

Understanding the Protection Framework of Refugees

Paul NDAHAYO

Department of Political and Administrative Studies, University of Zimbabwe, P.O. Box MP 167, Mount Pleasant, Zimbabwe

Abstract:

In many parts of the world, people are being displaced in a large number. This is due to the persecution, serious human rights abuses, armed conflicts, civil strife, and natural calamities that they encounter in their countries of origin. Ethnic cleansing, religious and tribal hatred and indeed struggles for political and economic power between various factions become the main reasons for people to go into exile and become refugees. It is important that refugees and people who receive them understand very well their legal protection framework.

Keywords: Protection, Refugees, Obligations

1. Definition of a refugee

The 1951 UN convention relating to the status of refugees defines a refugee as any person who:

“Owing to a well – founded fear of being persecuted for reasons of race, religion, nationality membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear is unwilling to return to it”ⁱ.

Initially, this definition limited application of the Convention to the refugee who acquired status as a result of events occurring before 1 January 1951. Signatory states were given the option of limiting its geographical application to Europe. As new refugee groups emerged, it became increasingly necessary to adapt the Convention in order to make it applicable to new refugee situations. In 1967, a Protocol was introduced which abolished the 1951 dateline making the Convention truly universal.

As G. Goodwin-Gill (1990:6) put it, this definition is of universal application, containing neither temporal nor geographical limitations. The substantive or ideological criteria are nevertheless a significant restriction on the scope of refugees ‘strictly so- called’, who are required to establish a well –founded fear of persecution on the stated grounds. In other words, this means that the receiving country should be satisfied beyond reasonable doubt that there are sufficient grounds to justify the fear of persecution. These grounds should be based on race, religion, ideology, political opinion or nationality.

According to this Convention, refugees are identifiable by their possession of four characteristics. They are outside their country of origin; they are unable or unwilling to avail themselves of the protection of that country, or to return there; such inability or unwillingness is attributable to a well-founded fear of being persecuted; and the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.ⁱⁱ

Regional instruments have also been adopted to further improve the situation of recognised refugees. The Organization of African unity shaped the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The Convention, passed in the wake of a decade of refugee crisis in Rwanda, Sudan, Eritrea, and Zaire (currently DRC), borrowed from earlier international statutes but then added to them, broadening the scope of who is a refugee and how the displaced should be treated.

This Convention has expanded the definition of a refugee to people who are compelled to leave their country not only as a result of persecution but also:

“Owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality”ⁱⁱⁱ.

This broader definition of a refugee has been of particular importance in situations where large numbers of people have been forced to flee and when it is impractical to examine individual claims for refugee status. The OAU Convention has subsequently inspired other new refugee legislation around the globe and as such has itself become a major landmark in the evolution of international law governing uprooted people. It inspired the 1984 Cartagena Declaration covering thousands of refugees in Latin America.

The Cartagena document expanded the definition of a refugee to include persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, internal conflict, massive violations of human rights or other circumstances which have seriously disturbed public order. Although, not formally binding, the Cartagena Declaration on refugees has become the basis of refugee policy in the region, and has been incorporated into the national legislation of a number of states.

It is worth noting that the 1969 OAU Convention governing the specific aspects of refugee problems in Africa was the first legal instrument to specifically include the now universally accepted principles of voluntary

repatriation.

The definitions of the OAU and the Cartagena Declaration have filled the gap left by the 1951 convention in that they brought about international protection to a large number of people who are forced to move for a complex range of reasons such as widespread violation of human rights abuses, generalised violence, foreign aggression and events seriously disturbing public order in either part or the whole country. They also have particular importance in situations of massive influx where it is generally impractical to examine on case-by-case basis refugee status.

2. Legal rights of a refugee

The 1951 UN Convention lists the principal rights which contracting states undertake to grant refugee status. These rights are subject to exceptions related to each country's particular requirements. According to Sadouddin Aga Khan (1978), these rights may be grouped under four categories: general provisions, juridical status, gainful employment, welfare and administrative measures.^{iv}

The 1951 UN Convention binds contracting states to grant holders of refugee under their jurisdiction a number of economic and social rights in order to preserve the human dignity of the refugee. Thus, the personal status of a refugee shall be governed by the law of the country of his domicile or if he has no domicile by the law of the country of his residence.^v Refugees should therefore receive at least the same rights and basic help as any other foreigner who is a legal resident, including certain fundamental entitlements of every individual. They have basic civil rights including the freedom of thought, of movement, and freedom from torture and degrading treatment.

Similarly, economic and social rights apply to refugees as they do to other individuals. Every refugee should have access to medical care. Every adult refugee should have the right to work. No refugee child should be deprived of schooling.

Article 26 of the 1951 UN Convention proclaims the right of refugees to choose their place of residence and to move freely within the territory of the country concerned. Article 28 provides for the issue of a travel document that is recognised by all the states signatory to the convention.

In certain circumstances, such as large scale inflows of refugees, asylum states may feel obliged to restrict certain rights such as freedom of movement, the freedom to work, or proper schooling for all children. The international community should fill such gaps, wherever possible. In other words, when there are no other resources available from government of the country of asylum or other agencies, UNHCR provides assistance to refugees who cannot meet their own basic needs. The assistance may be in the form of financial grants, food, and equipment such as kitchenware, tools, sanitation and shelter; or in programs to establish schools or clinics for refugees who are living in a camp or other communal groupings. UNHCR makes every effort to ensure that refugees can become self-sufficient as swiftly as possible.

Article 16 (1) of the 1951 UN Convention gives to refugees the right to have access to courts. It stipulates that "a refugee shall have free access to the courts of law of the territory of all contracting states". It also provides that "a refugee shall enjoy in the contracting state in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance.

3. Legal obligations of refugees

As stipulated in article 2 of the 1951 UN Convention every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order. In this case, host countries have the right to treat refugees like other aliens and citizens if they break the law.

To put an emphasis on this point, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa states that "Every refugee has duties to the country in which he finds himself.. He shall also abstain from any subversive activities against any Member state of the OAU."^{vi} In the light of article 3 (2) of the same Convention signatory states undertake to prohibit refugees residing in their respective territories from attacking any Member State of the OAU, by any activity likely to cause tension between member states, and in particular by use of arms, through the press, or by radio. In most cases, States have failed to uphold these commitments.

This provision helps host countries to prevent refugees from causing insecurity in their country of origin, to maintain peace and security, and to protect their nationals. It also prevents tensions among member states of the OAU. But as experience has it, refugees have always attacked their countries of origin in the form of a rebellion from host countries, member states of the OAU.

4. Protection of refugees

The lack or denial of the protection is a principal feature of today's refugee, and it is for international law, in turn, to substitute its own protection for that which the country of origin cannot or will not provide.

The international protection of refugees is a *framework for promoting and defining the rights of people who have been forced to sever links with their home country*^{vii}. For this task to be done accurately, the League of Nations created the International Refugee Organisation (IRO). The IRO' mandate was to protect refugee groups scattered throughout Europe in the aftermath of World War II. The IRO was replaced by Office of the United Nations High Commissioner for Refugees (UNHCR) in 1951. Its statute, adopted by the General Assembly resolution in December 1950, outlines the responsibilities of the office which are "providing international protection... and ... seeking permanent solutions to the problems of refugee" by way of voluntary repatriation or assimilation in new communities.^{viii}

The statute expressly provides that "the work of High commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.^{ix} Of the two functions, the provision of international protection is of primary importance, for without protection, such as intervention by the office to secure admission of refugees; there can be no possibility of finding lasting solutions.

Daily protection activities are necessarily dictated by the needs of refugees, but the statute of the UNHCR and the 1951 UN Convention give a summary of protection aspects. Direct protection activities, including intervention on behalf of individuals or groups, involve protection of the refugee's basic human rights, for example, non-discrimination, liberty, and security of the person.^x

UNHCR is also concerned specifically with the following: the prevention of the return of refugees to a country or territory in which their life or liberty may be endangered; the determination of refugee status; the granting of asylum; the prevention of expulsion; the issues of identity and travel documents; the facilitation of voluntary repatriation; the facilitation of family reunion; the assurance of access to educational institutions; the assurance of the right to work and the benefit of other economic and social rights; the facilitation of naturalisation. Of these, the first four, together with the principle of *non-refoulement* stands as the *sine qua non* of the search for permanent solutions.^{xi}

With regard to basic standards deriving from general international law, certain provisions of the 1966 Covenant on human rights are indicative of standards going beyond the purely conventional regime. Article 2 (1) of the covenant on Civil and Political Rights for example, obliges states to respect and to ensure the rights declared to " all individuals, within its territory and subject to its jurisdiction".^{xii} The same article elaborates a principle of non- discrimination in broad terms, including national or social origin; birth or other status, within the list of prohibited grounds of distinction.

Article 4 (1) permits derogation in certain circumstances (derogation is permitted in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed), and contains a narrow statement of the principle of non-discrimination, which would allow states to distinguish between nationals and aliens.^{xiii}

Nevertheless, any measures in derogation must be consistent with states' obligations under international law, and no derogation is allowed from those provisions which guarantee the right to life, or which forbid torture or inhuman treatment, slavery, servitude, or conviction or punishment under retroactive laws. The right to recognition as a person before the law and the right to freedom of conscience, thought, and religion are also declared in absolute terms.^{xiv}

The precise standard to be accorded to refugees will vary, depending on whether the state in which they find themselves has ratified the 1951 UN Convention and its 1967 Protocol or any other relevant treat/convention. Furthermore, it may also depend on whether the refugee is lawfully or unlawfully in the territory of the state, or has been formally granted a refugee status. For those rights which allow no discrimination between national and alien, whether the latter be a migrant, visitor, refugee, or asylum-seeker, and whether lawfully or unlawfully in the state, the obligations of respect and protection are incumbent on states, irrespective of ratification of treaties, and refugees ought in principle to benefit, whether admitted on a temporary, indefinite, or a permanent basis.^{xv}

In practice therefore, this objective may remain elusive, particularly where the host country is not able or not willing to take the necessary measures. Refugees have thus fallen victim to external, armed aggression; to attacks by pirates resulting in murder, rape, abduction, and robbery; to abandonment when in distress at sea; to actual and potential threats to life and security by paramilitary death squads; and to arbitrary detention and torture.^{xvi} Under these circumstances, the exercise of protection becomes uneasy and delicate task for both UNHCR and host countries. Sometimes international community makes appeals for action, but practical results become harder to obtain.

Regional and Non-Governmental Organizations can also protect refugees directly and indirectly. The Organization of African Unity(OAU), the Organization of American states(OAS), and the European Union(EU) have put into place, among others, instruments such as the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa, the African Charter on Human and Peoples'rights, the American convention on Human Rights, the 1984 Cartagena Declaration in Latin America, the European Convention on Human Rights,

the European Agreement on Social security and its supplementary Agreement together with the Protocol concerning the Protection of refugees and the European Agreement on Transfer of Responsibility for refugees.

With regard to Non – Governmental Organizations, account should be taken of the work of the International Committee of the Red Cross, of National Cross and Red crescent Societies, Amnesty International, Human Rights watch, Medecins Sans Frontieres, Care International, Jesuit Refugee Service, Save the Children Federation (SCF, USA), Save the Children Fund (SCF, UK), Norwegian People’s Aid (NPA), Redd Barna, Lutheran World Federation (LWF), World Vision, CIDA, the World Food Program, World Health Organization (WHO), UNICEF, UNDP, and mainly the UNHCR.

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- ⁱⁱⁱ Article 1 of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.
- ^{iv} Lectures on legal problems relating to refugees and displaced persons given at the Hague Academy of International law, August 1976.
- ^v Ibid.
- ^{vi} Article 3, OAU Convention op. Cit.
- ^{vii} UNHCR, Africa Refugee Day, 20 June 1995.
- ^{viii} Paragraph 1 of the UNHCR Statute
- ^{ix} Ibid., Paragraph 2.
- ^x Goodwin, G., Op. Cit., p. 136
- ^{xi} Ibid., p. 137
- ^{xii} Ibid.
- ^{xiii} Ibid.
- ^{xiv} Article 4(2). Cf. Annexe III, Elles, International Provisions protecting the Human Rights of Non-Citizens: UN doc. E/CN.4/sub.2/392/Rev.1(1980)57.
- ^{xv} Goodwin-Gill, G., Op. Cit., p. 139
- ^{xvi} For more information on these aspects see Goodwin-Gill, op.cit., p. 139

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