
The Legal Protection of Refugee and International Security

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Abstract: The term “refugee” in international law is characterized, on the one hand, by the principle of State sovereignty and, on another, by competing humanitarian principles deriving from general international laws and treaties. The study of protection of refugee invites a look not only at States’ obligations regarding admission and treatment after entry, but also at the potential responsibility under the international law of the State, whose conduct or omissions cause an outflow. In general sense the community of nations is responsible for finding solutions and providing international protection to refugee. This special mandate was entrusted to United Nations High Commissioner for Refugees (UNHCR), the agency committed to save and protect human lives, rights and supporting refugees, forcibly displaced communities and stateless people. At the beginning of the 21st century, protecting refugees means maintaining solidarity with the world’s most threatened, while finding answers to the challenges confronting the international system that was created to do just that. The aim of this article is to describe the foundations and the framework of international refugee law, to define refugees and protection of refugees; as well as to provide a brief analysis of the changing migration and asylum dynamics in the region and outline some of the main challenges arising in this context.

Keywords: Legal Protections, Refugee, Freedom of Movement, International Security, Managing Borders

1. Introduction

The term “refugee” is a term of art, that is, a term with a content verifiable according to principle of general international law. In ordinary usage, it has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. The destination is not relevant; the flight is to freedom, to safety. Implicit in the ordinary meaning of the word “refugee” lies an assumption that the person concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight. [1]

Refugees have existed as long as history, but an awareness of the responsibility of the international community to provide protection and find solutions for refugees dates only from the time of the League of Nations and the election of Fridtjof Nansen as the first High Commissioner for Russian refugees in 1921. [2]

The International Nansen Office for Refugees created by the League of Nations Resolution of 30 September 1930, began active operations on April 1, 1931. The League of

Nations defined refugees by categories, specifically in relation to their country of origin. Nansen’s mandate was subsequently extended to other groups of refugees, including Armenians in 1924, as well as Assyrian, Assyro-Chaldean, and Turkish Refugees in 1928. During the League of Nations period (1921-1946) several institutions were created to perform some or all of the tasks of the High Commissioner for Refugees: the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees coming from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946) and the Intergovernmental Committee on Refugees (1938-1947). [3]

A further international legal instrument of that period is the resolution which the Intergovernmental Committee on Refugees (IGCR) adopted in Evian on July 14, 1938 to define its functions. [4] Its primary objective, “facilitating involuntary emigration from Germany (including Austria)”. [5]

In February 1939 the Member States of the IGCR appointed as Director the newly appointed High

Commissioner for Refugees, whose headquarters were likewise in London. The IGCR ended its activities on 30 June 1947, six months after the Office of the High Commissioner closed. During that time the IGCR also protected the “Nansen refugees”. [6]

A major review at the Bermuda Conference in April 1943 expanded the mandate to include “all persons, wherever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs.” [7]

Since the early 1990s, the United Nations and the international aid community have focused on refugee emergencies, delivering humanitarian assistance to refugees and war-affected populations, and encouraging large scale repatriation programmes in high-profile regions such as the Balkans, the Great Lakes and, recently, Darfur and Chad. Almost two-thirds of the world’s refugees, however, are trapped in protracted refugee situations. Such situations – often characterized by long periods of exile, stretching to decades for some groups – occur on most continents in a range of environments including camps, rural settlements and urban centers. More recently, and especially since 11 September 2001, the United States and its allies have viewed international security policy through the prism of ‘failing states’, where a breakdown of institutions and governance has resulted in a vacuum of authority, leading to conditions where warlordism, terrorism and chronic instability flourish. A crucial but largely unrecognized component of peace-building processes in failing states in regions such as the Horn of Africa and West Africa is the relationship among chronic and recurring refugee flows, regional and intrastate conflict and economic underdevelopment. Recognizing the link between the related problems of failed states and protracted refugee situations is an important first step in formulating an effective response to these sources of potential instability. [8]

Up until 1950 the League of Nations, and thereafter the UN, established and dismantled several international institutions devoted to refugees in Europe. The International Refugee Organization (IRO) was the last to precede the United Nations High Commissioner for Refugees (UNHCR). The IRO was created in 1947 to deal with the problem of refugees in Europe in the aftermath of the Second World War and was to be terminated by June 30, 1950. [9]

The Office of the UNHCR succeeded the IRO as the principal UN agency concerned with refugees, taking account of the impact of developments within the UN, such as article 14 (1) of the Universal Declaration of Human Rights (‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’). The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217A. [10] Subsequent regional human rights instruments have elaborated on this right, guaranteeing the “right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions”)

and the 1967 Declaration on Territorial Asylum. [11] The bases for an international legal concept of the refugee are thus to be found in treaties, State and United Nation practice, and in the Statute of the UNHCR. [12]

In the 1980s and ’90s, substantial changes came about in the environment in which international refugee protection was to be realized. The number of refugees grew exponentially— no longer as a product of colonialism but due to the steep rise in internal interethnic conflicts in the newly independent states. And the refugee population steadily increased from a few million in the mid-1970s to some ten million by the late 1980s. In 1995 the number of persons needing assistance rocketed to around twenty-five million. The conflicts were fuelled by superpower rivalry and aggravated by socioeconomic problems in developing countries. Solutions to refugee problems became even more elusive— whether in Afghanistan, in the Horn of Africa, or in Southern Africa. To give some examples, 2.5 million people were displaced or fled to Iran from Northern Iraq in 1991; in former Yugoslavia the number of refugees, displaced and others assisted by UNHCR, exceeded four million; and the Great Lakes crisis of 1994 forced three million people to flee their countries. [13]

The field of UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was established. Briefly, the movement has been from the Statute through good offices and assistance, to protection and solutions. The class of beneficiaries has moved from those defined in the Statute, through those outside competence assisted on good offices basis, those defined in relevant resolutions of the General Assembly and directives of the Executive Committee, arriving finally at the generic class of refugees, displaced and other persons of concern to UNHCR. [14]

Finally, Migration dynamics in the Western Balkans (for the purpose of this paper, the Western Balkans includes Albania, Bosnia and Herzegovina, Croatia, Kosovo (UNSCR Resolution 1244/99), Montenegro, Serbia and the Republic of North Macedonia), have undergone fundamental changes during the past years. Countries in the region still have to cope with the consequences of large-scale displacement of the 1991-95 conflicts. Social and economic challenges continue to trigger the movement of nationals from the Western Balkan countries within and from the region. However, the gradual political stabilization has transformed the Western Balkans into a region of transit and increasingly also destination of migrants and refugees from outside the region, including vulnerable groups such as victims of trafficking, unaccompanied and separated children or women at risk. [15]

2. The Legal Framework of the International Refugee Protection System

The refugee in international law occupies a large space

characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law and from treaty. Refugee law nevertheless remains an incomplete legal regime of protection, imperfectly covering what to be a situation of exception. It is incomplete so far as refugees and asylum seekers may still be denied even temporary refuge or temporary protection, safe return to their homes, or compensation. [16]

The controlling international convention on refugee law is the 1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Optional Protocol relating to the Status of Refugees (1967 Optional Protocol). [17] The Convention enabled States to make a declaration when becoming party, according to which the words “events occurring before 1 January 1951” are understood to mean “events occurring in Europe” prior to that date. This geographical limitation has been maintained by a very limited number of States, and with the adoption of the 1967 Protocol, has lost much of its significance. [18]

The 1951 Convention establishes the definition of a refugee as well as the principle of non-refoulement (the principle of non-refoulement prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture. The possible application of non-refoulement or an analogous principle of refuge to those outside the 1951 Convention/1967 Protocol is also considered, as is the relationship between non-refoulement and asylum) and the rights afforded to those granted refugee status. Although the 1951 Convention definition remains the dominant definition. The regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

The 1967 Refugee Protocol is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition. Together, the Refugee Convention and Protocol cover three main subjects:

The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status;

The legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or refoulement, to a territory where their lives or freedom would be threatened; and

States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention.

By acceding to the Protocol, States agree to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

Convention refugees are thus identifiable by their possession of four elemental characteristics: (1) they are

outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion. [19]

The States which acceded to or ratified the 1951 Convention agreed that the term ‘refugee’ should apply, first to any person considered a refugee under earlier international agreements; and, secondly, to any person who, broadly speaking, qualifies as a refugee under the UNHCR Statute.

The 1951 Convention does not define how States Parties are to determine whether an individual meets the definition of a refugee. Instead, the establishment of asylum proceedings and refugee status determinations are left to each State Party to develop. This has resulted in disparities among different States as governments craft asylum laws based on their different resources, national security concerns, and histories with forced migration movements.

Despite differences at the national and regional levels, the overarching goal of the modern refugee regime is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them. Governments normally guarantee the basic human rights and physical security of their citizens. But when people become refugees this safety net disappears. Refugees fleeing war or persecution are often in a very vulnerable situation. They have no protection from their own state - indeed it is often their own government that is threatening to persecute them. If other countries do not let them in, and do not protect and help them once they are in, then they may be condemning them to an intolerable situation where their basic rights, security and, in some cases their lives, are in danger. [20]

The 1951 Convention and the 1967 Protocol remain the principal international instruments benefiting refugees, and their definition has been expressly adopted in a variety of regional arrangements aimed at further improving the situation of recognized refugees. It forms the basis for article I of the 1969 OAU Convention on Refugee Problems in Africa. While incorporating the existing 1951 Convention refugee definition, the OAU Convention added a paragraph specifying that the term “refugee” shall also apply to every person who, 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, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. In other words, the notion of “refugee” was broadened beyond victims of generalized conflict and violence. The OAU Convention was also a significant advance from the 1951 Convention in its recognition of the security implications of refugee flows, in its more specific focus on solutions— particularly on voluntary repatriation, in contrast to the integration bias of the 1951 Convention— and through its promotion of a burden-sharing approach to refugee assistance and protection. [21]

Moreover, the refugee crisis in Central America during the

1980s led in due course to one of the most encompassing approaches to the refugee question. The 1984 Cartagena Declaration proposed a significant broadening, analogous to that of the OAU Convention. [22]

A key step in establishing the governance – and governability – of refugee is the establishment of national law based on and in compliance with international law. This is usually accomplished through ratification by states of relevant international human rights instruments and international labour standards, followed by their effective implementation. [23]

The 1951 Convention also protects other rights of refugees, such as the rights to education, access to justice, employment and other fundamental freedoms and privileges similarly enshrined in international and regional human rights treaties. In their enjoyment of some rights, such as access to the courts, refugees are to be afforded the same treatment as nationals while with others, such as wage-earning employment and property rights, refugees are to be afforded the same treatment as foreign nationals.

Despite these rights being protected in the 1951 Convention and under human rights treaties, refugees in various countries do not enjoy full or equal legal protection of fundamental privileges. Ethiopia, for example, made reservations to Articles 22 (public education) and Article 17, treating these articles as recommendations rather than obligations. [24]

Although not a party to the 1951 Convention, Lebanon is host to a large population of refugees, predominantly Palestinians. Restrictive labor and property laws in Lebanon prevent Palestinians from practicing professions requiring syndicate membership, such as law, medicine, and engineering, and from registering property. [25]

The adjudication of asylum claims is reserved to individual States. Although some States, namely those that comprise the Council of Europe, have made an effort to adopt a uniform asylum system, international and regional bodies lack the jurisdiction to adjudicate individual asylum claims. [26] International and regional bodies do, however, adjudicate claims asserting violations of the human rights of refugees and asylum seekers. Furthermore, the municipal law practice of non-extradition of political offenders is one antecedent to current principles protecting refugees from return to a State in which they may face persecution. In some countries, the principle of asylum for refugees is expressly acknowledged in the constitution. [27]

In others, ratification of the 1951 Convention and the 1967 Protocol has direct effect in local law, while in still other cases, ratifying States may follow up their acceptance of international obligations with the enactment of specific refugee legislation or the adoption of appropriate administrative procedure. The Preamble to the Constitution of France acknowledges the principle of asylum, while a 1952 law declares that refugees within the competence of the Office shall include those within the mandate of UNHCR, as well as those within article 1 of the 1951 Convention. Canada also adopted the Convention definition in the 1976

Immigration Act. [28] The Federal Republic of Germany has both constitutional and enacted law provisions benefiting refugees, both of which were amended in 1992/93. In other countries, the admission of refugees and special groups is often decided by the government in the exercise of broad discretionary powers. There are a number of States who host large refugee populations but who are either not a party to the 1951 Convention and 1967 Optional Protocol or who do not have laws or policies in place to address asylum claims. These States include a large number of countries in the Middle East and Asia with significant refugee populations, including Egypt, Jordan, Syria, India, Malaysia, Lebanon, and Pakistan. [29] In such cases, refugee status determinations are carried out by field offices of the UNHCR. [30]

Finally, refugees within the mandate of UNHCR, and therefore eligible for protection and assistance by the international community, include not only those who can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain grounds (so-called ‘statutory refugees’), but also other large groups of persons who can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin. The agency does this in several ways: it ensures the basic human rights of uprooted or stateless people in their countries of asylum or habitual residence end that refugees will not be returned involuntarily to a country where they could face persecution. Longer term, the organization helps refugees find appropriate durable solutions to their plight, by repatriating voluntarily to their homeland, integrating in countries of asylum or resettling in third countries.

3. International Migration and Security

International migration is the movement of people across borders to reside permanently or temporarily in a country other than their country of birth or citizenship. The United Nations (UN) estimates that in 2013 some 232 million people were living outside their country of birth or citizenship for more than one year. This represents just over three per cent of the world’s population and would rank such migrants, if living within the same territory, as the world’s fifth largest country. While the number of international migrants has grown steadily, that three per cent proportion of world population has remained stable over the past 40 years. [31-34]

In current rates if international migration continue, the number of international migrants worldwide could reach 405 million by 2050. [35] While South-North movement patterns previously dominated the migration landscape, today international migrants move in equal share from developing to developed countries and between developing countries. [36] Migration is also no longer only unidirectional and permanent; it is increasingly multiphase and multidirectional, often occurring on temporary or circular basis. [37]

Migration today is motivated by a range of economic, political and social factors. Migrants may leave their country of origin because of conflict, widespread violations of human

rights or other reasons threatening life or safety. The UN global estimates of international migrants count those living outside their country of birth or citizenship for more than one year. While this estimate includes migrant workers, migrants in an irregular situation and refugees, it does not account for the millions of persons worldwide who migrate on a short-term temporary or seasonal basis to and from another, usually neighboring country for a few weeks or months each year. However, many of these persons are included in legal definitions of “migrant workers”. ICRMW is very clear that states have the right to control their borders, including the establishment of criteria governing admission of migrant workers and members of their families. This balance is reflected in Article 79 of ICRMW: “Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention”. Under Article 34 of ICRMW, migrants also have a duty to comply with the laws and regulations of the states of transit and destination as well as respect the cultural identity of the inhabitants of the states of transit and destination [38].

With international migration increasing in scope, scale and complexity, more countries are now simultaneously countries of origin, transit, and destination for migration. New forms of partnership and cooperation have emerged to govern migration, including in the context of South-South cooperation and engaging private as well as non-governmental actors. [39] In the absence of sufficient regular migration opportunities, migrants resort to irregular migration channels which place them at risk during transit and upon arrival in countries of destination. Many migrants, particularly those who are in an irregular situation and those working in precarious sectors, encounter human rights violations, labour exploitation including poor working conditions and low wages, trafficking and sexual abuse, violence, lack of social protection, discrimination and xenophobia. Thus, for too many migrants, their human development aspirations and potential remain unfulfilled, and their important contributions to the host society go unrecognized. Regardless of status, migrants, and in particular those who are most vulnerable, therefore require equal and specific inclusion in the development agenda at global, regional and national levels. [40]

Migration dynamics in the Western Balkans have undergone fundamental changes during the past years. However, the gradual political stabilization has transformed the Western Balkans into a region of transit and increasingly also destination of migrants and refugees from outside the region, including vulnerable groups such as victims of trafficking, unaccompanied and separated children or women at risk. In 2012 the asylum applications from the Western Balkan region in the EU27 + countries (including Switzerland and Norway) amounted to more than 30,000 which constituted almost 9% of all asylum applications. [41]

The recognition rates are low and rejected asylum-seekers are returned to their countries of origin under readmission agreements the EU and its Member States concluded with the countries in the Western Balkans. [42]

Long-term refugee populations are a critical element in ongoing conflict and instability, obstruct peace processes and undermine attempts at economic development. Recurring refugee flows are a source of international conflict: they generate instability in neighbouring countries and trigger interventions by host states and regional actors, and refugee camps can serve as bases and sanctuaries for armed groups that are sources of insurgency, resistance and terrorist movements. The militarization of refugee camps creates a security problem for the country of origin, the host country and even internationally as graphically illustrated by the situation in Eastern Zaire/Democratic Republic of Congo (DRC) in 1994–96. [43]

Other security concerns, such as arms trafficking, drug smuggling, trafficking in women and children, and the recruitment of child soldiers and mercenaries, are known to occur in camps hosting protracted refugee situations. The prolongation of refugee crises also has indirect security implications. Tensions between refugees and the local population often arise because refugees are perceived to receive preferential treatment, especially as access to local social services such as health and education become increasingly limited as a result of structural adjustment programmes and cut-backs Protracted Refugee Situations. If assistance to the camps is reduced, some refugees may pursue coping strategies such as banditry, prostitution and petty theft, which become additional local security concerns. In this way, protracted refugee situations are no less dangerous sources of instability than other more conventional security threats, and should be paid due attention by the US and other Western donor governments, relevant regional powers and multilateral security organizations. [44]

Many host governments now require all refugees to live in designated camps, in contrast to earlier policies of permitting self-settlement of refugees, and place significant restrictions on refugees seeking to leave the camps, either for employment or educational purposes. This ‘warehousing’ of refugees has significant human-rights and economic implications. As highlighted by the recent work of the US Committee for Refugees, sexual and physical violence in refugee camps is a significant concern. More generally, the prolonged encampment of refugee populations has led to the violation of a number of rights contained in the 1951 UN Convention Relating to the Status of Refugees, including freedom of movement and the right to seek wage-earning employment. Furthermore, Protracted Refugee Situations: Domestic and international security implications containing refugees in camps makes them wholly dependent on international assistance, prevents them from pursuing economic self-reliance, and precludes them from contributing to the development of their host communities and states. In cases where refugees have been allowed to engage in the local economy, it has been found that refugees can ‘have a

positive impact in the local economy by contributing to agricultural production, providing cheap labour and increasing local vendors' income from the sale of essential foodstuffs. [45]

4. Conclusion

Overall, protracted refugee situations present significant and mounting challenges to security, human rights and development. Given the interaction between these concerns, the full significance of protracted refugee situations for host states in Africa and Asia becomes more apparent. There are also important political reasons for Western states to address protracted refugee situations. Apparently insoluble physical and economic insecurity has led large numbers of asylum seekers and migrants to move to Western countries, often using illegal means of entry, including smuggling and trafficking organisations. This has contributed to the asylum crisis in the West and has moved this issue high up the international political agenda. It is therefore very much in the national interest of Western policymakers to give greater priority to protracted refugee situations in regions of chronic instability. [46]

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