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RIGHT TO ASYLUM IS A HUMAN RIGHT UNDER U. D. H. R: A BIRD VIEW

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Introduction:

Increasingly, many western governments are implementing hard-line or restrictive asylum policies and practices in order to deter and to prevent asylum-seekers from seeking refuge on their territory, including by interception and interdiction measures, visa controls, carrier sanctions, 'safe third country' arrangements, administrative detention, and/or restrictive interpretations of the refugee definition.¹ Increased detention, reduced welfare benefits and severe curtailment of self-sufficiency possibilities, coupled with restricted family reunification rights, have all been manifestations of this trend.² The application of deterrence measures has more recently been extended in some countries to recognised refugees, principally through the erosion of standards of treatment, including the 'denial of some of the important social, economic and cultural rights guaranteed by the 1951 Convention [relating to the Status of Refugees ('1951 Convention')³ and other rights⁴ guaranteed under international human rights law ('IHRL')'. In many developing countries, refugees are denied basic rights, often due to 'a sheer lack of resources'.⁵ To this end, a 'disproportionate amount of energy and resources tends to be focused on determining who is a refugee',⁶ rather than on their treatment pre- and post- recognition. 'Xenophobia and intolerance towards foreigners and in particular towards refugees and asylum-seekers have also increased in recent years'⁷ and contribute to a hostile local environment in which reduced standards of treatment are tolerated or even seen as acceptable. 'Although the vast majority of States have ratified the 1951 Convention/1967 Protocol, its application

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¹ M.J. Gibney, 'The state of asylum: democratization, judicialization and the evolution of refugee policy in Europe', New Issues in Refugee Research; Working Paper No. 50 (UNHCR, Oct. 2001), at 1 and B. Gorlick, 'Human rights and refugees: enhancing protection through international human rights law', New Issues in Refugee Research: Working Paper No. 30 (UNHCR, Oct. 2000), at 4.

² E. Feller, 'International refugee protection 50 years on: The protection challenges of the past, present and future' (2001) 83 (843) Int'l Rev. Red Cross -- Humanitarian Debate: Law, Policy, Action 581, at 589.

³ 189 UNTS 137, Adopted on 28 July 1951; entered into force on 22 Apr. 1954.

⁴ S.R. Chowdhury, 'A Response to the Refugee Problems in Post-Cold War Era: Some Existing and Emerging Norms of International Law', 7 IJRL 100, at 102, (1995).

⁵ S.R. Chowdhury, *ibid.*, at 101.

⁶ B. Gorlick, *above n.1*, at 6.

⁷ V. Türk and F. Nicholson, 'Refugee protection in international law: an overall perspective', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Cambridge University Press, 2003) 3, at 4.

varies enormously, depending on the national, cultural, economic and social situation.⁸ Clearly, the treatment of non-nationals is an area of persistent, serious and systematic human rights violations on a world scale.

Conceptual Narrative

'The refugee protection regime has its origins in general principles of human rights.'⁹ The inclusion of 'the right to seek and to enjoy asylum from persecution' in Article 14 of the UDHR alongside unanimously agreed human rights and fundamental freedoms squarely places IRL within the Human Rights paradigm. Moreover, reference in the Preamble to the 1951 Convention to the 1945 UN Charter, the UDHR and 'the principle that human beings shall enjoy fundamental rights and freedoms without discrimination' confirms that IRL was not intended to be seen in isolation from IHRL. The Preamble further notes that the UN has 'manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms'. There is, however, no specific reference to asylum or refugees in the UN Charter itself. Arguably such issues were considered to be subsumed within the wider discussion on human rights and fundamental freedoms at the time. It could hardly have been an oversight given the post-World War II environment and the large-scale refugee flows which, amongst other factors, precipitated the creation of the UN. The inclusion of Article 14 in the first declaration on the 'Human Rights and fundamental freedoms', as referred to in the UN Charter, supports this analysis.

Right of Asylum

The origins of the 'right to seek and to enjoy asylum from persecution in other countries' can be traced back to the 'right of sanctuary' in ancient Greece, imperial Rome and early Christian civilisation.¹⁰ Its modern equivalent was recognised by States in the form of Article 14 of the UDHR. Notably, initial drafting proposals that incorporated a correlative obligation 'to grant asylum' were not accepted.¹¹ Based on enduring principles of State sovereignty, 'the right to grant asylum remains a right of the State'.¹² In today's climate of heightened security concerns, arguments revolving around State sovereignty are gaining renewed vigour as the ultimate right of States to patrol their borders and to reject asylum-seekers at their frontiers.

Right to Enjoy Asylum

Apart from offering a definition of a refugee in Article 1, the 1951 Convention enumerates a range of rights owed to refugees in Articles 3 to 34. The 1951 Convention and/or its 1967 Protocol 'clarify the minimum standards implicit in the application of Article 14 of the Universal Declaration'.¹³ In line with the object and purpose of the 1951 Convention, by virtue of a positive refugee status determination under Article 1A(2), States are bound to grant to refugees minimum standards of treatment contained therein. By doing so, a framework for the treatment of refugees and

⁸ C. D. de Jong, 'The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later', 10 IJRL 688, at 691, (1998).

⁹ Art. 33, 1951 Convention

¹⁰ R.K. Goldman and S.M. Martin, above n.26, at 309.

¹¹ R. Plender and N. Mole, 'Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments', in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, (Cambridge University Press, 1999) 81, at 81. Cf. OAS Convention, above n.29, which provides in Art. 22(9) to the right 'to seek and be granted asylum in a foreign country', and Art. 12.3 of the African Charter, above n.29, which states: 'Every individual shall have the right when persecuted to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions

¹² C. Harvey, 'Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy', in F. Nicholson and P. Twomey (eds.), *Current Issues in UK Asylum Law and Policy*, (Ashgate, Dartmouth, 1998) 213, at 221

¹³ R.K. Goldman and S.M. Martin, above n.26, at 312

asylum-seekers in host countries has developed and the right to enjoy asylum has been transformed from an initially vague concept of temporary admission or stay¹⁴ to one requiring host States to adhere to particular practices. The replacement of a right 'to be granted' asylum with a right 'to enjoy' asylum changed the tone and ramifications of the provision. In contrast to the right to seek asylum, the right to enjoy asylum suggests at a minimum a right 'to benefit' from asylum. In determining applicable standards of treatment, the two key questions for refugees and asylum-seekers are: Do human rights standards apply to them? Which right prevails in the event of a conflict? One of the principal purposes of the UN is to promote and encourage 'respect for the human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.¹⁵ The human rights provisions of the UN Charter are directly binding on Member States.¹⁶ Similarly, the UDHR provides that 'All human beings are born free and equal in dignity and rights' (emphasis added) and that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (emphasis added). Although the UDHR is non-binding per se, it set the scene for the future elaboration of human rights standards which do not generally distinguish between nationals and non-nationals.

Durable Solution

To take the above analysis to its logical conclusion, it would be an over-sight not to mention briefly the clear link between standards of treatment in host countries for refugees and asylum-seekers and the realisation of durable solutions, including, particularly, opportunities for local integration. At the time of the drafting of the 1951 Convention, there was widespread recognition by States that local integration was a real solution to the plight of refugees. In fact, historically, local integration was the preferred durable solution and repatriation was actively discouraged, as most of the refugees originated from communist countries. The emphasis on voluntary repatriation as the 'primary' solution only arose at the end of the Cold War.

The Refugee context

Family ties and life are significant facets in every society worldwide. For refugees and asylum-seekers their family life is often faced with threats to its survival and existence. 'Refugees run multiple risks in the process of fleeing from persecution, one of which is the very real risk of separation from their families. As in other areas of refugee policy, host States have increasingly adopted restrictive measures, either through narrow definitions of who constitutes a family, the imposition of immigration-type criteria on reunification applications, such as length of residence, employment status, access to housing and/or earning capacity, or even bars to family reunification until after a specified period of time has elapsed. The UNHCR has referred to the 'continuing disinclination of some States to facilitate family reunification'. In addition, the negative impact that other refugee policies, such as detention of asylum-seekers, has on the right to family life is evident

Family unity and the 1951 Convention

The Conference of Plenipotentiaries failed to include a substantive provision on the right to family life in the 1951 Convention. In fact, the first pronouncement on the right to seek and to enjoy asylum from persecution in Article 14 of the UDHR was classed as an individual right. Moreover, the 1951 Convention refers to 'the refugee' in the singular, without any mention of the refugee's family.

¹⁴ T. Clark, above n.9, at 190

¹⁵ Art. 1(3), 1945 UN Charter. See, also, Arts. 55(c) and 56.

¹⁶ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion ICJ Reports 1971

While no substantive provision was included in the text of the 1951 Convention, the Final Act of the Conference adopted a specific recommendation that 'considered that the unity of the family ... is an essential right of the refugee' and 'commended Governments to take the necessary measures for the protection of the refugee's family' with a view to ensuring that the unity of the family is maintained and for the protection of minors.

The right to family life under international human rights law

There are myriad provisions that elaborate the right to family life under IHRL, starting with Article 16(3) of the UDHR which provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. The importance of the family is underlined by the inclusion of provisions in both the ICCPR and the ICESCR. Alongside the right to self-determination and equality/non-discrimination, the right to family life is the only other right that received double protection by virtue of its inclusion in both these instruments. Article 17 of the ICCPR incorporates the right in the form of a prohibition upon 'arbitrary or unlawful interference with [one's] ... family'. Furthermore, Article 23 adopts near identical wording as the UDHR and Article 24 addresses 'the protection of the rights of the child, as such or as a member of a family'. In contrast, Article 10 of the ICESCR utilises more discretionary, albeit broadly conceived, language in stating that '[t]he widest possible protection and assistance should be accorded to the family' (emphasis added). In adding 'assistance' as a component of the right, it reiterates the positive obligations on States.

The concept and definition of the family

Although international treaty law salutes the family as the basic unit upon which society is organized, the family is still a concept in transition. In fact, there is no definition of 'family' under international law. The absence of an agreed definition has meant that States may define the term according to their own interests, culture and system. The UNHCR in its 'Note on International Protection' in 2001 specifically highlighted the fact that cultural discrepancies in definitions of the family have given rise to problems for family unity. Yet, it ought to be acknowledged that the lack of a definition simultaneously allows scope for social and cultural variations of the family to be recognised and accepted as legitimate under international law

Family reunification

Apart from EXCOM Conclusions, which, although non-binding in a strict legal sense, reflect the views of EXCOM Member States and in the longer-term contribute to new customary practices, IRL offers little substantive guidance on the question of family reunification. Consistently, the UNHCR has called on States to adopt liberal and generous policies with respect to family reunification and promulgated similarly-oriented policy guidance, albeit with mixed results. Guidance that is available tends to appeal to States' humanitarian sensibilities and compassion, rather than to any strict legal obligations. More recently the UNHCR, through its Global Consultations on International Protection, has drawn upon international human rights and humanitarian law to reinforce its policy position on the reunification of refugee families.

Conclusion

There is no doubt that the 1951 Convention retains its 'central place in the international refugee protection regime', as acknowledged by States parties in the Declaration in December 2001. Yet it is similarly clear that the 1951 Convention does not cover the many rights nor deal with the range of issues facing forcibly displaced persons today. IRL suffers from the fact that it is seen as a 'compromise between the state imperative of migration control and humanitarian concerns'. Its lack of a complaints procedure and the failure of the UNHCR to activate its supervisory role in new and dynamic ways, such as through state reporting requirements, have, in addition, meant that the supervision of the rights of individual refugees under IRL has fallen.

References:

1. COOK, REBECCA J. (ed.): Human Rights of Women: National and International Perspectives, University of Pennsylvania Press, Philadelphia, (1994).
2. COOMANS, FONS: Clarifying the Core Elements of the Right to Education. In: The Right to Complain about Economic, Social and Cultural Rights. Coomans, F. & Hoof, G.J.H. van (eds.), Netherlands Institute of Human Rights, SIM Special, No.18, Utrecht, (1995), pp. 11-26.
3. CRAVEN, MATTHEW: The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development, paperback edition with corrections, Clarendon Press, Oxford, (1998).
4. DIJK, P. VAN AND HOOFF, G.J.H. VAN: Theory and Practice of the European Convention on Human Rights, Martinus Nijhoff Publishers, The Hague, (1998).
5. DONNELLY, JACK: Universal Human Rights in Theory and Practice, second revised edition, Cornell University press, Ithaca, (2003).
6. EIDE, ASBJORN, KRAUSE CATARINA & ROSAS ALLAN: Economic, Social and Cultural Rights, second revised edition, Martinus Nijhoff Publishers, The Hague, (2001).
7. EVANS, CAROLYN: Freedom of Religion under the European Convention on Human Rights, Oxford University Press, Oxford, (2001).
8. EVANS, MALCOLM & MURRAY, RACHEL (eds.): The African Charter on Human and Peoples' Rights, Cambridge University Press, Cambridge, (2002).
9. FORSYTHE, DAVID P: Human Rights in International Relations, Cambridge University Press, Cambridge, (2000).
10. FOSTER, JS (ed.): Women in politics and decision-making in Southern Africa: a gendered political analysis (2000).
11. FREDMAN, SANDRA (ed.): Discrimination and Human rights: The Case of Racism, Oxford University Press, Oxford, (2001).
12. GOODWIN-GIL, G.: The Refugee in International Law, second paperback edition, Clarendon Press, Oxford, (1998).
13. GORLICK, BRIAN: Human Rights and Refugees: Enhancing Protection through International Human Rights Law, in The Journal of Humanitarian Assistance. Working paper No. 30, (2000). [Http://www.jha.ac/articles/u030.htm](http://www.jha.ac/articles/u030.htm). Last date viewed: 3/3/2003. GORLICK, BRIAN: The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees, in International Journal of Refugee Law, vol. 11, no. 3 (1999), pp. 479-495.