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ASSIGNMENT QUESTION

International refugee law is mainly a treaty law. Discuss critically the regional and global instruments for refugee protection and their limitations.

International refugee law is designed only to provide a back-up source of protection to seriously at-risk persons. Its purpose is not to displace the primary rule that individuals should look to their state of nationality for protection, but simply to provide a safety net. International community used it to establish a regime for the international protection of refugees. The Geneva Convention Related to the Status of Refugees is the main source of legal protections for refugees. International Refugee Law provides a specific definition of refugee, safeguards the right to seek asylum, and protects against being forcibly returned to a country where one would face persecution (non-refoulment). The UN High Commission for Refugees (UNHCR) is mandated by the UN General Assembly to provide international protection to refugees and seek permanent solutions to their plight, they are the global instrument for refugee protection.

International community is meant to be a forum of second resort for the persecuted, approachable upon the failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but to provide refuge to those whose home state cannot or does not afford them protection from persecution.

It follows logically that persons who face even egregious risks, but who can secure meaningful protection from their own government, are not eligible for Convention refugee status. Thus, courts in most countries have sensibly required asylum seekers to exhaust reasonable domestic protection possibilities before asserting their entitlement to refugee status. Where, for example, the risk of persecution stems from actions of a local authority or non-state entity (such as a paramilitary group, or vigilante gang) that can and will be effectively suppressed by the national government, there is no genuine risk of persecution, and hence no need for surrogate international protection.

Even though refugee law has always been understood as surrogate protection, state practice traditionally assumed that proof of a sufficiently serious risk in one part of the home country was all that was required. That is, an individual qualified for refugee status if there was a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion in the town or region of origin. Until the mid-1980s, there was no practice of routinely denying asylum on the grounds that protection against an acknowledged risk could be secured in another part of the applicant’s state of origin.

To some extent, the traditional failure to explore the possibility of internal protection simply reflected both the predisposition of predominantly Western asylum states to respond generously for political and ideological reasons to the then-dominant stream of refugees from Communism arriving at their borders. With the arrival during the 1980s of increasing numbers of refugees from countries that were politically, racially, and culturally different from Western asylum countries, the historical openness of the developed world to refugee flows was displaced by a new commitment to exploit legal and other means to avoid the legal duty to admit refugees. The so-called “internal flight” doctrine emerged from this context. As formulated by the United Nations High Commissioner for Refugees (UNHCR).

In the aftermath of World War II, the United Nations General Assembly created the Office of the United Nations High Commissioner for Refugees (UNHCR). UNHCR is mandated to protect and find durable solutions for refugees. Its activities are based on a framework of international law and standards that includes the 1948 Universal Declaration of Human Rights and the four Geneva Conventions (1949) on international humanitarian law, as well as an array of international and regional treaties and declarations, both binding and non- binding, that specifically address the needs of refugees in order to protect them.

The United Nations Relief Works Agency for Palestine Refugees in the Near East (UNRWA) was created in 1948 to assist those Palestinians who had been displaced when the state of Israel was established. Almost 3million Palestinians are registered with UNRWA, which operates in Jordan, Lebanon, Syria, Gaza and the West Bank.

UNRWA defines as Palestinian refugees those people, and their descendants, who lived in Palestine two years prior to the 1948 hostilities and who lost their homes and livelihood as a consequence of the conflict. UNRWA was not given a mandate to protect the Palestinian refugees; that responsibility was implicitly left to the countries in which they took refuge. Moreover, because they were already under the aegis of a UN agency, those Palestinians registered with UNRWA were effectively excluded from UNHCR’s mandate when it was established in 1950. However, Palestinians outside the areas where UNRWA operates do fall under UNHCR’s mandate.

The legal status of Palestinians varies according to both the date of their displacement, or that of their parents and grandparents, and to their current place of residence. Some 850,000 Palestinians – those and their descendants who remained in the new state of Israel after 1948 - now have Israeli citizenship. An unknown number have also acquired the nationality of countries outside the Middle East. Of the Arab states accommodating Palestinian refugees, only Jordan has granted them citizenship on any substantial scale. The status of the remainder has proved at best ambiguous and many Palestinians are in an intolerable situation.

Regional-level work on the issue of refugee protection in Africa began very soon after the Organization of African Unity’s (OAU) 1963 formation, as evidenced by a 1964 resolution of the body’s Council of Ministers. The resolution established an ad hoc commission consisting of OAU ambassadors from Burundi, Cameroon, Congo-Léopoldville (today the Democratic Republic of the Congo (DRC)), Ghana, Nigeria, Rwanda, Senegal, Sudan, Tanganyika (today Tanzania) and Uganda to examine ‘(a) the refugee problem in Africa and make recommendations to the Council of Ministers on how it can be solved and (b) ways and means of maintaining refugees in their country of asylum.

The drafting of this resolution ultimately gave rise to is the subject of varied and conflicting accounts, in part because there are no official travaux préparatoires for the 1969 Convention. These accounts can, for ease of exposition, essentially be divided into two categories. On the one hand are commentators who address the Convention’s drafting history only briefly, without reference to primary sources such as OAU resolutions and archival material. They tend to note that the OAU’s interest in a regional refugee instrument was the result of the persecution-based universal refugee definition’s failure to reflect African realities, such as displacement resulting from colonialism and racist regimes. On the other hand, are a handful of writers who have addressed the 1969 Convention’s drafting history in some depth. Such accounts have consistently attributed the motivations behind the 1969 Convention to two factors: ‘[t]he first of these was the problem of subversive activities and the other the date line contained in Article 1A (2) of the 1951 Convention. The latter meant that whatever was the legal scope of application of the 1951 Convention, it did not apply to the new refugee situations which had arisen in Africa.

Also, four of the five drafts of the 1969 Convention include only the 1951 Convention refugee definition without the dateline confirms that dissatisfaction beyond the dateline question was simply not a factor initially motivating the adoption of a regional instrument. Until the time the 1967 Protocol relating to the Status of Refugees 1967 Protocol was adopted, work on the 1969 Convention was directed at making the 1951 Convention applicable in Africa; only later would addressing refugee issues particular to Africa concern that refugees should not be a source of friction between States and that individuals fleeing particularly African situations such as colonialism and white racist regimes should receive refugee protection become an explicit objective.

The legal instrument these concerns ultimately gave rise to has alongside the 1951 Convention governed the protection of refugees in Africa since its entry into force in 1974. In defining a refugee, the 1969 Convention’s Article I provide two sub-provisions. The first adopts the refugee definition found in Article 1A (2) of the 1951 Convention, minus the 1 January 1951 date limit that most States later agreed, by way of the 1967 Protocol, not to apply. This definition applies to those outside their country of origin (or habitual residence in the case of stateless refugees) who cannot return there because of ‘a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’. The second sub-provision provides, ‘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’.

The 1951 Convention’s emphasis on individualized persecution linked to Convention grounds in favor of a focus on disruptive conditions in the country of origin or nationality, the Article I (2) refugee definition stresses protection from what might be more broadly applicable conditions. According to Hathaway, it ‘acknowledges that fundamental forms of abuse may occur not only as a result of the calculated acts of the government... but also as a result of that government’s loss of authority’ This outward orientation has led to the conclusion among most scholars of the 1969 Convention that the Article I(2) refugee definition is ‘based solely on objective criteria and therefore mandates an objective test of refugee status. This consensus is overstated, for two reasons. First, focus on the objectivity of the Article I(2) refugee definition overestimates the subjectivity of the 1951 Convention definition and underestimates the extent to which the universal definition can equally apply to victims of war.

views of the Article I(2) refugee definition as entirely objective overlook elements of the definition that mandate an assessment of the nexus between the individual and the disruptive situation in the country of origin or nationality: that the individual must have been ‘compelled’ to leave his or her ‘place of habitual residence and that such flight must have been ‘owing to’ external aggression, occupation, foreign domination or events seriously disturbing public order. These aspects of Article I(2) and their impact on RSD under the 1969 Convention.

To date the 1969 Convention has been ratified by 45 of Africa’s 54 States. Eritrea, Sao Tomé & Principé and South Sudan have neither signed nor ratified the 1969 Convention. Morocco is also not party to the Convention, having withdrawn from the OAU in 1985 after the Saharawi Arab Democratic Republic was admitted as a member State. Djibouti, Madagascar, Mauritius, Namibia and Somalia have signed but not ratified the 1969 Convention. The Comoros, Eritrea, Libya, Mauritius and South Sudan have neither signed nor ratified the 1951 Convention nor its 1967 Protocol. Madagascar is a party to the 1951 Convention but not its 1967 Protocol, and it and the Republic of Congo continue to recognize the 1951 Convention’s geographical limitation. Despite the fact that most African countries have ratified the international and regional refugee instruments, the situation for the almost three million refugees in Africa is difficult, with their rights regularly violated. Many refugees in Africa will have fled as a result of conflict and other situations of violence at home. Indeed, as of the end of 2010, the vast majority of refugees in Africa were recognized under the 1969, not the 1951, Convention.

Also, according to ECOWAS, West Africa is characterized by a high level of migration, and particularly intra-regional migration. In addition, despite growing stability in most countries, the region continues to host thousands of refugees, most of whom were forcibly displaced during the conflicts of the 1990s and early 2000s. Recent trends show not only that intra-regional mobility is increasing, compounded by factors such as climate change and environmental degradation, but also that West Africa is a region of destination for migrants and refugees coming from other parts of Africa and the wider world.

The increasingly mixed nature of migratory movements means that refugees and migrants will often be travelling together. In this context, the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) are working together with governments, the Economic Community of West African States (ECOWAS), international organizations, civil society and other stakeholders to ensure that the rights of all refugees are upheld and that their protection needs are addressed.

In 2010, a series of joint workshops was held to promote a protection sensitive response to these movements in the ECOWAS space. This publication, which recapitulates the issues examined during the workshops, is meant to further facilitate cooperation between the different actors involved in the protection of persons on the move in order to protect refugees’ rights.

Also some provisions of the Refugee Convention limit its application to modern international crisis. First of all, the definition of what constitutes a refugee is pretty restricted: a refugee under international law is a person who is outside of its country and is unable or unwilling to return to it because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (article 1). This definition raises several questions. It ties the obligation of states to protect only the people who are recognized as being refugees in application with this definition, but what about asylum-seekers? Most of Syrian, Afghan, and South Sudanese refugees (representing more than 55% of the total world refugee population identified by the UNHCR) have not been yet, officially, qualified as refugees but did seek asylum in different countries. Is international refugee law not applicable to them? Besides, the qualification of refugee is restricted to people who have a “well-founded fear of being persecuted”, and therefore does not theoretically apply to people who flee conflicts. Interestingly, in the case of Syrians or Iraqis for instance, many states do recognize their refugee status in application of the Convention, while their situation apparently does not fall into this category. Consequently, states have here a wide discretion in dealing with the recent “refugee crisis”, which consequently reduces the power of international refugee law in dealing with it: the states are not in many cases formally obliged by the law to protect these people. International refugee law becomes dependent in that case on the political will of member states. Moreover, the term “persecution” itself is not defined, and neither the different reasons of persecution enumerated. Even if these categories have been successfully extended in many countries to persecution in reason for instance of sexual orientation, or female genital mutilation, it never has been extended (or rarely) to economic refugees or climate change refugees. States have here again a wide discretion in who is worthy of protection under international law while these people are forced to flee their country. Overall, the definition of refugee provided by the 1951 Convention, even if it defines a necessary minimal definition, fails to consider the major part of modern situations of forced migration.

Furthermore, the Convention lacks several legal mechanisms to tackle the recent “refugee crisis”. The first main problem is the absence of any repartition procedure of refugees between states. Nothing in the Convention forces non-neighboring countries to help other countries and “share the burden”, but nothing specifies either that refugees should claim protection in the first country they enter. This limbo creates a situation where the most vulnerable countries are by far the ones who host the big majority of the world refugees (the top 6 hosting countries being in order Turkey, Pakistan, Lebanon, Iran, Uganda and Ethiopia). This situation is not only creating intense problems in the management of forced displacements, but also could appear as being in contradiction with one of the purposes of the Refugee Convention: administer an international problem via the entire international community. Adding to this, no international body has the direct power to oversee the respect of the Convention or to provide a legally binding interpretation capable to create a coherent international refugee protection. Hence, disputes related to its interpretation or application must be brought before the International Court of Justice (article 38), but this has never been the case, and the UNHCR, the specialized UN agency on the question, delegation resides only in the obligation for state members to “cooperate” with the UNHCR and provide information on the topic to the institution (article 35). Despite its growing influence in refugee protection and in national refugee policies, the UNHCR guidelines on the topic, which try to create a coherent system in line with modern issues, are very unequally taken into account by states, and do not effectively prevent states from violating the Refugee Convention provisions.

Finally, protecting refugees is primarily the responsibility of States. Throughout its history, the United Nations High Commissioner for Refugees (UNHCR) has worked closely with governments as partners in refugee protection. In every region of the world, governments have generously granted asylum to refugees and allowed them to remain until conditions were conducive for the refugees to return to their homes in safety and with dignity. Governments have allowed UNHCR to operate on their territories and have provided financial assistance to refugees, both through their own domestic refugee programs and by funding UNHCR’s protection and assistance operations.

An increasing number of countries around the world have invited refugees to settle permanently on their territories. By offering naturalization, providing land and/or permitting legal employment, governments of both asylum countries and resettlement countries have offered a lasting solution to the problems of those refugees who could not be assured protection in their home countries or in their country of first asylum.

Legal framework that supports the international refugee protection regime was built by States. Through the years, States have affirmed their commitment to protecting refugees by acceding to the 1951 Convention relating to the Status of Refugees, the cornerstone document of refugee protection. The Convention, which was developed and drafted by States, enumerates the rights and responsibilities of refugees and the obligations of States that are parties to it. As of September 2001, 141 States had acceded to the Convention and/or its Protocol. In addition, as members of UNHCR’s Executive Committee, 57 governments help shape the organization’s protection policies and assistance activities.