

Protecting refugee rights — Getting serious about terminology

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1 Introduction

The emergence of Vladimir Zhirinovsky in Russia, Jean Marie le Pen in France, Skinheads in the United Kingdom and the rise of neo-Nazism in Europe and the United States clearly reflect the rise of intolerance against the 'other' in the world we inhabit. This is often reflected in a nauseating tide of xenophobia. Attacks on foreigners on the streets of Moscow, Manchester or Madrid are becoming more commonplace. Indeed, the catalyst for this article was television footage of the murder of a Mozambican refugee on the streets of Cape Town for the reprehensible crime of being different. That this can take place in a country which had undergone the scourge of apartheid is appalling. Small wonder then that policy-makers and academics are examining ways in which to enhance refugee protection. Rather than ensuring effective monitoring and enforcement of the existing refugee regime, efforts to date have focused on extending this regime by equating illegal immigrants with refugees, and by using terms such as 'economic refugees' and 'environmental refugees'. In doing so, these efforts unwittingly undermine the cause of refugee protection.

2 Who is an undocumented migrant?

This might sound like a banal question. It could be argued, for instance, that it is self-evident that an undocumented migrant or illegal immigrant is one who is residing in a country without the required documentation or illegally. Such a view would be strengthened by a perusal of South

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Africa's Aliens Control Act of 1991. The Act stipulates that a person is an 'illegal alien' if he or she:

- enters South Africa at a place other than a port of entry;
- remains in the country without a valid residence permit;
- acts in contravention of his or her residence permit;
- remains in South Africa after the expiry of a residence permit;
- is prohibited from entering the country; or
- becomes a prohibited person while in South Africa.¹

The idea that one can make a distinction between undocumented migrants (or illegal immigrants) and refugees, is implied in the current definition of the term 'refugee'. For example, the 1951 United Nations Convention Relating to the Status of Refugees (UN Refugee Convention) defines refugees as persons who are living outside their country because of a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.²

According to this definition, almost 18 million of the world's migrants may be classified as refugees. But this UN definition has been criticised by several scholars for being too restrictive. Woehlcke, for instance, notes that the Convention was originally intended to regulate the European refugee problem after the Second World War and that it is no longer applicable today where 'economic refugees' (those fleeing poverty and economic hardship) and 'environmental refugees' (those fleeing ecological catastrophe) make up the bulk of the numbers.³ Loescher further elaborates:⁴

[I]n many developing countries which have few resources and weak government structures, economic hardship is generally exacerbated by political violence. Thus it has become increasingly difficult to make hard and fast distinctions between refugees (as defined by the 1951 UN Convention with its political bias) and economic migrants.

In the same vein, Astrid Surhke notes that the criterion determining refugee status is persecution, usually referring to an act of a government against an individual.⁵ This, she asserts, excludes those fleeing from generalised conditions of violence, insecurity and oppression, for example, in the case of the Democratic Republic of Congo. It also excludes the inhabitants of states where violence is externally induced. South Africa's destabilisation of the Frontline States (FLS) throughout

¹ Arts 1 to 6 Aliens Control Act 96 of 1991.

² Art 1A(2) UN Refugee Convention, signed on 28 July 1951 and entered into force 22 April 1954, quoted in G Loescher *Refugee movements and international security*, *Adelphi Paper* (1992) 2.

³ M Woehlcke 'Environmental refugees' (1992) 43(3) *Aussenpolitik* 287-288.

⁴ Loescher (n 2 above) 7.

⁵ Quoted in H Solomon 'In search of Canaan: A critical evaluation of the causes and effects of migration within Southern Africa, and strategies to cope with them' (1993) 24 *Southern African Perspectives* 3-4.

much of the 1980s, as a result of its support of proxy groups — such as the National Resistance Movement of Mozambique (Renamo); the National Union for the Total Independence of Angola (Unita); the Lesotho Liberation Army and the Mashala Gang in Zambia — is an example of such externally induced unrest.⁶

Scholars such as Dolan argue that in South Africa the conventional distinction between undocumented migrants and refugees does not adequately reflect empirical reality and therefore is bound to produce ineffective policies.⁷ For a more inclusive definition of refugee status, many point to the Organisation of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), adopted in Addis Ababa on 10 September 1969, as containing such an inclusive definition. The OAU Refugee Convention defines that a person is a refugee if:⁸

[o]wing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of or the whole of his country of origin or nationality, [he] is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Is the definition provided for by the UN Refugee Convention inadequate in meeting the needs of protection for contemporary refugees? The answer is no. This paper will highlight the continued relevance of the 1951 UN Convention. There are key weaknesses in the arguments made by critics of the UN Refugee Convention.

Firstly, what will the implications be of broadening this definition? It can be argued that broadening the definition will adversely affect domestic stability as borders are opened without restriction and large numbers of people from impoverished and politically unstable states stream through national boundaries to relatively more prosperous and politically stable polities. The situation in receiving states would be made more serious, since only a minority of the world's people live in societies that respect human rights or that can meet the material needs of their members. Weiner puts it this way:⁹

⁶ See X Carim 'Critical and postmodern readings of strategic culture in the 1990s' paper read at the Conference on a Culture of Peace in Commemoration of Dr Martin Luther King Jr, University of Zimbabwe, Harare, 1995; H Solomon 'Change and continuity in South Africa's foreign policy, 1978–1991' unpublished MA dissertation, University of Durban-Westville, 1994 169.

⁷ C Dolan 'Policy challenges for the new South Africa' *Southern African Migration: Domestic and Regional Policy Implications* Workshop Proceedings 14, Johannesburg: Centre for Policy Studies, 1995 53–54.

⁸ Art 1(2) OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969 (OAU Doc CAB/LEG/24.3), adopted on 10 September 1969 and entered into force on 20 June 1974.

⁹ M Weiner *The global migration crisis: Challenge to states and to human rights* (1995) 189.

There are, however, several legitimate objections to broadening the definition of refugees. If acts of discrimination short of persecution are the basis for claiming asylum, a large part of the world's population could do so. Asylum on the basis of discrimination could plausibly be claimed, for example, by over 100 million Indian Muslims whose mosque at Ayodhya was destroyed and who were fearful after many Muslims in Bombay and elsewhere were killed by Hindus. Millions of women around the world could similarly point to discriminatory restrictions imposed by their state or society as justification for seeking asylum. Moreover, a country that does not want its minorities could engage in systematic discrimination and impel countries that embrace a liberal conception of refugees to admit all whose human rights have been violated. The more liberal democratic states and international agencies become in granting asylum to persecuted minorities, the greater the inducement for a nationalist regime to engage in some form of 'ethnic cleansing'.

Building on this theme, Martin notes that refugee status is a scarce resource.¹⁰ Individuals who have been granted refugee status are in a privileged category; it is an entitlement that allows them to move to a safe country for protection and assistance. Governments themselves must decide to whom such an entitlement should be given and how generous they should be. The broader the definition and the greater the entitlement, the more refugees will in all likelihood come.

But critics of the UN Refugee Convention will not be silenced. They argue that, while it makes sense from the perspective of the interests of the potential host state, it does not take the interests of the potential illegal immigrant or refugee into account. In other words, it is argued that the UN Refugee Convention is overly state-centric and is not sympathetic enough towards the human imperatives that drive people away from their homes.¹¹ However, Melander disputes this assertion.¹² He argues that the definition provided in the UN Refugee Convention is as relevant today as it was in the 1950s when it was adopted. In practice, he states that the 1951 definition is far more flexible than its critics would have us believe. This flexibility is evident in the immediate aftermath of the Soviet suppression of the 1956 Hungarian uprising which saw all Western governments following the lead of the United Nations High Commissioner for Refugees (UNHCR) in declaring all Hungarians fleeing from their native land to be refugees. More recently, the UN Refugee Convention has been interpreted so broadly by the UNHCR, that the organisation became involved in the early stages of the Yugoslav crisis even before the break-up of Tito's 'monolithic' communist state and before those who were internally displaced, crossed international frontiers. Through the UN Security Council's Resolution 688 of 1991, the UNHCR also set up 'safety zones' within Iraq to provide protection for

¹⁰ D Martin 'The refugee concept: On definitions, politics and the careful use of a scarce resource' in H Adelman (ed) *Refugee Policy* (1991).

¹¹ See in this regard A Shacknove 'Who is a refugee?' (1985) *Ethics* 274–284.

¹² G Melander 'The two refugee definitions' *Report, 4*, Lund, Sweden: Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 1987.

displaced Kurds.¹³ According to a strict interpretation of the refugee definition in the UN Refugee Convention, the UNHCR was clearly overstepping its mark. But, when asked about this, a senior UNHCR representative stated that the organisation uses a wider interpretation of the 1951 Convention's definition of a refugee. Moreover, she argued that a clear linkage existed between those internally displaced and refugees, in general.¹⁴

The question that may be posed is why one does not simply broaden the definition of the term refugee, if it is to be interpreted broadly anyway. The answer to this question lies in the fact that, should the term be broadened any further, it will be open to abuse by a number of people. As noted earlier, the broader the formal definition, the more the refugees, the more porous the borders and the more chances there are of domestic, and hence, international instability.

One of the most fundamental criticisms of the 1951 Refugee Convention is that it is unclear about what constitutes persecution and asserts that emphasis on the individual negates the concept of 'group persecution'. Once more, it is maintained that this criticism is unfair. While the UNHCR makes it clear that there is no universally accepted definition of persecution, this does not mean that there is no internationally acceptable criterion for determining whether a person has a 'well-founded fear of persecution'.¹⁵ Melander observes that there is a growing tendency to make reference to basic human rights, that is, the criterion for persecution may be fulfilled if the applicant fears exposure to human rights violations.¹⁶ In this respect, it is civil and political rights, in particular, that are relevant, in other words, those rights often dealing with the protection of the individual from state authority. The criterion may also be fulfilled when economic, social and cultural rights may be violated, in particular, if the applicant fears discriminatory measures.

Existing human rights instruments are also used by the UNHCR to assist it in interpreting the term 'persecution'. For instance, the Universal Declaration of Human Rights of 1948 (Universal Declaration) and the International Covenant on Civil and Political Rights¹⁷ provide good guidelines as to when persecution is involved. A person who fears arbitrary detention contrary to article 9 of the Universal Declaration may be persecuted. The same applies to a person who fears punishment contrary to the right to freedom of opinion or expression, as prescribed in article 19 of the Universal Declaration. Actually, all substantive articles

¹³ Weiner (n 9 above) 156.

¹⁴ Telephonic conversation with Ms Pia Prutz Phiri, Senior Protection Officer, Southern African Office of the UNHCR, 23 April 1996.

¹⁵ UNHCR *Handbook on procedures and criteria for determining refugee status* (1979) 14.

¹⁶ Melander (n 12 above) 13.

¹⁷ C Humana *World human rights guide* (1983) 13–23.

of the Universal Declaration can be used to understand the meaning of 'persecution'.

However, every person who has been or will be faced with a human rights violation in his or her country of origin cannot be considered a refugee. An important prerequisite is that the violation must reach a certain degree of severity before it will be classified as persecution. An arbitrary arrest must be of a certain duration to fulfil this criterion. In addition, the human rights violation must be motivated by one or more of the five causes of persecution mentioned in the 1951 Convention: race, religion, nationality, membership of a particular social group or political opinion.¹⁸ The question of gender would be subsumed under the rubric of 'social group'. A 1996 case in the United States illustrates this well. A nineteen-year old woman from Togo fled her country to the United States and asked for refuge on the basis that she was being forced to undergo female genital mutilation. The United States Immigration Board of Appeals agreed with her that female genital mutilation constituted gender discrimination and persecution. Thus, she was granted asylum in the United States.¹⁹

Finally, according to the UN Refugee Convention, the fear of persecution must be individualised, that is, it is necessary that the applicant personally fears such measures. The same applies to human rights violations which, according to relevant international instruments, can always be related to an individual. This fact, however, does *not* preclude group persecution or group violations of human rights, for instance when it is based on race. Likewise, it may be established that parts of the population fear human rights violations. Thus, in South Africa, the policy of apartheid was directed against every person who did not belong to the white minority. As such, black South Africans were accorded the status of refugees in their respective host states.

In the same vein, Nobel argues strongly for the retention of the 1951 Convention, noting that any confusion relating to the status of refugees is harmful to the cause of their protection.²⁰ Moreover, he attacks scholars such as Woehlcke and Loescher who wish to extend refugee status to economic and environmental migrants, and points out that terms such as 'economic refugee' and 'environmental refugee' are non-existent in international law.²¹ The underlying rationale for this legal

¹⁸ n 15 above, 14.

¹⁹ 'United States: Department of Justice, Board of Immigration appeals decision in re Fauziya Kasinga (female genital mutilation as a basis for asylum) (13 June 1996)'; reproduced in (1997) 9 *African Journal of International and Comparative Law* 195–216. H Solomon 'Who is an illegal immigrant?' (1996) 5(6) *African Security Review*; Melander (n 12 above) 7.

²⁰ P Nobel 'Protection of refugees in Europe as seen in 1987' Report No 4, Lund, Sweden: Raoul Wallenberg Institute of Human Rights and Humanitarian Law (1987) 28.

²¹ As above, 26–27.

stance is obvious: A distinction can be made between an illegal immigrant and a refugee based on the causes prompting a person to leave his or her country and to settle in another. Toolo and Bethlehem put it this way:²²

It is possible to argue that there is a difference between *refugees* (my emphasis) who have been driven from their own countries in large numbers as a result of a national crisis and *illegal immigrants* (my emphasis) who make a primarily individual decision to come to South Africa. While such an individual decision may reflect the conditions faced by people in the home country, this would be different from the crisis-driven nature of refugees. Refugees are only in a position to return to home when the crisis in their own country has been resolved, whereas illegal immigrants would not be dependent on a political or military solution.

Moreover, contrary to the claims of critics of the UN Refugee Convention, the OAU Refugee Convention does not extend protection under the refugee regime to illegal immigrants. Weiner²³ notes in this regard that there are more similarities than differences between the two Conventions. Both definitions view refugees as individuals who lack the protection of their own government. Neither definition applies to displaced persons within a country irrespective of whether there is persecution or violence, or to individuals fleeing from natural disasters such as floods, droughts or earthquakes. Moreover, neither definition includes individuals who flee from a tyrannical regime unless they are personally persecuted or their society is torn by life-threatening violence. Thus, it would be wrong to counterpose the two Conventions, since they are so similar. Furthermore, in the Preamble to the OAU Refugee Convention it is stated categorically that the OAU Refugee Convention is meant to complement and not oppose the UN Refugee Convention.

3 Conclusion

From the above, it is clear that the UN Refugee Convention steers a middle path between the rights of the individual and those of the state. This is as it should be, since undue emphasis on the rights of individuals can only lead to anarchy (open borders with its attendant domestic instability), while undue emphasis on the rights of states can only lead to regimes unconcerned with their moral obligations to the suffering of broader humanity outside the confines of citizenship.

²² H Toolo & L Bethlehem 'Labour migration to South Africa' paper read at the National Labour and Economic Development Institute (NALEDI) Workshop on Labour Migration to South Africa, Johannesburg, 31 August 1994 5.

²³ Weiner (n 9 above) 188–189.

South Africa has ratified both the UN Refugee Convention and the 1969 OAU Convention. Government policy consequently reflects this narrower version of the term 'refugee'. Scholars and policy makers who are serious about protecting refugee rights should give more attention to monitoring the implementation and enforcement of the existing refugee regime rather than seeking to broaden and thereby undermine the status of *bona fide* refugees.