

ILLEGAL IMMIGRANTS OR ECONOMIC REFUGEES: A CASE FOR THE RECOGNITION OF ECONOMIC REFUGEES IN INTERNATIONAL LAW

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I INTRODUCTION

Refugee law is not a 'self-contained legal regime'.¹ It is not aimed at holding states responsible;² its function is remedial in that the underlying purpose is to establish whether the applicant satisfies the requirements for refugee status. Determinations of refugee status entail contextualized, practical applications of human rights norms. Increasingly, refugee law is confronting issues at the forefront of the human rights agenda, especially questions of socio-economic conditions and their impact on refugee movements.³

According to Article 1(A) (2) of the 1951 UN Refugee Convention,⁴ a refugee is a person who

'owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.'

This definition is reaffirmed in the 1969 OAU Refugee Convention,⁵ which is only applicable on the African continent. This Convention declares that the granting of asylum to refugees is a peaceful and humanitarian act and should not constitute political

¹ Goodwin-Gill and McAdam refer to refugee law as 'an incomplete legal regime of protection', Goodwin-Gill, GS & McAdam, J *The Refugee in International Law* (2007), Oxford University Press, 1.

² In any event, as a matter of doctrine, both human rights law and refugee law recognize state responsibility for human rights violations by non-state actors.

³ In this regard, the African Union is committed to taking up the multifaceted challenges that confront Africa and its peoples, in light of the social, economic and political changes taking place in the world (which by reference includes considering refugee rights in their proper context, pursuant to the undertakings in the 1969 OAU Refugee Convention to protect refugees). See Joiner, J. 'Foreword' in *Compendium of Key Human Rights Documents of the African Union* 4th ed (2010), PULP, vii.

⁴ 1951 *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137.

⁵ The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, (OAU Doc. CAB/LEG/24.3); 1001 UNTS 45. The OAU Convention on Refugees was adopted on 10 September 1969 and entered into force on 20 June 1974, 1001 UNTS 45.

tension.⁶ Moreover, the OAU Refugee Convention is significant because it extends the definition of a refugee quite considerably, given Africa's history and proclivity towards refugee movements.⁷ Sub-Saharan Africa is routinely – and justifiably – described as a 'continent of refugees', with Africa being home to more refugees and internally displaced persons than any other continent.⁸ Accordingly, a refugee is [also] a person

'who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or his nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality.'

The UN Refugee Convention definition emphasises 'events seriously disturbing public order' of which serious economic meltdown arguably constitutes such an event, as it invariably brings anxiety and a generalised state of instability. The confluence of circumstances giving rise to refugee movements has been highlighted by Mutua when he prophetically stated that

'the only salvation for the [African] continent, and the one sure cure for the problem of displacement [and forced migration] lies in governments that are freely elected, States that are accountable and transparent, and societies that respect human rights. Otherwise, Africa's demise is inevitable'.⁹

To this must be added Richmond's assertion that 'the majority of population movements are a complex response to the reality of a global society in which ethno-religious, social, economic, and political determinants are inextricably bound together'.¹⁰

In South Africa, the Refugees Act 130 of 1998 reproduced the UN Refugee Convention definition, and incorporated the extended definition of the OAU Refugee

⁶ Article 2(2) of the OAU Refugee Convention.

⁷ Hathaway, JC (*The Law of Refugee Status* (1991)) at 17 claims that this inclusive definition was a reaction to practical problems facing the developing world – hence assessing the plight of refugees on the basis of a 'de facto' rather than a 'formal, authority structure within the country of origin'.

⁸ Dieng, A (former Secretary General of the International Commission of Jurists (ICJ)), as stated in the Report of the Second Government Legal Experts' Meeting on the Establishment of an African Court on Human and Peoples' Rights, 11-14 April, 1997 Nouakchott, Mauritania, *OAU Doc. OAU/LEG/EXP/AFCHPR/RPT (2)*.

⁹ Mutua, M. 'The Interaction between Human Rights, Democracy and Governance and the Displacement of Populations' (1995) *International Journal of Refugee Law* 45.

¹⁰ Richmond, AH. *Global Apartheid. Refugees, Racism and the New World Order* (1993) Oxford University Press 58.

Convention, consonant with South Africa's voluntarily undertaken international obligations to receive and protect refugees.¹¹ Accordingly, by the end of 2011, South Africa had received 107 000 refugees – mostly from Somalia, Democratic Republic of the Congo and Sudan. South Africa continues to hold the record for the largest recipient of individual asylum applications – a status it has held for the past four years.¹²

Recognized refugees and registered asylum-seekers enjoy a specific legal status that sets them apart from other migrants.¹³ They are regarded to be in an exceptionally vulnerable situation, as they don't receive any protection from their own state and therefore require particular humanitarian concern.¹⁴ Based on a close consideration of the refugee definition, it can be seen that refugee status only attaches to those individuals subject to persecution for political and politically-inclined reasons. Yet this definition excludes one group that has become more visible and is growing – economic refugees. Economic refugees are categorically denied refugee status, yet on humanitarian grounds there is scope for developing the definition of a refugee to include the granting of refugee status to a person who has had to flee their country due to economic hardship.

The term 'economic refugee' is non-existent in international law.¹⁵ In South Africa, the Refugees Act makes no provision for granting asylum on humanitarian grounds emanating from economic issues. Internationally, however, there is increasing reference in scholarly works and discussion papers by both scholars and civil society groups to 'economic refugees', 'climate refugees' and 'environmental refugees'.¹⁶ The question then becomes: does the current legal framework which excludes these forms of refugees reflect the realities on the ground, and does it fully address the objectives of the granting of refugee status? This article seeks to address this fundamental question and concludes that the time is ripe for the extension of the refugee definition to encompass economic refugees. A continued relegation of economic refugees to the

¹¹ South Africa ratified the OAU Refugee Convention on 15 December 1995.

¹² 2011 Annual 'Global Trends' report released by the UN High Commissioner for Refugees (UNHCR), <http://www.unhcr.org/4fd9e6266.html>.

¹³ Stone, L. 'Refugees in South Africa: Caught between the threat of *refoulement* and xenophobia', lecture presented to LLM (International Law) students, University of Pretoria, 3 August 2011 (co- author).

¹⁴ *Ibid.*

¹⁵ Nobel, P. 'Protection of refugees in Europe as seen in 1987' Report No 4, Lund, Sweden: Raoul Wallenberg Institute of Human Rights and Humanitarian Law (1987) 26-27.

¹⁶ While this category of persons has been 'disfavoured' by the law, there is a growing international trend towards including them within the expanded criteria in regional refugee treaties, such as the OAU Refugee Convention and the Cartagena Declaration on Refugees of the Organisation of American States (OAS), as per the Annual Report of the Inter-American Commission on Human Rights 1984-1985, OEA/Ser.L/II.66.doc, rev 1, at 190.

periphery presupposes that economic and social rights, which are in themselves central tenants of social justice, occupy a subordinate and inferior place in international human rights law. If indeed they take an inferior position, then we can safely talk of double standards, contradiction and inconsistency in refugee law, as it is a fundamental principle that human rights are equal, mutually dependant and interrelated. Socio-economic rights are inextricably linked to civil and political rights, such that someone cannot exercise his or her civil and political rights without exercising socio-economic rights. People do not survive by having the right to vote alone, or the right to freedom of expression, rather they survive by having food on the table and accessing healthcare, among other rights, and these rights enable them to exercise the right to vote and speak freely. It is argued that just as political persecution and a trumping of civil and political rights in a person's country of origin gives the person access to refugee status in a foreign country, extreme cases of economic challenges should enable one to seek refugee status elsewhere if all rights are equal and if no right is less important than another.

II DEFINING AND DIFFERENTIATING AN 'ECONOMIC REFUGEE' FROM AN 'ECONOMIC MIGRANT'

The term 'economic refugee' was first coined in an essay that was written by Professor of Linguistics George Lakoff and his colleague Sam Ferguson. The essay was originally published by the now-defunct Rockridge Institute, which urged the American public to recognize that the 'issue of illegal immigration' is first and foremost a humanitarian matter that has many layers of complexity.¹⁷ Although much of the literature treats economic refugees and economic immigrants as the same group of people – sometimes termed 'illegal immigrants' or 'illegal aliens' – these terms actually refer to two different groups.

According to the International Organisation for Migration (IOM), an economic migrant is 'a person leaving his or her habitual place of residence to settle outside his or her country of origin in order to improve his or her quality of life.'¹⁸ This term is often loosely used to distinguish between people who migrate in search of better standards of

¹⁷ Discussion of article by George Lakoff and Sam Ferguson, 'The Framing of Immigration' (2006) Published online. See: <http://economicrefugee.wordpress.com/what-does-economic-refugee-mean/>. Full article available at http://www.huffingtonpost.com/george-lakoff/reframing-words-to-reclai_b_32389.

¹⁸International Organisation for Migration. Definition of key terms: <http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html#economic-migrant>.

living from refugees fleeing persecution, and is also similarly used to refer to persons attempting to enter a foreign country illegally and/or seeking asylum 'without *bona fide* cause'. It may equally be applied to persons leaving their country of origin for the purpose of employment.¹⁹ Unlike an economic migrant, an economic refugee flees oppressive poverty. This is the backbone of the distinction between economic refugees and economic migrants; that an economic migrant moves out of free will and is motivated by the need to seek greener pastures. According to current definitions of economic refugees, economic refugees 'choose' to migrate for mainly financial reasons and have a relatively unconstrained choice.²⁰ However, it is too simplistic a rendering to attribute the movement of economic refugees to 'choice' when such a choice is one between life and death.²¹ This is not a case of choosing greener pastures; it is a case of moving from a place where there would be no livelihood at all. Movement thus ceases to be a matter of free will and choice, and becomes a necessity, usually as a matter of moral urgency; hence it becomes an issue of forced migration. While it is true that economic migrants normally leave their countries voluntarily, compulsion is responsible for the movement of economic refugees.

Often we see the illegal presence of economic refugees in foreign countries, not because their situation did not warrant them leaving their countries, nor because they crossed the borders with malicious intent as criminals. Most leave their countries out of a pressing need that leaves them with no other options. Furthermore, because these people cross the borders without the required documentation, and are subsequently denied recognition as refugees, the countries in which they seek asylum do not provide safe havens. Once denied legal admission to the destination countries, most refugees do not return home, choosing rather to remain as undocumented persons. The result is that the access of these undocumented persons to certain services and subsequent enjoyment of their rights is severely restricted. Forced to obtain jobs illegally, they endure unfair labour practices. Furthermore, as Harris notes, 'constant fear of apprehension restricts undocumented refugees in their daily activities.'²² What then

¹⁹ *Ibid.*

²⁰ Discussion of article by George Lakoff and Sam Ferguson, 'The Framing of Immigration' (2006) Published online. See: <http://economicrefugee.wordpress.com/what-does-economic-refugee-mean/>.

²¹ 'Populations of Concern to UNHCR', UNHCR Global Appeal (2012-2013), 108-109. This reveals that the Great Lakes region of Central Africa and the East and Horn of Africa currently house over 628 thousand and 1.2 million refugees, respectively, because of ongoing violent civil conflict in those regions.

²² Harris, EK. "Economic Refugees: Unprotected in the United States by virtue of an inaccurate label" *American University Journal of International Law and Policy* (*Am. U. J. Int'l L. & Pol'y*) [Vol. 9:1]. 269–307, 303.

happens is that the rights of these vulnerable people are further violated, not only by employers, but by the authorities of the host countries. More often, though, it is ordinary citizens who infringe the rights of undocumented migrants. South African is no stranger to this scenario, and the victims of xenophobia in 2008 have daunting stories of persecution to relate.²³ Once the rights of such refugees are abused, their access to justice is severely limited. This is particularly true in the context of Zimbabweans entering South Africa.²⁴ What then ensues is the dire situation where there are *de facto* refugees who have fled economic persecution in their own countries – only to be persecuted further in their destination countries because they are categorized as being a foreign national. Far from being ‘second-class citizens’, they are regarded as aliens, in an often hostile host state, simply because their reason for being displaced from their countries of origin is economic – no matter how gross or severe it is.

III A HUMANITARIAN BASIS FOR ACCORDING REFUGEE STATUS TO ECONOMIC REFUGEES

Contemporary human rights jurisprudence is increasingly focusing on socio-economic rights as a core fundamental value of a universal character.²⁵ In South Africa and in many other jurisdictions, economic rights are justiciable – increasingly so, with the Constitution unequivocally providing for enforceable socio-economic rights. The importance of socio-economic rights is thus no longer subject to debate. As such, it seems reasonable to argue that the proactive protection of refugees’ socio-economic rights is as important as protecting their rights to life and physical integrity, amongst others.

As Stone argues: ‘For refugee law to serve the purpose for which it was intended, a creative rethinking of international law is necessary; such rethinking taking the form of the co-application of international human rights law, international criminal

²³ Ernesto Alfabeto Nhamuave, a 35-year-old Mozambican, was burnt alive during the xenophobic violence in South Africa in May 2008. In 2011, around 120 foreign nationals were killed, of whom five were burnt alive. In 2012, 140 foreigners were killed and 250 others injured in violent attacks across the country (see *Aljazeera News*, “S Africa migrants battle rising persecution”, accessible at <http://www.aljazeera.com/indepth/features/2013/06/201365124758700631.html>). More recently, in May 2013, a Somalian was filmed lying naked and prone on a street and being pelted with stones and rocks. See, also, “The nature of South Africa’s legal obligations to combat xenophobia”, Centre for Human Rights Research Report, 7.

²⁴ Stone, note 13 supra.

²⁵ Sachs, A. *Social and Economic Rights: Can They Be Made Justiciable?* (Southern Methodist University School of Law, 1999), 18; see, generally, Langford, M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) Cambridge University Press.

law and humanitarian law...'.²⁶ What this alludes to in this context is the application of refugee law within the wider context of international human rights law. A purposive approach is also warranted. It is important that the objectives that refugee law seeks to achieve and protect are met, rather than focusing mainly on the legalities attendant in procedure. A 'law and sociology' approach is preferable when dealing with complex issues such as refugee rights. As early as 1907, Pound espoused in reference to the interplay of economics, politics and law, and by implication, the interplay between socio-economic and political rights that:

'The modern teacher of law should be a student of sociology, economics, and politics as well. He should know not only what the courts decide and the principles by which they decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied; he should know the state of popular thought and feeling which makes the environment in which the principles must operate in practice. Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood. The most logical and skilfully reasoned rules may defeat the end of law in their practical administration because they are not adapted to the environment in which they are to be enforced.'²⁷

The essence of this assertion speaks to the imperative of applying refugee law in a context where there is an interplay of politics and economics, rather than an application of law from a purely legalistic position - without regard to the reasons for the law and its intended end. In 1910 Pound published one of his most celebrated papers, 'Law in Books and Law in Action',²⁸ in the *American Law Review*, and coined the phrase 'law in action'. The traditions of 'sociological approaches to law' and 'law in action' have generally been seen as necessarily separate developments, with the former relating to theorising within conceptual frameworks, and as such belonging in the domain of the 'theorist', and the latter relating to the redressing of concrete situations, and as such belonging in the domain of the 'problem solver'. Whilst we take the view that such distinctions are based on an overly theoretical analysis of two practical approaches, both closely related to one another, what is important however is that the extension of the refugee definition to encompass economic refugees is law in action. There are sound arguments for this, and this article deals with just a few of the arguments.

²⁶ Stone, L. "Elevating a well-founded fear of sexual violence to a form of persecution in refugee status determination: Justifications for a more inclusive approach" *SAYIL* 2013.

²⁷ Pound, R. "The need of a sociological jurisprudence" 19 *Green Bag* 607 (1907) 611, 611-612.

²⁸ Pound, R. "Law in books and Law in Action" 44 *Am. L. Rev.* 12 (1910).

Still on a purposive approach and an integrated application of human rights law and the wider international human rights framework, it will be easy to see that most aggravated economic challenges that produce economic refugees are direct products of political processes. Loescher maintains that economic hardship is exacerbated by political violence in developing countries – which have few resources and weak government structures.²⁹ As a result, it has become increasingly difficult to make hard and fast distinctions between refugees (in the literal sense, on the basis of political opinion or other listed grounds³⁰) and economic migrants.³¹

Melander observes that there is a growing tendency to make reference to basic human rights – that is, the criterion for persecution may be fulfilled if the applicant fears exposure to human rights violations.³² Whilst Melander was arguing for refugee status based on a widened category of civil and political rights, her statement is important in as far as it exposes the rationale behind refugee status being human rights violations. In many cases violations of socio-economic rights far exceed the gravity and effects of violations of civil and political rights. It is an established principle that human rights are interrelated, interdependent, and do not operate to the exclusion of another. They are mutually cumulative. Civil and political rights do not take precedence over socio-economic rights, and the reverse is true, for no one cluster of rights can be fully exercised without the other cluster.

Whilst there may be few cases of economic refugees in the developed global north, the situation is vastly different in Africa, in South America, and even in some Asian countries. Sub-Saharan Africa comprises 13 per cent of the world population, but only 1 to 2 per cent of the global economic performance.³³ Of the poorest 39 states in the world, 30 are located in Africa.³⁴ Failed economies generally also mean weak states, predatory ruling cliques, and human rights abuses.³⁵ These conditions lead to refugee

²⁹ Loescher, G. "Refugee movements and international security" *Adelphi Paper* (1992) 7.

³⁰ Solomon, H. "Protecting Refugee Rights: Getting Serious About Terminology" *African Human Rights Law Journal* (2002) 2 65.

³¹ Loescher, note 29 supra, 7.

³² Melander, G. "The two refugee definitions" *Report*, 4 (1987) Lund, Sweden: Raoul Wallenberg Institute of Human Rights and Humanitarian Law.

³³ Tetzlaff, R *Die Idee des Wandels. Spiegel Special Geschichte, Afrika, Das Umkämpfte Paradies*, No 2 (2007) 148.

³⁴ *Ibid.*

³⁵ Castles, S. "Towards a Sociology of Forced Migration and Social Transformation" *Sociology*, Vol 37, No 1, February 2003, 17.

movements combining economic and human rights motivations.³⁶ Elsewhere, a number of people who have applied for asylum in the United Kingdom and in South Africa, have done so as they are economically destitute rather than victims of political persecution. There are many asylum seekers fleeing political persecution, but by far the highest number are economic refugees. Thus refugees not only flee from threats to their life, but also escape poverty and social injustice. Just as much as refugees fear for their lives when they leave their countries, they also fear for their lives when the economic circumstances of their countries does not sustain livelihood. In the United States, the Refugee Policy Group Report stated that while many persons might not have a ‘well-founded fear of persecution’, they do have a ‘well-founded fear of injury, deprivation of human rights, and even death’.³⁷

When people are in abject poverty, hopelessness, and in a hopeless society, civil and political rights often have little meaning. Consider for instance a scenario where there is an economically well-off individual who, because of his public opposition to the government and its policies, is under threat of arrest and persecution by the government.³⁸ Then, consider on the other hand an individual who had not offended the government and is not being persecuted by it, and yet he is in an economically hopeless situation because of collapsed government services that have brought the economy virtually to a stand-still – with famine and disease plaguing the country. If both men apply for refugee status in a neighbouring country, the economically well-off man who spoke against the government is given refugee status because he has a ‘well-founded fear of persecution’, and the poor, diseased and economically hopeless man is denied refugee status because he is not under political persecution – and is said to have ‘voluntarily’ decided to leave his country and is an economic migrant. From both a human rights and a humanitarian perspective, this latter view is morally, ethically and legally unjustified. Without even considering the moral issues in any depth, this is unacceptable, and yet that is the legal position as it presently stands. There can only be one reason why differential treatment occurs in this scenario; that civil and political

³⁶ Zolberg A R, Aguayo S, Suhrke A *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*. New York: Oxford University Press (1989) 260; Faist, T *The Volume and Dynamics of International Migration and Transnational Social Spaces*. (2000) Oxford University Press 23.

³⁷ Refugee Policy Group Report 8 U.S.C. §1101(a) (42) (A).

³⁸ *Tantoush v Refugee Appeal Board*, case number 13182/06, Transvaal Provincial Division, is an excellent example hereof, as Tantoush was an ardent critic Colonel Muammar Qaddafi’s policies in Libya during the 1980s – which forced him to flee Libya under threat of death.

rights are elevated over socio-economic rights. Given that human rights are accorded equal status in human rights conventions, this is in fact an anomaly.

The situation of Zimbabwe during the period 2008-9 provides a practical and closer to home example than the scenario described above. With inflation skyrocketing to levels never seen since the infamous Weimar Republic of the 1920s, many Zimbabweans were left in a state of sheer despondency. The prevailing situation was that even those people who had the money, could not purchase food because there was simply nothing to buy – with extremely low production and minimal supplies even from external channels. Many became entirely dependent on food aid.³⁹ Then there followed a cholera outbreak that swept across the country at a time when hospitals were most incapacitated and operating at their lowest levels, probably since Zimbabwe became independent in 1980.⁴⁰ Most significantly though, is that this all happened in the aftermath of the disputed 2008 election, and the economic collapse was a direct result of the election and many other political factors – foreign economic sanctions included. The consequence of all this was the movement of people into neighbouring countries – primarily South Africa and Botswana. In total an estimated three million people sought refuge in neighbouring South Africa.⁴¹ Whilst included in this number are people who moved to South Africa before the 2008 crisis, the significant proportion were economic refugees of the 2008 crisis. The economic challenges in Zimbabwe did not rise naturally, rather they were tied to the political situation prevailing in the country.⁴² In most instances of economic refugees, this is also the case. The economic problems forcing such refugees to migrate can almost always be traced back to political challenges and unrest.

Yet in the face of all this, the international refugee legal framework only provides for political refugees who face persecution and a well-founded fear of death, arrest and torture. Harris argues that ‘this end result is unjust because economic refugees face the same possibility of death by governmental mass terror campaigns and starvation due to embargoes or other political tactics as political refugees do.’⁴³ She further notes that

³⁹ See for example, “Project profile: Food Assistance in Zimbabwe - World Food Programme 2008”. Available at <http://www.acdi-cida.gc.ca/cidaweb%5Ccpo.nsf/projEn/M012813001>.

⁴⁰ See the report by the World Health Organisation (WHO) “Cholera in Zimbabwe”. Available at http://www.who.int/csr/don/2008_12_02/en/.

⁴¹ *The Zimbabwean* ‘Recognise Economic Rights’ 24 March 2011. <http://www.thezimbabwean.co/news/38363/recognise-economic-refugees-verryn.html>.

⁴² *Ibid.*

⁴³ Harris, note 22 supra, 271.

recent events in Haiti, Guatemala, and El Salvador are clear testimony that flight to the United States is a means of survival – not just an opportunity to enhance one's lifestyle. In fact, she proceeds to say that these refugees fear just as much for their lives as do the 'political' refugees whom the United States protects.⁴⁴ With reference to Haiti, Harris argues that 'the conditions of physical danger and extreme poverty engendered by political instability and policy in Haiti underscore the weakness and inappropriateness of distinguishing between political and economic refugees.'⁴⁵ A case of recognising economic refugees as worthy of refugee status in international law thus does not border on nominalism, but on realism – if realism is to be taken as truly reflecting the realities on the ground.⁴⁶

A further case in point regarding the recognition of economic refugees on humanitarian grounds is where natural disasters are concerned. The need for humanitarian intervention in natural disasters cannot be denied. It is also a fact that post-disaster recovery may take time and yet when the victims migrate their status is unclear – regardless of there being an obvious humanitarian basis for their protection. This group of people is in need of international protection in other territories; internal humanitarian intervention may be insufficient.

The concept around refugees in its classical formulation in international law was on humanitarian grounds, and it still is. That said, should it then matter whether the humanitarian grounds for which political refugees are granted refugee status are economic and not political – where the effect is the same? It seems rational and logical to grant a person refugee status not necessarily because he or she has been severely persecuted, or fears persecution, but also because that person has lost everything that he or she owned due to conflict, natural disaster, or economic collapse – such that the person has no livelihood in his or her country of origin and there is no prospect of recovery soon, and with all these events beyond the refugee's control.

It is unhelpful to avoid the term 'economic refugees' – opting rather to call them 'illegal immigrants' and 'illegal aliens'. This unfairly defines the immigrants as criminals, as if they were inherently bad people.⁴⁷ As Lakoff and Ferguson lament, the term

⁴⁴ *Ibid*, 277.

⁴⁵ *Ibid*, 284.

⁴⁶ For a discussion on realist and nominalist views within the field of international migration, see Hein, J. "Refugees, Immigrants and the State" *Annual Review of Sociology* 1993 Vol. 19: 43-59.

⁴⁷ Lakoff, G. and Ferguson, S., note 17 *supra*.

‘illegal’ – particularly ‘illegal alien’ – dehumanizes.⁴⁸ It ignores the questions of why are people migrating, often at great personal risk? Why do they feel it necessary to avoid legal channels? The approach reduces the entire debate to questions of legality.⁴⁹

IV GOING FORWARD: RECOMMENDATIONS

The success of refugee law (namely to ensure the objective of protecting refugees) will be achieved only when the principles of international human rights law (IHRL), international humanitarian law (IHL) and international criminal law (ICL) are simultaneously applied – creating a layered web of protection. International law scholars have, for the past few years, been preoccupied with the notion of the fragmentation of international law.⁵⁰ In the context of refugee law, merely addressing the seemingly fragmented nature of applicable legal regimes – in particular, IHRL, IHL and ICL – is insufficient. Rather, we argue that these legal regimes are components of a system of international law, each reinforcing the other. There are exceptions, where irreconcilable conflict occurs among norms belonging to these different regimes;⁵¹ however, this is certainly the exception and not the rule. Refugee law can therefore not continue to be applied without regard to established human rights norms such as the equal status that all human rights enjoy, and the interrelatedness and interdependence of the rights.

Given the 1969 OAU Refugee Convention’s expanded refugee definition, it is submitted that a creative and broadened interpretation of this treaty may help to accommodate economic refugees – albeit in a limited way. Premised on the UN Refugee Convention, Gibney denotes ‘refugees’ as ‘people who require a new state of residence, either temporarily or permanently, because if forced to return or to stay at home they would, as a result of either the inadequacy or brutality of their state, be persecuted or seriously jeopardize their physical security or *vital subsistence needs*’.⁵² Gibney’s arguments are sound in this regard: the Refugee Convention’s core mandate was to alleviate the consequences of the problems described by Gibney, by offering victims a degree of international legal protection, amongst other assistance, and

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ See, for example, Koskeniemi, M. ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission’ UN Doc A/CN.4/L.682, 13 April 2006; Report of the International Law Commission (ILC), 56th session, UN Doc A/59/10, 408 para 5.

⁵¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996), para. 25.
⁵² Gibney, JM. “Liberal Democratic States and Responsibilities to Refugees” *American Political Science Review*, Vol. 93, No 1 March 1999 170.

eventually to help them begin a new life.⁵³ However, its major weakness is that it was not designed to tackle the root causes of people's flight such as human rights violations, political and armed conflict in the country of origin.⁵⁴ For this reason, the Convention should be exploited to maximum effect, by ensuring that anyone who is subject to persecution – of any kind – should be protected by it.⁵⁵ As with the creative and broadened interpretation suggested for the OAU Convention, Gibney suggests the same for the UN Convention.

More is needed, however, than merely broadened interpretations of existing frameworks whose protection, even with extended interpretations, will be minimal at most. The definition of political refugee should be broadened to include individuals and groups fleeing dangerous conditions and who cannot meet the criteria for persecution under its current interpretation.⁵⁶ The rationale for advocating the extension of the refugee definition is to ensure that all rights recognised in international law are given equal recognition and protection, and that there is no discordance in principle and in practice.

More encompassing and flexible criteria need to be introduced in determining who qualifies for refugee status. Determining whether cross-border movements are forced or voluntary may be one sound way of doing it, but this may not be practicable in the vast majority of cases, and this is not the most relevant element under international law. The crux of the issue should be whether persons have a need for international protection; and, if so, on what grounds this need may be turned into an entitlement.⁵⁷ As with political refugees, an important prerequisite may be that the violation of rights, or the fear of the violation of rights, in the country of origin must reach a certain degree of severity or threshold. It is acknowledged that extending the definition of refugees to include economic refugees would mean increased burden on host nations. To avoid undeserving cases of migrants being recognised as refugees, however, the test must be an objective one that looks at the circumstances of the individual and the country from which the individual has come. This may appear to be a fluid 'venture', but with the right legal guidelines, it may not prove to be difficult a terrain to cross after all.

⁵³ *Ibid.*

⁵⁴ UNHCR. *The Refugee Convention, the Landmark document that underpins our work*, available at: www.unhcr-centraleurope.org/en/resources/conventions/refugee-convention.html.

⁵⁵ Stone note 26 *supra*.

⁵⁶ Harris note 22 *supra*, 306.

⁵⁷ UNHCR Policy Paper "Climate change, natural disasters and human displacement: A UNHCR perspective." 14 August 2009, available at: <http://www.unhcr.org/4901e81a4.html>.

The reality and urgency of economic refugees is apparent across the world, and closer to home the case of economically induced movement of people from Zimbabwe to South Africa is a good example – as alluded to above. In addition to the obligations voluntarily incurred when it ratified the UN and OAU Refugee Conventions, South Africa also ratified the Southern African Development Community (SADC) Protocol on the Facilitation of Movement of Persons.⁵⁸ For the purposes of more fully implementing this Protocol in the wake of Zimbabwe’s economic refugees reaching the country, South Africa signed a Memorandum of Understanding with the Zimbabwean government on 4 May 2009, facilitating the reciprocal free movement of Zimbabweans into South Africa and vice versa. The Memorandum of Understanding has substantially altered the legal position with respect to Zimbabweans entering South Africa, in that Zimbabwean citizens can now travel to South Africa on a free, 90-day visitor's permit and can apply to do casual work during their stay. However, despite the distinction that has been drawn between refugees and economic migrants, Zimbabweans have still had the right to apply for asylum just as any other migrant would – as to deny legitimate claimants the right to apply for asylum would be tantamount to contravening the international principle of *non-refoulement*.⁵⁹ By withdrawing the visa restrictions, what has happened is that refugee law has been developed in South Africa, as refugee status on economic or humanitarian grounds has never been recognised in international law. By affording Zimbabweans the right to remain in South Africa on the basis that economic and political factors are so closely entwined, the result is that the definition of a refugee has been implicitly expanded – at least between these two countries in recognition of economic refugees, and notwithstanding the definition contained in the Refugee Act. We see this step taken by Zimbabwe and South Africa as a step in the development of international refugee law towards recognition of economic refugees, at least in a small way. This agreement attests to the realities on the ground and the pressing need to cater for economic refugees.

The United Nations High Commission for Refugees (UNHCR) recognises that there are indeed certain groups of migrants, currently falling outside of the scope of international protection, who are in need of humanitarian and/or other forms of assistance. The world is currently confronted with an accumulation of negative trends:

⁵⁸ Accessible at: <http://www.sadc.int/>.

⁵⁹ According to Article 33 of the UN Refugee Convention, and adopted in the OAU Refugee Convention and the Refugees Act, *refoulement* is a principle in international refugee law that protects refugees from being returned to places where their lives or freedoms could be threatened.

climate change, an increased incidence of natural disasters, outbreaks of diseases, rising food and energy prices, and turbulence in financial markets and a global economic slump. While it is impossible to predict the exact outcome of these phenomena, it is evident that they create the conditions in which significant numbers of people may be displaced or feel obliged to migrate.⁶⁰ In response to these circumstances, the UNHCR encourages the international community to adopt an approach based on respect for human rights and international cooperation.⁶¹ We envisage that this approach contemplated by the UNHCR is one that speaks to international protection of human rights without preferential focus on political rights.

V CONCLUSION

Whilst it may have been justifiable in 1951 when the UN Refugee Convention was drafted, to limit refugee status to victims of political persecution is inadequate. The global human rights context has developed and shifted since then – with socio-economic rights increasingly taking root. Increasingly, more people are becoming victims of politically-induced economic collapse, and their lives and human security are acutely threatened – leaving them with no option but to migrate. Other than an economic fear of increasing the burden on host countries, there is no justification in law to limit the granting of refugee status only to those under political persecution or in fear of political persecution, when there are other people who are worse off and in a battle between life and death owing to economic challenges not of their own making. A consistent application of human rights law dictates that no rights are more important than others, and where there is persecution, whether economic or political, the international community should afford protection. This forms a sound humanitarian basis upon which to extend the definition of refugees to include economic refugees.

The reason why economic refugees seek to be in countries that are economically well off, is that many are simply in search of basic survival – fleeing a genuine economic threat to their lives. This is why economic refugees from Zimbabwe did not flock to Swaziland, Lesotho, or Zambia, but rather to South Africa and Botswana, because these are economically stable and viable countries. This is why West and Central Africans also travel to South Africa. Surely, then, it becomes apparent that refugee

⁶⁰ UNHCR Policy Paper “Climate change, natural disasters and human displacement: A UNHCR perspective.” 14 August 2009, available at: <http://www.unhcr.org/4901e81a4.html>.

⁶¹ *Ibid.*

status is not 'desired' but is quite literally the only option available to millions of people suffering in the midst of collapsed economies. There is no question of a 'well-founded fear' of economic challenges, but a real and grave situation of economic despondency, a genuine struggle for daily survival.

The extension of the refugee definition is a test of how far the international community is willing to go in the protection of the fundamental human rights of people. A denial of refugee status for economic refugees will not stop those who have no option but to migrate from migrating. Rather, it will exacerbate the problem of 'refugees in orbit'.⁶² The question is: do those entrusted with global and national leadership and law-making have the political will to employ the ingenuity and resources that stable and better developed countries have – to help those who most need it?

⁶² The expression 'refugees in orbit' describes the plight of refugees who, while not being rejected or returned to the country where they fear persecution, are not granted asylum in any country to which they apply, and are obliged to move from one country to another. See Hurwitz A *The Collective Responsibility of States to Protect Refugees* (2009) Oxford University Press, 20.