

INTERNATIONAL REFUGEE SYSTEM IN CRISIS

Qadar Bakhsh Baloch

IN 1951, the year the Office of the United Nations High Commissioner for Refugees (UNHCR) was established,¹ there were an estimated one million refugees within the Commissioner's mandate. That number increased 100-time in succeeding years.² In 2002, refugees worldwide were estimated 14.9 million,³ coming to around 12 millions⁴ (excluding 3.7 million Palestine Refugees of in the Near East (UNRWA) and above 25 million internally displaced persons worldwide).⁵ By early 2004, the number of people concerned to the UNHCR was 17.1 million, including 9.7 million refugees (57%), 985,500 asylum seekers (6%), 1.1 million returned refugees (6%), 4.4 million internally displaced persons (26%) and 912,200 others of concern (5%).⁶

In 1951, most of the refugees were European. Majority today is African and Asian, accounting for almost 10.5 millions against 1.4 million European and American combined.⁷ Current refugees' movement, unlike those of the past, increasingly takes the form of mass exoduses rather than individual flights. For 80 percent of today's refugees are women and children. The causes of exodus have also multiplied and now include natural or ecological disasters and extreme poverty. As a result, many refugees today do not fit the definition contained in the Convention relating to the 'status of refugees'⁸ which refer to the victims of persecution for reasons of race, religion, nationality and membership of a particular social group or political opinion.⁹

There is a clear relationship between the problem of refugees and the issue of human rights. Violations of human rights are not only among the major causes of mass exoduses but also rule out the option of voluntary repatriation for as long as they persist. Violations of minority rights and ethnic conflicts are increasingly sources of both mass exoduses and internal displacements.

The blatant disregard of the minimum rights of refugees and internally displaced persons is another dimension of the relationship between the two issues. During the process of seeking asylum, people faces restrictive measures, thereby denying them access to safe territories. In some instances asylum seekers and refugees are detained¹⁰ or forcibly returned to areas where their lives, liberty and security are threatened¹¹. Some are attacked by armed groups, or recruited into armed forces and forced to fight for one side, or the other in civil conflicts. Asylum seekers and refugees are also victims of racist aggression. Refugees have rights, which should be respected prior to, during and after, the process of seeking asylum. Respect for human rights is a necessary condition for both preventing and resolving today's refugee flows.

Nearly 54-year after its adoption, the Refugee Convention remains the only international instrument for the protection of refugees. Doubt is increasingly being expressed however as to its adequacy to meet that role. The crux of criticism is that the Convention is obsolete and inappropriate to deal with contemporary challenges. The disparity between the costs and abuse of developed asylum systems, and the level of attention paid to refugee situations in poorer countries, has become increasingly apparent. Also apparent is that many hundreds of people desperate to enter Western countries are dying each year in the attempt to circumvent increasingly tough border controls. The traffic in illegal immigrants was graphically illustrated in June 2000 when 58 young Chinese people suffocated to death in the back of a tomato truck after traveling to the southern British port of Dover from Belgium.

In 1998, the Austrian Presidency of the EU suggested replacing the Convention with the EU asylum law, which meets today's requirements rather than those of a geopolitical outdated situation.¹² In the same year, the General Secretary of Germany's Liberal Party called in effect for default from the Convention on the grounds that it was an invitation to abuse and to unrestricted and unregulated migration.¹³ In April 2005, Jack Straw, the UK Home Secretary, criticised the Convention as "too broad for conditions in the 21st century, and as 'no longer can adequate guide to policy in the age of mass air travel and economic migration'".¹⁴ Conservative Party leader William Hague described the asylum system as near collapse in today's utterly different world.¹⁵

In March 2000, the Australian Immigration Minister Philip Ruddock described the international asylum system as open to exploitation and manipulation by non-refugees, saying it should be toughened either administratively or by reviewing the actual treaty document itself¹⁶. And in August he announced that the Government was reviewing the interpretation and implementation of the Refugee Convention in Australia.¹⁷

Tensions between governments of receiving countries and the UNHCR and other asylum-seeker advocacy groups are intensifying. A recent UNHCR commissioned analysis of responses of European governments concludes that current policy risks ending the right of asylum in Europe¹, and that the current status quo is practically and ethically bankrupt from all positions.¹⁸ As the 1951 Refugee Convention approaches its 54th anniversary, debate as to whether it has reached its use by date will intensify.

The paper describes the problems with the operation of the Convention that have been identified by researchers and commentators over the last two decades and will also look briefly at options for reforming the international refugee regime.

SALIENT FEATURES OF THE PREVAILING INTERNATIONAL REFUGEE LAW

OWING TO THE LIMITED SCOPE of the assignment and imposed restrictions on its volume and size, I would not discuss each and every international and regional instrument separately over here but only review all the major conventions together, drawing salient conclusions from these instruments together. Main instruments analysed for the purpose of drawing findings are:

International Instruments

- The Universal Declaration of Human Rights, 1948;
- The Convention on the Status of Refugees, 1951;
- The Protocol on the Status of Refugees, 1967;
- The Fourth Geneva Convention on the Protection of Civilian Persons in times of War, 1949. It calls for the protection of civilian victims and also deals with refugees and displaced persons;¹⁹
- The Additional Protocol to the Fourth Geneva Convention of 1949, 1977. It stipulates that refugees and stateless people shall

be protected persons under part one and three of the Fourth Geneva Convention;²⁰

- The Convention on the Status of Stateless Persons, 1954;²¹
- The 1961 Convention on the Reduction of Statelessness. It specifies that a person or persons shall not be deprived of their nationality on racial, ethnic, religious or political grounds;²²
- The 1967 United Nations Declaration on Territorial Asylum, which upholds the basic humanitarian principle of non-refoulement, recalling the Universal Declaration of Human Rights, which spells out the right to leave any country and to return to one's country and the right to seek and enjoy asylum;²³
- The Covenant on Political and Civil Rights, 1976; and
- The Covenant on Socio-Cultural and Economic Rights, 1976.

Regional Instruments

- The OAU Refugee Convention of 1969. The convention elaborates the definition and scope of refugee, incorporating a broadening clause: “. . . Shall apply also to every 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 nationality.”²⁴
- The Council of Europe has adopted several instruments concerning refugees. Some of the important are:
 - (a) The European Agreement on the Abolition of Visas for Refugees, 1959;
 - (b) The Resolution 14 on Asylum to persons in danger of persecution, 1967;
 - (c) The European Agreement on Transfer of Responsibility for Refugees, 1980;
 - (d) The Recommendation on the Harmonisation of National Procedures Relating to Asylum, 1981;
 - (e) The Dublin Convention of 1990 lays down criteria for determining which member State is responsible for examining an asylum request with one or more member states of the Community; and
 - (f) The European Conventions on extradition and social security also contain provisions on refugees.
- The Cartagena Declaration on Refugees, 1984. In 1980s, the outbreak of civil strife in Central America resulted in massive

exoduses of refugees, posing serious economic and social problems for the host countries.²⁵ The declaration adopts the OAU Convention's "refugee" definition;²⁶

Major Conclusions

1. Asylum seekers and refugees are entitled to all the rights and fundamental freedoms that are spelled out in international human rights instruments. The protection of the refugee must therefore be seen in the broader context of the protection of human rights. The creation of two separate organizations to deal with human rights and refugees does not mean that these issues are not interrelated. The work of the United Nations in the field of human rights and that of the High Commissioner for Refugees is inextricably linked in the sense that both entities share a common purpose of 'safeguarding the human dignity'.
2. The substantive link between human rights and refugees raises several questions:
 - i) In the first place, who is a refugee and what are his or her rights under international law?
 - ii) What are the rights of those asylum seekers who fail to qualify as refugees under the 1951 Convention and the 1967 Protocol?
 - iii) How can refugees be distinguished from economic migrants?
 - iv) Can the international community deny protection to those who claim not to receive protection from their country of origin?
 - v) What exactly is the link between violations of human rights and movements of refugees? To what extent are those violations the causes of mass exoduses?
 - vi) In what ways can the rights of refugees be violated in the process of asylum seeking in host countries?
 - vii) Finally, what is the relationship between repatriation and human rights? Can repatriation be truly voluntary when the country of origin is unable, or unwilling, to guarantee respect for the civil, political, economic, social and cultural rights of its citizens?
3. In practical terms, the task of international protection includes the prevention of refoulement, assistance in the processing of asylum

seekers, providing legal counsel and aid, promoting arrangements for the physical safety of refugees, promoting and assisting voluntary repatriation and helping refugees to resettle.²⁷ Thus, the international protection function has a legal basis, and its exercise is mandatory for the High Commissioner. The right to protection, although not defined as a separate right as such, is implicit in the 1951 Convention and its fundamental provisions, particularly the principle of non-refoulement.

4. In addition, many universally recognised human rights are directly applicable to refugees. These include the right to life, protection from torture and ill-treatment, the right to a nationality, the right to freedom of movement, the right to leave any country, including one's own and to return to one's country, and the right not to be forcibly returned. These rights are affirmed, among other civil, political, economic, social and cultural rights, for all persons, citizens and non-citizens alike in the International Bill of Human Rights.
 - i. "No one shall be subject to arbitrary arrest, detention or exile."²⁸
 - ii. "Everyone has the right to seek and to enjoy in other countries asylum from persecution."²⁹
 - iii. "Everyone has the right to a nationality."³⁰
 - iv. "Everyone has the right to freedom of movement and residence within the borders of each State."³¹
5. Non-refoulement.³² A central element of international protection is the right not to be forcibly returned or expelled to a situation, which would threaten one's life or freedom. This principle of non-refoulement finds further expression in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which stipulates that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Furthermore, "the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."³³
6. Contemporary refugee movements are different from those of the period immediately following the Second World War. Reasons for

leaving are very often complex and not simply the result of immediate persecution. Persons flee because of civil conflicts, massive violations of their human rights, foreign aggression and occupation, poverty, famine, disease and ecological disasters. Many do not qualify as refugees on the basis of the United Nations definition.

7. In order to qualify internationally, the person must be a “political” refugee. The 1951 Convention relating to the Status of Refugees places emphasis on “fear of persecution” but it does not define the term clearly. It refers to threats to life and freedom of the individual “on account of his race, religion, nationality, membership of a particular social group or political opinion.”³⁴
8. In many countries, the majority of applications for asylum are rejected on a strict reading of the 1951 definition. From a human rights perspective, this situation raises great concern. It will not always be possible to distinguish, with certainty, between a refugee and an economic migrant. It may be argued that if the emphasis is placed on threats to life and freedom, there is little to distinguish between a person facing death through starvation and another threatened with arbitrary execution because of her political beliefs.

ANALYSES:

PREVAILING PROBLEMS

THE ESSENCE OF CRITICISM of the 1951 UN Refugee Convention is that the treaty was developed in and for a different era. While the Western countries’ asylum systems might have coped well enough until the end of the Cold War, they were not designed with today’s mass refugee outflows and migratory movements in mind. This section summarizes the resulting problems with the operation of the Convention that have been identified by researchers and commentators over the last twenty years or so.³⁵ Statistics, unless otherwise indicated, are from the UNHCR or the USCR.

EXISTING PROBLEM AREAS

DEFINITION. The 1951 Refugee Convention is a product of the Cold War environment and it reflects both European experiences of Nazi wartime persecutions and Western political interests, as these were perceived at the time.³⁶ Most asylum seekers are now from the

poorer countries of the Middle East, Asia, Africa, and Eastern Europe rather than Western Europe. They are less welcomed. There is no longer a need for unskilled labour in developed countries, and no longer any ideological or strategic advantage attached to conferring asylum.

With rapidly increasing numbers of asylum seekers since the late 1980s, governments have therefore not been inclined towards expansion of the outdated Convention grounds and criteria. Since 1980, refugee movements have been more likely to be the result of civil wars, ethnic and communal conflicts and generalized violence, or natural disasters or famine usually in combinations than individually targeted persecution by an oppressive regime. The world refugee and internally displaced population have risen dramatically following the end of the Cold War. The plight and need of these people is obvious.

BURDEN-SHARING MECHANISM. While the Convention is predicated on international cooperation and recognises the need to share equitably the burdens and responsibilities of protecting refugees, it gives no prescription on how to do so. Burden sharing has become one of the most contentious issues among receiving countries, one that involves not just people and money but competition for food, medical services, jobs, housing and the environment. Left unresolved, the issue could threaten the very existence of the international refugee protection regime.

Asylum seekers are drawn to particular countries by a range of obvious factors-proximity, family and ethnic community networks, employment opportunities and wage levels, generosity of welfare systems, levels of tolerance within existing societies and the accessibility of determination systems. In Europe, in 1999, 70 percent of asylum seekers sought protection in just four countries; Germany, Britain, Switzerland and the Netherlands.

Pakistan has hosted more than 3-million Afghan Refugees for more or less two decades. Besides, the food and other humanitarian assistance provided by the UNHCR, there was host of other burdens, which were never shared by international community. Unemployment, Drug trafficking, worsening Law and order situation, deteriorating economy, smuggling, environmental

degradation, sectarian violence, increasing pressures on civic facilities, etc, were born by Pakistan alone.

MIGRATION CHANNEL. The UN has estimated that 125 million people are, at any given time, outside their homeland in search of a more secure political environment or better economic future.³⁷ Increasing disparities in wealth and life opportunities (income differentials between the richest and poorest countries are currently in the order of 70:1³⁸) provide compelling motivation to migrate; the spread of information, information technology, the accessibility of air travel and the services of people smugglers provide the means. And asylum channels provide an avenue. Since 1985 the number of asylum seekers in Europe has outnumbered all legally admitted foreign workers.³⁹ An estimated one million migrants were transported, worldwide, in illegal operations worth up to 20 billion USD in 1999.⁴⁰

The Convention gives people the right to arrive by whatever means and request refugee status. Even where claims are clearly 'abusive', receiving states are required to go through determination of status procedures. Consideration of requests takes time. Telling refugees and migrants apart is difficult: both use people smugglers, have fraudulent or no documents, and have similar stories. And even though only a small minority of asylum seekers gains recognition in Western European countries (the rate of recognition in EU countries in the 1990s was in the order of 10-15 percent), only a minority of failed asylum seekers ever actually leave.

The UNHCR has acknowledged the need for restrictive measures and speeded up determination processes, while simultaneously criticizing governments for blocking access to possibly genuine refugees. The UK Government in a White Paper tabled in 1998 promised 'fairer, faster, and firmer' determination of refugee status.⁴¹ The backlog of asylum seekers in the UK in July 2000 was over 100 000, and the system was being described in the British press as in crisis. Solving the problem of irregular migration may be incompatible with upholding Convention obligations as they currently stand.

NON-DEPARTURE. The length of stay involved in the refugee determination process makes removal of people at the end of it difficult. (The average processing time within the UK's 'fairer, faster,

firmer' system in July 2000 was 13 months.⁴² During this time asylum seekers establish themselves in the country. In most of the developed countries, only a minority of failed asylum seekers actually ever leave, voluntarily or otherwise. The UK Home Office has acknowledged that up to two-thirds of those refused asylum simply 'vanish'.

In 1999 the UK received 71160 applications. In 1999 fewer than 8,000 failed applicants were either deported or known to have left voluntarily.⁴³ The large-scale removals may simply not be possible under liberal democracies.⁴⁴ Without the possibility of such deportations, however, the entire process of asylum determination is, though costly, somewhat pointless.

ECONOMIC REFUGEES. The conventions based asylum regime has fostered characterisations of asylum seekers as either political and thus 'genuine' and 'legitimate' and 'deserving', or economic and thus 'abusive' and 'illegitimate' and 'undeserving'.

Public debates on asylum seekers are often based on the assumption that such clear-cut distinctions actually exist. Most asylum seekers however come from countries where economic failure and political instability and persecution and poverty are inextricably mixed. And despite the either /or nature of determinations, distinctions between individual asylum seekers can rarely be established with any degree of certainty.

There is rarely documentary evidence of persecution. Commentators have however begun to question the morality of distinguishing between people impelled to flee from persecution, and people impelled to flee from poverty and lack of opportunity. In 1989, the International Monetary Fund (I.M.F.) estimated that 65 billion USD was transferred out of the host countries by migrants in remittances. This figure exceeded by about 20 billion USD all official donor assistance.

Harding thus describes 'economic refugees' in Western countries as the 'ferry-men' of development for their countries, and their use of asylum systems to access much higher earnings as rational and intelligent as well as predictable.⁴⁵

The defenders of the Convention are arguing that migration restrictions in Western countries must be lifted in order to ease the pressure on and thus maintain the 'integrity' of the asylum system.

The EU has concluded that asylum-driven migration can only be controlled through development, and through forging agreements with governments of sending countries on aid and trade and training and temporary (and controlled) migration opportunities.

VIOLATIONS OF REFUGEE RIGHTS. It is now well recognised that human rights violations are a major cause of mass exoduses. While efforts continue to remedy the problem at its source, attention is also turning to the difficulties that asylum-seekers encounter after they leave their countries of origin. Three issues⁴⁶ are giving rise to concern.

- The first is the disturbing tendency to close doors to asylum-seekers;
- The second relates to violations of the minimum rights of asylum-seekers during the process of applying for asylum and also after refugee status has been granted. Intolerance, racism, xenophobia, aggression, national and ethnic tensions and conflicts are on the rise in many places and affect many groups, in particular asylum-seekers and refugees; and
- The third issue is the persistent human rights violations in countries of origin and the need to address those violations before refugees can be voluntarily repatriated.

RESTRICTIVE MEASURES. There is a growing tendency to close doors to asylum-seekers.⁴⁷ Some governments, faced with an influx of asylum-seekers, economic migrants and illegal aliens, have introduced restrictive measures that hinder access to their territories. These measures include complicated or burdensome visa requirements for nationals of some countries and fines imposed on airlines that carry undocumented aliens.⁴⁸

ILL-TREATMENT. In some cases the minimum standards of treatment of asylum seekers are not respected. Inadequate refugee-determination procedures and refoulement at airports and borders cause enormous problems for some asylum-seekers.

At times refoulement takes inhumane forms such as the forcible return of asylum-seekers to the countries of origin where their lives, liberties and security may be threatened.⁴⁹ Boats of asylum-seekers have even been pushed back to sea to die of hunger or make an easy prey for pirates and sharks when they have attempted to land on

certain shores. Other examples of ill treatment include physical assaults, the detention of asylum-seekers for extended periods and without legitimate reasons and harsh interrogation procedures.⁵⁰

A Government may also fail to provide adequate protection to refugees and asylum-seekers- thereby exposing them to physical danger from racist and xenophobic aggression.

THREAT TO THE LIFE, LIBERTY AND SECURITY. In some places refugees are regularly subjected to attacks and abuse. Many have died in military or armed attacks on refugee camps and settlements. Young males and minors are frequently recruited into armed or guerrilla bands and forced to fight in civil wars. The United Nations General Assembly in numerous resolutions has condemned attacks on refugee camps.

The Commission on Human Rights has also been concerned with specific cases, such as attacks on Palestinian refugees in Lebanese camps and attacks on the Thai-Cambodian border.

Refugee women and children are a particularly vulnerable group. The Convention on the Rights of the Child (1989) makes a specific provision for giving “appropriate protection and humanitarian assistance”⁵¹ to the refugee children. Women make up a large proportion of the world’s refugee population. They are very frequently subjected to physical and sexual abuse in countries of refuge.

REFUGEES AND XENOPHOBIC OR RACIST AGGRESSION. There has been a marked increase in violent attacks against refugees and asylum-seekers in recent years. Today refugees in some countries, where such phenomenon is on the rise, live with the constant fear of physical assaults and threats to their life and security. Refugees, as a vulnerable group of foreigners, often become the primary targets of racist hatred. Political debates in some countries have tended to blur all the issues that relate to foreigners. Asylum-seekers, refugees, economic migrants, immigrants and seasonal workers are often lumped together as foreigners.

The consequences have been threefold:

- First, the principles of protection and non-refoulement of refugees have been repeatedly violated;
- Secondly, the number of violent incidents perpetrated against refugees has increased; and

- Thirdly, the refugee issue has come to be seen in political, rather than humanitarian terms and the lines between immigration policy and refugee policy have started to blur.

VIOLATIONS OF VOLUNTARY RETURN. The final link between human rights and refugee problems lies in the issue of durable solutions. Convention relating to the Status of Refugees stipulates that refugee status is not permanent and enumerates the conditions under which the Convention can cease to apply.⁵²

Exile is neither a durable nor a truly humanitarian solution for refugees. Exile, as a form of compelled separation from the homeland, is only a temporary respite. Repatriation, however, is feasible and humanitarian only when it is carried out on a voluntary basis and when it takes into account respect for the human rights of refugees. As long as violations of human rights persist in countries of origin, it is doubtful whether any refugee would decide to return voluntarily.

Hence, the restoration of respect for and the promotion of all categories of human rights and the cessation of violent conflict in countries of origin are the necessary conditions for the voluntary return of refugees.

BARRIERS TO ACCESS. During the past few years, especially after 9/11, many states have taken measures to obstruct refugees trying to reach their countries and their asylum procedures. New visa requirements, fines on airlines and shipping companies for transporting people without travel documents or visas, interdiction on the high seas and pre-flight screening of passengers are major examples of such restrictive measures.

Nearly all the Western European countries imposed a visa requirement on people from Bosnia-Herzegovina after mid-1992, when the war had started and a large number of people were trying to escape generalised violence as well as torture, rape and political killings. They then offered the refugees 'temporary protection'.

The same raising of barriers against fleeing refugees was seen after the military coup in Haiti in 2004, when supporters of the deposed President were arbitrarily arrested, tortured and killed. This directly violated the principle of non-refoulement. Other Haitian refugees intercepted at sea languished in the US base at Guantánamo Bay awaiting screening by UNHCR officials and US.

The US Supreme Court ruled that the interception of Haitians in coastal waters by US naval officials did not violate the principle of non-refoulement. The ruling was a perverse reading of this customary norm of international law and is widely regarded as representing a political rather than judicially sound interpretation of international refugee law.⁵³ Measures that obstruct the entry of asylum-seekers, including visa requirements and carrier sanctions, are incompatible with the intention of articles 31 and 33 of the UN Refugee Convention.

REJECTION AT THE BORDER. Border officials should never be allowed to decide an asylum application; they should be explicitly instructed to refer all such cases to the responsible authority. EXCOM has stated that there must be a clearly identified authority responsible for examining requests for refugee status and that a frontier authority should not reject an asylum claim without reference to that authority⁵⁴.

In practice, however, border officials often refuse to allow refugees without proper documents to enter the country to seek asylum.⁵⁵ Border officials should be instructed and trained in their duty to respect the principle of non-refoulement⁵⁶ When refugees are rejected at the border they will be sent back to their persecutors, sent to another country where they could be at risk of human rights violations or refoulement, or forced to enter the country of asylum illegally and possibly face punishment for 'illegal entry'.

DETENTION. In Europe and North America detention of asylum-seekers has increased dramatically as states make strenuous efforts to deter and obstruct refugees from seeking asylum in their countries⁵⁷. In Australia asylum-seekers who arrive without prior authorization are automatically detained. In some countries, asylum-seekers are detained as soon as they arrive and are held while their application is processed.

In others, specific groups of asylum-seekers are placed behind bars, for example those whose applications are considered 'manifestly unfounded'.⁵⁸ Other countries regularly detain rejected asylum-seekers pending deportation. These conditions place the onus on the detaining authorities to demonstrate why other measures short of detention are not sufficient.

Moreover, even if an asylum-seeker is detained legitimately, detention should not continue for longer than is necessary.⁵⁹ For example, detention “to verify identity” or “to determine the elements on which the claim to refugee status or asylum is based” should be permitted only until a preliminary interview can be carried out.

RECOMMENDATIONS

OVER THE PAST DECADE widespread disregard for human rights has caused one refugee crisis after another. At the same time, the system devised to protect refugees has fallen into disarray, with states showing increasing reluctance to host refugees. Every day governments are violating the principle of non-refoulement, the fundamental basis of refugee protection. UNHCR, the agency set up to guarantee international protection for refugees, appears unable to ensure that states fulfill even their minimum obligations towards those forced to flee their country.

One essential element in restoring respect for human rights in countries where abuses have been widespread is ending impunity. Amnesty International calls on all governments to end impunity by investigating reports of human rights violations and bringing those responsible to justice. This would be a major step towards breaking the cycle of violence and giving refugees the confidence to return home. It is also proven fact that many armed conflicts that cause refugees to flee are fuelled by outside powers that supply arms, personnel and expertise to protagonists known to disregard human rights. It therefore calls on all governments to end transfers of equipment and training for military, security or police forces that are used to commit or facilitate human rights abuses.

The international system to protect refugees is in crisis⁶⁰. Many people who deserve protection are falling through the net: denied access to asylum procedures; wrongly told they do not qualify as refugees; sent back to countries where they will not be safe. However, instead of enhancing refugee protection, governments are trying to restrict even further the definition of who qualifies for protection and the degree of protection they should receive.

The stark reality is that governments, both individually and collectively, are unwilling to commit themselves to a greater degree of protection. This has led Amnesty International to conclude that this is not a time to call for bold new measures by the international

community, such as the development of new international standards. Rather, it is a time to remind the world's governments of their existing obligations towards refugees and to urge them to ensure that these minimum standards are respected. Amnesty International calls on the international community to ensure that the full framework provided by international human rights law is applied to the protection of refugees.

The following recommendations outline the minimum steps necessary to protect the human rights of refugees so that they are safe from further harm and are treated with the dignity that their tragic circumstances demand.

RECONSIDERING THE CONVENTION

THE BRITISH PRIME MINISTER TONEY BLAIR said it was now time to “stand back and consider its [the Convention’s] applications in today’s world.” British policy in future, he said, would be “asylum for those who qualify under the rules, fast action to deal with those who don’t.”

British Home Secretary Jack Straw concurred, “the Convention is no longer working as its framers intended.” Citing a tenfold increase in the number of asylum seekers in the Great Britain since 1988, Straw added:

“. . . would-be migrants are taking advantage of one aspect of the Convention—namely, that it places an obligation on states to consider any application for asylum made on their territory, however ill-founded.”

Lawmakers from Washington to Berlin have been worried that the Convention was a convenient screen behind which everyone from terrorists to mass murderers and dope dealers could hide

STEPS SUGGESTED FOR THE COUNTRIES OF ASYLUM

PEOPLE USUALLY BECOME REFUGEES because their human rights are at grave risk. They sever the link with their own state, and seek the protection of another state, because their own government is persecuting them or cannot be relied on to protect them. When refugees seek the protection of another state, they rarely receive a warm welcome. Many are turned back at the border without a hearing; detained as “illegal immigrants”; subjected to further violence or squalid conditions in refugee camps; put through

summary and unfair asylum procedures; or sent back to the country they fled. Some of the suggested steps to be taken by the countries of Asylum are:

- Build awareness and public support for the rights of refugees;
- Ratification of international treaties relating to the protection of human rights and the rights of refugees;
- All states should apply the full range of refugee and human rights treaties in determining who is entitled to protection as a refugee. Their assessment of claims should be based on international and regional refugee instruments and relevant human rights instruments;
- Stop forcibly returning refugees to countries where they are at risk of serious human rights violations so as to establish principle of non- refoulement;
- States should ensure that all asylum-seekers are referred to an independent and specialized body responsible for deciding asylum claims. Border officials should never decide claims; they should be instructed to refer each asylum-seeker to the responsible body.
- States should not penalise asylum-seekers for illegal entry;
- End practices that prevent or deter asylum-seekers pursuing claims. Universal Declaration of Human Rights states: "Everyone has the right to seek and to enjoy asylum from persecution."⁶¹ They should ensure that there are no restrictions on entry or border control measures that in practice obstruct access;
- States should ensure that any restrictive measures, such as visa controls, carrier sanctions and interdict border controls, do not in effect prevent asylum- seekers obtaining access to their jurisdiction or asylum procedures. All asylum-seekers, in whatever manner they arrive at the border or within the jurisdiction of a state, must be referred to the body responsible for deciding asylum claims;
- Detention of asylum-seekers should normally be avoided. All asylum-seekers should be given adequate opportunity to have their detention reviewed by a judicial or similar authority;
- Recognise and meet the special needs of asylum-seekers. For example, the protection needs of women, children and those

persecuted because of their sexual orientation are often misunderstood or wrongly interpreted; and

- Protect the rights of refugees in situations of mass exodus.

Suggestions To/For the International Community

REFUGEES HAVE BEEN FORCED to sever the bond with their own state and therefore have an exceptional status—they are of international concern.⁶² UNHCR was established to protect them and to provide them with assistance. However at the international level there is no coordinated scrutiny or monitoring of refugee protection. The crisis in refugee protection and related human rights issues are not being addressed in a comprehensive way.

- Base repatriation programs on human rights standards;⁶³
- The principle of non-refoulement must never be violated by repatriation schemes. Repatriation programs should include human rights guarantees at all stages of the return. Repatriation should not be imposed until there is a fundamental and lasting change in the human rights situation in the country of return;
- The human rights situation in the country of return should be subject to independent and impartial assessment based on publicly available information before, during and after any repatriation;
- Efforts should be made to ensure the involvement of a representative cross-section of the refugee community in assessing when return is possible;
- Individuals should have the right not to repatriate without an adequate opportunity for an individual assessment of their asylum claim;
- Strengthen international solidarity and responsibility sharing. International organisations responsible for providing refugee protection and assistance should be able to operate without political interference by governments and with secure funding;⁶⁴
- 'Responsibility sharing' should not be used to prevent refugees from seeking asylum in the country of their choice or to limit protection to the region of origin. All countries should share the responsibility for hosting refugees by making resettlement;
- Make the International System more Accountable;⁶⁵

- States should comply with their reporting obligations under the UN Refugee Convention. UNHCR should submit these reports to the UN General Assembly annually;
- An independent, impartial mechanism should be established to monitor the compliance of States Parties to the UN Refugee Convention and its 1967 Protocol; and
- Ensure that internally displaced people are protected.

CONCLUSION

THE 1951 GENEVA REFUGEE CONVENTION, the basic instrument of refugee protection, offers neither a comprehensive nor a flexible response to the diversity and complexity of forced population movements that are occurring today. The problem with the Convention can also be summarized in simpler terms, of what it doesn't include. It does not confer any right of assistance on refugees unless and until they reach a signatory country. It confers no right of assistance on the 'internally displaced' at all. It imposes no obligation on governments not to persecute their citizens, or to guarantee their safe return. It imposes no mechanism for preventing mass outflows, for burden sharing between states, for ensuring speedy assistance for those most in need, or for maximising the effectiveness of international resources. And it takes no account of the capacity of receiving states.

The problem with reforming the international refugee regime is in what the Convention does provide a system for providing protection to people at risk of persecution in their own countries. No matter how lost they may become amongst mass claims and backlogs, there are few countries willing to risk turning such people away.

The refugee problem continues to challenge the international community. While refugee-receiving States should maintain their commitment to the protection of refugees and encourage tolerance towards diversity, refugee-producing States have the duty to prevent acts that produce mass exoduses of their populations. At the same time the world needs to reach an agreement on how best to prevent new flows of refugees. The root causes of these situations should be further studied and rectified. A coordinated and system-wide response will always be the most effective way of dealing with emergencies.

ENDNOTES

- ¹ UN General Assembly resolution 319 A (IV) of 3 December 1949
- ² The UNHCR publication "The State of the World's Refugees 1997" quotes: "UNHCR is now responsible for the welfare of some 22 million people around the world, around 13 million of whom are refugees in the conventional sense of the word: people who have left their own country to escape from persecution, armed conflict or violence. To this figure can be added a very large number of uprooted people who do not receive any form of international protection or assistance, the majority of whom remain within the borders of their own country. In total, some 50 million people around the world might legitimately be described as victims of forced displacement" (at p 2). The 1999 publication UNHCR by Numbers notes a figure of 21,459,620 persons of concern to UNHCR.
- ³ Table 3, World Refugee Survey 2002 by US Committee for Refugees
- ⁴ Table 5, World Refugee Survey 2004 by US Committee for Refugees
- ⁵ UNHCR Statistical Year Book, 2001, (Source: <http://www.un.org/unrwa>)
- ⁶ UNHCR Publication: Refugees by Numbers (2004 edition) .: <http://www.un.org/unhcr>
- ⁷ Refugees and Asylum Seekers World Wide, Table-4, Table 5, World Refugee Survey 2004 by US Committee for Refugees
- ⁸ Table 1, World Refugee Survey 2002 by US Committee for Refugees (www.refugees.org/worldmain.htm.)
- ⁹ Article 1 (Refugee definition) of Convention on Status of Refugees- 1951
- ¹⁰ The use of detention of asylum-seekers by states in Europe has been extensively documented by UNHCR. See 'Detention of Asylum-Seekers in Europe', UNHCR European Series, vol. 1, no 2 (1995).
- ¹¹ Here I am referring of the interdiction, refugee-screening and 'safe-haven' protection exercised by the US government in July 1994 for Haitian asylum seekers and August 1994 for Cubans.
- ¹² EU Presidency, *Strategy papers on immigration and asylum*, Brussels, 1 July 1998. www.proasyl.de/texte/europe/eu-a-o.htm.
- ¹³ Quoted in Jeremy Harding, 'The Uninvited', *London Review of Books*, 3 February 2000.
- ¹⁴ Quoted in 'UN Convention on asylum seekers is weak, says Straw', *The Telegraph* (UK), 12 March 2000.
- ¹⁵ William Hague, 'Common Sense on Asylum Seekers', *Guardian Unlimited* (UK), 18 April 2000.
- ¹⁶ 'Toughen UN Convention: Ruddock', *Sydney Morning Herald*, 22 March 2000.
- ¹⁷ Hon. Philip Ruddock MP, MPS 088/2000, 29 August 2000.

¹⁸ John Morrison, *The trafficking and smuggling of refugees: the end game in European asylum policy?* UNHCR, Geneva, July 2000,

<http://www.unhcr.ch/evaluate/reports/traffick.pdf>.

¹⁹ Article 44 of 1949 4th Geneva convention

²⁰ Article 73 of the 1977 Additional Protocol to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of War.

²¹ Article 1 of Convention relating to the Status of Stateless persons- 1954.

²² Article 9, to The 1961 Convention on the Reduction of Statelessness

²³ Articles 13 and 14 of the Universal Declaration of Human Rights-1948

²⁴ Second paragraph of article 1 of the African Convention 1969.

²⁵ In Latin America, refugees fled Chile, Argentina, and Nicaragua in the late 1970s and 1980s, resettling mostly in neighboring states. Cuba, which had received refugees from Chile, Uruguay, and other nations, temporarily removed its exit restrictions and permitted about 120,000 people to go to the United States. During the same period, internal upheavals in El Salvador led to an outflow of refugees. Because of the influx of Cubans, Haitians, and Indochina's, the United States, became, for a time, a country of mass asylum..

²⁶ Part III, Para. 3, Cartagena Declaration on Refugees

²⁷ Article 8, Statute of the Office of the UNHCR.

²⁸ Universal Declaration of Human Rights, article 9

²⁹ *ibid*, article 14

³⁰ *ibid*, article 15

³¹ Article 13 *ibid*; International Covenant on Civil and Political Rights, article 12.

³² 1951 Convention on status of refugees, Article 33. See also, 1969 American Convention on Human Rights, Article 22(8); 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, and standard-setting extradition treaties. ICCPR, Article 7, and 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3, have also been found to include a *non-refoulement* component

³³ Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

³⁴ Article 33, The 1951 Convention relating to the Status of Refugees

³⁵ It has drawn particularly from the work of James Hathaway, Osgood Law School and Centre for Refugee Studies, York University, Toronto; Matthew Gibney, Refugees Studies Program, Oxford. It is also drawn from Refugee and Migration Policies in Europe, North America and Australia (IGC), the International Organization for Migration (IOM), and the UNHCR, in the UK, Europe and North America May-August 1999.

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- ³⁶ A good description of the background to the Convention and its early years of operation is in Sarah Collinson, *Beyond Borders: West European Migration Policy Towards the 21st Century*, Royal Institute of International Affairs, London, 1993.
- ³⁷ Marion Jimenez, *National Post*, 31 March 2000.
- ³⁸ Christopher DeMuth, speaking at CIS conference 18 May 2000, <http://www.cis.org.au/main%20pages/DeMuth%20EDIT.htm>.
- ³⁹ Gil Loescher, *The Asylum Dilemma in the West*, Pennsylvania State University Press, Pennsylvania, 1992.
- ⁴⁰ UN report cited by Nick Hopkins in *The Guardian* (UK), 6 July 2000.
- ⁴¹ The UK Government's *Fairer, Faster and Firmer* White Paper was tabled in the House of Commons 27 July 1998.
- ⁴² Alan Travis, '600 million to end asylum backlog', *The Guardian* (UK), 24 July 2000.
- ⁴³ Staff and agencies, 'More asylum seekers to be deported', *Guardian Unlimited* (UK), 7 June 2000.
- ⁴⁴ Professor Georges Tapinos, Institut d'etudes politiques de Paris, & OECD consultant, in OECD, *Trends in International Migration* OECD, Paris, 1999.
- ⁴⁵ Quoted in Jeremy Harding, 'The Uninvited', *London Review of Books*, 3 February 2000.
- ⁴⁶ Amnesty International, September 2001 on " The Asylum Crisis: Human rights challenge for EU.
- ⁴⁷ Nearly all Western European countries imposed a visa requirement on people from Bosnia-Herzegovina after mid-1992, when the war had started and a large number of people were trying to escape generalized violence as well as torture, rape and political killings.
- ⁴⁸ *ibid*
- ⁴⁹ Most Haitian refugees tried to reach the USA in the months after the coup in mid 1992 and more than 38,000 risked their lives at sea. In June 1992 the USA intercepted Haitian boat people at sea and summarily returned them, without any examination of their asylum claims. This directly violated the principle of *non-refoulement*.
- ⁵⁰ Although several of the examples of obstacles to refugee protection have largely found their genesis in developed countries, serious refugee protection problems also occur in less-developed countries. . In the Latin American context a UNHCR report noted that: "Numerous countries [in the region] have indeed acceded to the 1951 Convention and/or 1967 Protocol, but few have a fully operational national legislation and, [for those that do] fewer do apply them systematically if UNHCR is not there to remind concerned authorities of their duties. While it is true that we are rarely confronted with very serious protection problems, there are still numerous situations in our countries, which justify our presence and monitoring role.

This is more so when we note that [UNHCR's] main challenge for this end of century is to ensure that effective protection of refugees and asylum-seekers goes hand-in-hand with activities geared to ensure effective institution building and training programmes (on behalf of both governmental and non-governmental counterparts) and the enactment or revision and effective application of refugee law." (UNHCR Regional Office Costa Rica Report of 28 February 1996,)

⁵¹ Article. 22 , Convention on the Rights of the Child (1989)

⁵² Article 1, paragraph C, of the Convention relating to the Status of Refugees 1951

⁵³ The interdiction, refugee-screening and 'safe-haven' protection exercised by the US government in July 1994 for Haitian asylum seekers and August 1994 for Cubans.

⁵⁴ EXCOM Conclusions 8 and 15 (j).

⁵⁵ In the 8 January 1987 letter, UNHCR states: "There must furthermore be an intention to mislead the authorities. Thus an asylum seeker who arrives without documentation ... cannot be detained under this specific heading. Similarly an asylum seeker who has destroyed his documents ... but informs the authorities of his identity, the elements of his claim, and his travels, should not be detained under this heading."

⁵⁶ 1951 Convention, Article 33. See also, 1969 American Convention on Human Rights, Article 22(8); 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, and standard-setting extradition treaties. ICCPR, Article 7, and 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3, have also been found to include a *non-refoulement* component.

⁵⁷ See 'Detention of Asylum-Seekers in Europe', UNHCR European Series, vol 1, no 2 (1995).

⁵⁷ The interdiction, refugee-screening and 'safe-haven' protection exercised by the US government in July 1994 for Haitian asylum seekers and August 1994 for Cubans.

⁵⁸ In the USA, asylum-seekers are frequently moved from one detention centre to another, sometimes far from their families or legal representatives. Australia's main detention facility for asylum-seekers in Port Hedland is thousands of miles away from any major city and access to legal counsel is a major problem.

⁵⁹ See EXCOM Conclusions 44 (XXXVII) 1986; 85 (XLIX) 1998, para (cc, dd, ee).

⁶⁰ Much has been written on reforming the UN Treaty Body System in recent years. Several practical proposals for reforming and re-activating this particular aspect of the UN human rights system are contained in the

‘Conclusions and Recommendation’ from the proceedings of a Conference Enforcing International Human Rights Law: The Treaty System in the Twenty-First Century held at York University, Toronto, on 22-24 June 1997. Interim report by Philip Alston entitled ‘Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights,, The United Nations and Human Rights: A Critical Appraisal, Clarendon Press, Oxford, 1992.

⁶¹ Article 14.1 of the Universal Declaration of Human Rights

⁶² The international community is also obliged to ensure that the costs of refugee protection are properly shared, regardless of where refugees have fled. The Preamble to the UN Refugee Convention states:

"...The grant of asylum may place unduly heavy burdens on certain countries, and... a satisfactory solution... cannot therefore be achieved without international cooperation."

⁶³ 55/2 UN Millennium Declaration, vi, para26 , by General Assembly 55th session

⁶⁴ Hathaway has made a stark comparison of refugee burden sharing between Northern and Southern states wherein he notes that: "Of the 26 states hosting at least one refugee per 100 citizens, 21 were among the world's poorest (i.e. they had a per capita income of less than \$1000 per year ... The Refugee Convention speaks about the importance of sharing, but incorporates no mechanism to make it happen. Northern states each year spend at least \$12 billion to process the refugee claims of about 15% of the world's refugee population, yet contribute only \$1-2 billion to meet the needs of 85% of the world's refugees who are present in comparatively poor states..." 'Keynote Address of Professor James Hathaway at New Delhi Workshop on International Refugee Law', Indian Journal of International Law, vol 39, no 1, January-March 1999, at p. 11.

⁶⁵ In 1981 'Study on Human Rights and Massive Exoduses' which was prepared by former UN High Commissioner for Refugees, Sadruddin Aga Khan, wherein he noted: "Since the individual is the ultimate beneficiary international law, the need to respect human rights is all the more important. These rights, embodied 1948 Universal Declaration of Human Rights constitute a set of guidelines, a code of conduct, of how, in an ideal society, the nation-state should deal with an individual. The former should not abuse the latter. The rule of law should reign supreme and impartial courts must enforce this even against governments....", UN Document ref: E/CN.4/1503 of 31 December 1981, at pp 8-9.