

Screening in mass influxes: the challenge of exclusion and separation

by Bonaventure Rutinwa

It is now beyond contention that, in situations of composite population flows, persons not deserving international protection should be excluded from refugee status and those likely to jeopardise protection must be separated from ordinary refugees.¹ Some suggest that a consensus is emerging in refugee jurisprudence as to which persons should be liable to separation.²

Afghanistan, however, has highlighted a host of legal and practical difficulties. The number of Afghans who attempted to cross borders during Operation Enduring Freedom may not have reached the proportions which many expected. Nevertheless, the prospect of a mass influx once again raised the question of how to separate ordinary civilians from persons who, under refugee law, do not deserve international protection. In the context of Afghanistan, these included members of al-Qa'ida who master-minded or executed the terrorist activities that triggered the war and their Taliban hosts and facilitators. Now that many Taliban and al-Qa'ida combatants have fled Afghanistan, several countries may have to judge what kind of involvement in Taliban administration or al-Qa'ida activities might warrant exclusion from refugee status.

While the need to separate has not been a prominent feature of reports from the region, certain pertinent questions need to be raised, as relevant to future discussion on this subject as to the current situation. What conduct or attributes would warrant separation or exclusion? Is membership, past or present, of al-Qa'ida sufficient to warrant exclusion or separation? How is separation or exclusion to be carried out in situations of mass influx? What is to be done with those asylum seekers who have been excluded/separated? Whose

mandate or responsibility is it to look after separated persons?

Drawing on comparative experience from Africa, this article highlights how the above issues have previously been dealt with and proposes suggestions on how to resolve dilemmas of separation and exclusion in situations of mass influx.

Legal and factual circumstances for exclusion/separation

The provisions of refugee instruments applicable in Africa are fairly clear as to which persons are excluded from refugee status.³ Nevertheless, actual cases of individuals who have been excluded, particularly those who are alleged combatants, have aroused controversy and highlighted conceptual difficulties.

The arrest in November 2000 in Tanzania of two Burundian refugees, found in possession of weapons and allegedly engaged in military activities in Burundi, is a case in point. UNHCR pondered the legal implications in order to determine whether they were refugees or even persons of concern to the agency. One view was that combatants cannot be refugees, that an individual who actively and willingly participates in armed conflict does

because refugee status could only be lost under the five Convention grounds which do not include covert return home. Thus refugees who return to their country of origin and then come back (even if they went as combatants) remain of concern to UNHCR as refugees.

Exclusion and separation procedures

In situations of mass influx, the usual procedure for determination of refugee status is group determination on a *prima facie* basis. Effectively, a state recognises refugee status on the basis of the readily apparent, objective circumstances in the country of origin giving rise to exodus. Its purpose is to ensure admission to safety and to enable timely delivery of assistance to asylum seekers.

However, group recognition of refugee status has a number of disadvantages. It is difficult to exclude criminal and other elements who do not deserve international protection. Drastic government actions to avoid hosting criminal elements among refugees have had serious consequences for asylum seekers. An example is provided by the decision in 1997 of the Central African Republic to bar entry to all Rwandese asylum seekers in order to prevent the entry of alleged

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not fall within the scope of the obligations under which refugees are protected. When this individual is found on the territory of a non-belligerent, neutral state, s/he should not be treated according to refugee law standards. The other view was that the mere fact that refugees returned to fight in their country of origin does not make them lose refugee status

genocidaires. In-country UNHCR staff members and Geneva colleagues debated how to distinguish and separate bona fide refugees from those meriting exclusion. The CAR authorities only relented after UNHCR undertook to provide sufficient human and material resources to screen genuine refugees from criminal elements.

Mechanics of separation/exclusion

The application of a prima facie approach to admission of asylum seekers has meant that where separation and exclusion are deemed necessary they have had to take place after the targeted elements were already intermingled with genuine refugees in settlements. At this stage, weeding out the undeserving armed elements from civilian refugees has proved to be extremely risky. A case in point was the attempt to exclude armed elements from the large Rwandan refugee population in Eastern Zaire in 1994. Although it was noted that the presence of armed militia represented the greatest threat for the refugees, it was also acknowledged that separating them from other refugees would be a complex task and require the use of force. Various military options proposed by the UN Secretary General were rejected by the Security Council and those countries who had been asked to provide troops. This compelled the Secretary General to request UNHCR to provide security. It was on this basis that the Zairean Camp Security Contingent was established in February 1995 to provide security to refugees without separating them from undeserving elements.

The possibility of resistance to separation is likely to occur, even where the specific factors that obtained in eastern Zaire (collusion by local authorities and negation of protection principles) do not exist. This became evident in 1996 when the Tanzanian government attempted to transport alleged criminals to the Rwandan border. Special riot police and the army had to be brought in to quell refugee riots. When the government wanted to take to Dar es Salaam a refugee leader for whom resettlement in another country had been arranged, refugees suspected he was about to be imprisoned or sent to Rwanda. They threatened violence until the government allowed witnesses to accompany him to Dar es Salaam to see him onto a plane bound for the country of resettlement. These incidents show that separation of refugees, even where legitimate, is a sensitive exercise requiring careful handling.

What follows after exclusion/separation?

Those excluded from refugee status and of no concern to UNHCR can in theory be required to leave the territory of the host state. Often, however, this is impossible due to the risk of persecution and torture which face them in their home countries. The fact of their exclusion denies them any chance of being accepted for resettlement by any third state. In these circumstances, what can host governments do?

One option is to expel separated and excluded refugees under article 32 of the 1951 Convention if the activities

for which they were separated constitute a threat to national security or public order. However, even when the activities of separated persons meet the threshold of threat to national security, they cannot, under human rights law, be sent back to their countries of origin if they still face the possibility of persecution or torture. Unless a third country is prepared to accept them - which is highly unlikely - then the host country has no choice but to allow them to remain on its territory.

A second alternative for the separatees is to intern them, a path chosen by Tanzania in 1996 when it established a detention facility at Mwiswa, in Kagera region. Mwiswa was intended to



Rwandan refugees, DRC, 1997

host those guilty of intimidation: Rwandan refugees who were coercing or otherwise dissuading their fellow refugees from returning to Rwanda. After the mass repatriation of December 1996, the facility was used to host those Rwandans who said that

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they feared for their lives if they returned to Rwanda. Since the passage of the Refugees Act in 1998, Mwisa has become the place for detention of combatants in addition to asylum seekers and refugees.

In Tanzania the detention of separated persons raises a number of issues. As separation effectively results in restriction of movement and residence, is it compatible with principles of international law requiring that such restrictions should be imposed only when necessary and that the conditions imposed should be proportionate to the problem being addressed? Should mere possession of arms be sufficient reason to warrant detention without trial? How long should the detention be? Section 27 of the Refugees Act provides that the detention period should be three months but allows renewal of detention under the provisions of the Preventive Detention Act of 1963. How many times can detention be extended?

Who is responsible for the separated?

Where separation has occurred, questions about mandate and responsibility arise. Authorities can disagree over the status of the persons separated. This happened in 1997 when a group of Mai Mai fighters from Zaire arrived in Tanzania. Instead of asking for asylum, the soldiers wanted to retain their combatant status. The International Committee of the Red Cross concluded that they were not combatants for the purposes of international humanitarian law of armed conflict and therefore they were not persons of concern to the Red Cross. UNHCR would not deal with them as long as they claimed combatant status and expressed a desire to go back and fight. As a result, the government of Tanzania had to keep them in a football stadium for almost a year after

which they accepted refugee status and were transferred to a refugee settlement.

Whenever external agencies such as ICRC and UNHCR wash their hands of any category of asylum seekers, the burden naturally falls on the host country to take care of them. Such, however, is the unfair burden facing countries such as Pakistan should they arrest and detain Taliban and al-Qa'ida militants.

Conclusion and recommendations

While exclusion and separation are appropriate tools for addressing problems of mixed flows of asylum seekers, there are added difficulties when states of asylum attempt to screen in order to apply the exclusion clauses. Despite the apparently clear-cut provisions of relevant international instruments, liability to exclusion in individual cases is not always obvious.

We need to address difficulties in a way which recognises the concerns of host countries and is compatible with principles of asylum. Regarding ex-Taliban and al-Qa'ida militants, I would argue that the mere fact of former membership should not be a sufficient reason for immediate exclusion or even separation, provided that the asylum seeker is prepared to renounce terrorism and war, lay down any arms and become a 'normal' refugee. We need to endorse recommendations which emerged from a UNHCR-convened seminar in February 2001:

Persons who previously were members of military organisations are not excluded from seeking asylum and protection as refugees. [But] before considering the asylum applications of such persons/groups, a reasonable period of time should be allowed to elapse, the purpose of which would be to establish that the persons have completely renounced military activities and have no intention of resuming the war.⁴

In situations of mass influx all persons who arrive at borders and seek asylum should be admitted as prima facie refugees. Thereafter individuals

can be screened and, if they are found not to be refugees, they can be excluded. In exceptional cases, such as previous indictment by an international tribunal, exclusion could be considered immediately.

The internment of separated persons must be consistent with principles of refugee and human rights law. In particular, the restrictions imposed on the separatees, including those related to freedom of movement, must be proportionate to the preservation of the humanitarian character of asylum as a peaceful and friendly act, the prevention of subversion and demilitarisation of refugee camps, and the safe location of refugees.⁵

The international community should provide military and financial assistance to countries like Pakistan which need to carry out separation exercises. The burden of looking after separated persons should not be left solely to host countries. If it is accepted that it is necessary to separate *non-bona fide* refugees, responsibility for looking after the separated should be shared by all those with responsibility for refugee protection. This is not simply a question of mandate or even morality. It is one of functional necessity.

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1 For various recommendations to this effect see B Rutinwa 'Refugee Protection and Security in East Africa', *Refugee Participation Network*, September 1996, pp11-14.

2 See C Beyani 'International Legal Criteria for the Separation of Members of Armed Forces, Armed Bands and Militia from Refugees in the Territories of Host States', *International Journal of Refugee Law*, Vol 12, Special Supplementary Issue 2000, pp251-271.

3 See the 1951 Convention Relating to the Status of Refugees, Article 1F and the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa, Article I(5).

4 Overview of Key Conclusions/Recommendations of the UNHCR Regional Symposium on Maintaining the Civilian and Humanitarian Character of Asylum, Refugee Status, Camps and other Locations, 26-27 February 2001, Pretoria, South Africa, para 14(b).

5 C Beyani *Op. Cit.*, p265.