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DICUSS ON THE INTERNATIONAL REFUGEE LAW AND GLOBAL INSTRUMENTS FOR REFUGEE PROTECTION AND THEIR LIMITATIONS

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16/SMS10/006

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400L

PCS402 (CONFLICTS AND HUMAN DISPLACEMENT)

INTRODUCTION

The more there are conflicts, the more they generate a large number of refugees, the more a large number of refugees is spread out around the world, the more it becomes a global issue involving the entire international community. Nowadays, the protection of refugees has become a major problem states, international organizations and other refugees' agencies have been facing, so it can be seen as a continuous feature of international life in the present century. In this light the work seeks to discuss the global and regional instruments for refugee protection and their limitations.

Who is a refugee?

Refugees are a special class of migrants who under international law deserve specific protection by their host state. According to Article 1 of the 1951 UN Convention, as modified by the 1967 Protocol, a refugee is defined as a person who ‘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.’ This definition implies that several qualifying conditions apply to be considered a refugee: (1) presence outside home country; (2) well-founded fear of persecution (being at risk of harm is insufficient reason in the absence of discriminatory persecution); (3) incapacity to enjoy the protection of one’s own state from the persecution feared. The definition of refugees was actually intended to exclude internally displaced persons, economic migrants, victims of natural disasters, and persons fleeing violent conflict but not subject to discrimination amounting to persecution. It is only in 1951 (and then through a broadening of the refugee definition in 1967) that the international community established 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. IRL is the document that 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-refoulement).

Individuals only become refugees when the above said has happened which implies that the country which they once belonged to has failed in ensuing human security.

**What is Human Security?**

As noted in General Assembly resolution 66/290, “human security is an approach to assist Member States in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people.” It calls for “people-centred, comprehensive, context-specific and prevention-oriented responses that strengthen the protection and empowerment of all people.” When a state fails to ensure human security for its citizens it has failed in its “Responsibility to Protect”

**What is responsibility to protect?**

The Responsibility to Protect (R2P or RtoP) is a global political commitment which was endorsed by all member states of the United Nations at the 2005 World Summit in order to address its four key concerns to prevent genocide, war crimes, ethnic cleansing and crimes against humanity.

In paragraphs 138 and 139 of the 2005 World Summit Outcome Document ([A/RES/60/1](https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/pdf/N0548760.pdf?OpenElement)) Heads of State and Government affirmed their responsibility to protect their own populations from genocide, war crimes, ethnic cleansing and crimes against humanity and accepted a collective responsibility to encourage and help each other uphold this commitment. They also declared their preparedness to take timely and decisive action, in accordance with the United Nations Charter and in cooperation with relevant regional organizations, when national authorities manifestly fail to protect their populations.

The responsibility to protect embodies a political commitment to end the worst forms of violence and persecution. It seeks to narrow the gap between Member States’ pre-existing obligations under international humanitarian and human rights law and the reality faced by populations at risk of genocide, war crimes, ethnic cleansing and crimes against humanity.

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However, the United nations (UN) has a role to play in the protection of refugees. 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. Respect for the rule of law and human rights forms the essence of the protection of refugees, returnees and stateless persons.  [The Office of the United Nations High Commissioner for Refugees](http://www.unhcr.org/cgi-bin/texis/vtx/home) (UNHCR) has a mandate to provide international protection to refugees, including promoting the accession to international refugee instruments and other relevant human rights instruments.  UNHCR’s activities are also focused on assisting in the strengthening of legal structures that would enhance the rule of law, including in the area of transitional justice.

Statelessness is a source of human insecurity, forced displacement and serious conflict, which may pose a threat to national and regional stability. Legislation on nationality and administrative practices that are in accordance with internationally recognized human rights standards are essential elements of the rule of law and key in addressing root causes of conflict.  UNHCR provides technical advice and support to governments for the accession to the [1954 Convention Relating to the Status of Stateless Persons](http://www.unhcr.org/3bbb25729.html) and [the 1961 Convention on the Reduction of Statelessness](http://www.unhcr.org/3bbb286d8.html).

NOTE: The only international legal norms applying specifically to refugees at global level are the [1951 UN Convention relating to the status of refugees (Geneva Convention) and the 1967 Protocol relating to the status of refugees](http://www.unhcr.org/3b66c2aa10.html). The Geneva Convention and its Protocol have been ratified by almost [150 states](http://www.unhcr.org/3b73b0d63.html) to date (however a number of countries, such as the Gulf States and India, are not among the signatories). The Convention was drafted under the specific conditions of the post-war period, applying only to persons who became refugees as a result of events occurring before 1 January 1951 in Europe. This temporal and geographical limitation was removed by the 1967 Protocol.

REGIONAL ORGANIZATION (ECOWAS)

Regional and sub-regional organizations are in a pivotal position to assist and respond regionally or locally to situations of concern from the perspective of the principle of the responsibility to protect. In many cases, the historical, cultural, geographic and political ties of these organisations to countries in their respective regions significantly increase the effectiveness of prevention and response tools to situations at risk of atrocity crimes. According to the United Nations “Collaboration with these organizations thus brings added value to the implementation of each of the three pillars of the responsibility to protect.”

Under pillar I, regional and sub-regional arrangements can encourage Governments to recognize their obligations under relevant international conventions and to identify and address sources of friction within their societies before they lead to violence or atrocity crimes.

Under pillar II, regional and sub-regional arrangements are vital in strengthening structural prevention efforts. They play a key role in the regional and sub-regional development of norms, standards and institutions that promote tolerance, transparency, accountability, and the constructive management of diversity. Also, they are at the forefront of the provision of assistance in crises that have a regional dimension. For example, non-State actors, such as armed groups, drug cartels or terrorists tend to operate on a transnational basis, thus requiring cooperative responses at the regional or sub-regional level.

Under pillar III, when States are unable or unwilling to protect their own populations from atrocity crimes, quiet response tools such as investigation, fact-finding, good offices, mediation, personal persuasion and conflict resolution, laid out in Chapters VI and VIII of the United Nations Charter, are often undertaken by regional and sub-regional arrangements. In this regard, it is important to take into account that context matters - while the responsibility to protect is a universal principle, its implementation and tools applied should consider institutional and cultural differences from region to region.

Regional and sub-regional arrangements also have an important role to play at the global level. For instance, because they are closer to the situations in which there is a risk of commission of the crimes, they can be critical in helping to ensure the accurate and timely flow of information and analysis from the country level to global decision-makers, while lessening the risk of misinterpretation, misinformation and deliberate distortion.

Several regional and sub-regional institutions have explicitly affirmed their support for the responsibility to protect principle.

Economic integration is the fundamental mission of ECOWAS, and the free movement of persons and goods within the sub-region was identified as an indispensable factor in the integration process. Over the past 30 years, a framework for the progressive implementation of the rights of entry, residence, work and establishment for all ECOWAS citizens has been rolled out in the region.

**The Free Movement Protocols**

West African states, fully conscious of the benefits that the free circulation of goods and persons would bring to the region, quickly followed the signing of the ECOWAS Treaty of 1975 with the 1979 Protocol relating to the Free Movement of Persons, Residence and Establishment. The 1979 Protocol and the four supplementary protocols that followed it provide for the citizens of the fifteen ECOWAS countries a legal framework for the progressive implementation of the rights of entry, residence, work and establishment, which were already instituted by the ECOWAS Treaty, in its Article 59. These rights are detailed in the corresponding Protocol on Free Movement and elaborated upon in two supplementary protocols on the Right of Residence and the Right to Establishment, as well as in two additional protocols clarifying procedural matters and legal notions.

**The Protocols and refugee protection**

The Protocols on Free Movement within ECOWAS were not adopted as instruments of protection for persons on the move. Nevertheless, this regional legal framework, combined with domestic legal provisions governing residence and naturalisation, offers a range of possibilities for refugees from ECOWAS member states to claim rights and access durable solutions in ECOWAS countries, in addition to rights already granted by the refugee conventions. UNHCR and the ECOWAS Commission enjoy a common understanding of the applicability of the protocols’ provisions to refugees. This common vision is enshrined in the Memorandum on ‘Equality of treatment for refugees with other citizens of ECOWAS Member States in the exercise of Free Movement, Right of residence and Establishment’ which was adopted in 2007.

In practice, many refugees displaced by conflicts in West Africa, most of whom have been staying in their host country for many years, choose to integrate locally. However, rather than applying for naturalisation, many prefer obtaining residence and work entitlements without giving up their original citizenship. The ECOWAS Protocols present these refugees with the unique possibility to achieve ‘local integration’ through greater regional mobility, as guarantees under the Protocols allow them not only to establish themselves in their host country but also to retain their nationality and all related privileges.

REFUGEE PROTECTION IN WEST AFRICA

Amongst those on the move, many are fleeing persecution, human rights violations and armed conflict in their home countries and may be entitled to special protection as refugees under international law. In order to effectively respond to mixed migratory flows in West Africa, a basic understanding of both the international refugee protection regime and the refugee situation in West Africa is essential. All of the countries in West Africa have signed and ratified the 1951 Geneva Convention, its 1967 Protocol and the 1969 OAU Convention, thereby accepting the refugee definitions in these instruments defined above.

Following the definition of a refugee given above, some people are exempted. Some persons are considered undeserving of international refugee protection under the exclusion clauses of the 1951 Convention and the 1969 OAU Convention on account of being responsible for war crimes, crimes against humanity or crimes against peace, and will be denied refugee protection on that basis. Similarly, those who have committed serious non-political crimes or acted against the purposes and principles of the United Nations, or, in the case of the 1969 OAU Convention, those of the Organization of African Unity, cannot benefit from refugee status.

**Refugee Status Determination**

Refugee status determination (RSD) is the legal or administrative process undertaken by states and/or UNHCR to determine whether a person is a refugee, in accordance with national, regional and international law. The responsibility for determining refugee status falls primarily to states, although UNHCR does conduct RSD under its mandate in those countries that have not ratified any of the refugee instruments, do not have a national asylum procedure in place and/or are unable or unwilling to comprehensively assess asylum applications in their countries. In West Africa, RSD is undertaken by the governments, with UNHCR participating in most government eligibility committees, either in an observatory or less frequently in a voting capacity. The determination of refugee status can be undertaken individually or on a group basis.

In certain circumstances, states or UNHCR will grant refugee status to individuals on a prima facie, or group, basis. This generally occurs in the context of mass influx, usually as a result of conflict or generalized violence, where those seeking international protection arrive in such numbers and at such a rate as to render individual determinations impracticable, and where there is general agreement that those who are fleeing satisfy the refugee definition given the situation in their home country. Individuals recognized as refugees on a prima facie basis enjoy the same status and rights as those who are granted refugee status under individual procedures.

**Cessation of refugee status**

Refugee status remains valid until it is established that international protection is no longer necessary or justified. Two different types of situations can lead to the cessation of one’s refugee statusunder the provisions of the 1951 Convention.

• Refugee status may cease following certain voluntary acts on the part of the refugees themselves, for instance if they voluntarily re-availed themselves of the protection of their country of origin, or if they acquire a new nationality and enjoy the protection of the country of their new nationality.

• Refugee status may also cease when there have been fundamental, stable and lasting changes in the country of origin, such that the refugee no longer has a well founded fear of persecution. In West Africa, the latest refugee population for whom the cessation clause was invoked was Sierra Leoneans who had fled their country during the civil war in the early 1990s. Given that the 2002 peace agreements had led to positive and durable changes in Sierra Leone, it was decided in 2008 to invoke the “ceased circumstances” cessation clause on the ground that those who had fled the country because of the conflict could no longer be considered refugees.

As noted above, all member states of ECOWAS have acceded to the Geneva Convention relating to the Status of Refugees (1951) and its additional Protocol (1967), as well as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), which specifically addresses refugee movements in Africa.

The major forced displacements of the 1990s and early 2000s in West Africa, mainly from Sierra Leone, Liberia and Ivory Coast, have given way more recently to increased stability throughout the region. This has allowed for major voluntary repatriation movements to take place. In 2007, a tripartite agreement was signed between the Governments of Mauritania and Senegal and UNHCR, resulting in the ongoing repatriation of Mauritanian refugees from Senegal. After the situation had fundamentally improved in Sierra Leone, the ‘changed circumstances’ cessation clause was invoked for Sierra Leonean refugees in 2008 and UNHCR facilitated voluntary repatriation for those wishing to return. Encouraging signs of peace and stability in Liberia have also allowed UNHCR to support voluntary repatriation to Liberia, preparing the ground for a possible invocation of the cessation clause for this refugee population in the near future.

**Critique**

All member states of ECOWAS have acceded to the Geneva Convention relating to the Status of Refugees (1951) and its additional Protocol (1967), as well as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), which specifically addresses refugee movements in Africa. The only instrument close to the protection of rights of citizens of member state is the protocol on free movement within ECOWAS which has its limitations (for better understanding refer to the protocol). This doesn’t provide a solid benchmark for the protection of refugees.

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