REFUGEE MOVEMENTS: THE CHALLENGE OF INTERNATIONAL PROTECTION[**]

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INTRODUCTION

1. The mandate of protection

UNHCR is the United Nations subsidiary organ which has been established by the General Assembly in 1950[1] in order to assist the international community in protecting refugees and finding durable solutions to their problems.

Protection lies at the heart of the organisation's efforts to find lasting solutions to the plight of refugees and provides the context in which it carries out its relief activities.

Key to UNHCR's protection activities is the 1951 Convention relating to the status of refugees which was drawn up in parallel with the creation of UNHCR. It is a legally binding treaty and a milestone in international refugee law. It contains a general definition of the term refugee that no longer ties it to specific national groups. A refugee is a person who "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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is enable or, owing to such fear, is unwilling to return to it".

The Convention also clearly establishes in its Article 33 the principle of non refoulement, according to which no person may be returned against his of her will to a territory where he or she may be exposed to persecution. It sets standards for the treatment of refugees, including their legal status, employment and welfare.

As the post Geneva Convention era demonstrated that movements of refugees were amplifying and becoming universal, the international community adopted a variety of legal instruments ranging from the 1967 New-York Protocol, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees to General Assembly resolutions which, on an ad hoc basis, have mandated UNHCR to take care of groups of people usually referred to as persons of concern, who are in need of international protection.

Refugee protection, on the basis of these instruments, is about:

— encouraging governments to subscribe to them and to ensure that the standards they set out are effectively put into practice

[1] General Assembly Resolution 428 (v) of 14 December 1950.

— promoting the granting of asylum to persons in need of protection, *i.e.*, admission to safety and protection against forcible return to a country where their life and freedom could be at threat and ensuring that fair and efficient refugee status determination procedures are established, also allowing asylum-seekers protection against expulsion
— ensuring appropriate legal, economic and social integration of refugees in the country where they are given asylum
— helping the refugees returning to their home country to reintegrate appropriately and assisting the country of origin authorities with amnesty monitoring and returnees rights' protection
— promoting physical security of refugees, asylum-seekers and returnees, particularly their safety from military attacks and other acts of violence
— promoting the reunification of refugee families.

2. The challenges of international protection

We have come to learn over many years that refugee protection, by definition, involves crises, challenges and a fair degree of failure. **The regime of refugee protection, properly situated within the broader human rights context**, is a specific one designed for the politically-disinterested handling of a potentially highly political and security-threatening area. As with human rights, the crucial underpinnings of the system are political support —that is, State responsibility— and international respect for the rule of law —the essential legal basis. When these essentials are absent, as in the Great Lakes region of central Africa, the consequences can be tragic.[2]

The end of the cold war and the collapse of the old order have given rise to a more volatile world in which new refugee movements are likely to continue to occur. At the same time, the nature of the refugee problem has undergone fundamental changes which challenge the international protection system. Firstly, nationalistic, ethnic or communal tensions have become the predominant factor in refugee movements. Secondly the loosening grip of authoritarian regimes and the destructive effects of civil war are straining fragile State structures. Thirdly, internal conflicts are causing both refugee movements and internal displacement. Fourthly, the widespread deprivation that continues to afflict the great majority of humankind is not only leading **larger number of migrants to leave their homes in search for a better life**; it is also exacerbating the social and political instability that produces refugees.

[2] Statement by Dennis Mc Namara, Director of the Division of International Protection, at the Standing Committee Meeting of the Executive Committee of the High Commissioner's Programme, 24 June 1997.

In this world where persecution, **massive human rights violations** and armed conflict remain a daily reality, the need to protect refugees is greater than ever before. Unfortunately, confronted by rising number of refugees and migrants, the traditional system for protecting refugees has come dangerously close to breaking down. Resources are scarce, humanitarian issues are not really on the agenda anymore. We have faced, with the recent crises, our limits. The Member States realised that their foreign policies had gone so far that human rights violations could not be prevented anymore and the United Nations Organisation felt helpless in carrying out its mandate.

Given this environment, the international community and UNHCR are faced with difficulties in fields that we shall review, such as UNHCR's nature as an international organisation, the asylum crisis and peacekeeping.

UNHCR'S NATURE

UNHCR has been created in 1950[3] in application of article 22 of the United Nations Charter which allows for the creation by the General Assembly, of the subsidiary organs that it deems necessary for the carrying out of its functions.

Contrary to specialised institutions such as the WHO or the ILO, subsidiary organs are not independent. Specialised institutions are the entities that States can create in order to apply Chapter IX of the Charter, on international social and economical co-operation. According to this Chapter, specialised institutions are created by an international agreement through which States **agree** to delegate to them some of their sovereign competencies. States enable these specialised institutions to carry out these tasks, thanks to legislative organs which have the power to create binding international law and to specific executive organs which propose policies to be adopted by their own general assemblies. Lastly, the institutions have their own permanent budget.

This is not the case of UNHCR. In accordance with its Statute, the High Commissioner for Refugees follows policy guidelines from the General Assembly and the United Nations Economic and Social Council (ECOSOC). The Executive Committee of the High Commissioners Programme (EXCOM), established under a General Assembly resolution and an ECOSOC resolution[4] composed of around 50 Governments oversees UNHCR's budgets and advises on refugee protection. It holds an annual session in Geneva every October to approve programmes for the next calendar year and to set the financial target

[3] See footnote 1.
[4] GA 1166 (XII) and ECOSOC 672 (XXV).

needed to implement them. UNHCR does not have its own constitutive charter, does not have its own budget.

UNHCR does not produce any binding international law because it does not have any independent legislative body. Each year, the EXCOM adopts what we call Conclusions, which are guidelines for the implementation of international protection matters. Hence, refugee protection is at heart a shared State responsibility. Countries of origin, countries of asylum and donor states, including members of the Security Council, the General Assembly and this EXCOM, must agree to play their full role if it is to work. UNHCR is only the designated prompter, facilitator, overseer and supporter of this process —but cannot substitute for it. Refugee protection is a highly political matter, and States still have not agreed to delegate their sovereign competencies in this field. When this is the case, UNHCR will not be a subsidiary organ anymore, but a specialised institution in the sense of article 57 of the UN Charter.

Hence, one of the challenges of international protection, ever more so in the context of the international protection system breakdown described above, is to persuade States to extend their broad support to its activities. If in the recent years UNHCR has enjoyed a general level of financial and political backing which is the envy of many parts of the UN system, direct and sustained support for the Office's protection mandate is much less tangible and often much more difficult to mobilise. Laboriously drafted and hardly bargained EXCOM Conclusions are too often not applied or internationally supported. The years spent on forging a consensus regarding military attacks on camps, and their civilian and humanitarian character;[5] or on basic conditions of treatment in mass influx,[6] or responsibilities in repatriation,[7] or on minimum standards for due process in refugee status determination,[8] often seem to have little impact on State practice.

If UNHCR is to meet its statutory obligations in this area, the agreed minimum standards for implementation have to receive proper international support. All lawyers know that laws honoured mainly in the breach seriously erode any legal system. The international community needs to urgently review the effect of non compliance in the international refugee law domain. Strengthening UNHCR's ability to produce (and control its implementation) binding law, hence, transforming it into a specialised agency would be a solution. Finalising and adopting a treaty that would establish an international criminal court at the June 1998 diplomatic conference would be another, since we all have in mind that recent horrific human tragedies which have produced

[5] Nº 27 (XXXIII) of 1982, nº 32 (XXXIV) of 1983, nº 45 (XXXVII) of 1986.
[6] Nº 22 (XXXII) of 1981.
[7] Nº 18 (XXXI) of 1980, nº 40 (XXXVI) of 1985.
[8] Nº8 (XXVIII) of 1977, nº 15 (XXX) of 1980, nº 30 (XXXIV) of 1983.

endless fluxes of refugees and massacres were caused by persons responsible for crimes such as genocide, crimes against humanity and war crimes.

For the time being, we count more and more on civil society, with actors who have taken on an increasingly important role in shaping national and international agendas. They include local authorities, mass media, business and industry, professional associations, religious and cultural organisations, and the intellectual and research communities. A vibrant civil society is critical to processes of democratisation and empowerment.

THE ASYLUM CRISIS

1. Refugee status determination procedures

With the **interruption of immigration policies** in Western Europe and the increase in the arrival of asylum-seekers from the early eighties in Europe and North America, has been the introduction of accelerated procedures for those asylum claims which are so clearly without foundation as not to merit detailed examination at every level of the procedure, a narrower interpretation of the refugee definition, more stringent determination procedures, and attempts to limit access to asylum channels.

In these countries, we are working in a politically-charged environment; with illegal immigrants, criminal aliens and terrorist high on election agendas. Drift-net provisions created in response, without clarifying the specificity or scale of the refugee component can do great damage to the basic regime of international protection.

In this context, we have had to reiterate some basic international protection principles and the way they should be applied to various stages of asylum-seeking such as access to refugee status determination procedures, procedural safeguards and the appreciation of the asylum-seekers' itineraries.

As far as access to procedures is concerned, we insist on the fact that every refugee is, initially, also an asylum-seeker. Therefore, to protect refugees, ayslum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Consequently, every asylum-seeker should have access to status determination procedures and be assisted to present his or her claim. The implementation may be at variance with policy measures adopted with the aim of preventing illegal immigration, such as visa requirements, airport screening, and sanctions imposed on group carriers for transporting irregular migrants. Such general migration-management measures result in excluding asylum-seekers from access to procedures.

In the field of procedures, some States differentiate between normal and accelerated. Normal procedures should, in principle, be the norm covering

over all asylum claims, carried out by an authority which is fully qualified and competent to take decisions in this connection. In case of a negative decision, an opportunity should be given for an independent review/appeal, during which time the asylum-seeker must be allowed to remain in the country.

States may have recourse to accelerated procedures, provided that the nature of the applications for asylum which are to be examined in such procedures is well defined and that the procedures are accompanied by appropriate safeguards because the more accelerated a procedure is, higher is the risk that an erroneous decision will be taken.

The itineraries of the asylum-seekers are more and more considered in a substantive way to reject their claims. Some States have recourse to the concept of "protection elsewhere" referred to as principles of "safe third country" or "host third country" of "first country of asylum", in order to allocate responsibility for examining asylum applications among States in such a way that refugees and asylum-seekers receive the protection they require somewhere.

The responsibility of a State under the 1951 Convention and 1967 Protocol is engaged whenever that State is presented with a request for asylum involving a claim to refugee status by a person either at its borders or within its territory or jurisdiction. In all such cases, States parties are required to observe the principle of non-refoulement. The fact that a refugee has found or could found protection in one country does not remove the obligation of other States to respect this obligation of non-refoulement in dealing with the refugee, even though it may be agreed that the primary responsibility for providing protection, including asylum, lies with another State. It is important that, if applied, the concept of "protection elsewhere" be surrounded by the same procedural safeguards as those applied to accelerated procedures for manifestly unfounded claims.

Furthermore, the competent authorities of the receiving State should be informed by the sending State of the basis of the removal decision, to avoid summary rejection of the asylum claims merely because the asylum-seeker has been returned from a country where she or he had already asked for asylum. Consent of the receiving State should be obtained before an asylum-seeker will be admitted and his or her asylum application be examined on its merits in fair procedures.

2. Refugee status determination criteria

Not only refugee status determination procedures but also criteria have been restricted in this context of asylum crisis. Fearing to face massive influxes of refugees after the breakdown of State structures in countries like ex-Yugoslavia, Angola or Somalia, some States have interpreted the 1951 refugee definition in a manner that does not comply, according to UNHCR, to

the doctrine and to some caselaw, with the letter and the spirit of the Geneva Convention.

Concerning the notion of "protection of the country of origin", it is generally accepted that a refugee claim under Article 1 of the Convention can be established if the State is the agent of persecution. This is equally the case when persons are exposed to persecution by non-governmental entities which have some link with the State, or whose activities are encouraged or tolerated by the State.

However, persecution may also emanate from entities for which no link with the State can be established and which the State is unable to control. The essential issue in establishing the basis and justification for the extension of international protection is the fact of an absence of national protection against persecution, whether or not this deficiency can be attributed to an affirmative intention to harm on the part of the State. Persecution that does not involve State complicity is still, nonetheless, persecution. In such cases, it must be concluded that the State is not in a position to give effective protection to its national who has a well founded fear of persecution, and that international protection is the only available option for the person involved. Not only States can be accountable for **violations of human rights**, non-governmental actors can also. It is the responsibility of the international community to ensure that such violations do not occur, if not, that protection is extended to the victims.

It is **only after the increase** of applications from people of the above mentioned countries that the council of States of Germany, France and lastly the Netherlands have changed their jurisprudence and adopted such interpretations of the notion of agents of persecution. Other national courts and also the European Human Rights Court of Justice share this view according to which any **violation of human rights** is a lack of protection that a citizen normally deserves, should State structures be in place or not, which lack is cared for by international protection in the sense of the 1951 Geneva Convention.

Examples are many, of such restrictive interpretations, such as the internal flight alternative, the treatment of draft evaders and deserters and the civil war refugees.