

A regime at a loss?

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“Protracted situations cannot and should not be allowed to fester.”

So stated UN High Commissioner for Refugees António Guterres in closing the Dialogue on Protracted Refugee Situations (PRS) in 2008. The Dialogue itself focused on a number of existing PRS, in an effort to pull them out of neglect and to mobilise the international community towards their resolution. To bring long-standing refugee situations to a dignified and sustainable closure is a worthy and urgent undertaking. The more intriguing question remains, however: why do refugee situations fester in the first place? And its corollary: what can be done to prevent refugee situations from becoming protracted – i.e. to help them evolve fluidly towards an eventual resolution?

The contemporary refugee regime represents a formidable ambition, namely: to tackle and solve all manifestations of the refugee ‘problem’, regardless of where, when or how often these happen. The unpredictability inherent in this commitment is compounded by the polymorphism of the refugee ‘problem’, to the effect that, refugee crisis after refugee crisis, the regime must constantly reinvent itself around a rather incomplete set of ‘universal’ standards, few of which are binding or undisputed.

Between front-line states, potential burden-sharers (including resettlement countries) and – critically – the state of origin and other states able to influence its behaviour, every new refugee situation sets into motion a hesitant waltz around responsibilities, in which no-one dares take the first step, for fear that the partner(s) step back. This makes UNHCR’s role as a mediator of solutions singularly complex, and often unrewarding, as the UN refugee agency is all too easily sacrificed by one or more parties as the ultimate scapegoat for their own lack of cooperation or determination.

In order to promote durable solutions, UNHCR has no choice but to build trust in the cooperative

model it embodies. The only tool at its disposal in this endeavour is the much-touted ‘comprehensive plan of action’, a package of measures projecting a sense of equity in the attribution of states’ responsibilities, supported by a mechanism for ongoing negotiation and arbitration.

Such an approach must be introduced early on in the developing crisis, lest uncooperative reflexes solidify and wishful thinking about solutions replace the will to act on them. Exhortations to this effect are in abundant supply: two recent Conclusions of UNHCR’s Executive Committee recommend that “consultations should seek to develop, as early on in a crisis as possible, a comprehensive plan of action [...] that includes arrangements on a bilateral or multilateral basis to apportion burdens and responsibilities in response to specific mass influx situations”¹; and, within this context, to “recognize the challenges involved with the timing and sequencing of solutions.”²

That so many refugee situations have become protracted is a sure sign that an early focus on solutions is easier said than done, and indeed, the refugee regime as we know it has a serious problem with timing and sequencing generally.

The term ‘protracted refugee situation’ carries an important qualitative connotation: it is about the duration of life in exile but also, and more significantly, about the quality of such life, which is seen to deteriorate over time as solutions remain elusive. “The consequences of having so many human beings in a static state,” notes UNHCR, “include wasted lives, squandered resources and increased threats to security.”³

The image of the ‘warehoused’ refugee is symptomatic of a regime at a loss: it is as though there were no standards to be followed between “the emergency phase – where the

focus is on life-saving protection and assistance” – and durable solutions, which in most cases “cannot [be] expect[ed] in the foreseeable future”.⁴ Furthermore, it denotes a worrying disconnect between reality and standards, for no human situation is ever static – rather it is the system that is unable to capture (and support) its inner dynamics.

The conceptualisation of refugee situations in terms of successive ‘phases’ is a problem in itself, as it entails rigidity where fluidity should be the keyword. Time is represented as a series of isolated ‘moments’, and regime norms, institutional mandates and types of intervention are supposed to phase in, then phase out, almost mechanically. In contrast, a dynamic conceptualisation of ‘refugee time’ will rely on the concept of transition, and the regime’s ability to meet its dual objectives – protection and solutions – will depend on the way those ingredients of the regime dovetail.

Almost a decade ago, UNHCR staff member Arafat Jamal denounced the continuing use of ‘minimum [emergency] standards’ as benchmarks for UNHCR performance many years into an operation. He urged UNHCR to think in terms of essential needs rather than minimum standards, arguing that over time essential needs will grow “as refugee lives become increasingly intolerable”.⁵ Jamal claimed that this shift from minimum standards to essential needs would provide UNHCR with a “dynamic analytical tool” and that UNHCR must “both let go – give more responsibility to the community; and tighten the rein – develop a comprehensive plan”.⁶ Indeed, the protection and development of skills and resources within the refugee community enable a certain dynamism in programming. UNHCR and other humanitarian actors have by now espoused this approach quite firmly through self-reliance and livelihoods programmes. But perhaps Jamal’s most luminous intuition was that “[e]nabling the development of human capacities entails essentially a time-elastic

human rights approach” seeing in this the rights-enhancing potential of self-reliance as a modality of dignity and freedom – the ownership of rights as resources being squarely located in refugees and their community.

On the other hand, rights are of little avail if they are not mirrored by (state) obligations. International law allows for a gradual evolution of the basic duty to admit refugees into a more complete set of solution-oriented obligations, which are no less real for being shared with the international community at large. The clearest indication of the significance of the passing of time for the realisation of refugee rights is in Article 17 of the 1951 Refugee Convention, which provides that restrictions on wage-earning employment must disappear after three years’ residence in the country. Elsewhere, the gradual realisation is rather implicit in the conditioning of rights on the nature of the refugee’s attachment to the host state. Nowadays, however, the Convention, and indeed the whole body of refugee law, must be read in the light of general human rights law, and an incremental enhancement of rights is the norm – known as progressive realisation – under the International Covenant on Economic, Social and Cultural Rights. The concept of progressive realisation recognises that economic, social and cultural rights cannot generally be achieved within a short timeframe. The concept nonetheless incorporates obligations which are of immediate effect, sets positive progress – more rights as time passes – as the norm, and bans retrogression.

Despite their impressive growth in recent years, self-reliance and livelihoods programmes face difficulties in setting clear benchmarks to measure their impact on the ‘progressive realisation’ of socio-economic rights, and more still in getting host states to acknowledge any obligations in this regard.

In any event, solution-oriented obligations cannot be imposed upon countries of asylum alone. “Why is the road to solutions blocked?” and “Why do refugees’ rights and their quality of life deteriorate?” are two sides of the same question. The gradual descent of a refugee

situation into ‘protractedness’ is best described as collective action failure. Particularly in large-scale refugee situations, the reluctance of host states towards local integration is a major factor in the degradation of standards in refugee settlements and refugees being “unable to break free from enforced reliance on external assistance”.⁷ What this attitude reflects, however, is essentially a deep mistrust in an international system of responsibility-sharing that has all too often failed to deliver fairness.

The perception that local integration is a duty for asylum states, whereas burden-sharing and repatriation/reintegration are left to the discretion of resettlement states and states of origin, cannot be overcome within the strict parameters of the traditional ‘trilogy’ of durable solutions. Indeed, this traditional approach may be self-defeating, precisely because it compares and combines standards and modalities of international cooperation that correspond to multiple and varied levels of individual and collective responsibility. Thus, for example, voluntary repatriation is both the corollary to a *non-refoulement* rule binding on the country of asylum, and the expression of a right to return which cannot forever be detached from notions of state (of origin) responsibility, including in its reparation and rehabilitation dimensions.

Likewise, continued mobility on the part of former refugees after repatriation does not necessarily represent a failure of the reintegration process. It may be appropriate to consider whether legal migration opportunities should be incorporated more fully in comprehensive solutions plans.⁸

To be true to the objective of resolving the refugee ‘problem’, one has to acknowledge that the refugee regime does not contain in itself either the normative or cooperative instruments which will deliver the sought-after permanent solutions. The ultimate transition may well be ‘regime shifting’,⁹ as the sustainability of solutions to a refugee problem means little more than a mutation of this problem into a set of non-refugee problems.

How early in a refugee situation should this mutation be prepared, and factored into a dynamic management of ‘refugee time’? There cannot be a single clear-cut answer to this question. It matters, however, that it be on the minds of all stakeholders – governments, international organisations, NGOs and analysts – if they are serious about preventing new and future refugee situations from festering.

While it does not stand alone, the refugee regime is an essential mediator between broader social and political processes. It occupies a critical space in international relations – but it is probably more helpful to conceptualise that space as time. The problem-solving orientation of the regime contains the paradox that, to be effective, it must constantly work itself out of relevance. The conundrum will always be to ensure protection as long as it is needed, while keeping it as short as possible. There seems to be only one way of dealing with this, and that is to stress the link between protection and solutions as twin pillars of the regime: not to see protection as an obligation and solutions as lucky windows of opportunity but indeed to work creatively and responsibly on both, all the time.

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1. Conclusion No. 100 (LV), 2004, International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations. (Emphasis added.)

2. Conclusion No. 104 (LVI), 2005, Local Integration

3. UNHCR, ‘Protracted Refugee Situations’, Executive Committee of the High Commissioner’s Programme, Standing Committee, 30th Meeting, UN Doc. EC/54/SC/CRP.14, 2004

4. UNHCR, The State of the World’s Refugees 2006

5. Arafat Jamal, ‘Minimum Standards and Essential Needs in a Protracted Refugee Situation: A Review of the UNHCR Programme in Kakuma, Kenya’, UNHCR 2001 http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3429

6. Ibid.

7. UNHCR, note 3 above

8. See Jeff Crisp, ‘Beyond the Nexus: UNHCR’s evolving perspective on refugee protection and international migration’, *New Issues in Refugee Research* <http://www.unhcr.org/4818749a2.html>

9. I have borrowed this term from ‘regime complexity’ theory, while appreciating that it commonly denotes a tactical choice of states or other regime actors, rather than a mutation of the problem at hand. Thanks to Alexander Betts for guidance on this point.