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A TERMPAPER ON

REGIONAL AND GLOBAL INSTRUMENTS FOR REFUGEE PROTECTION AND THEIR LIMITATIONS

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APRIL, 2020

Initially, during the first half of the twentieth century, IRL was country-specific – i.e. its instruments only targeted those persons forcibly displaced from certain states. It is only in the aftermath of World War II, within the new United Nations context, that states have put into place the current system for the protection of refugees. This system is universal in its scope and composed of two pillars: the United NationsHigh Commissioner for Refugees (UNHCR), created in December 1950; and the 1951 Convention relating to the Status of Refugees (the 1951 Convention), defining those who can benefit from the refugee status and containing the rights attached to it.

According to the article 1(A)(2) of the 1951 Convention, “the term ‘refugee’ shall apply to any person who […] as a result of events occurring before 1 January 1951 and owing to 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 anationality 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”.

Despite its universal vocation, it is worth noting that this refugee definition contemplates a temporal and a geographic limitation – one being recognized as a refugee only in relation to events occurred in Europe and before 1 January 1951. Such limitations were removed sixteen years later with the adoption of the 1967 Protocol Relating to the Status of Refugees. Therefore, it is only with the 1967 amendments that the 1951 Convention has indeed become a valuable universal instrument for the protection of refugees. However, truth must be told: the amended refugee definition contained in the 1951 Convention still presents some shortcomings that become evident during its application.

Africa is the first continent which established regional arrangement for the protection of refugees. Over the years, states have sought to address the shortcomings of the 1951 Convention, although on a regional level. Some of the consequences of the solidification of African Colonial borders in line with the principle of *uti possidetis* were internal strife, large scale dislocation, and the movement of people across these borders. Although the national war of liberation accounted for a substantial number of refugees in the 1960s, many more fled ‘explosive internal, social and political situations’ which predated independence. By 1964, the influx of refugees from Rwanda into Burundi, the DRC, and Uganda had spurred the OAU into action, first to the establishment of a ten member Refugee Commission to investigate the refugee ‘problem’ in Africa, and later setting in motion the drafting of a regional treaty. The reasons for having such regional regime was justified on the ground that the 1951 UN Convention on Refugees was European in focus and not suitable for the African situation, particularly as many refugees were seen at that stage as being the result of the fight for independence. A regional High Commissioner for Refugees was also contemplated although it was resisted by the UNHCR and abandoned later on.

This process culminated in the adoption by the OAU Assembly on 10 September 1969 of the OAU Convention Governing the Specific Aspects of Refugees in Africa (OAU Refugee Convention). It was entered into force on 20 July 1974.

 The most important limitations of the UN Refugee Convention may be traced to the Socio-political context of its adoption, which was dominated by the effects of the aftermath of WWII and the beginning of cold war. First, the basis of qualification for refugees was limited to a ‘well-founded fear of being persecuted for reasons of ….’ ‘Fear’ is a subjective requirement, which needs to be assessed individually for its ‘well-foundness’. Apart from the individualistic focus, the list of grounds on which one could earn the status of a ‘refugee’ is very restrictive and also does not take into account other factors (such as natural disasters or internal wars).

The 1951 Convention’s lacked of a precise definition of the term “persecution”, key element of the refugee definition. In 1979, the UNHCR published the “Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status”, where “persecution” was defined as any threat to life or freedom, whose existence had to be assessed on the basis of both objective and subjective criteria However, this definition of the term persecution remains unsatisfactory: on one hand, because it is still very broad and therefore difficult to be implemented; on the other, because it is contained in a non-legally binding document.

Another shortcoming regards the five grounds of persecution (race, religion, nationality, membership of a particular social group and political opinion), categorically listed in the refugee definition. These five grounds considerably limit its scope: indeed, only the presence of at least one of them can determine the application of the 1951 Convention. Hence it is worth mentioning the lack of reference to economic, social and cultural rights for the purpose of refugee status determination: for example, people who leave their countries of origin or residence due to the lack of education and/or work are not considered as refugees. Additionally, there is also a lack of gender perspective, not only as a ground of persecution but also as a limitation to the protection of women and homosexuals.

Another limit concerns the lack of a broader integration between the refugee definition and other human rights, as only violations of civil and political rights are considered for determining the refugee status. In light of this, the integration between the three generations of human rights is little considered when it comes to the concept of refugee. An example of this fact can be seen in the possible approximation with environmental issues, considering that the right to a healthy environment is a human right of third generation and people who flee climate change and/or natural disasters cannot benefit from the refuge protection.

A time-limit was included in the UN Refugee Convention. The ‘fear’ had to be ‘as a result of events occurring before 1 January 1951’, underling the close link between the Convention and the war that preceded it. Geographical in nature, was included as an option to be adopted at ratification (or accession).

 In light of the above, it is not surprising that African states saw the convention as a ‘European instrument’ The perception of exclusion was exacerbated in the 1960s, when it became clear that, in Africa, refugee problems continued and, most often started well after 1951. Due in the main to Africa’s criticism and its efforts to adopt a separate convention, the UN in 1966 adopted a brief protocol to the 1951 Convention which entered into force in 1967. The protocol dispensed with the temporal and geographical limitations of the 1951 Convention. From 1967 on, then, the Convention applied equally to all who qualified for refugee status. However, the restrictive definition of ‘refugee’ was left intact.

Therefore, after the adoption of the 1967 protocol, African efforts to elaborate a separate UN instrument dealing with refugees were channeled into the adoption of a complementary regional instrument (OAU Refugee Convention recognizes the two UN instruments in its preamble). Thus, to understand the added value of OAU Convention, one should differentiate between the global and regional systems of refugee protection.

The OAU Refugee Convention mirrors exactly the wording of the UN Convention, but expands the definition of the term ‘refugee’. The global instrument requires a ‘well-founded fear of being persecuted’ as a fundamental precondition for refugee status. In contrast, the OAU Refugee Convention extends the term to include anyone who is compelled to flee a country of residence ‘owing’ to external aggression, occupation, foreign domination or events seriously disturbing public order….. It is no longer the subjective fear of the individual alone, but also objectively ascertainable circumstantial compulsion that may give rise to ‘refugee’ status. ‘Fear of persecution’ places the emphasis on person’s beliefs, and not on the socio-political context.

The UN Refugee Convention’s definition presupposes that refugees will be screened individually in order to establish whether they have a ‘well-founded fear of persecution’. Such a system is obviously only manageable when persons flee on their own or in small groups. However, in the case of mass migrations, the application of such an individualized test becomes impossible. Mass migrations necessitate an approach which uses cumulative and objective factors to determine refugee status. Such factors are events ‘seriously disrupting’ public order and ‘foreign domination’ (Art. 1(2)) of OAU Refugee Convention).

The grounds in the OAU Convention on which refugees lose their status (‘cessation of statuses) or on which they are barred from qualifying as refugees (‘exclusion from statuses) are once more derived from the UN document. What are the three additional categories of exclusion or cessation under the OAU Refugee Convention.

The OAU Refugee convention is explicit about the obligation of states to grant asylum (Art. II (2), in contrast to the UN Convention which is silent on the issue. However, the way this right is framed and the requirement of compliance with internal laws renders asylum provision more of recommendatory to states. Further, the non-refoulement principle (the right not be sent back or expelled) appears to be absolute (Art. II (2)). The OAU Refugee Convention also expressly includes reference to voluntary repatriation in Article 5.

Its adoption being resulted from the inter-state ramifications of refugee moments than from a concern for the ‘rights’ of refugees, the OAU Convention reinforces notions of state security and sovereignty. It determines that a refugee has to conform to the law in the state of refugee, and that he/she has a duty to ‘abstain from any subversive activities against any member state of the OAU (Art. III (1)).

Another innovation is the duty placed by the OAU Refugee Convention on the country of origin in relation to returning refugees: state must grant full rights and privileges to returning nationals, and must refrain from any sanctions or punishment against them (Art. III (3) & III (4)).

Though the OAU Refugee Convention has addressed regional specificities and nature of refugee problems in Africa, it is said to be not adequate document. It is argued that it is ‘entirely silent’ on issues of mass influx and the procedure for determining who is a refugee is largely left to states discretion. In addition there is a suggestion that the principle of non-refoulement can be limited if the individual acts contrary to the principles of the convention.

It is also said that the Convention does not take a strong human rights approach. There is no real mention of rights of refugee beyond those discussed above (asylum and non-refoulment), it does not deal with women and restricts freedom of movement and rights of expression and association. It does not have provisions relating to the quality of life of refugees (food, health, housing, etc). It does not have its own enforcement mechanism and depends on external organs (UNHCR). Therefore, with a view to filling some of the gaps in the convention it is suggested that the convention should be considered together with the guarantees under ACHPR, ACRWC and APRW.