protocol lifted these temporal and geographic limitations. As of 2020, there are 146 parties to the Convention and 147 to the Protocol. Madagascar and Saint Kitts and Nevis are parties only to the Convention, while Venezuela, Cape Verde, and the United States are party only to the Protocol (United Nations Treaty Series).

clarity by current US immigration policy: in time with indefinitely suspending refugee resettlement and humanitarian parole[2] in the US—and thus abandoning around 100,000 refugees from the Democratic Republic of Congo, Afghanistan, Venezuela, Syria, Burma, Somalia, Nicaragua, Guatemala, Iraq, Eritrea, and Sudan, all of whom expected to resettle in the US this year (Bier 2025)—the Trump administration has explicitly prioritized the resettlement of white South Africans (Montoya-Galvez 2025). Taken together, these realities appear to contravene both the universal scope of the 1967 Protocol as well as the professed humanitarian commitments historically espoused by states within the Global North. From this follows a patently bleak picture of international refugee law as developed through and for Western hegemony, and as an ultimately incoherent legal instrument due to the underlying tension between the ostensibly universal focus of refugee protection on the one hand, and the international humanitarian regime's privileging of refugees from the Global North in practice on the other.

Overall, scholars have turned to history to try and explain this tension. Some (Martin 1988; Goodwin-Gill 2001; Pirouet 2001; Schuster 2003; Haddad 2008) argue that today's asylum seekers are, indeed, "fundamentally different from previous cohorts in nature and character" (Mayblin 2014), prompting Western governments to backtrack on the humanitarian commitments they claimed to prioritize during the Convention's development. However, other scholars primarily operating from the Third World Approaches to International Law (TWAIL) movement (Chimni 1998; Mayblin 2014; Ramasubramanyam 2018; Krause 2021; Abraham 2023) challenge the legitimacy of those humanitarian commitments themselves, arguing instead that the Convention should be understood as the product of Cold War politics that shaped the

[2]Humanitarian parole provides individuals who are otherwise legally inadmissible into the United States with temporary entry for urgent humanitarian reasons (USCIS).

refugee into a decidedly European figure. Accordingly, while the Protocol lifted the geographical and temporal restrictions on the refugee definition that were codified by the Convention, TWAIL scholarship delineates the extent to which the amended Convention's conceptual infrastructure still retains its colonial origins.

As I explore within this paper, the colonial conceptual infrastructure of the Convention was developed through a series of (at least) eighty-five[3] meetings that took place across several United Nations organs[4] between the years 1948-1951. More specifically, as the relevant meeting transcripts reveal, this infrastructure was developed through extensive deliberations between delegates who attended these forums and were at once positioned as 1) participants within the international juridical field, 2) representatives of their respective nations, and 3) individuals. The normative claims they made regarding what refugee protection ought to be thus emerged from their coinciding positionalities.

Unsurprisingly, not every delegate had the same amount of influence within this field: the transcripts also suggest that these meetings were consistently dominated by the most powerful states within the Global North (i.e., France, the United Kingdom, and the United States), each of which supported a restricted refugee definition. With this being said, comparatively less powerful states within both the Global North and Global South nonetheless challenged the restricted definition, often by way of banding together within meetings to lay bare the tension between the Convention's universal aim and its restricted applicability. In this paper, I will draw

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[3] This number is an approximation based on archival data I have found online, and it includes meetings related to the drafting of the International Bill of Human Rights—I'm still deciding how much of this data I want to include in my second year paper. This drafting process proceeded that of the Refugee Convention and was frequently referenced by delegates both in favor of, and against, the colonial applicability clause.

[4] These include the Ad Hoc Committee on Statelessness and Related Problems, the Economic and Social Council, the General Assembly, and the Conference of Plenipotentiaries. I will delineate the relationship between these organs as it relates to the Convention drafting in more detail.

from Pierre Bourdieu's field theory and his notion of symbolic violence to historicize the juridical field of international refugee law and the interaction of actors within it.

Within this project more broadly, I will map out this network of actors and trace the arguments made amidst it to answer the following questions: 1) What were the boundaries of the juridical field from which the 1951 Convention emerged, and which actors did it include? 2) How did actors frame their support of, or their resistance towards, the restricted Convention definition? 3) To what extent did the Cold War function as a "historical juncture" within the development of asylum? This paper primarily engages with the second and third of these questions. Overall, by tracing the framing that these actors employed, I will identify the specific rhetorical "weapons" deployed by, and against, "weak" actors within the development of international refugee law. As I will illustrate, tracing both sets of rhetorical frameworks remains relevant to understanding—and ultimately imagining beyond—our current, exclusionary asylum regime. To this end, I will first outline the theoretical framework that I will subsequently use to analyze a selection of meeting transcripts related to the Convention's drafting.

Part I: Theoretical Framework

I. The Myth of Difference, the Cold War as a Historical Juncture, and the "Colonial Applicability Clause"

Article 14 of the Universal Declaration of Human Rights (UDHR) recognizes the right to asylum, by way of affirming that "everyone has the right to seek and enjoy in other countries asylum from persecution" (United Nations General Assembly, 1948). It is worth noting here that the UDHR was ratified by the United Nations General Assembly (UNGA) in 1948: two years prior, the Long Telegram and Churchill's Iron Curtain speech "moved the Cold War into Ideological Territory" (Leventhal 2023). The Long Telegram, sent to Harry Truman by then-Counselor to the US Department of State George Kennan, framed the Soviet Union as a threat that needed to be contained ideologically. The development of the UDHR thus became an opportunity for the US to assert the superiority of Western rights ideology, vis-à-vis arguing in favor of an individualist focus on civil and political rights over the Soviet emphasis on cultural and political rights. The US emerged as the undisputable winner of this ideological battle: "the UNHCR approved more than 80 percent of the almost 50 recommendations offered by Roosevelt" (Brucken 2013, as quoted in Leventhal 2023).

The drafting of the 1951 Refugee Convention took place almost immediately following the drafting of the UDHR. Accordingly, the Convention drafting process "drew heavily" from the UDHR negotiations and prioritized individualist criteria for persecution. As the Cold War progressed, the figure of the refugee as "white, male, and anti-Communist" acquired significant ideological and political salience for the U.S. and its allies, which sought to present themselves as humanitarian havens for dissidents from enemy (namely, Communist) states.

At the same time, Western states became increasingly concerned with the contradiction posed by their commitments to universal human rights on the international stage and their domestic and foreign policies, which enforced racial discrimination (in the US context) and colonialism. This contradiction was almost immediately identified and leveraged by legal actors contesting racial discrimination within the US: in *Oyama v. California*, for example, the public petitioner's brief and an amicus brief filed by the ACLU "argued against the racially discriminatory Alien Land Law on the basis that it violated the UN Charter" (Levanthal 2023, 44). As I will examine, this same contradiction was also employed by delegates from the Global South to contest the restricted scope of the Convention definition.

Through analyzing Hansard records of British parliamentary debates that took place around 1951, Lucy Mayblin (2014) notes that the 700,000 Palestinians who were displaced due to the Nakba in 1948 and the millions of Koreans who were displaced during the Korean War between 1951-1953 were, in fact, discussed *more* frequently in Parliament than European refugees were. Importantly, though, the focus of these discussions involved providing large sums of bilateral aid commensurate with non-Western refugees' "exceptional circumstances," instead of an acknowledgement of their status as bona fide Convention refugees. Rather than attempt to limit the scope of the refugee definition, British parliamentarians tried to argue that non-Western "refugees" fleeing the violence of colonialism fell outside the ambit of protection that the Convention should rightfully offer. The legal scholar B.S. Chimni (1998) characterizes this argument as the "myth of difference". As I will show, delegates in favor of the restricted definition promulgated it to retain both their domestic and international interests alongside an ostensibly universal Convention focus.

More specifically, Chimni (1998, 1) describes the myth of difference as "the idea that great dissimilarities characterized refugees in Europe and the Third World." Among the most frequent claims used by both policymakers and scholars in support of this myth is the notion that non-Western refugees do not meet the individualist criteria of persecution as readily as their Western counterparts. In response, Chimni notes that refugees who fled Hungary in 1956 (and who were granted prima facie status by the Austrian government) likely "would not have been recognized, had the application for refugee status been determined at another time and on an individual basis" (Melander 1990, 146, as quoted by Chimni 1998, 9). It therefore appears that this individualist criterion was developed—and continues to be selectively applied by—the U.S. and its allies, largely in line with their geopolitical ends.

Additionally, some also claim that non-Western refugees primarily flee "internal" rather than "international" conflicts and are thus ineligible for refugee status. Chimni problematizes the binary between internal and international conflict historically, by way of examining the Rwandan case. While Western media portrayed this case as a "open-shut case of ethnic conflict," (Choussudovsky 1997, as cited in Chimni 1998, 9), Chimni highlights the complex economic and social realities that facilitated it. Choussudovsky (1997, 1787) concretizes this point, claiming that it was "the deterioration of the economic environment which immediately followed the collapse of the international coffee market and the sweeping macro-economic reforms by the Bretton Woods institutions [which] exacerbated simmering ethnic tensions and accelerated the process of political collapse." As the Convention meeting transcripts also reveal, Northern states perpetuated the myth of difference through constructing the existence of what is, historically, a false binary.

To summarize, against the backdrop of Cold War-era politics, the US and its allies tried to maintain a professed commitment to the universal right to asylum while also calling for a geographically and temporally restricted refugee definition aimed at preserving their geopolitical interests. As I explore through archival data within the following section, they attempted to thread this rhetorical needle by using the myth of difference. Their efforts culminated in the "colonial applicability clause," which was renamed the "territorial applicability clause" within the final version of the Convention.

The clause defines a refugee as someone who,

"As a result of events occurring before 1 January 1951 and 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…

For the purposes of this Convention, the words "events occurring before 1 January 1951" shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State *shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.*

"…Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned"

Most importantly, the clause explicitly limits the applicability of the refugee definition to Europeans fleeing the events of World War II. While it does also codify the possible expansion of this definition, it leaves this entirely to the discretion of colonizing states. It also implicitly legitimates their status as colonizers through granting them the ability to expand the definition to include "all or any of the territories for the international relations of which it is responsible." It is worth noting here that in addition to serving as arbiters of refugee status for members of the Global South, colonizing states were largely the cause of their displacement to begin with.

Overall, the Cold War functioned as what James Mahoney (2000, 513) calls a "historical juncture" in the development of asylum law. Mahoney defines a critical juncture as "the adoption of an institutional arrangement from among two or more alternatives" which then "makes it progressively more difficult to return to the initial point where multiple alternatives were still available." As previously described, while the 1967 Protocol lifted these geographical and temporal restrictions, this did not change the conceptual architecture of the refugee definition—its failure to account for cultural, economic, gender based, and climate changed induced displacement illustrates both the continuation and shortcomings of its individualist focus. Furthermore, decades after 1967, the myth of difference remains just as prominent within the rhetoric used by political leaders to justify their exclusionary asylum policies.

II. Bourdieusian Field Theory, Symbolic Violence, and Access to the 1951 Convention Meetings

Understanding the conceptual framework of the 1951 Convention necessitates considering the specific interactions that gave rise to it. To start, not every state had the same access to each of the forums wherein the Convention was deliberated. The sequence of these meetings occurred as follows. First, a draft Convention was prepared by the International Refugee Organization (IRO) in 1950. This was sent to the Ad Hoc Committee on Statelessness and Related Problems (which met 32 times between January and February of 1950), which reported to the Economic and Social Council (ECOSOC). The Ad Hoc Committee submitted its revised Convention to ECOSOC, which reviewed it in consultation with the General Assembly (UNGA). ECOSOC reconvened the Ad Hoc Committee and had it report directly to the UNGA (August 1950), wherein the colonial applicability clause was debated. Final consultations occurred in the Conference of Plenipotentiaries (1951).

As Ulrike Krause (2021) describes, only the UNGA was comprised of all member states (60 in 1950). The Ad Hoc Committee had 13 members[5], ECOSOC had 18[6], and the Conference of Plenipotentiaries had twenty[7]. Eight states were present in all three forums: Belgium, Brazil, Canada, Denmark, France, UK, US, and Venezuela. Unsurprisingly, these states had the most influence on the Convention; among them, the US, the UK, and France in particular dominated in terms of speaking time during meetings. Krause (2021) notes that non-member states were unable to participate in UN debates—colonized nations were ineligible for membership.

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[5]The Ad Hoc Committee was comprised of Belgium, Brazil, Canada, China, Denmark, Israel, Poland, Turkey, the USSR, the UK, the US, and Venezuela. The USSR and Poland refused to continue participate following the first meeting due to the fact that China's representative was affiliated with the Kuomintang Party, the Chinese Communist Party's direct political rival. At the time, the USSR and Poland were allied with the CCP government.
[6]In 1951, ECOSOC's members included Belgium, Canada, Chile, China, Czechoslovakia, France, India, Iran, Mexico, Pakistan, Peru, Philippines, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States, and Uruguay. Venezuela was an observer in this forum, meaning that it did not get to vote.
[7]The Conference was attended by Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Germany, Greece, Holy See (Vatican City), Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela, and Yugoslavia. Cuba and Iran were represented by observers.

Furthermore, while the UNGA decided to invite “all states, both members and nonmembers” to the Conference of Plenipotentiaries, this in effect only meant sovereign states; among the 26 states that attended, “five were former and seven current colonial powers, ten decolonized states of which three had gained global power, and four were without a direct colonial past” (Krause 2021). The structure of the UN and its membership requirements shaped who got to attend each meeting—and, by extension, directly influenced the conceptual infrastructure of the Convention as it was developed within these forums.

In addition, Krause (2024) notes that this structural subalternization was compounded by disparities in delegates’ gender and sexual orientation. More specifically, both the membership of the Ad Hoc Committee and ECOSOC were comprised exclusively of men. The ECOSOC’s Social Committee, wherein the draft Convention was discussed, had one woman as a regular delegate (representing Canada), and no women were named as speakers in the UNGA plenary. Lastly, there were no women delegates present as state delegates during the Conference of Plenipotentiaries (Krause 2024): the Convention meetings were instead dominated by white, heterosexual men, who then determined the grounds upon which the world’s most vulnerable populations could seek protection. It is perhaps unsurprising that the refugee definition has since been widely criticized for failing to include gender-based violence as a ground for persecution. The absence of women and LGBTQ perspectives within these forums was no doubt related to the barriers that members of both populations would no doubt encounter while trying to become state delegates during the mid-twentieth century. The same is also true of the lack of delegates from less privileged socioeconomic backgrounds, considering the fact that state delegates are typically amongst their country’s lifelong elite.

Overall, the boundaries of the field wherein asylum was conceptualized were themselves the product of wider, colonial and patriarchal structures. By "field" here, I am specifically referring to Pierre Bourdieu's (1979) usage of the concept. According to Bourdieu, a field is setting comprised of differently positioned actors; their positions relative to one are the result of the specific rules that dictate every given field. As such, each field has its own internal protocols, assumptions, characteristic behaviors, and self-sustaining values. Within the juridical field, practices are "patterned by tradition, education, and the daily experience of legal custom and professional usage" (Terdiman 1987). In this vein, Julian Go (2008, 6) delineates two "related but analytically separable" features of fields: "1) the objective configuration of actor-positions and 2) the subjective meanings guiding actors in the struggle, that is, the 'rules of the game' and particular types of cultural or symbolic capital." Ultimately, actors within the international juridical field must maneuver the implicit "rules of the game." For delegates from the Global South, this meant framing their resistance to the restricted definition through an appeal to the Convention's universalist aim as it was explicitly articulated by the General Assembly in resolution 429 (v).

Here, it is crucial to recognize the extent of this resistance even within a field structured to privilege the perspectives of Northern states. On the one hand, the US, the UK, and France perpetrated "symbolic violence"—or what Bourdieu described as an imposition of a "legitimate vision of the social world" (Fernandez 2005, 12)—through the specific arguments they made in favor of a restricted definition. On the other hand, and as I will show within my analysis of the relevant meeting transcripts, less powerful, Southern states resisted this symbolic violence from *within* the same rhetorical structure. By pointing out the contradiction between the Convention's professed universalism and the restricted refugee definition, these states argued that an expanded refugee definition was necessary for the very concept of a "refugee" to remain coherent. In the section that follows, I will turn towards conceptualizing this resistance in greater detail.

III. Resistance: "Weapons of the Weak" and "Legal Double Consciousness"

When referring to the "weak," I have in mind a spectrum of positionalities and power. On one end of that spectrum were the US, the UK, and France, given the fact that the Convention meetings were structured to privilege their perspectives and that they spoke more during these sessions than any other delegates did. On the other end of that spectrum are Southern states such as Iran, Mexico, Egypt, Peru, Brazil, the Philippines, Pakistan, and India, though not every one of these states was equally "weak." For example, as the meeting transcripts reveal, Peru's representative was present during the ECOSOC meetings, but unlike the representatives from Mexico, India, Pakistan, and Chile, he barely spoke. Whether this was due to structural disadvantage or the individual personality of Peru's representative is difficult to definitively posit, but it nonetheless complicates straightforward binaries between "weak" and "strong" states. Additionally, not every Southern state opposed the colonial applicability clause: Brazil opposed an expanded refugee definition, instead advocating for increased development aid for "non-self-governing peoples".

Furthermore, some states—such as Canada, Belgium, China, and the USSR—were situated around the middle of this spectrum. China and Russia are (along with the US, UK, and France) permanent members of the UN Security Council. Though the Security Council did not play a role in the drafting of the Convention, the five permanent members of the United Nations do wield a comparatively heightened degree of power within the institution more broadly. In the specific context of the Refugee Convention, however, the US' influence in shaping the UDHR and the formation of NATO in 1949 meant that Belgium and Canada (both NATO members) participated within these meetings much more frequently than the USSR and China, for whom the individualist focus of the Convention already signaled a departure from their own ideological frameworks.

As such, when conceptualizing the resistance of the "weak" within the international juridical field, I am referring specifically to Southern states collectively without also suggesting that they were all equally "weak"—in line with how TWAIL scholars also approach power asymmetries at the global level.[8] As mentioned earlier, this does not mean that these individual delegates were themselves "weak," given the power they needed to have within their home countries in order to be present within such forums to begin with.

Shifting now to conceptualizing their resistance, James Scott famously argues that we ought to analyze more than just marked "historic events" if we are to understand oppression and opposition to it—instead, we should also consider less visible, "everyday" forms of resistance. To this end, Scott introduces his notion of "transcripts": established ways of behaving and speaking which, linking Scott's work to Bourdieu's, govern particular social settings (or "fields"). In this context, resistance takes the form of "hidden transcripts" which allow for "a veiled discourse of dignity and self-assertion within the public transcripts." To concretize his notion of hidden transcripts, Scott analyzed examples such as rumors, gossip, disguises, linguistic tricks, metaphors, euphemisms, folktales, ritual gestures, and anonymity. I argue that the rhetorical strategies employed by weaker states during the Convention meetings constitute a "weapon of the weak" given that they were strategically staged from within the juridical field. As such, these delegates worked through this public transcript to achieve a different end than the one

[8]In her piece "Weapons Against the Weak", the legal scholar Asli Bali examines sanctions as a tool of economic statecraft wielded by states in the Global North. As such, the "weak" in her analysis are states in the Global South—though she does not suggest that all of them are equally vulnerable to the devastating effects of sanctions.

it was curated for. Unlike the actors implied by Scott's notion of hidden transcripts, though, these delegates were relatively (and in some instances completely) transparent about their resistance towards the colonial applicability clause. Overall, through their simultaneous awareness of their own rights claims *as well as* their knowledge of the transcripts that structure the international juridical field, they exercised what I describe as "legal double consciousness".

DuBois developed the concept of "double consciousness" through his first person, phenomenological account of navigating the United States as a Black man, viewed perpetually by White society through the veil of racialization. To that end, he writes,

> "It is a peculiar sensation, this double consciousness, this sense of always looking at oneself through the eyes of others, of measuring one's own soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder" (DuBois 1996).

Due to their double consciousness, the racialized subject is uniquely aware of race itself as a sociocultural construct. In other words, they possess distinctive clarity regarding not only race, but American society in turn as constructed through it.

Existing scholarship primarily applies double consciousness to international law through the experiences of academics operating within the TWAIL tradition, and who thereby "recognize the discord between their emancipatory hope for international law and its predatory reality" (Al-Attar 2022). I argue that "legal double consciousness" provides an apt lens through which to analyze the rhetorical resistance of delegates from the Global South. More specifically, these delegates possessed a simultaneous awareness of the conceptual infrastructure from which the colonial applicability clause emerged (i.e., the myth of difference) and the rights claims of the contexts they represented. By arguing in favor of a truly universal refugee definition, they directly countered the myth of difference and, by extension, tried to resolve a fundamental tension at the core of refugee law. It is no doubt the case that states in the Global North knew of this tension—as previously described, they tried to circumvent it via their rhetoric. However, Southern delegates laid bare its existence, and they often did so by invoking the experiences of their constituents.

In this way, their argument structure speaks to a "double consciousness" of universal asylum and the colonial interests which restricted its applicability in practice. Their attempts to make the case for an expanded definition by highlighting this gap—as well as by foregrounding the imperative of rectifying it, lest the normative framework of the Convention itself collapses—also mirrors DuBois' claim that double consciousness entails epistemic clarity. As such, this legal double consciousness is, within the international juridical field, a weapon of the weak as well as a powerful generator of normative claims. Through this lens, scholars can narrate the history of international law such that Southern states are treated as active contributors and distinctive knowledge producers, rather than as passive recipients of a legal regime designed to exclude them.

I will now briefly turn towards analyzing the archival data itself, from which the theoretical framework outlined within the first part of this paper emerges.

Methods

(This section will undergo substantial revision as I keep working through the data and, in turn, figuring out how I want to tell the story of what these meetings entailed).

I am currently analyzing meeting transcripts, reports, and memoranda related to the Convention's drafting. These documents span the years 1948-1951, and are accessible via the UN Digital Archives, the UN Digital Library, and RefWorld, the UNHCR's Global Law and Policy Database. I am primarily looking at Ad Hoc Committee, ECOSOC, UNGA, and Conference of Plenipotentiaries data (and am also considering analyzing data from the Drafting

Committee on the International Bill of Rights). As of now, I have primarily coded Ad Hoc Committee, ECOSOC, and UNGA transcripts—this constitutes about 50-60 documents, each of which ranges from a few to over 100 pages in length and corresponds to a specific meeting. In this paper, I have included a sample analysis of several documents which help to clarify the relationship between my theoretical framework and the data I am analyzing. However, as I continue revising this paper, I also intend on including a detailed (and chronological) account of the meetings themselves—as well as a survey of the specific delegates who attended them.

I am currently using NVivo to trace patterns in the rhetoric used by each delegate: as of now, I have forty-three codes; I chose to focus broadly on appeals to the universal scope of the Convention as an overarching framework to group many of these codes together (I will illustrate how through the specific evidence I cite within my archival analysis). I am also utilizing Aeon Timeline to piece together 1) the sequence of meetings and which organ of the UN they are a part of, 2) which delegates were present in which meetings, 3) the backgrounds of these individual delegates, and 4) the domestic contexts of specific countries as they relate to arguments made within the meetings.

While my coding has, thus far, focused primarily on the substance of what was said at each meeting, I am currently trying to determine how I can calculate the percentage of speaking time that each delegate had, as well as how I can visually represent the relationships between them (i.e., how I can map the relationship between delegates from the same region, delegates who are positioned similarly within the gradient of "weak" and "powerful" states, whether the delegate representing a particular state changes depending on the UN organ in question, etc.). Additionally, I am considering restructuring this paper so that my theoretical framework and my analysis of the archival material are presented simultaneously (rather than how they are presented now, as separate sections of the paper).

Part II: (Selected) Archival Analysis

The Ad Hoc Committee submitted its first report in February 1950, wherein it spelled out its preliminary conceptualization of asylum. This report included a summary of the proposed colonial applicability clause and the rationale for its inclusion, which was as follows:

> *"The Committee discussed whether it would include in a definition all refugees irrespective of their origin and of the fact that the events which caused the rupture of their country of origin belongs to the past or future. The Committee put aside this solution believing it would be difficult for a Government to sign a blank cheque and undertake obligations toward future refugees, the origin and number of which would be unknown."* (38).

Even within this initial summation, the myth of difference is subtly enforced. More specifically, while the reference to "all refugees" does—albeit ambiguously—imply the existence of refugees outside of Europe, the responsibility of attending to them is framed as a problem to be addressed in future. In contrast to the subtle recognition of all refugees within the first line of this summation, the "number" and "origin" of non-European refugees is characterized as "unknown". This then forms the basis upon which the restricted definition is justified, lest an expanded one require governments to "sign a blank cheque and undertake obligations towards future refugees." Evidently, a stark contrast was established at the outset between the rights of European refugees as enshrined within the Convention, and the rights of non-European refugees as too controversial and onerous to envision. The Ad Hoc Committee's report does not include a transcript or summary of the discussion that this garnered amongst its members. However, it was subsequently sent to ECOSOC, and the debates which followed across each of the relevant UN organs help clarify how support for, and resistance towards, the clause was framed.

Among the documents which trace this debate, the Federal and Territorial Application Clause Memorandum prepared by the General Assembly's Legal Department on July 3, 1951 is especially revealing, in that it provides a summary of the discussions regarding the colonial applicability clause that took place regarding the clause within the UN's Third Committee[9]. Unlike the other UN organs wherein the Convention was discussed, all members of the United Nations are automatically members of the Third Committee; by 1951, this included sixty member states. This structural reality enabled a far wider range of delegates to respond to the clause in considerably more straightforward terms than they did in other forums.

To start, the UK argued that an expanded refugee definition would "deny non-self-governing peoples" the right to determine whether they wanted to become signatories to the Convention. In time with attempting to pursue this line of argument, the UK also insisted that its territories remained under its control:

> *"The Delegate of the United Kingdom emphasized that the question before the Committee was not whether it was right or wrong that a colonial system should still exist in the 20th century but merely whether, with such a system in existence should a colonial clause be incorporated in the Covenant. The U.K. had never claimed that the peoples of the territories under its administration were sovereign and independent. No one could deny however that those peoples were constantly progressing along the road to self-government and independence and it was precisely in order to take such progress into account that a colonial clause should be inserted in the Covenant...If the colonial clause were omitted, the participation of colonies in an international convention would become automatic and those territories would thus find themselves deprived of the right to decide for themselves. The opponents of the colonial clause would therefore be seen to be illogical since they demanded autonomy for the peoples of the non-self-governing territories while at the same time denying them the right to decide for themselves."*

To maintain its status as a colonizer along with its Cold War era commitment to democracy and humanitarianism, the UK employed striking rhetorical acrobatics suggesting that a restricted

[9]The UN Third Committee was established concurrent with the creation of the United Nations in 1945: its primary focus was on addressing human rights in the aftermath of WWII. It was tasked with drafting the UDHR and, later, facilitating discussion regarding revisions of the draft Convention.

definition actually supported the autonomy of colonized people. It also explicitly touted the myth of difference, through denying that the people it had colonized were independent. By referring to them as “the peoples of non-self-governing territories,” it also implicitly rendered them as other—patently outside the scope of the Convention. In a related vein, while expressing its support for the clause, France also reiterated differences between itself and its “overseas territories.” These alleged differences served as the foundation upon which France predicated its case in favor of the clause:

> *“[The Delegate of France] warned the Committee against omitting a territorial clause, which would represent a double disadvantage. It might subject countries inhabited by different peoples to uniform obligations and the standards that they adopted for their legislation would be those applicable to peoples still in the lowest stage of development; or in the case, for example, of a convention on the rights of the family, it would involve transformations that might require several months in metropolitan France but could only be carried out in the overseas territories after a long period of time and then under conditions that might endanger public orders since the peoples would not be ready for such changes. In either case, such measures would run the risk of retarding human progress.”*

Indeed, France’s rationale for the clause positions its colonies— “still in the lowest stage of development”—as primitive and woefully unprepared for the introduction of human rights within their territories. Belgium extended this line of rhetoric:

> *“The representative of Belgium was in favor of the inclusion of the colonial clause and said that the government of Belgium hoped that it would not be compelled to give immediate automatic effect in the Congo to the principles of the covenant but would be permitted to judge the best and most practical time to do so. He thought that the attacks launched against the administer powers might be traced to a form of resentment complex felt by countries which had suffered in the past from foreign domination.*
>
> *The history of Belgium itself provided a parallel for that of the Congo and other non-self-governing territories. Originally, Belgians had been a collection of tribes which had been overrun by the Roman Empire. While contemporary Belgians were extremely proud of the leaders of those tribes which had battled valiantly for independence, they were well aware that they owed much of their existing civilization to Rome, and through Rome to Greece. It had, however, required centuries for Belgium to take its place in the forefront of civilization as currently understood.”*

Unlike France or Britian, Belgium made no pretense of viewing the colonized world as worthy of inclusion within the ambit of the Convention. Rather than attempt to argue that an expanded definition would be to the detriment of its colonies (a la the UK and France), it outright asserted that these colonies and those states that were “launching attacks against the administer powers” needed to remember their place within the international geopolitical order. Evoking DuBois is especially apt here: the international juridical field, as cultivated and dominated by the Global North, requires the colonized subject to measure themselves “by the tape of a world that looks on in amused contempt and pity” (DuBois, 1997). However—and in line with the epistemic clarity that double consciousness grants individuals—delegates from the Global South challenged the colonial applicability clause as being fundamentally at odds with the notion of universal rights, and as threatening the legitimacy of international human rights law in turn.

To this end, the representatives of several Southern states pointed to the universal normative framework of the United Nations—codified within the aptly titled UDHR, and integral to the development of the UN as a decidedly supranational institution. The representative of the Philippines spoke to this directly:

> *“The Delegate of the Philippines said the purpose of the draft resolution submitted jointly by the Philippines and Syria (A/C.3/L.71/Rev.1) was to do away once and for all with the so-called colonial clause which constituted a constant source of irritation, as well as of embarrassment for the colonial powers. Because the U.N. Charter., in several passages mentioned human rights and the human person, a new concept had arisen in public international law - that the individual could be the subject of international law. The benefits of the covenant should therefore be extended human beings everywhere. The Philippine and Syrian draft resolution stressed two points: from the legal viewpoint the metropolitan powers might be regarded as principals whose international commitments should automatically extend to the colonial territories. From the moral viewpoint the inhabitants of the dependent territories were clearly as much entitled to the enjoyment of human rights as anyone else.”*

Within their brilliant counter to the clause, the Filipino delegate appealed to the very same individualist normative framework that was used by the Global North to justify the existence of the clause. Reminiscent once again of DuBoisian double consciousness, they referenced their visceral reaction to the clause while also laying bare the moral hypocrisy that it represented—and the subsequent threat it posed to the normative framework upon which international human rights law (and refugee law by extension) professedly emerged from.

The representative of Iraq crystallized this threat to the legitimacy of international human rights law within her remarks, arguing,

"…her delegation opposed the inclusion of the colonial clause in the Covenant on Human Rights and added that however weighty the arguments advanced for its inclusion it would deprive the Covenant of all practical effectiveness; the very aim of the Covenant was to insure the obligation of human rights to peoples who were deprived of them, who lived in ignorance of what was due to them as human beings.

Though the Iraqi representative was referring to the Covenant on Human Rights, rather than the Refugee Convention per se, these bodies of law (and their corollary colonial applicability clauses) developed in tandem. As she argued, to impose geographical and temporal limits on ostensibly universal rights is, ultimately, to deprive those rights of "all their practical effectiveness". Afghanistan's representative also wryly remarked upon the irony of Belgium's "civilizing" rhetoric:

"The representative of Afghanistan stated that those who claimed they were trying to civilize the peoples whom they were colonizing should at least give them the right to learn how to become conscious of their human dignity."

As the exchanges within this memorandum illustrate, the tension between universal rights per se and the limitations imposed upon their practical applicability via colonial applicability clauses was, on the one hand, maintained by colonizing states through the myth of difference. On the other hand, it was contested by comparatively weaker states through their appeal to universalism, which simultaneously acknowledged their own self-perception, the perception they knew that colonizing states accorded them and other (especially colonized) states, and the incongruity between these perceptions. This incongruity was then framed as a threat to the legitimacy of international human rights law—making it a veritable "weapon of the weak." Similar rhetorical patterns were present within other forums and at different stages of the drafting process. During ECOSOC's 158th meeting in August, 1950[10], France's delegate attempted to offer what he described as his nation's benevolence towards refugees overtime as a justification for it now supporting the clause.

> *"…the records of the meetings of the Ad Hoc Committee left an unsatisfactory impression – the impression that the countries of Europe were responsible for the existence of a problem which the other, more liberal, countries would have been able to solve. That was a heinous mistake, since distortion of the problem at the outset might have extremely unfortunate consequences. In actual fact, the position was quite different. The truth was that certain European countries were the victims of their geographical situation which had made them, for more than thirty years, a haven of refuge in a particularly disturbed part of the world. They had also been the victims of their own liberalism…they opened their doors without discrimination to all who were in the unfortunate position of having to leave their native country…(8)*
>
> *…France, which had served as a refuge for the whole of Europe, had earned the right to ask that there should be at least some feeling in favour of the text its delegation had submitted. (12)*

France's delegate vacillated between suggesting that France had opened its doors to "all who were in the unfortunate position of having to leave their native country" and arguing that, because it had already "served as a refuge for the whole of Europe," its support of the clause is justified. In keeping with the tension charted throughout this paper, he maintained a dual focus on France's support of the clause on the one hand and its status as a "liberal," and thereby humanitarian, society on the other by claiming that France was a "victim of its own liberalism." It is worth noting that five years earlier, on May 8, 1945, French authorities killed 45,000 Algerian civilians as part of its effort to repress anti-colonial demonstrations (Charef). A total of

[10]Delegates from Australia, Belgium, Brazil, Canada, Chile, China, Denmark, France, India, Iran, Mexico, Pakistan, Peru, the UK, and the US were present during this meeting.

1,500,000 more civilians were killed by France as part of the Algerian War of Independence which lasted from 1954-1962 (Gastel 2012), marking the end of 132 years of French occupation.

The United States also tried to maintain its support for the clause alongside its professed humanitarian commitments, although it did so not by explicitly naming its own interests, but instead by suggesting that a "broad definition" would actually harm refugees themselves:

> "*The United States definition was not narrow, as had been alleged; it was precise. The United States Government believed that international; status as a refugee, and the benefits of the United Nations Convention under discussion, should extend to everyone, without limitation, who needed it. His government believed, however, that definition by categories would be more likely to ensure maximum protection for refugees who needed such protection at the earliest opportunity than would the global definition…it was probable that if a global definition were adopted some countries may be reluctant to adhere to the Convention; there were persons who might be considered refugees, for example those fleeing from a revolution, for whom countries might not wish to provide a blank cheque of protection in advance."* (14)

In this way, the US' support for the clause mirrors the stance that France and the UK took during the Third Committee meeting. Furthermore, along with supporting the clause per se, the US also excluded people fleeing "revolutions" from the scope of the Convention in the name of "precision": because these revolutions were by and large struggles for independence in colonized nations, disqualifying those who fled in the aftermath of these struggles also effectively limited the Convention's scope to Europe.

Pakistan's delegate spoke directly to the United States' attempt to restrict the refugee definition, emphasizing the importance of clarifying the refugee definition rather than fixating on its purpose:

> *"He could not follow the United States argument that the definition of the term 'refugee' was all-important. A definition was always a definition, whatever the term involved, and he could not see how the question of underlying purpose affected the issue…*
>
> *…He also considered that it should not be claimed that an international instrument was international in application when its scope was limited to a particular area of the*

world…nor could he understand paragraph B of article 1.[11] *How could a definition be added to, and how could persons be added to a definition? The problem before the Committee was to ensure that the Convention embraced all refugees; if it was to be regarded as an instrument of restricted application its title should be reconciled with that conception." (16)*

Here, Pakistan's delegate highlighted the conceptual tension present within the US' approach to the refugee definition: as described throughout this paper, a Refugee Convention so-labelled entails a universal understanding of refugees which is contradicted by restricting its scope in practice. He therefore exhibits a "double consciousness" of what the refugee definition can/ought to be and what France, the US, and their allies wanted it to be, and addressed this gap directly within his response.

Both Egypt and Iraq's delegates made similar arguments against the clause within the Conference of Plenipotentiaries, as documented within the summary record of the Conference's twentieth meeting. More specifically, Egypt's delegate referenced France's rationale for supporting the clause and countered it by appealing to a universal understanding of international solidarity:

"Speaking on the definition of the term 'refugee', the French representative had stated that France could not sign a blank cheque and assume unlimited and indefinite commitments in respect of all refugees. But the Conference's task was not to broaden the obligations undertaken by the various countries, but to confer legal status on refugees already within the territories of Contracting States. If the principle of international solidarity was to be respected, the scope of the Convention must be extended to include all refugees irrespective of their origin. The Conference had received its terms of reference from the General Assembly, which had delimited the scope of its activity in resolution 429 (v); it was now too late to restrict that scope."

[11]This paragraph in the draft convention stipulates circumstances when the refugee label will cease to apply to an individual. Some of these circumstances include voluntary repatriation, the acquisition of a new nationality, and the "circumstances in connection with which [an individual] has been recognized as a refugee ceasing to exist." All of them were ultimately incorporated into the final Convention.

Rather than arguing for a broadening of the Convention definition, Egypt's delegate portrayed "refugees" in non-European countries as *already being* refugees. This also speaks to his double consciousness of the refugee definition as constructed by France on the one hand, and as it was understood by non-European "refugees" on the other. Building on this, Egypt's delegate implicitly expressed his hope in the international juridical field by appealing to a universalist notion of "international solidarity"; as such, he simultaneously recognized the constraints of the field (i.e., France's concern about committing to a "blank check") the gap between what actors in the field claim to support and the stances they actually hold, *and* a sense of possibility insofar as what the international juridical field could be.

Shortly afterwards, Iraq's delegate expressed his agreement with Egypt and proceeded to articulate his "surprise" and "embarrassment" upon learning of the proposed clause:

> *"He had been given to understand that the Convention was to apply to all refugees without distinction, and he had therefore been both surprised and embarrassed to hear certain delegations assert that it should apply only to European refugees. He understood the position of the French representative, which was based on the understandable desire to avoid signing a blank cheque on behalf of the French Government, and which was at the same time intended as a reproof to countries, some of them outside Europe, which had not thought it worthwhile to attend the Conference. Although some absent countries might be indifferent to the refugee problem, Iraq was extremely interested in it, and was desirous of seeing a Convention emerge from its deliberations which would apply to all refugees."*

Iraq's delegate also situated his rejection of the clause within a universalist approach to the refugee definition and his country's corollary belief in the juridical field as capable of attending to the "refugee problem". At an even more foundational level than the other delegates who challenged the clause through their double consciousness, Iraq's delegate cited his participation in the Conference as itself proof of what the Convention could be.

Indeed, much like the Third Committee meeting, delegates from Western states (i.e., the US, UK, and France) sought to maintain their own claim to humanitarianism as well as their support for the colonial applicability clause during ECOSOC and Conference of Plenipotentiaries meetings. In lockstep with this, delegates from Southern states recognized the irony in their rhetoric and navigated it through their legal double consciousness—expressed by their appeals to universalist conceptions of human rights and international solidarity.

Conclusion

While explicating the 1951 Refugee Convention's colonial origins and its continued impact on (post)colonial populations today, Chimni disavows what critics sometimes argue follows inevitably from TWAIL—international legal nihilism. In this vein, he advocates for "a creative and imaginative use of existing international law and institutions to further the interests of the 'wretched of the earth', even as we underline [international law's] class character" (2004). My project is, similarly, an act of hope: certainly not in legal institutions as they are, but instead in the possibility of resistance and reimagining by actors who are positioned both within and outside of them. From history, we can glean frameworks through which to probe refugee law's fundamental paradox—and, thereby, through which we can work to ensure that asylum seekers such as Manuel receive lifesaving legal status.

I am currently deciding how I want to proceed. I can see several papers emerging from this project: one can focus on a granular analysis of the various actors present within specific meetings, one can focus on the Cold War as a historical juncture in the development of international refugee and human rights law, and another still can focus on "legal double consciousness" as a "weapon of the weak" in international refugee law. This paper provided me with an opportunity to sit down and detail my theoretical framework at length, as well as to put it to the test by way of analyzing a sample of archival sources which address the colonial applicability clause directly.

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