Challenging established categories and exploring intersections

A critical assessment of common notions in migration discourse

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Abstract

Although freedom of movement and the right to seek asylum are rights conferred to all persons under the Universal Declaration of Human Rights and other international covenants, it is commonly accepted that today’s nation states may, in the exercise of sovereign powers, regulate and control entry and exit across their borders. However, states are also obligated to respect the principle of non-refoulement, the cornerstone of the international legal framework, enshrined in the 1951 Convention Relating to the Status of Refugees, which forbids states from returning refugees and asylum seekers to territories where their lives and/or freedom would be threatened. As such, a primary concern of many states, particularly so-called ‘destination’ countries (such as those in Europe, or North America) is to separate ‘genuine’ or ‘bona fide’ refugees from other migrants, economic migrants in particular. In the context of today’s mass displacement from countries such as Syria, Iraq and Afghanistan (to name but a few), where the bulk of those displaced first seek protection in neighbouring countries that may or may not be signatories to the 1951 Convention, and where the UNHCR acts as a ‘gatekeeper’, my contribution will aim to examine some of the common notions in migration discourse, as well as the policies and criteria that are used to determine who is a refugee and who gets ‘resettled’ (i.e. access to a third country in Europe, North America or Australia). I argue that some of the limitations and protection gaps in this current framework, particularly when it comes to the seeking of ‘durable solutions’, may indeed contribute to the phenomenon of ‘irregular migration’.
1 Introduction

The so-called refugee crisis in the Euro-Mediterranean region has dominated news headlines for well over a year now. Although the forced displacement of persons heading towards Europe should not have come as a surprise as the underlying conflicts and political problems leading to this displacement go back several years (and in some cases decades), the world began to focus on the issue only once the displaced started to make their way to Europe in large numbers using increasingly ‘irregular’ means. In this contribution I seek to shed light on the legal notions to capture this movement and explore the shortcomings – not to say the failure – of the current international legal framework to adequately address the unfolding humanitarian crisis. I will highlight not only that the current international legal categories and framework fails to adequately address the needs and vulnerabilities of displaced persons but also that it is precisely the existing migration and asylum policies that create this ‘irregular’ movement of displaced persons.

2 Legal classifications and their limitations

To understand why this movement is happening in an irregular manner, we must first acknowledge the fact that arriving in Europe legally is all but impossible for most of those coming.

All human beings theoretically enjoy the right to freedom of movement. Article 13 of the Universal Declaration of Human Rights (UDHR) (1948)\(^1\) and Article 12 of the International Covenant on Civil and Political Rights (ICCPR) (1976)\(^2\) both stipulate that individuals should enjoy the right to free movement within the borders of their own countries, and the right to leave any country, including their own, and to return to it. However, though both instruments grant all persons the right to leave their country, they are both silent with regards to a right to enter other countries. Article 12(3) of the ICCPR states that the right to free movement within and out of one’s country ‘shall not be subject to any restrictions except

\(^1\) The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948, arose directly from the experience of the Second World War and represents the first global expression of what are believed to be the rights to which all human beings are inherently entitled. Though not a treaty, it is a constitutive document of the United Nations and a powerful tool in applying diplomatic and moral pressure to governments that violate any of its articles. For a text of the UDHR, see United Nations (UN): http://www.un.org/en/universal-declaration-human-rights/.

\(^2\) A multilateral treaty ratified by 168 state parties, which constitutes part of the International Bill of Rights.
those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant. In today’s world, however, it is assumed that all sovereign states have the right to regulate the entry and exit of non-citizens (and even their own citizens) into and out of their countries. In short, the freedom of movement exists only in theory. In practice, the ability of any individual to leave his or her country and enter another is circumscribed by the passport they hold (and of course other practical matters, such as having the economic means to travel). And the passports held by most of the persons arriving on Europe’s shores are not ones favoured.

Furthermore, although Article 14(1) of the UDHR states that ‘everyone has the right to seek and enjoy in other countries asylum from persecution’, practically speaking, this right does not exist in an absolute sense. Most nation states have laws and regulations delineating who can enter their country, for how long, and the terms of their stay. As foreigners, the right to enter a country is predicated on the assumption that the stay in that country will be temporary, and for a specific purpose (tourism, study, work). Generally speaking, ‘to seek asylum’ is not a purpose for which one can seek permission to enter a country. However, many states are bound by the principle of non-refoulement, which forbids states from sending or pushing back refugees to territories where their life or freedom would be threatened. The principle of non-refoulement, crystallised in Article 33 of the 1951 Convention Relating to the Status of Refugees, is the cornerstone of the international legal framework that governs refugee protection today. The 1951 Convention emerged and was drafted in the aftermath of two world wars which devastated Europe and led to large-scale displacement, and has since been ratified by 148 state parties. The non-refoulement principle has been elevated to hold the status of customary international law, meaning that all states are bound by this principle regardless of whether or not they have become signatories to the 1951 Convention.

What the non-refoulement principle circumscribes is that no state may deport, expel or push back a refugee, not only to the country he or she fled for fear of persecution (usually the country of origin), but also to countries where they would be at risk of refoulement. There have been many debates about the parameters of the non-refoulement principle: at what point is a state ‘bound’ by this principle? When is someone actually on their territory? Who is bound by the principle? Who does it protect? A detailed discussion of the non-refoulement principle is beyond the scope of this paper and has been examined extensively elsewhere (UN High Commissioner for Refugees 2001). For the purpose of this paper, it should suffice to state the following key points: (1) a state’s obligation to abide by the non-refoulement principle begins as soon as the person seeking asylum is subject to that state’s jurisdiction; (2) the prohibition on refoulement applies in any
circumstance where the state and its organs, or any agent authorised to act on behalf of the state, is involved; and (3) the non-refoulement principle applies to asylum seekers and refugees.

From a legal standpoint, the term ‘refugee’ is reserved for those who have undergone some sort of formal determination procedure, and have been found to fulfil the legal definition of a refugee (set out in Article 1(a) of the 1951 Refugee Convention and adapted into the domestic legislation of many countries that use their own domestic legal framework for adjudicating refugee status). Until this formal declaration is made, the term used for persons seeking refugee status is ‘asylum seeker’. However, since the non-refoulement principle protects refugees and asylum seekers, states may not deport or push back asylum seekers until their status has been clarified. And, as mentioned above, the non-refoulement principle is triggered not only when the asylum seeker is physically on the territory of the state, but as soon as he or she is subject to the state’s jurisdiction (at the border, transit zones, territorial waters). It is for this reason that classifications such as migrant versus asylum seeker are significant.

In the current so-called refugee crisis gripping the Euro-Mediterranean region, the majority of those seeking protection in Europe are from Syria. The conflict in Syria has raged for more than five years and received a significant amount of media coverage. Because of this, the term refugee has been used to categorically refer to those fleeing Syria. But would the term also be used for those fleeing lesser known conflicts? Some of those seeking refuge are not fleeing countries in the grip of war, but countries ruled by authoritarian, repressive regimes. Although the asylum system is, theoretically, supposed to be apolitical, an asylum seeker stands a better chance of obtaining refugee status when fleeing a regime that is maligned and disliked by the countries of asylum, as opposed to one that has served as an ally. Those least in luck are persons fleeing countries that may be politically repressive, or undergoing some conflict, but which are also known to be impoverished. Those are persons labelled ‘economic migrants’ and therefore not deserving of international protection.

It is important to realise, however, that not all persons who flee war zones are automatically refugees. To be a refugee under the 1951 Convention, a person has to show that they are at risk of persecution based on one of five grounds: race, religion, nationality, political opinion or membership of a particular social group. In the context of a conflict, those who are disparately impacted in conflict due to their ethnic group or religion are more readily accepted as 1951 refugees (for example the Yazidis). However, the 1951 Convention is not meant to protect those fleeing generalised violence (there are other forms of complementary protection in such cases). Furthermore, even a person fleeing a war-afflicted country who may otherwise fit the 1951 refugee definition may be excluded from protection under
the 1951 Convention if it is found that within their country of origin they could have fled to a safe area (what is usually termed an ‘internal protection or flight alternative’).

Economic migrants are excluded from the refugee definition. However, it is important to recognise that, in practice, things are not always so black and white. In many cases, economic impoverishment and political repression and corruption go hand in hand. Wars also lead to disruption of livelihoods and it is scarcity and economic pressures that compel some to flee during war. Is the need to feed your family morally any less compelling? If we decide that a political activist is more ‘deserving’ of international protection than, say, a Senegalese fisherman who has become destitute because big fishing industries have destroyed his livelihood, it is only because we have chosen to privilege civil and political rights over economic and social ones, and we need to be conscious of this.

3 The current ‘refugee crisis’ and its challenges

These distinctions become important when we consider the current forced displacement across the Euro-Mediterranean region and the manner in which those seeking asylum are classified and treated.

Turning specifically to the current ‘crisis’, we need to examine more broadly the area encompassing not only the Middle East and North Africa (MENA), but also the Horn of Africa and Central Asian regions.

Undoubtedly, much of the forced displacement witnessed today is a consequence of the uprisings and subsequent conflicts that have engulfed the MENA region since 2011. The starkest example of this, of course, is Syria, where approximately 4.8 million Syrians have been registered with the United Nations High Commissioner for Refugees (UNHCR) outside the country (UNHCR 2016), and more than 6.6 million are thought to be displaced internally (Internal Displacement Monitoring Center (IDMC) 2016a). These figures represent nearly half the population of the country.

Aside from Syria, there have been conflicts in Libya and Yemen (where an estimated 2.5 million have been internally displaced) (IDMC 2016b). With the emergence and sweep of the so-called ‘Islamic State’ in large parts of Iraq, there has been a consequent rise in internal and external displacement in that country. Palestinians residing in countries like Syria and Iraq have been forced into exile for a second or in some cases third time. Conflicts and unrest that predate 2011 have in some cases been reignited (Sudan, Afghanistan) and politically repressive regimes in the region continue to steadily fuel waves of migration (Eritrea, Iran). In fact, Eritrea is a leading origin of asylum seekers (Laub 2015).
Violence has also disrupted traditional labour migration within the region. For instance, many Egyptian workers in Libya have been forced by the chaos to return to their home country (Aman 2015), where high unemployment and a poor economy is prompting many to seek better opportunities in Europe.

In addition, it is important to bear in mind that despite the uproar and panic in Europe over the so-called migration crisis, the number of migrants who have come to Europe represents only a fraction of those who fled their homes and are residing in host countries within the region.

According to the UNHCR, the three largest refugee host countries are currently Turkey, Pakistan and Lebanon (UNHCR 2015). As mentioned previously, most refugees originate from Syria. Of the estimated 4.8 million Syrians registered with the UNHCR, more than 2.6 million are registered in Turkey, and more than 1 million are in Lebanon (UNHCR 2016).

The UNHCR recently stated that displacement has hit an all-time record high (Edwards 2016). What is particularly significant about this is the fact that increasingly larger numbers of refugees are experiencing ‘protracted crises’, defined as a situation in which ‘25,000 or more refugees originating from the same country have sought asylum in another country (or countries) for at least five consecutive years … and find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile’ (UNHCR 2004).

As the Syrian crisis extends into its sixth year, the situation of Syrians who have been residing in host countries in the MENA region may now be described as a ‘protracted crisis’. Asylum seekers coming to Europe include not only Syrians but also other nationalities (in particular Afghans and Somalis), some of whom are fleeing conflicts, unrest and political repression that have gripped their countries for much longer.

4 The failure of durable solutions and conditions of host countries

The UNHCR’s mandate includes finding ‘durable solutions’ for refugees (UNHCR 2007). The three durable policy solutions are: local integration, repatriation and resettlement. Although there is, technically speaking, no hierarchy among the solutions, legal historians have observed that, over time, the international community has favoured certain solutions over others (Chimni 1999). In the aftermath of the Second World War, the international community looked at resettlement as the preferred solution for those fleeing the ‘Eastern Block’ to the West. With the end of the Cold War, the preference shifted to ‘containment’, either through the
encouragement of repatriation or local integration in host countries (which has been attempted through the building of refugee camps, which are not truly conducive to integration) (Chimni 1998). Regardless of how one views the evolution of practices, it is clear that these ‘durable solutions’ have failed, or revealed themselves as inadequate to address the current levels of displacement.

In order to understand what compels asylum seekers to undertake the costly and high-risk journey to Europe\(^3\), it is important to better comprehend this inadequacy and also consider the host countries’ context.

**Local integration**

Local integration as a durable solution involves three dimensions: legal, economic and social/cultural (UNHCR 2008). As a legal process, it entails a refugee acquiring a broader range of rights in the host state (especially as their period of stay there increases). As an economic process, it means that the refugee must have the right and reasonable opportunity to establish a livelihood and attain a standard of living comparable to citizens of the host country. Finally, it is a social and cultural process of adaptation and acceptance that enables the refugee to make contributions to the host country without fear of discrimination. True local integration is a process that takes time. However, the principle is established in international refugee law and Article 34 of the 1951 Convention exhorts contracting states to ‘facilitate the assimilation and naturalization of refugees’, suggesting that the ideal and natural culmination of local integration is a refugee obtaining citizenship status in the host country.

Unfortunately, at least within the MENA region, refugees are living in circumstances which are not at all conducive to true local integration. Most of the countries in the MENA region are not signatories to the 1951 Convention (for example, Jordan and Lebanon), and even in countries like Egypt which are a signatory to the 1951 Convention, the reservations made to the convention make the process of integration very difficult. In addition, most of the countries of the region lack a domestic legal framework for asylum/refugee status. Consequently, for instance, refugee status does not automatically confer upon those holding it the right to work in the host country. Like other foreigners, refugees are obligated to comply with a burdensome sponsorship scheme, which leads many of them to work illegally and risk arrest/detention.\(^4\) Residence in the host countries as refugees does not, in

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\(^3\) For instance, in 2015, the International Organization for Migration estimated that 3,771 persons lost their lives trying to cross the Mediterranean; see International Organization for Migration (2016).

\(^4\) For example, arrest for working illegally is the main reason why Syrian refugees are detained in Jordan. See: Al-Masri and Gillespie (2013).
most cases, lead to lawful permanent residence or citizenship, and access to education, healthcare and other services may be quite restricted.

**Voluntary repatriation**

Another durable solution is the *voluntary* repatriation of refugees to their country of origin. The key element of this solution is that, ideally, the return should be voluntary, based on an informed decision when conditions prevail that allow return in safety and dignity. The idea of safety here comprises safety that is physical (no dangers are posed to the returnees from the government or any other armed groups), legal (there is no longer a fear of persecution) and economic (there are conditions that would allow for the material security of refugees).

In the context of mass displacements caused by civil wars or armed conflict, host governments are advised not to put pressure on refugees to return upon the ceasing of hostilities or even after the execution of a peace agreement. The changed conditions in the country of origin must be ‘fundamental’ and ‘durable’ (UNHCR 2003). What this means is that the circumstances that led to a refugee’s flight must have changed in a way so complete that the refugee no longer has any fear of returning to his or her country, and those changes must be enduring. If there is any chance that hostilities could re-erupt, for instance, then refugees should not be made to repatriate.

As mentioned above, a defining feature of many of today’s refugee crises is their protracted nature. Many of the conflicts in the countries of concern – Afghanistan, Iraq, Somalia, Sudan and Syria – have been ongoing and flare up even after some periods of relative calm. In fact, despite the difficult conditions that they face in the host countries, returns to country of origin remain quite low. For instance, according to the UNHCR, over the course of 2014, 126,800 refugees returned back home – the lowest number since 1983 (UNHCR 2015). In general, the longer the period of exile continues, the more difficult and unlikely it becomes for refugees to return.

**Resettlement**

Resettlement, the third ‘durable solution’, refers to the transfer of refugees from the country in which they have sought asylum to another state that has agreed to admit them as refugees and grant them permanent settlement and an opportunity for eventual citizenship (UNHCR 2011). It is important to understand that resettlement is not a ‘right’. Resettlement is seen as serving two primary functions: first, it serves as an important protection tool for particular refugees whose particular protection needs may not be addressed in the country of asylum; second, it is meant to be a tangible expression of international solidarity (occasionally referred to as ‘burden sharing’), allowing states to share the responsibility as opposed to
placing it all on host countries. As previously mentioned, host countries in the
developing world generally bear the greatest responsibility in this regard and are
made to absorb the largest numbers of refugees. Generally, the UNHCR makes
submissions to countries of resettlement, which in turn interview the refugees and
make a decision on whether to accept them. There is no obligation to accept refu-
gees for resettlement and countries of resettlement may have particular admission
criteria. It is also important to recognise that on a global level only a minority of
refugees are resettled. For instance, in 2014, the UNHCR submitted 103,890 refu-
gees for resettlement, of which 73,331 actually departed (UNHCR 2014). The 2014
figures were an increase from 93,226 in 2013 and 75,080 in 2012 (UNHCR 2015).

In a way, resettlement represents the ‘legal’ means by which refugees facing
problems in host countries can get to countries of resettlement. However, aside
from the fact that the number of refugees who are resettled is a minority of the to-
tal number of registered refugees, there are some other problems with the process
that reduce its effectiveness as a tool to address situations of forced displacement.

First, the process may also be bureaucratically burdensome and quite lengthy.
The first stage involves being selected by the UNHCR (based on criteria that will
be discussed below), and then being referred to one of the resettlement countries,
which, in turn, conducts interviews and background checks before admitting a
refugee into their country. With an annual quota of 70,000, the United States is
the world’s leading resettlement country (Migration Policy Institute 2015). How-
ever, the United States also conducts quite extensive background checks and has
stringent admission criteria, which notoriously take a long time to administer. It
is quite common to hear of people waiting well over a year after being referred to
the United States to find out whether they will in fact be resettled.

Second, when particular refugee crises are thrust into the spotlight and get
media coverage and result in increased resettlement numbers, it impacts nega-
tively on other refugees. It can happen both in terms of numbers (unless the total
resettlement quota of a country is increased to accommodate the regular refugee
load and the refugees now suddenly in the spotlight), or in terms of simply push-
ing the other refugees to the back of the queue in terms of priority and increas-
ing their wait for resettlement. Of course it also creates a great deal of resentment
within refugee communities against one another – when one group is perceived
to be receiving ‘favourable’ treatment. The refugees from neglected countries lose
faith in the system and are more likely to explore irregular migration routes and
are more susceptible to traffickers.

Third, resettlement referrals are generally made based on vulnerability criteria
determined by the UNHCR (among them: legal and/or physical protection needs,
women and girls at risk, medical needs, etc.) (UNHCR 2003). While it is on the
face of it understandable that the UNHCR should establish particular criteria for
making these determinations, in practice it is extremely difficult for UNHCR staff
to make these determinations when confronted with a population who all face
vulnerabilities. The reality is that the desire to ‘fit into’ the vulnerability criteria
does lead to abuse and in turn creates a situation of distrust for refugees.

Lastly, the resettlement system tends to disfavour ‘secondary movers’, a term
used to refer to refugees who have moved onwards to a third country after having
initially sought and found protection elsewhere. Sometimes, refugees will move
onwards for protection reasons that relate to their original flight (for instance, if a
refugee has fled to a neighbouring country and fears that intelligence agents from
his country of origin are active and cooperate with agents in the host country). At
other times, the onward movement may have been caused by other protection or
survival issues. However, the refugee regime tends to favour those ‘coming direct-
ly’ from countries where their life and/or freedom was threatened. Consequently,
it is not unusual to find that secondary movers, though they will be registered, will
not be referred for resettlement (except in extreme cases of vulnerability). Again,
this means that this group will also be more likely to seek irregular channels of
migration.

In sum, the traditional durable solutions do not adequately address the current
needs of the displaced. As discussed, local integration is not occurring in a mean-
ingful sense in most of the host countries. Repatriation remains a remote possibil-
ity given the intractable nature of some of the conflicts and the fact that instability
and violence continue to be defining characteristics of many of the refugee source
countries for the foreseeable future. Lastly, resettlement, the ‘legal’ means for mi-
gration, addresses the needs of a fraction of those forcibly displaced.

The failure of the international refugee regime to address this unprecedented
displacement and the mentality that labels this phenomenon a ‘refugee crisis’ for
Europe neglects to consider the reality that forced displacement, for both political
and economic reasons (which are related, despite all attempts by policymakers to
separate the two), will continue for the foreseeable future.

5 Conclusion

Given these shortcomings, how might a future solution look like? The answer is
not a straightforward one. Clearly, any attempts to resolve the ‘refugee crisis’ must
be comprehensive: it must address the underlying causes of migration as well as
those people who are, in fact, already displaced.

Against this background it is, first of all, important to cease viewing the move-
ment of refugees and other migrants solely as a matter of a single country defined
by its domestic affairs; the movement is a consequence of political and economic
policies and circumstances in which the international community, and in particular its most powerful states, as well as international economic and financial institutions play a crucial role and are deeply involved. More robust cooperation and concerted actions are needed to protect civilians in conflicts, including those internally displaced. Some have argued that the 1951 Convention must be replaced with a broader convention to address the various causes of those who seek refuge (including internally), be it war, political oppression or climate change. The states absorbing the largest numbers of refugees must be given more assistance to integrate them. And more expeditious processes must be put in place to resettle refugees who have crossed borders and continue to have protection needs. Undoubtedly, there are no easy or immediate solutions, but it is clear that the current system is inadequate and untenable.

References


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