

## An Operational Approach to International Refugee Protection

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# An Operational Approach to International Refugee Protection

## Introduction

Madam Chairman, Ladies and Gentlemen,

It is a great privilege and pleasure to present the keynote address for this Conference under the auspices of the Cornell International Law Journal.

I must say that it feels a bit awkward for a UNHCR official to be caught contributing to a conference whose theme contains the phrase "Refusing Refugees" in its title. But I know that your emphasis is in fact on the latter part of the title: on identifying barriers to asylum and on pursuing solutions and protection for refugees. Indeed, many of the distinguished scholars and practitioners from whom we will hear during the course of this conference have dedicated their careers to identifying and analyzing these barriers to protection, and to working with their governments (in some cases assisting progress by meeting with their governments in court) to find solutions.

In this respect, let me assure you that in responding to your kind invitation to contribute to such a challenging theme, I pledge to address such issues proactively rather than reactively. In other words, instead of focusing on refusal policies and the implementation of new barriers to refugees, I intend to concentrate on the legal and pragmatic tools that can be utilized to secure the protection of persons in need of asylum. This combination of legal, yet pragmatic, tools is what I mean by the notion of an "operational approach to international refugee protection."

As we face humanitarian crises in all, and I must unfortunately emphasize *all*, parts of the world, this Conference provides a timely opportunity to examine new trends in the development of refugee law and policy. If only by virtue of your own particular geographic location, you are no doubt fully aware of the issues at stake in connection with the

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Haitian situation, but our continuing search for durable solutions to the plight of refugees in various countries of South America should not be forgotten. For the past twenty years, these situations, among others, have profoundly informed the domestic debate in the United States regarding fundamental principles of refugee protection. In addition, and again if only through media coverage, you may be well apprised of more distant events generating refugee movements. Somalia and the former Yugoslavia have become familiar headlines. In some respects, you may view these as "foreign affairs" issues to be combined with a dose of "military" brainstorming on the merits of intervention. Allow me to insert the refugee dimension.

The situation in Somalia over the last year has led nearly a half million Somalis to search for asylum in neighboring Kenya. The conflict in the former Yugoslavia has resulted so far in some three million people seeking protection in Bosnia and in the adjacent states of Croatia and Serbia. An additional half million people find themselves in other European countries, mainly Germany.

These figures shock the conscience. At the same time, it is difficult to comprehend the fate of nearly one million Mozambican refugees in Malawi, more than a half million Liberian refugees in neighboring Guinea and Côte D'Ivoire, and the fragile repatriation of refugees in Pakistan and Iran into Afghanistan. Furthermore, ongoing conflicts in newly independent States such as Armenia, Azerbaijan, and Tajikistan are calling for immediate responses on behalf of large groups of persons in need of international protection.

Against this background, you will understand the difficulty of setting priorities. Clearly, however, the "rule of law" plays a vital role. Indeed, the survival of human beings often depends on the existence and observance by States of international obligations to ensure appropriate remedies. While hoping this evening to fuel the debate with practical views, I dare say that some questions will remain unanswered and will surely deserve further consideration in the panel discussions tomorrow. With that proviso, I will first identify current strains in refugee protection and then put on record some of the new approaches being used to resolve these obstacles.

## **I. Identification of Current Strains in Refugee Protection**

Although some of you may be new to the field of refugee law, all of you are aware that the institution of asylum is one of the fundamental components of refugee protection. Indeed, references to asylum may be found in almost every language and tradition throughout the world. As surprising as it may sound, however, and taking the risk that scholars and students in this room would like to offer rebuttal later, the only authoritative universal legal instrument codifying refugee principles does not provide an express self-explanatory right to obtain asylum.

I am referring to the 1951 United Nations Convention<sup>1</sup> and 1967 UN Protocol relating to the status of refugees.<sup>2</sup> In a nutshell, the scope of these instruments can be summarized as follows:

1. Although no provision explicitly grants a right to obtain asylum, an explicit obligation prevents States from forcibly returning persons where their lives or freedom would be in danger for reasons related to the refugee definition contained in the Convention. Hence, a right of non-refoulement for the persons concerned is provided. It is also worth recalling that the 1948 Universal Declaration of Human Rights is specifically referenced in the Preamble of the 1951 Refugee Convention. One very relevant section of the Declaration has concrete language on the right of every person "to seek and to enjoy in other countries asylum from persecution."<sup>3</sup>
2. The 1951 Convention does not provide any detailed indication as to the manner in which the refugee definition is to be interpreted and applied—a matter which is therefore left to the sovereignty of the State parties. It follows that the application of the refugee definition is couched in very broad terms permitting different interpretations which may all be correct from a purely legal standpoint.
3. Apart from the basic right of non-refoulement available to all refugees, the 1951 Convention also grants certain economic and social rights to refugees, conditioned in some instances upon their particular status in the territory of a contracting State—physical presence, residence, or other legal status. Examples include the right to work and to earn a livelihood.

As of today, 114 States have ratified either or both of these treaty instruments. While protecting those persons who cannot turn to their own government for protection has become either a legal or moral obligation the international community has imposed upon itself, it is an obligation that States seem to be viewing as increasingly burdensome.

Because of the internal situations in receiving countries, including the manifestation of xenophobia and an increased financial burden, the political agendas of many of these countries of asylum no longer coincide with their humanitarian obligations. The increasing numbers of people seeking protection encourage national authorities to test what they perceive as gaps and/or loopholes in international refugee law.

Another strain in refugee protection comes from the fact that there are new types of refugee situations as well as, to our dismay, new grounds for persecution. For instance, the use of rape and forced impregnation as a weapon of war in the former Yugoslavia constitutes a new and horrible form of persecution. Another example is the coerced movement of people for environmental reasons. A third illustration is exemplified by a recent Canadian decision which includes persecution on the basis of gender as a ground for establishing refugee status.

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1. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137.

2. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

3. G.A. Res. 217, U.N. Doc. A/810, at 74 (1948).

These new developments inevitably affect potential refugee situations, both conceptually and in quantitative terms. Under ideal circumstances, these new refugee situations should lead policymakers to adopt a more open and liberal protection approach. Instead, what are we witnessing? Several national administrations have apparently opted for a course of action in the opposite direction, adopting a more restrictive attitude that has narrowed the criteria for determining refugee status. In addition, even gaining access to asylum procedures is becoming a real obstacle course for those persons fleeing persecution.

Although the 1951 Convention and 1967 Protocol remain central to defining standards for refugee protection in countries of asylum, a number of people take the view that the Convention was a child of the Cold War, and hence that it is outdated today. The defenders of these instruments, however, remind us that the 1951 Convention broke new ground in many respects. It defined refugees in universally applicable terms and provided a broad standard for their treatment. It introduced the notion of "non-refoulement," and, for the first time, it created a link between a refugee instrument and an international organization by giving UNHCR the responsibility for supervising the application of the Convention.

Today, a new spirit of international cooperation has fostered opportunities for conflict resolution. At the same time, however, new sources of tensions and conflicts are emerging. Although many States still cooperate very positively in granting asylum to refugees, local integration into the receiving countries no longer seems to be a feasible solution in many cases. This is particularly true in most mass-influx situations. Thus, the increase in the magnitude and the complexity of the refugee problem calls for new policies and practices in order to respond effectively. Indeed, in some countries, the growing number of asylum seekers is associated with an increase in the number of persons migrating from the developing world to industrialized countries for a variety of reasons. Many of these persons seek to use the mechanism of asylum because of an absence of alternative immigration options. The result, our government colleagues tell us, is an unbearable strain on the system.

## **II. New Approaches to Solving the Refugee Problem**

So, what is going wrong? Is it the system of refugee protection, or should we not look to this system in the first place? Does the failure perhaps lie as well in the inadequate implementation of human rights protections in conjunction with economic development policies which exhibit a fatal pattern? I would like now to turn to new approaches which can be used to solve some of these problems.

### A. Prevention

I begin with the premise that asylum remains an essential protection mechanism, but may not always be the appropriate long-term solution for refugees. UNHCR recognizes the need to give greater attention to activities vis-à-vis countries of origin with a potential for producing refugees, especially in the area of prevention. A new challenge for the international community is to devise methods, where appropriate, to meet the security and protection needs of individuals prior to departure so that they will not have to flee. This statement should not, however, be misconstrued. The scope of prevention addresses only the causes of displacement, not the right to leave.

The root causes of refugee flows are almost always and invariably linked with political conflict and the violation of human rights. Consequently, UNHCR has sought to build up its cooperation with the human rights machinery of the United Nations and other relevant organizations such as the International Committee of the Red Cross. UNHCR's preventive efforts have also taken the form of enhancing legal norms through extending technical advice, training, information, and institution-building, particularly in countries, such as the newly independent States in the former Soviet Union, confronted by actual or potential refugee problems.

But prevention for UNHCR also means direct engagement in situations of active crisis or open conflict. This is where the operational nature of UNHCR's action finds its significance. Under specific circumstances, UNHCR is extending protection and assistance to internally displaced persons and other victims of conflict in an effort to limit, to the extent possible, the impetus to flee. For example, UNHCR's experience in the former Yugoslavia demonstrates that an international humanitarian presence is an essential element of prevention and protection, allowing persons to avail themselves of the right to remain when this is their initial proposed option.

The major effect of using prevention as a new approach has been to shift the work of UNHCR from the relatively stable conditions in the country of asylum to the more turbulent and often evolutionary processes in the country of origin. Thus, we are confronted with the major challenge of developing principles and strategies to meet the protection and assistance needs of uprooted people in their own country, notwithstanding the constraint of the principle of State sovereignty, or, as in the case of Somalia, the difficulties encountered when the State's own governmental structures have virtually collapsed.

Reviewing current operational activities from a UNHCR angle, it is essential to stress that UNHCR is a member of the overall UN family. The UN as a whole is undergoing dynamic changes. It has begun to include on its agenda the imperative need for humanitarian intervention. In fact, many recent UN operations, whether engaged in peacekeeping or in enforcement under Chapter VII of the UN Charter, also address the need for a speedy response to affected populations. For

instance, the Gulf War was followed by a massive refugee crisis when 1.7 million Kurds fled their homes in a fortnight. In an unprecedented move, the Security Council adopted Resolution 688,<sup>4</sup> which linked human rights violations to threats to international peace and security, and insisted that Iraq allow immediate access by international organizations to all those persons in need of assistance in certain parts of Iraq. This resolution permitted international intervention to create a safety zone in northern Iraq to provide relief to previously displaced persons, as well as to refugees returning from adjacent countries. Thus, the need for humanitarian access superseded the traditional inviolability of national sovereignty. Within weeks of the creation of the safety zone, almost all of the Iraqi Kurds along the Turkish border and in Iran were back in northern Iraq.

Consider now the former Yugoslavia. One distinctive feature of UNHCR's protection role is that it not only protects refugees and internally displaced persons, but also those persons who have not yet moved from their original place of residence. In the context of a conflict which has as its very objective the forced displacement of people, UNHCR finds itself confronted with a major, even crucial, dilemma. To what extent do we encourage people to remain where they are when that choice could well jeopardize their lives and liberties? On the other hand, if we help them to move do we not become accomplices to "ethnic cleansing"? Although UNHCR's presence together with other agencies and private organizations has not prevented "ethnic cleansing" as such, facts show that the international presence has made and can still make a difference.

All this is in the context of the growing recognition of the importance of the concept of state responsibility, particularly as it relates to countries of origin and their responsibilities, not only to facilitate voluntary repatriation of refugees, but also to address the root causes of their flight. State responsibility is increasingly referred to as a term defining the body of obligations that require States to respect the human rights of their own nationals.

## B. Asylum

In the face of expectations for a new deal in world politics, including new avenues at the United Nations, one would hope that preventive diplomacy could render refugee problems obsolete. There is a risk, in view of the present compelling problems affecting asylum, of relinquishing or weakening the legal commitments of host countries or the obligation of States to cooperate in solving refugee problems. Must we discard asylum as an outdated institution, allow the principle of non-refoulement to be questioned, and abandon durable solutions?

The answer is clearly "no." Asylum, conceived as the sum total of protection standards which should be provided by a State in the exercise

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4. S.C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc. 5/RES/688 (1991).

of its responsibility for refugees, is a fundamental protection mechanism whose continued significance must be reaffirmed. Its modalities can, however, be developed to reflect the broad diversity of protection needs in various parts of the world, and on the basis of existing international instruments. These variable approaches do not contradict, but rather complement, long-tested protection systems such as the one based on the 1951 Convention.

### *1. Temporary Protection*

One of these new approaches is the mechanism of temporary protection which States are currently using for persons who have been forced to flee the conflict in the former Yugoslavia. A similar mechanism, commonly referred to as Temporary Protected Status, has been known in the United States since the passage of the U.S. Immigration Act of 1990. This mechanism provides that Temporary Protected Status can be granted to aliens physically present in the U.S. who, if they were returned to their home countries, would be imperiled by armed conflict, natural disaster, or other extraordinary conditions in that country. In European States, in the context of an emergency situation, temporary protection also serves as a flexible, practical tool to provide protection to persons who need it while at the same time leaving open the possibility of safe return as the most desirable and feasible solution. Temporary protection provides a means of avoiding the imposition of an undue burden on the already overstressed asylum procedures of the receiving States. In response to UNHCR appeals for a global humanitarian response to the crisis in the former Yugoslavia, many States have adopted the practice of suspending or freezing adjudication of asylum applications for persons accorded temporary protection. As far as basic standards are concerned, temporary protection should include, at a minimum, admission to the country of refuge, respect for the principle of non-refoulement, and essential guarantees relating to employment, education, and family reunion, in addition, of course, to permission to remain until a safe return can take place. UNHCR spares no effort to continue to encourage the response of European governments in providing temporary protection to persons fleeing conflict in former Yugoslavia.

### *2. Accelerated Procedures*

Let me now turn to a second operational innovation which may also be converted into a problem. UNHCR recognizes that a number of governments face serious problems in responding to large and growing numbers of asylum seekers, and agreed some years ago that for manifestly unfounded claims, an *accelerated procedure* was an appropriate response, provided basic safeguards are in place.

### 3. *Notion of Safe Country*

Nowadays, there is resort to what can be seen as a refinement of the reasoning behind the concept of accelerated procedures. It is commonly referred to as the notion of a "safe country of origin" (i.e., a country that can be objectively verified as not having experienced refugee-producing conditions for a sustained period of time). An increasing number of States have included or are considering including in their legislation lists of countries considered "safe" in order to predetermine when asylum seekers should be denied access to procedures or even to access at the border. Determining whether a country is "safe" is a complex and delicate task which cannot be underestimated. UNHCR increasingly becomes operational in advising States that applicants coming from a country considered a safe country of origin should be able to rebut the presumption of "safety," and, to this effect, should have the possibility of having a negative decision reviewed while still in the country.

### 4. *First Country of Asylum*

The notion of safe country has also been used as a criterion for the return of asylum-seekers to countries where they have or could have sought asylum, i.e., not their country of origin, but a country in which they may have transited during their flight. In other words, it is a means for States to avoid consideration of an asylum application on the grounds that the applicant could have previously found protection in another country. Here again, UNHCR considers it operationally imperative to intervene and recommends that the application of the notion of first country of asylum be accompanied by relevant procedural safeguards. The "first country of asylum" concept is, of course, familiar to you under the name of "firm resettlement" in your 1990 final asylum regulations.<sup>5</sup>

## C. *Regional Concerted Arrangements*

Another development is the growth of regional arrangements about which you will hear more tomorrow. UNHCR believes that traditional responses to refugee problems based on the 1951 Convention and the 1967 Protocol continue to have universal validity. Concurrently, the combination of national, regional, and universal options and strategies in certain situations specific to refugee problems lends itself well to what UNHCR refers to as concerted and comprehensive regional arrangements. What we really mean in plain language is a sort of "package" in the context of refugee crises that affect a number of countries in the same region because of the interlocking and mutually reinforcing nature of the components of the arrangements. UNHCR has gained useful experience with such approaches in Central America and Southeast Asia. These experiences lead us to believe that the realization of solu-

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5. 8 C.F.R. § 208.15 (1993).

tions in a growing number of refugee situations today is most likely where the solution is made an integral part of a comprehensive arrangement which strikes a balance between the interests of affected States and the protection needs of the individuals concerned.

In this context, some European States have developed regional instruments, such as the Dublin Convention and Schengen Agreements, which deal with State responsibilities for examining asylum requests. These instruments set out criteria by which States assume or deny responsibility for the review of refugee status or asylum claims. However, there are significant differences among national procedures governing asylum and refugee status determinations. In the absence of harmonization of procedures, this could well permit exploitation of the current imbalance in the asylum burden of States. This is why UNHCR spares no effort in cooperating with States in developing and promoting harmonized as well as acceptable standards.

#### D. Solutions/Repatriation

Having just shared a number of observations on means to secure admission into receiving countries, we must not forget the importance of looking at long-term meaningful solutions for refugees. While prevention is accepted by most as preferable to having to resolve situations after they have developed, its limitations are obvious. On the other hand, once refugees have found asylum, notwithstanding the degree to which they have been integrated into local society, "home sweet home" remains a normal human objective. The most classical, desirable, and enduring solution for most refugees is to return home voluntarily, in safety and dignity. Obviously, this solution can take place only when the root causes of flight are removed.

Normally, returning refugees should be reabsorbed into their own national protection systems. Given the fragile outcome of multilateral efforts at comprehensive peace settlements around the globe, voluntary safe return of refugees does not always take place in ideal conditions. In fact, large numbers of refugees are going back to countries devastated by war, to areas which have been heavily mined, or to situations where the national reconciliation process is precarious. Therefore, repatriation is not simply a question of logistics and relief. For instance, negotiating guarantees of safety, monitoring the security of returnees, and ensuring basic reintegration assistance are among UNHCR's tasks in Cambodia, where reports show that the Office has so far helped more than 300,000 refugees to return safely. UNHCR hopes to undertake a similar operation for some 1.5 million refugees when they go back to Mozambique.

While UNHCR should promote or encourage voluntary repatriation only when conditions allow it to do so, the Office, nevertheless, has a responsibility to facilitate or assist the return of individuals whenever they so choose. Sometimes they have no other viable option but to choose return. This is not only about semantics. It is a central question

about applicable rules for the cessation of refugee status. The question becomes even more problematic for persons benefiting from temporary protection when the decisions about the need for protection are entrusted to the host country authorities rather than to the beneficiaries.

### **Concluding Remarks**

Finally, in drawing conclusions on all this, and carefully avoiding wishful thinking, I would like to emphasize that UNHCR has no monopoly on either innovative thoughts or operational vehicles for protection. I have been properly briefed on the quality of this audience and its readiness to discuss global issues. I have tried not only to cross borders, together with refugees, but as well to attempt to catch you in a cross-fire of conceptual and operational problems.

For those of you who are still students in International Law, allow me to strongly recommend a firm petition to your professors along the following lines: Abolish barriers between refugee law, humanitarian law, and human rights law. Interaction among these topics is so obvious that we cannot afford the luxury of privileging one at the expense of the others.

On this basis, close links with academic institutions such as this distinguished one remain of utmost importance for UNHCR. Exchange of ideas and research on the numerous issues related to refugee protection have already proved a most valuable contribution to the cause of refugees. Let us then, practitioners as well as academics, continue to mobilize our efforts toward a genuine protection agenda for refugees. As human beings, regardless of legal background, let us raise our children with the sacred values of tolerance, tolerance, and tolerance. Thank you for your attention.