

REFUGEES IN THE MASS MEDIA WORKSHOP

Freedom of expression and human rights in the age of the refugee crisis and “terrorism”: Implications for refugees¹

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1. International conventions and instruments on refugees

The 1951 Convention relating to the Status of Refugees defines a refugee as:

“A person who... as a result of events occurring before 1 January 1951 and 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/her nationality and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of that country”

Its preamble invokes both the Charter of the UN (1945) and the Universal Declaration of Human Rights (1948) in saying that these two instruments have:

“...Affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.”

In the UN Charter no less than seven articles deal with fundamental rights and freedoms for all people and these are 1, 13, 55, 56, 62, 68 and 76

Article 19 of the Universal Declaration of Human Rights states that:

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“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Article 19 of the International Covenant on Civil and Political Rights provides:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his (sic) choice.”

Similar provisions are found in the European Convention on Human Rights adopted by the Council of Europe in Rome in 1950, the American convention on human rights adopted in 1969 and the The Organisation of African Unity (OAU) Convention on Human and People’s Rights adopted in 1981.

Refugees are by extension and as a special category of minority groups entitled to all the rights contained in these key international and regional instruments and these rights include their right to freedom of expression.

Article 3 of the 1951 United Nations Convention on Refugees provides that states should not discriminate against refugees on the basis of race, religion or country of origin. At article 5 it is stated that nothing in the Convention to be deemed to impair the rights and benefits granted to refugees by the State in which they find themselves in.

Interestingly, Article 15 talks about States according refugees lawfully staying in their territory “the most favourable treatment accorded to nationals of a foreign country” in relation to “non-political and non-profit making associations”

This leaves room to ask, what about in the case political associations? Association is one of the mediums through which the right to freedom of expression is exercised.

3. Regional instruments on refugees

The 1968 OAU Convention Governing Specific Aspects of Refugee Problems in Africa has an expanded definition of the grounds for seeking refuge and includes reasons such as “external aggression, occupation, foreign domination and events seriously disturbing public order”

Article III of this convention is of particular importance because it demands of refugees not to commit “any subversive activities against any Member State of the OAU”. This of course includes governments in their countries of origin.

This article also requires the receiving state to prohibit refugees from attacking any Member State by way of “any activity likely to cause tension between Members States, and in particular by use of arms, through the press, or by radio.”

Section 27 (b) of the South African Refugee’s Act (130 of 1998) says a refugee “enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act.”

For some curious reason, the Act makes a distinction between refugees and asylum seekers and is resoundingly quiet on what category of rights apply to the latter. (In the act, a refugee is defined as “any person who has been granted asylum”)

In its proper construction, section 27 does not therefore apply to asylum seekers. All in all refugees are entitled to enjoy their right to freedom of expression in the same manner as the citizens of South Africa. It creates a certain degree of tension between what the OAU/AU Convention says about prohibiting refugees from engaging in subversive activities for example through the media.

In the present circumstances however I would argue that the Refugees Act prevails over the prohibition imposed by the Convention.

Section 232 of the Constitution (Customary International law)

“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”

Section 233 (Application of international law)

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”

But we have to remember that in terms of both the UN and the OAU Conventions, asylum will be denied where there are serious grounds to believe that a person has:

Committed a crime against peace, a war crime or a crime against humanity;
Committed a serious non-political crime outside their country of refuge;
Has been guilty of acts contrary to the purposes and principles of the United Nations.
Has been guilty of acts contrary to the purposes and principles of the OAU/AU (OAU Convention)

4. The global war against terror

To borrow from Amnesty International’s Secretary General Irene Khan’s comments in the 2003 annual report of the AI, the war on terror as a self-deluding adventure that:

“Far from making the world a safer place, has made it more dangerous by curtailing human rights, undermining the rule of international law and shielding governments from scrutiny. It has deepened divisions among people of different faiths and origins, sowing the seeds for more conflict. The overwhelming impact of all this is genuine fear -- among the affluent as well as the poor.”³

Refugees are perhaps going to be worst affected by this new shift and situation of the world’s state of affairs. Countries are eager if not overzealous in denying asylum to

³ Amnesty International, 2003 Annual Report, “No short cut to genuine security: suffering beyond the spotlight, Accessed at <http://web.amnesty.org/library/Index/ENGPOL100112003?open&of=ENG-200>

people persecuted in their own countries especially if they can somehow allege that such people have committed “terrorist offences”

An article in the Sunday Independent of August 17 2003 succinctly captured the dilemma facing refugees today. As Donna Arzt and Lucille Rignanese wryly observe in relation to the game of political music chairs by African leaders around former Liberian President Charles Taylor, “Political asylum [is] a precious and scarce resource these days”

In their thrust, Anti-terrorism laws largely target foreigners, immigrants and asylum seekers for detention without trial or charge. This has become the case particularly in what is now irreverently referred to as “fortress Europe and America”.

Europe and America have virtually turned themselves into impregnable fortresses for refugees and asylum seekers. Beginning the early 90s many European countries began to tighten their asylum and refugee laws and even many liberal democracies that have been the bastion of refugee protection such as Germany amended its constitution (Article 16 of the basic law) so that any one who has passed through a third country which is considered safe is now not eligible for refugee recognition).

4.1. The US Patriot Act (2001)

Under this draconian Act, the Attorney General can detain indefinitely immigrants convicted of crimes and immigration offences and any person that he or she has “reasonable” grounds to believe is a terrorist or “is engaged in any other activity that endangers the national security of the United States.”

4.2. UK’s Anti-Terrorism, Crime and Security Act (2001)

Also allows suspected international terrorists to be detained indefinitely without trial.

A major problem attending to this new haste in the global war against terror is that there is no internationally accepted definition of terrorism. Different states apply different

definitions and what may be considered as terrorism in one country may perhaps be viewed differently in another more liberal state. But this divergence is continuously narrowing and soon, governments of the world, led by the US and the UK may arrive at a consensus on what they believe to be acts of terror.

Presently the SA government is struggling to find a reasonable definition of terrorist acts so that it can pass an anti-terrorism law. Two weeks ago, the Portfolio Committee on Safety and Security published a new draft version of the Anti-Terrorism Bill which presents four (4) different definitions for consideration. The Bill tabled before Parliament in March this year was strongly opposed by members of the civil society as draconian and over-reaching in its breadth.

Refugees may soon find that their stringent outspokenness and opposition to tyrannical governments in their countries of origin may in all probability be equated with terrorism and once they move to other countries to seek refuge could be denied asylum. On the other hand once they are granted asylum, the protecting states are likely to frown against their constant criticism of their home governments.

The war against terror is undermining international law, especially the law of extradition. In October 1999, the South African authorities handed over a Tanzanian asylum seeker Mohamed Khalfan to the American FBI. He was suspected of being a member of the Al Qaeda and part of the group that bombed of the US embassies in Nairobi and Dar es Salaam in August 1998.

On May 28 2001, the Constitutional Court ruled that Mohammed's deportation had been unlawful because the government had not "sought assurances from the U.S. government that Khalfan would not be subjected to the death penalty."

The court further held that the Government had failed to uphold the rights enshrined in the Constitution which were applicable in all matters decided in South Africa, even in the case of foreign nationals residing in this country illegally, and which the Government was constitutionally bound to uphold.

5. The case of Muslim people arrested in Malawi on the orders of the US

On the orders of the United States, Malawian authorities in June 2003 arrested and illegally handed over five Muslims to the US authorities on claims that they were connected to the Al Qaeda. This was despite the fact that some of them were not even Malawian citizens and the court had ordered that they should not be deported.

Protest activities, which ensued in demand that the men be returned and charged domestically, were violently put down by the Malawian government of President Bakili Muluzi, himself a Muslim. All the five were later released.

Governments across the world argue that there is an international consensus and commitment around the need to combat terrorism by among other things enacting anti-terror legislation and adopting relevant measures at both the domestic and international level. In so doing they religiously chant the mantra of United Nations Resolution 1373 of September 28 2001, which requires them to take measures for the purpose of ensuring that:

“Terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”⁴

Resolution 1373, states claim, ties their hands. They hold that it requires them to enact “terror-specific laws”, irrespective of how draconian such legislation can be. Some third world countries have found themselves in the unenviable position of having to invent anti-terror laws of which they have a scant understanding and pretty much often in total disregard to the massive opposition shown by their own citizenry.

Furthermore, other measures such as economic pressure has been applied to those states that cannot make their minds fast enough and cooperation in the surrender of people suspected of engaging in ‘terrorist activities’, largely in violation of long established principles and rules of international extradition, has become alarming.⁵

⁴ Available at www.un.org

⁵ See the discussions above of the five Muslim men arrested in Malawi on suspicion of aiding the *Al Qaeda* network.

The resolution even gives directives for making inroads on the practice of international refugee law by requiring states to:

“Ensure that in conformity with international law...refugee status is not abused by perpetrators, organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for extradition of alleged terrorists”.

A very worrying and ominous situation is created by this resolution. In essence it erodes the principle of non-refoulement and the political offence exception, which have been the hallmarks of international refugee law. It would have been okay to make such a provision if it was easy to define terrorism and if indeed there were democratic systems in the world. Unfortunately this is not the case.

Thank you