

Refugee Protection: The challenges from Interventionist and Terrorism concerns

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What is protection?

When we talk of protection we mean legal protection. The concept must be associated with entitlements under the law and, for effective redress of grievances, mechanisms to vindicate claims in respect of those entitlements.

An inquiry, then into whether a population has ‘protection’ is an examination of the fashion in which the pertinent authorities comply with the entitlements of the individual under the international law, and the manner in which these legal principles are implemented and respected.

To understand the challenges of refugee protection in the context of terrorism it is important to re-visit the definition of a refugee . A refugee is a persons who is outside of his/her country of nationality (or place of habitual residence for stateless persons) who has a well founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion.

It is worth noting that all those persons who flee across a border from generalised threats posed by war or civil disturbances are outside the scope of international refugee law. Such persons are considered not to have sufficient individualized fear of persecution. The 1969 OAU convention has however subscribed to a broadened refugee definition, which includes war and civil disorder. Somali refugees fall within this broader definition of a refugee.

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The concept of persecution is an important one in refugee definition. Persecution is ordinarily considered to come from government sources. Under certain circumstances however, forces that a government either cannot or will not control can become 'agents' of persecution for purposes of refugee protection e.g. insurgent movement, the Islamic Court Union would fall within this category, and thus, the assertion for example by Minister Tuju that Somali government is not fighting its own people is faulty.

Upon flight, a refugee becomes subject to the jurisdiction of the authorities in a country of reception. Treatment must correspond with the obligation to respect fundamental human rights, including the right not to be returned to a territory where the individual may face persecution i.e. non refoulment. This prohibition includes non rejection at the border or shore.

Challenges of Refugee Protection in this era of terrorism

Refugees and regional instability and security

The war in Somali and in deed the anti terror campaign in the region is unfolding against the back ground of 'mounting state in insensitivity and hostility to the plight of refugees (Kathina 2002). Refugee regime has changed drastically from tolerance in the 70s and 80s to hostility in 90s and now refugees have come to be seen as a force of national and regional insecurity and instability. 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. On August 30th, 2005, US Homeland Security Secretary, Michael Chertoff, was quoted saying that 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. (Ayiera 2007)

To enhance security, 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

There has been an effort to regionalize refugee protection. The argument has been that refugees should be protected within the regions they are generated from instead of them having to cross the ocean and seas to the western countries. In 2004 for example, 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 UK. This would result in the creation or expansion of refugee camps in Eastern Europe, Africa, Turkey and the Middle East (State watch Bulletin 2004). This position was condemned by human rights groups, and it was shelved. However, it has been modified and adopted by the EU in its harmonization of EU asylum policies. Through bilateral and multilateral arrangements, EU states have engaged sub-Saharan region states to ‘strengthen protection in the region of origin’ (Betts and Milner 2006), while reinforcing irregular migration deterrents. The same agenda has also been packaged as development assistance for local integration where, states in the North would provide development assistance to refugees hosting countries in the south to retain them within the region. Notably, in 2005 during the UNHCR EXCOM consultations, African countries rejected this proposal arguing that it goes against the spirit of burden /responsibility sharing.

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 (Hayes 2004). 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.

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. 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.

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.. 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.

The 1951 Convention is under siege

The war on terrorism, coupled with stricter immigration laws and practices of states to prevent entry or hasten return bring into question the relevance and applicability of the 1952 and Convention on Refugees to the contemporary migration, security concerns and refugee situations. States are unwilling to prioritize refugee protection, and refugees are frequently classified with other irregular migrants. In September 2006 for example, 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 (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

Refugee Protection in Kenya

The on going war in Somali has definitely impacted on refugee protection in Kenya. The first reaction of the Government of Kenya was to close the boarders with Somali and to return over 400 asylum seekers. This directly violated international law related

to refugees. Article 33 on Non refoulement of the UN convention and article 2 (3) of the 1969 OAU convention on return and rejection at the frontiers.

Although the government employs an encampment policy in refugee protection in Kenya, there is a large population of Somalis living in Nairobi and other urban areas. With the heightened concerns on terrorism, there is a possibility that the government will employ the policy in a stricter manner to confine refugees and especially Somalis to the Camps, severely restricting their freedom of movement and right to work. It has been well acknowledged that camps violate the fundamental rights of the freedom of movement that is essentially to the enjoyment of all other rights. Camps also constitute a unique setting for the arbitrary exercise of power (Guglielmo and Harrell-Bond 2005). This restriction in the camps will also interfere in enjoyment of other rights such as right to education, to gainful employment to travel outside the country of asylum among others and therefore grossly undermine refugee protection in Kenya.

It is evident that public sentiment and government action in many countries are in synchrony with stricter immigration laws, border controls and diminishing refugee protection. In Kenya, an opinion poll on 6th January 2007 indicated that over 94% of Kenyans who responded were in favor of the government sending back the Somali refugees to Somalia, and that Kenya had hosted Somali refugees for too long. It is unlikely that the immigration law and border controls will be relaxed; rather, they will get stricter and more stringent.

On the other hand, the sentiments of the respondents to the survey indicate a raise in xenophobia amongst Kenyan populace. Xenophobia often leads to discrimination and segregation. This would in effect lead to violation of Article 3 of the refugee convention and indeed an overriding principle in international human rights law.

Declining refugee protection in Kenya is also connected to state suspicion and resistance to radical Islamism ideology among sections of refugees (Kathina 2002). From September 11, the nexus between asylum and Islam has been manifested in Kenya and the region. The response to Somali refugees is heavily influenced by negative perceptions and fears. Thus, although the settling of Somali refugees in Camps and in Nairobi, and other towns, along side Kenyan Somalis has facilitated

their integration and protection of certain rights, the refugees are saddled with heavy baggage of enduring prejudice and marginalisation against their Kenyan counter parts. Besides state repression, the profiling of Somali refugees for security reasons is a common feature in Kenya and beyond. Last year for example, the government conducted an alien registration process in Eastleigh, Kariokor and Pumwani, with the aim of profiling Somali refugees and other aliens of Somali decent. Though the registration profiled other aliens and refugees in Kenya, the site of the registration centres clearly pointed at their target i.e Somalis.

Refugees, a diplomatic burden.

Kenya and indeed other countries in the region have often viewed refugees as diplomatic burden, political irritant and an embarrassment to Kenya which considers itself as neutral in the Somali conflict (Kagwanja and Kathina 2006). This is not something new in this region. For instance refugees in Northern Uganda are pawns in the conflict between the Government and the Lord's Resistance Army (LRA). Alleged to support the Sudanese People Liberation Army, refugees have been subjected to several attacks by insurgents groups supported by the Khartoum government (Kathina 2002).

In most of the countries hosting refugees in this region, the presence of refugees drawn from former elite class and government officials has always posed a challenge. Often perceived as threats to incumbent regimes at home, this category of refugees is under constant threat of assassination, abduction and disappearance by agents of their own government. UNHCR is always on the look out of such refugees and their refugee status determination process is accelerated and eventually they are resettled to safe third countries (mostly USA, Canada and Australia). Unfortunately for such refugees and especially of Somali decent, this will now be very difficult. The stakes have been raised and the goal posts keep on shifting. For example, it is now not possible to resettle refugees of Oromo descent who are persecuted by the Ethiopian government on account that they are sympathisers of OLF.

Is there a possibility of protection within the region?

Some Scholars have argued that the regional mood within East Africa has been one of restricting rather than expanding refugee rights. East Africa continues to be lumped

refugees together with insecurity and defence matters. This approach does not in any way expand space for refugee protection. Attempts to harmonize refugee policies and practices within the EAC have so far failed. On the other hand, the Igarad has registered better progress in regard to humanitarian issues and has in fact managed to craft its programme in a manner that is non-threatening to its member states. It defines refugee as a humanitarian and non-political issue and focused exclusively on assistance to the exclusion of protection. This fails to address issues relating to responsibility and standards of protection to refugees. It is therefore difficult if not impossible for refugees in general to receive adequate protection in a region where refugee policy has been intricately bound with security concerns and where war against terrorism is thrusting state security to the fore and prejudices Somalis and Muslims to the detriment of refugee rights and protection.

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 shared responsibility of refugee protection is skewed, with host states taking the lion's share of the burden. Host state governments such as Kenya, argue that while developed countries are mounting higher barriers to entry of refugees, they are expected to embrace open-door asylum policies, without due regard to their national interest and concerns such as security. If this equation is not reversed in the light of anti-terror war in Somali and elsewhere, this position will continue being used to justify violation of refugee protection standards and rights.

Conclusion

Over the years, the principle of non-refoulement has been held sacrosanct in refugee protection, yet the pursuance of anti-terrorism is undermining this principle, hence the very core of refugee protection. Refugees are no longer guaranteed protection just because they have arrived at the border (and airports) of a country. The right to seek asylum is no longer guaranteed. The threat of terrorism demands higher standards of immigration controls to prevent entry of suspected terrorists. The question lies in whether the refugee regime has been able to respond to the current situation and

whether the Convention remains relevant today. How can states provide refugee protection and respond to global security needs?

If states do not pursue policies that would create a balance between war on terror and refugee protection, the refugee protection regime will crumble down. As it is now, the charity of host countries in the south is buckling under the weight of protracted refugee situations and the swelling numbers of refugees with no end in sight to conflicts. As result, more host countries are calling for the creation of 'safe zones' within the conflict countries and to protect 'refugees' in their own countries in these safe zones, rather than permit them to flee across the border. The distinction between refugees and internally displaced becomes very thin and eventually the right to seek asylum as enshrined the UDHR is eventually eroded.