QUESTION

Do you think that developed countries in Europe and North America are protecting the rights of refugees in line with the principle of non refoulement?

 ANSWER

The principle of non-refoulement is the cornerstone of asylum and of international refugee law. Following from the right to seek and to enjoy in other countries asylum from persecution, as set forth in Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.

Procedures or arrangements for identifying refugees should provide a guarantee against refoulement, by ensuring that persons who are entitled to protection do in fact receive it. Such procedures or arrangements are particularly important when a country receives both asylum-seekers and migratory movements. In UNHCR's view, respect for the principle of non-refoulement can therefore be most effectively ensured if claims to refugee status and asylum are determined substantively and expeditiously.

International human rights law provides additional forms of protection in this area. Article 3 of the 1984 UN Convention against Torture stipulates that no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Similarly, Art. 7 of the International Covenant on Civil and Political Rights has been interpreted as prohibiting the return of persons to places where torture or persecution is feared. In the regional context, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Court of Human Rights as implicitly prohibiting the return of anyone to a place where they would face a "real and substantiated" risk of ill-treatment in breach of the prohibition of torture or inhuman or degrading treatment or punishment.While Art. 33 (2) of the 1951 Convention foresees exceptions to the principle of non-refoulement, international human rights law and most regional refugee instruments set forth an absolute prohibition, without exceptions of any sort.

It is indispensable to clarify the concept of refugee, because nations possess a duty to protect refugees and asylum seekers against their return to places where their lives or freedom may be threatened, until those threats no longer exist.This point is even more important for asylum seekers since the status of refugee is a conditio sine qua non to seek asylum in another country. Thus, every refugee may seek asylum, but, although there is a presumption that every asylum seeker has the status of refugee, it can be otherwise disproven in order to deny that protection.

The 1951 Convention prescribes in its article I that the term “refugee” shall apply to any person, who possessing a: 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 a nationality 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. Individuals deemed as refugees under the 1951 Convention need to be outside their country of origin, be unable or unwilling to seek or take advantage of the protection of that country, or to return there due to a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion.

In this regard, the UNHCR has insisted in a broader interpretation of the concept of refugee as it appears in the 1951 Convention. For instance, the UNHCR in its guidelines,has urged the parliaments to implement expanded refugee definitions such as those adopted by the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, or the Cartagena Declaration, because these instruments consider refugees to be not only persons who have a well-founded fear of persecution, but also persons who were forced to leave their country on account of serious alterations of the public order, occupation, external aggression, foreign domination, violence, internal conflicts or massive violations of human rights. Consequently, many countries have included those categories of refugees into its municipal law. twenty-one

However, the concept of refugee is not of a peaceful discussion within the doctrine. Fernandez affirms that there is not a uniform concept of refugee in international law because every nation regulates it in a different form within its legislation. Furthermore, Mariño Menéndez pointed out that the 1951 Convention has numerous flaws, among which he cited: the lack of clarity of the concept “ well-founded fear of being persecuted” , the term “ persecution” being inappropriate, and the fact that it does not make reference to questions of first asylum, nor to the establishment of internal procedures to select refugees.

Also, as the determination of the status of refugee is a discretional matter of each nation, it may involve issues of politics. For instance, China has an agreement with North Korea to return any national of that country found in China without the proper documents. Therefore, it is a policy of China not to examine asylum claims from North Koreans and to return them to their country. 23 In cases like that, the concept of refugee is reduced to what it is political convenient for a nation.

On the other hand, the concept of refugee may be narrowly interpreted by administrative or judicial authorities of a nation, when referring to the grounds on account of which the “well-founded fear of persecution” is required. For instance, the term “membership of a particular social group” has been interpreted in the United States to add requirements of “social visibility” and “particularity”, we will address this topic in part 3.1. Also, there has been a discussion about whether certain groups of individuals may fit in the "membership of a particular social group" concept, such as women and members of the LGTB community, so individuals in those groups may request asylum without difficulties.

From this point of view, the narrow or broader interpretation of the concept of refugee is fundamental to provide rights to asylum seekers such as “the right to life, protection from torture and ill-treatment, the right to a nationality, the right to freedom of movement, the right to leave any country, including one's own, and to return to one's country, and the right not to be forcibly returned ”

The so-called ‘first country of asylum’ principle often justifies the decision to return asylum seekers to another country. It means that a country can reject a person’s asylum application if they have already been granted protection by another country. It is also often referred to as ‘safe third country’ principle. This broader term includes other relationships between an asylum seeker and a third country where they are deemed safe.

These two principles are central to the Dublin Regulation, of which Norway is a member. The Dublin Regulation aims to streamline asylum management in Europe by only allowing an asylum application to be processed by one country; normally the country where the person first arrives in Europe. It seeks to avoid ‘asylum shopping’ when a person applies for protection in one country after being rejected by another. Although the Dublin Regulation is only valid for European countries that have signed it, the two previous principles are based on an interpretation of the 1951 Refugee Convention, and hence applicable to all countries that have acceded to it. The principles are not directly mentioned in the Convention, but derived from Article 31, which states that a refugee should not be punished for illegally entering a country if they are arriving directly from a country where they were under threat.

In November, the majority of parties in Norway’s parliament agreed to amend the Immigration Act. Norway no longer requires that a country accept and process asylum applications to be considered a safe third country. The change meant that Russia was deemed safe to receive asylum seekers, and subsequently people were forced to return there. The Norwegian Government amended the Immigration Act in a single week in November, assuring the public it had consulted with the top human rights experts, and that the amendment was in line with international obligations. However, the UN High Commissioner for Refugees and several international law experts strongly disputed the amendment.

First Russia, then Turkey,NRC and others organizations warned that Norway's assessment of Russia as a safe third country was a dangerous step towards recognizing Syria's neighbours in a similar way. Today we are witnessing the reality of this. When governments met in Brussels on 7 March, Turkey offered to take back all asylum seekers arriving in Greece if the EU accepted an equal number of Syrian refugees from Turkey.

The proposal may seem attractive at first, as it would remove the demand for people smugglers. However, NRC is highly critical of the proposal. It denies refugees the right to have their asylum applications processed in Europe, and Turkey cannot guarantee that the rights of all refugees will be safeguarded in line with the Refugee Convention. Turkey has only partially signed the Convention; agreeing to abide it with regards to European refugees only. Hence, Turkey can not be considered a safe third country.