

An introduction to international, regional and national refugee law and protection: Practical challenges in international relations and globalization

**Lecture by Judy Wakahiu¹ at The Jesuit Hekima Peace College, Nairobi
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INTRODUCTION

The origin of refugee rights are closely inter twined with the emergence of systems of international human rights

International aliens law general principles:

- Recognized the special vulnerability which attend persons outside the boundaries of their nation states
 - It was the first legal system to deny the absolute right of states to treat persons within their jurisdiction in whatever manner deemed appropriate
- Provided aliens with
- Recognition of alien as juridical personality
 - Respect for life and physical integrity
 - Personal and spiritual liberty within socially bearable limits
 - No political rights!
 - Adequate compensation of denial of property
 - Granted fair and non discriminatory judicial system to claim these rights

League of Nation

- Strengthen the alien's laws by introducing collectivized surrogacy i.e. direct protection by the international community for those whose interest are not adequately safeguarded by national governments
- States became accountable to International Community in respect to Human Rights
- Dealt with refugees from Russia and Armenia (2 million) in 1917 and 1926
- Refugee we seen as unprotected persons, and an anomaly in international law
- They were also seen as a passing phenomena
- 1928 – refugee allowed to access welfare system and non restriction in foreign labor granted
 - reshaped the substance of the human rights guaranteed to aliens such as waiver of reciprocity and guaranteed basic civil and economic rights.

¹ Judy Wakahiu is the Director of Refugee Consortium of Kenya- a refugee legal aid and advocacy organization.

- ♦ **1933- principle of non refoulement (not to be returned)**
- ♦ **Freely accepted international supervision of national compliance with the human rights**
- ♦ **1936- provisions on status of refugee comings from Germany which provided**
 1. identity certificates
 2. protection from expulsions
 3. recognition of personal status
 4. access to court
- **1947: Creation of international Refugee Organization by United Nations**
- **1947- 1951 the International Refugee Organization relocated/ resettled over a million to Americas, Israel, South Africa and Australia**
- **1950 the UN proposed assimilation of other refugees who could not be resettled.**
- **1951- resurrected the codification of legally binding refugee rights**
- **1951 convention introduced new rights such as**
 - a. Refugees not to be penalized for illegal entry
 - b. Exemption from exceptional measures applied against nationals
 - c. Right to transfer externally acquired assets to countries of resettlement
 - d. Right to seek asylum (escape) to be accepted (not to be returned) and to be sheltered (provided with asylum).
 - e. Protection against discrimination
 - f. Religious freedom
 - g. Access to courts
 - h. Basic liberties of a refugees

1967 protocol

- Abolished obligation by states to restrict themselves to protection on a geographical ground e.g before 1951 (thus refugees from Europe only)

As a starting point, it is necessary to define the term refugee so as to be able to tell who the Refugee legislation, whether international or national, applies to. There are various conventions and laws governing refugee protection. These include:

- The 1951 United Nations convention relating to the status of refugees
- The 1967 Protocol relating to the status of refugees
- Regional instruments such as the 1969 OAU convention governing specific aspects of the refugee problem in Africa.

Who is a refugee?

Under the UN convention, a refugee is defined as any person who **as a result of events occurring before 1 January 1951 and 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 as a result of such events, is unable or, owing to such fear is unwilling to return to it.²

In 1967 the Protocol to the 1951 UN Convention came into place to address the question of **'new' refugees**. Since the UN convention covered only persons who had become refugees as a result of events occurring before 1 January 1951, there was a need for law to cover the new refugee situations that had arisen after the convention was adopted. The definition herein of the term refugee remained pretty much the same as under the Convention, save that the dateline was eliminated.

The 1969 OAU convention served to bring in a new element in the definition of who a refugee is. In addition to the definition under the UN convention, **refugee was also defined as 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.³**

The framework of international refugee law is based upon a desire to protect people who are vulnerable to human rights violations. Refugees are vulnerable to abuses of their rights since they are people who have lost the protection of their countries of nationality. One of the most fundamental provisions of refugee law is that any person claiming asylum may not ordinarily be sent away without careful investigation of their need for protection. This is the principle of *non refoulement* which will be discussed later in more detail.

Kenya is a state party to all the above mentioned conventions and other international human rights instruments. Until early this year, Kenya had no domestic legislation regulating the protection of refugees. Attempts to have a Bill put through in parliament began as early as 1991. Prior to the enactment of the Act, refugees were treated under the Immigration (Amendment) Act of 1972, which is restrictive and aims to exclude rather than grant protection.

Historical Background of refugee protection and organizations

² A 1 (2) of the 1951 UN Convention on the Status of Refugees

³ Article I (2) The OAU convention.

The first international co-ordination on refugee affairs was by the League of Nations High Commission for refugees led by Fridtjof Nansen set up in 1921 to assist people who had become refugees in the wake of the Russian Revolution.

1923 saw the mandate of the commission being expanded to include Armenians fleeing the Turkish Asia Minor in 1915 and 1923 due to the Armenian genocide. Following Nansen's death in 1930, the International Nansen Office for Refugees was established to succeed the commission. The rise of Nazism led to establishment, in 1933, of a High Commissioner for Refugees was created. This was an amalgamation of the International Nansen Office and the High Commissioner for Refugees coming from Germany. This ended in 1946 and thereafter, an Intergovernmental Committee was convened and was soon after in 1947 replaced by the International Refugee organization.⁴

The League of Nations was disbanded after failing to prevent the Second World War and the United Nations Relief and Rehabilitation Administration (UNRRA) established to address the plight of the millions of people displaced throughout Europe. This was in 1944. The International Refugee Organization earlier mentioned was created in 1947 by the United Nations. With the demise of this organization also, there was still a need for a refugee agency. Thus in 1951 the Office of the United Nations High Commissioner for Refugees (UNHCR) was created as a subsidiary organ of the general assembly. Its mandate was to provide, on a non-political and humanitarian basis, international protection to refugees and to offer permanent solutions for them.

International protection of refugees begins with securing their admission to a country of asylum, the grant of asylum and respect for their fundamental human rights, including the right not to be forcibly returned to a country where their safety or survival are threatened. It ends only with the attainment of a durable solution.⁵

Key principles governing refugee law

Certain principles cut across all legislation on Refugee law. This includes the 1951 UN convention and its 1967 protocol, the 1969 OAU convention and in this particular case the Refugee Act of Kenya. Other regional instruments across the world also have similar provisions, such as the Cartagena

⁴ Wikipedia and UNHCR study module 1- An introduction to International protection

⁵ An introduction to International protection- protecting persons of concern to UNHCR

Declaration which applies to the Central and Latin American states. These are:

1. Right to seek and enjoy asylum

Under the Universal Declaration of Human Rights, 'Everybody has the right to seek and enjoy asylum' however, the **granting** of asylum is not a right, asylum seekers are therefore allowed the right to fair Refugee Status Determination (RSD) procedures and are exempted from following immigration regulations relating to entry.

'Members states of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees' Article II (1) and;

Article 2 enables member states of the OAU to offer asylum as a peaceful and humanitarian act without the same being construed as a hostile act by the country of origin.

2. The principle of *non-refoulement*

This principle prohibits the return of refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion, and is the cornerstone of international protection. In accordance with human rights law, *refoulement* is never permitted if it would expose the individual concerned to a risk of torture, inhuman or degrading treatment or punishment. This also applies to asylum seekers at the border or in the country of asylum until their status has been determined.⁶

3. Non-discrimination

There is a requirement to treat all refugees in a non-discriminatory manner and maintain standards for treatment of refugees.

4. Concept of burden sharing

The international community eases the burden of first countries of asylum by taking on some of the refugees hosting responsibility. This is particularly so, where there are serious protection concerns for either individuals or groups.

⁶ The 1951 Convention at Article 33 and OAU Convention at Article II(3)

‘...where a member state finds difficulty in continuing to grant asylum it may apply to another in the spirit of solidarity and international co-operation for that other to lighten its burden’ Article 2(4 and 5) of the OAU convention.

Protection responsibility

States have been given the primary responsibility to protect refugees. The Office of the United Nations High Commissioner for Refugees (UNHCR) is mandated to ensure that governments take all measures to protect persons of concern to the UN. The responsibility for states is based on obligations arising from international law. State parties to the 1951 UN convention, the protocol and the OAU convention have obligations in accordance with the provisions of these instruments.

The UNHCR is the only international organization with a specific mandate to protect refugees at the global level. The people known as persons of concern to the UNHCR are listed hereunder:-

- Refugees⁷ and asylum seekers (a person seeking international protection whose claim has not been officially decided on)
- Returnees- these are former refugees or internally displaced persons who return to their country or area of origin, whether spontaneously or in an organized manner. The most crucial aspect of their return is that it has to be voluntary.
- Stateless persons- these are people not considered to be nationals of any state. They are thus without any effective national protection.
- Internally Displaced Persons (IDPs)- these are people forced to flee their homes as a result of armed conflict, internal strife, systematic violations of human rights or natural or manmade disasters and who are within their own country. These, however, only fall under UNHCR’s mandate under certain circumstances.⁸

International protection and its implementation

The legal framework on international protection is composed of international refugee law, international human rights law and in certain circumstances, international humanitarian law and international criminal law.

In Kenya, the international law regime that applies include the United Nations Convention on the Status of Refugees & its 1967 protocol and the 1969 OAU convention governing specific aspects of the refugee problem in Africa. The three have a definition of refugees that is basically the same save

⁷ As defined under the UN Convention and its 1967 Protocol and the OAU Convention

⁸ An introduction to International Protection,p.13-14,2005

for the OAU convention and the 1967 protocol which added new aspects to the definitions.⁹

Exclusion clauses¹⁰

There are certain categories of persons who are expressly excluded from being recognized as refugees and as a result of this cannot be afforded the protection given to refugees.

Articles 1D to 1E of the 1951 convention define the circumstances under which persons who otherwise qualify for refugee status under the inclusion clauses are nevertheless denied such status because they do not need international protection. These provisions apply to:

- Individuals already receiving the protection of the United Nations
- Individuals not in need of such protection such as those who have been recognized by the authorities of another country in which they have taken residence as having the same rights and obligations as nationals in that country.
- Individuals who have committed crimes against peace, war crimes or crimes against humanity and as such are undeserving of UN protection.
- Individuals guilty of acts contrary to the purposes and principles of the United Nations.
- Individuals who have committed serious non-political crimes outside the country of refuge prior to their admission to that country as a refugee.

Cessation clauses¹¹

Refugee status comes to an end when the concerned person:

- Has voluntarily re-availed himself to the protection of the country of his nationality
- Having lost his nationality voluntarily reacquires it
- Has voluntarily re-established himself in the country of nationality
- He can no longer, because the circumstances leading to his refugee status have ceased to exist, continue to refuse to avail himself to the protection of his country of nationality.

⁹ See page 1 supra

¹⁰ Article 1 (F) of the 1951 convention, section 4 of the Refugee Act of Kenya

¹¹ Article 1 (C) of the 1951 Convention, Article 1 (4) of the OAU Convention and Section 5 of the Refugee Act

- Acquires a new nationality and enjoys the protection of that country.

Refugee Status Determination (RSD) Procedures

In order for a state to fulfil its obligations towards refugees, it must first identify who a refugee is. It is primarily the responsibility of the government of a country to determine whether someone falls within the applicable refugee definition within its jurisdiction. Convention refugees are individuals determined to be refugees by the authorities of states that have acceded to the 1951 convention and its protocol. As such they are entitled to claim the rights and benefits that those states have agreed to accord refugees.

UNHCR is also mandated to carry out RSD. In some instances, states may ask UNHCR to do so if the state has yet to establish suitable procedures. It also carries out RSD in countries that are not party to any of the international refugee instruments.

Eligibility as refugees may also be determined on a group basis. Such refugees are known as prima facie refugees and usually they arrive rapidly in large numbers due to the same reasons for flight.¹²

In RSD, there are 2 stages, mainly ascertaining the relevant facts of the case and applying to those facts ascertained, the definitions in the conventions to determine the recognition of persons as refugees.

In RSD, the inclusion, cessation, cancellation and exclusion clauses come into play.

Durable Solutions

The mandate of the UNHCR, the primary international organization dealing with refugees is to offer protection to persons of concern to them and to provide durable solutions to the refugee problem.

Durable solutions enable a lasting end to the refugee status by clothing refugees with the vestments of citizenship and national protection. They are also used as tools of protection and means of responsibility sharing. They include local integration, voluntary repatriation and resettlement.

Local integration

¹² An introduction to International Protection- protecting persons of concern to the UNHCR p. 62

Under local integration, a refugee becomes socially, economically and legally integrated in the first country of asylum. Local integration refers to permanent stay in the first country of asylum.¹³

Voluntary Repatriation

This envisages the willful return of a refugee to the country of origin.¹⁴

Resettlement

A refugee moves from the first country of asylum and takes up residence and citizenship in another country that has agreed to receive him. Essentially, therefore resettlement takes place by the will of the receiving sovereign state.¹⁵

National Legislation

Many states simply adopt the refugee definition found in the relevant international instruments to which they are parties. There is, however, nothing to prevent a country adopting a refugee definition that is wider than that required under its international obligations.

Kenya, as earlier stated is a signatory to the 1951 UN Convention and its 1967 Protocol and the 1969 OAU Convention. However, Kenya is a dualist state and has to domesticate the instruments into the national laws before they become binding. This was done early this year when Kenya finally enacted Refugee law. Prior to this, it was only bound by the conventions on a “gentleman’s agreement’ that because it ratified and because of the ramifications on it in relation to the international community, it would continue to be bound by the instruments. This position changed with the Act coming into place with the domestication of these laws into the Act.

THE REFUGEE ACT OF KENYA

The Act removes the management of refugees from the mandate of the UNHCR and establishes a National Council and a Refugee Directorate that together will have overall responsibility for all refugee matters.

¹³ Article 34 of the Un Convention

Chapter II, 8c of the 1950 Statute of the Office of the High Commissioner for refugees

¹⁴ Chapter II (9) and (8) c of the Statute, Article V of the OAU Convention and Article #5 of the UN convention

¹⁵ The 1950 Statute of the Office of the UNHCR- Chapter II (9and8c)

The Act determines which individuals qualify to be granted refugee status and also sets out circumstances under which persons will be disqualified. It further provides for circumstances under which a person will cease to be a refugee.

Under the Act, every refugee is to be issued with an **identification card** in the prescribed form, and if the need should arise, **travel documents**.

Critically, the Act makes a formal adherence to the 1951 UN Convention Relating to the Status of Refugees as well as the 1967 Protocol, and to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Among some of the rights and freedoms accorded to refugees under the 1951 Convention are the rights of association, rights to ownership of property, identification and travel documents, access to the courts, non-discrimination and the freedom of movement. Additionally, it allows refugees the right to obtain gainful employment, as do other legal aliens.

Notably, the Act provides for *appointed officers* who are appointed by the Minister who may on **reasonable suspicion** of unlawful behaviour or concealment of identity or status, search and/or question any refugee and take finger or foot prints, photographs, x-rays or other electromagnetic ray photographs of any refugee.

There are only three provisions in the Act that are specifically designed to cater for women and children. Per the Act, female refugees may only be searched by female officers or other designated female persons, with a strict regard for decency. Further, measures will be taken to protect women, especially from sexual violence. For children, the Act promises *appropriate protection and care*.

The Act formalises the hitherto de facto **encampment policy** and makes it a punishable offence for a refugee to, without authority, leave and/or reside outside of a refugee-designated area.

Finally, under the Act refugees are obligated to:

- Go to the relevant authorities within reasonable time of entry to explain their Circumstances
- Obtain the prescribed documentation
- Desist from making fraudulent representation during status determination
- Remain within the refugee-designated areas unless otherwise authorized

Comparisons: Will the Act translate the current situation into a workable one?

- As a matter of utmost importance, the Act will remove refugees in Kenya from under the UNHCR mandate and at the same time, create a local policy framework within which refugee issues will be addressed.
- Rather than depart from the current encampment policy, the Act endorses it and further makes it an offence for refugees to live outside the refugee-designated areas without due authorization – this raises freedom of movement issues.
- By providing that refugees be issued with identity cards, the Act addresses the prevailing “identity crisis” amongst refugees whereby the lack of identification has rendered them vulnerable to police harassment.
- The Act does not effectively redress the police/refugee balance of power because it allows for appointed officers – policemen may be included – to search and/or question any refugee and to take finger or foot prints, photographs, x-rays and other electromagnetic ray photographs of any refugee on “reasonable suspicion”. The term “reasonable suspicion” is so fluid as to be broadly interpreted – this does little to lessen the vulnerability of refugees who for too long have been at the mercy of law enforcement officers who have exhibited little regard for due process.
- The Act **formally** integrates into Kenyan law the 1951 UN Convention and the 1969 OAU Convention, which Conventions confer on refugees, most notably the right to identification and travel documents, freedom of movement, access to the courts and the right to non-discrimination – many of the rights and privileges conferred by the Conventions are incompatible with encampment. By way of obligation, the 1969 OAU Convention specifically declares that refugees are not to engage in **subversive** activity, which declaration places on refugees the responsibility not to engage in any activity that would jeopardize the security of their host country, their countries of origin and/or themselves.

- Interestingly, the Act allows refugees to enter gainful employment - subject to the same rights and restrictions conferred and imposed on other non-citizens - but at the same time enforces the encampment policy which restricts refugees to a designated area with no real employment opportunities; perhaps this provision was designed to apply to those refugees who will acquire authorisation to reside outside of the refugee-designated areas, if not, the two provisions are incompatible.
- There is no strategy in the Act to protect refugees from physical attacks and assaults that stem from home country feuds and vendettas that are carried forward into Kenya.
- Many of the provisions in the Act are generally worded making the legislation tend toward a lack of detail. For example, it does not specifically deal with issues around medical care, education, housing, food and living conditions in the camps.
- Under the Act, refugees are granted access to the courts – this is a thoughtful provision.

Challenges in refugee Protection

The refugees emerging from the Second World War, when the 1951 UN Convention on the Status of Refugees was drafted, were persons fleeing from international conflict and totalitarian regimes. **The “well founded fear of persecution” was easily discernable and objectively ascertainable on a case by case basis.** This made the refugee easily distinguishable from the economic migrant and other migrant categories. The movement of refugees in the post War era coincided with a demand for labour for industrial growth Europe and North America. The refugee as an economic migrant was welcome and faced little hassle in receiving protection.

However, the ‘prototype’ of the refugee began to change in the 1960s. The cause of refugee flight shifted from **international wars to internal conflicts**, civil wars, ethnic animosity and gross violations of human rights many of which were caused by non-state actors. The internal upheavals that many African, Asian and South American countries were going through resulted in massive outflows of refugees fleeing war, generalized violence and events seriously disturbing public order; in other words, refugees who could not fit into the 1951 Convention’s definition of refugees. The sanctity of state sovereignty precluded any interference in the internal affairs of a state and the chaos persisted, with a constant outpouring of refugees. From a handful

of refugees, UNHCR found itself faced with over 14 million refugees by 1965 in the global South and outside the scope of the agency's 3-year mandate. In response, the international community expanded the mandate of UNHCR and by the 1967 Protocol to the Refugee Convention, extended international protection to refugees emerging out of new conflicts. The Agency found itself plunged deep into a growing 'southern' refugee crisis that was to last for decades.

On the underbelly of a mounting refugee crisis, **globalization** was fuelling **freer movement of people, goods, services and information**. Frequent, fast and fairly inexpensive travel, international communication and technological development facilitated travel to new corners of the globe and a growing awareness of the economic disparities between the global North and the global South, the developed and the underdeveloped, the 'first world' and the 'third world'. Globalization has not only increased the movement of voluntary migrants, but also expanded the destination countries for refugees. Refugees did not just flee into the neighboring countries as they had done in the past, some traveled further, moving from the South to the North, from Africa and Asia to Europe and the US. Refugee migration became intercontinental. And with the growing North-South economic polarization, the lines between refugees and economic migrants became more indistinct, while Europe became more concerned with separating those who arrived to seek refugee protection and those who arrived for economic opportunities. Asylum became a highly politicized issue and EU states moved from internal attempts to manage asylum and migration in the 1980s, to multilateral arrangements to control entry into the EU in the 1990s, efforts dubbed 'Fortress Europe' to describe the effect of the immigration control measures (Zetter *et al.* 2003). Europe has been preoccupied with discouraging the entry of undocumented, irregular and illegal migration into the EU (Hayes 2004).

At the same time, the growing awareness of **terrorism** as an international issue has not left migration and refugee protection unscathed. As early as 1976, the Terrorism, Radicalism, Extremism and Violence International (TREVI) was created in Europe to combat international terrorism, illegal immigration and crime. However, the sharp change in immigration and border entry policies is traceable to '**Nine-Eleven**'. International migration policies can be easily divided into before and after Nine-Eleven. The barriers to entry have become higher, with countries demanding detailed information on why, where from and how entrants enter their territories, while reserving the right to turn away persons without proper documentation or for any other reasons. In asserting the sovereign right to control entry into States' territories, refugee protection has been watered down and the right to seek asylum is less secure.

On January 4th, Kenya denied entry to asylum seekers from Somalia in the interests of preventing the entry of ousted Islamic Courts Union militia who, the government asserted, had links linked to suspected terrorist groups. South Africa deports back thousands of Zimbabwe each week despite the near state collapse of Zimbabwe. On August 30th, 2005, US Homeland Security Secretary, Michael Chertoff, was quoted saying tightening US borders had become a top priority for the Homeland Security Department. The Department has since enacted a range of programmes including stricter background checks, visa security systems, sharing intelligence with international allies, to deter entry of migrants and by extension, terrorist. More recently, the US has proposed the construction of a border wall between the US and Mexico to control entry through its southern border.

Higher Walls

States have put in place law and policy measures and a range of programmes to raise the barriers to entry, tightening border controls and discourage asylum entries. While these measures are mostly in industrialized countries, the backlash has affected the policies and practices on refugee protection across the globe and seriously watered down the quality of refugee protection.

Regionalizing refugee protection

In 2004, the UK proposed an “**external processing**” policy and “protection in the region” by which the UK government would process all asylum claims outside the UK and require asylum seekers to seek protection solutions within their regions of origin before arriving in the EU. This would result in the creation or expansion of refugee camps in Eastern Europe, Africa, Turkey and the Middle East (Statewatch Bulletin 2004). This position was roundly condemned by human rights groups, and it was shelved. However, it has been modified and adopted by the EU in its harmonisation of EU asylum policies. Through bilateral and multilateral arrangements, EU states have engaged sub-Saharan and Maghreb region states to ‘strengthen protection in the region of origin’ (Betts and Milner 2006), while reinforcing irregular migration deterrents.

In 2002, UNHCR introduced the concept of **Convention Plus** to reaffirm the applicability of the 1951 Convention on Refugees in the face of changed immigration, asylum and political priorities. Initially, the concept received much criticism as it emerged at about the same time as the EU’s debates on transit processing and protection in the region of origin. While it has more recently been commended for seeking a fairly representative participation of host and donor countries, it is still faulted for having a heavy leaning to the interests of donor countries.

Visa policies and carrier sanctions

In 2001, the majority of EU countries adopted a visa policy (**Common Consular Instructions**) that **'white' and 'black'** listed countries with respect to visa entry requirements (Hayes2004). Those on the 'white' list were 44 countries from Europe, Australasia, Japan, Israel, North America and some South American countries. The rest of the world, mostly Africa, South America, Asia and the Middle East, and some Eastern European countries fall in the 'black' list which means stringent visa requirements for entry. Some countries go further to post immigration officials in the airports of 'black' listed countries to intercept irregular movement before they arrive in Europe. In addition, many countries of the global North impose carrier sanctions, or steep penalties on carriers (airline companies, ships, trains, etc) that facilitate the arrival of undocumented and irregular migrants. To avoid the sanctions, airline companies now vet their passengers to ensure they have valid visas and documentation to allow entry into the global North. This has challenged the right to seek asylum.

The US immigration policy states **that issuance of a Visa does not guarantee a right to enter but simply secures the right to present oneself at the border (airport)**. The stringent visa requirements act as barrier to entry, and apply mainly to countries of the global South. South Africa requires immigrants from select African countries to deposit a steep cash surety in addition to visa fees in order to obtain a visa. The surety acts as cover in the event of deportation and a guarantee of return to the traveler's own country.

Interception and return

The US, Australia, and Italy, to name but a few, have been known to intercept refugees and migrants, commonly referred to as the **'Boat People'**, at sea to prevent their arrival on land. Despite serious protests from human rights groups and UNHCR, Australia continued to turn back asylum seekers and migrants in the Pacific, before they docked on Australian territory. Australia now employs a mandatory detention policy which requires custodial holding of migrants without documentation until they are assessed. If their claims fail, they are returned to their countries or regions of origin. The EU asylum policies allow for denial of the right to enter, and asylum seekers may be intercepted at borders (including at airports), subjected to an accelerated process and returned or expelled. Where the asylum seeker has gone through a 'safe third country' or where they could have 'sought protection in the region' of origin, they may be returned or denied entry.

Response of the Global South

While the tightening of immigration controls is predominantly in the global North, the global South has responded to the increased burden these policies are placing on their economies, infrastructure, political structures and internal security. As a result, refugee protection in the global South is

deteriorating. While the countries of the global South may not have put in place restriction measures as elaborate as the global North, the in-country practices are focused on deterring entry of refugees and irregular migrants. UNHCR estimates that about 70 percent of the world refugee population is in the global South.

Border closure, refolement, expulsion

With protracted refugee situations, many host countries of the South are grappling with host country fatigue. Tanzania, which was renowned for its open door asylum policies, became the largest refugee host country in Africa nearly overnight in 1994 following the mass influx of refugees from Rwanda and Burundi. The large inflows of refugees exerted tremendous pressure on the host areas, increased crime and insecurity, led to environmental degradation, and generated cultural tension between the host communities and the refugees. In March 1995, Tanzania closed its border with Burundi to prevent the entry of more refugees. In 1996, the country forcefully repatriated Rwanda refugees as international support dwindled, leaving the country with a bigger burden than it was willing to bear.

In March 2003, Kenya denied entry to a group of Somali refugees fleeing clan fighting in Somali. The move was to be repeated in **January 2007** when the Government went further to close the border, forcefully expel 400 Somali asylum seekers and deny entry to new refugees while the conflict between the Islamic Courts Union who had earlier overrun the country, and the Ethiopia-backed Transitional Federal Government of Somalia was underway. The sentiments expressed by Kenya government officials indicated a move towards stricter border controls and the subjugation of refugee protection to national security and interests.

Encampment

Many states in Africa have adopted measures that **limit the quality of asylum**, such as containing refugees in isolated and insecure camps, cutting them off from local communities and making them fully dependent on international assistance (Betts and Milner 2006). The overwhelming numbers of refugees, the protracted refugee situations, the diminution of donor support and the emerging security concerns have been cited as justification for restricting asylum.

The Decline in Refugee Protection

The UN Refugee Convention that prohibits return of refugees to their country of origin if they have a “well-founded fear of persecution” was drafted in response to the experience of Jewish refugees after the Second World War, where they were forced back into Hitler’s hands when other nations refused

to grant them asylum. With most of the refugees today coming from the global South, the description of the refugee has burst the seams of the 'traditional' definition, and it has become difficult to draw a sharp distinction between the refugee and the economic migrant. In addition to the fleeing from persecution, civil wars and generalized violence, refugees will seek to settle in countries where they can maximize their economic opportunities. Yet states have become over zealous in separating refugees and economic migrants, and sacrificing refugee protection to prevent the entry of irregular migrants.

Stricter immigration controls aimed at deterring the arrival of asylum seekers from the global South has placed greater pressure on the asylum regime in the global South where host countries take in large refugee populations for long periods because they share borders with refugee-producing countries. In the meantime, financial and capacity support from donor countries is inadequate and dwindling in many refugee situations. The humanitarian assistance given addresses the direct needs of the refugees such as food, shelter, medical assistance, education, among others, while the collateral effects suffered by the host countries, such as insecurity, environmental degradation and cultural tensions between hosts and refugees, are left to the host countries to address. The shared responsibility of refugee protection is skewed, with host states taking the lion's share of the burden. Host states governments argue that while developing countries and mounting higher barriers to entry of refugees, they are expected to embrace open-door asylum policies, a position that has been used to justify violation of refugee protection standards.

The stricter immigration laws and practices of states to prevent entry or hasten return bring into question the relevance and applicability of the Convention on Refugees to the contemporary migration, security concerns and refugee situations. The concept of Convention Plus was a UNHCR effort to revalidate the Convention through three initiatives crafted to respond to the contemporary challenges of refugee protection. The Convention Plus initiative faced sharp criticism at its inception as a mere attempt to pander to the whims of the global North countries at the expense of the global South which bears the brunt of refugee protection responsibilities.

In host countries, **the principle of voluntary repatriation has been undermined.** Overwhelmed by refugee numbers and the protraction of their stay, host countries are increasingly engaging in forceful repatriation or making the conditions of asylum unfavourable to force return. The heightening of entry barriers have undermined the durable solutions.

States are unwilling to prioritize refugee protection, and refugees are frequently classified with other irregular migrants. In September 2006, voters in Switzerland ratified new asylum and immigration laws making it more difficult for refugees to receive assistance and effectively blocking non-European unskilled workers from entering the country. This means those whose asylum claims have been rejected may be sent home within a shorter period. Children may be held in safe custody for up to a year even though they have not been charged with any crime (Klapper, 2006). The asylum seekers, like other migrants, are required to produce valid identity papers within 48 hours of entering Switzerland. This is in contravention to the provisions of the Convention which require states not to penalize asylum seekers for arriving without documentation.

Conclusion

Globalization, politicization of asylum and the global war against terrorism have affected the entry and refugee protection policies in the North and the South. Stringent barriers to entry, interception before entry, detention on arrival, accelerated processing and rapid deportation are ways that the global North have responded to the asylum and migration crises. Mass refoulement, denial of entry at the border, detention of asylum seekers along with irregular migrants, regular deportation and forced repatriation are the global South's responses. The ideals of globalization: free movement of people, relaxation of border controls, a 'global village' with the emergence of denizens rather than citizens, are receding further and further out of reach as countries fight to protect their territorial integrity, cultural and historical homogeneity, common beliefs and statehood, against the escalation of immigration. Ironically, globalization has produced a greater emphasis on exclusion, cultural homogeneity, language and high standards for inclusion, rather than the global village as envisioned (see Geschiere and Nyamnjoh 2002).

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