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A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead?

By
Bemma Donkoh*

The dawning of a new century and millennium in the year 2001 roughly coincides with the commemoration of fifty years of responsibility-sharing by States in an international system designed to protect and assist refugees. Toward the end of 2000, we will commemorate the 50th anniversary of the creation of the Office of the United Nations High Commissioner for Refugees (UNHCR).

On December 14, 1950, the United Nations General Assembly passed a resolution creating the office of a High Commissioner for Refugees. This position, under the auspices of the United Nations, would provide "international protection" to refugees and seek "permanent solutions" for the problem of refugees in conjunction with the governments of member states. In the year 2001, we will reach another landmark: 50 years since the adoption of the 1951 Convention Relating to the Status of Refugees. Under different circumstances, the endurance for half a century of an institution in which all the world's States and citizens continue to be stakeholders would have called for a celebration. Why are we not celebrating?

It is indicative of the ambivalence with which most people view the refugee issue that the UNHCR, after much internal reflection, has decided that now would not be a good time to "celebrate." Indeed, one doubts whether there could ever be a good time to celebrate such an issue. Instead, a decision was made to focus on the strengths, potential and resilience of refugees as individuals and as communities throughout the world, in order to bring into sharp relief both the plight of refugees and their proximity to the ordinary person in the street. In so doing, the UNHCR hopes also to affirm the morale and value of all those who, along with the UNHCR, assist and advocate for the rights of refugees and the forcibly displaced.

In December of 1950, the establishment of the UNHCR was a preliminary, and necessary, step toward achieving the goal of an effective, although young,

* Deputy Regional Representative, UNHCR Regional Office for North America and the Caribbean. These remarks were part of a presentation, "Global Perspectives on the Effectiveness of International Law and Institutions for Protecting the Rights of Refugees/Internally Displaced Persons (IDPs)." The views expressed are those of the author and do not necessarily represent those of UNHCR.

United Nations. The original goal of the UNHCR was to build a multilateral legal system designed to safeguard the rights of individuals displaced as a result of conflicts that had taken place in Europe and to coordinate international support for these populations. The second essential lynchpin of the new international accord was to follow within a year of the creation of the organization. In July 1951, an international conference of plenipotentiaries adopted a treaty that included a shared refugee definition and the scope of the protection attached to refugee status. The equation offered by the 1951 Convention Relating to the Status of Refugees was thus: Contracting States committed themselves to guarantee rights for refugees. The system set forth in the Convention was underscored by an understanding that States, in co-operation with one another, should be responsible for refugees, despite their status as non-nationals. The rationale underlying such an institutionalized, multilateral approach, as opposed to the *ad hoc* initiatives launched in previous eras to assist displaced groups, was explained in the Preamble to the 1951 Convention. The Preamble recognized that, "the grant of asylum may place an unduly heavy burden on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international Cooperation."

The 1951 Refugee Convention articulated the central concepts of an international refugee protection regime. These elements include:

- Establishment of a shared refugee definition. Under the Convention, a refugee is a person outside his/her country of origin who, because of a well-founded fear of persecution on account of race, nationality, membership of a particular social group or political opinion, is entitled to protection and cannot be required to return to his country of origin;
- Articulation of the principle of *non-refoulement*: refugees should not be returned to face persecution or the threat of persecution;
- Creation of a duty to extend protection to all refugees without discrimination;
- Articulation of the tenet that the refugee problem should be treated as a social and humanitarian one, and therefore, should not become a cause of tension between States;
- Recognition of the principle that persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner and, accordingly, should not be penalized for having entered into or remaining illegally in the country where they seek asylum;
- Commitment to the principle that the expulsion of refugees should be undertaken only in exceptional circumstances directly bearing on national security or public order, given the very serious consequences attendant to expulsion where a refugee is involved; and
- Establishment of the principle that co-operation of States with the UNHCR is essential if the effective co-ordination of measures taken to address the problem of refugees is to be ensured.

Thus, what began as an arrangement limited in time and scope—intended to solve a post-Second World War, European problem—has lasted for 50 years. The persistent problem of human displacement and cross-border migration arising from the systematic deprivation of fundamental human rights, violent conflicts and other events affecting the security of individuals and communities forces the mandates of the 1951 Convention and its progeny to the forefront of international law. Early on in the Convention's history, events such as the Algerian War of Independence in 1956, the revolution in Rwanda, and the start of the de-colonization struggles of former Portuguese colonies in Africa and Asia forced the international community to recognize its limitations. To bridge the obvious gaps in the Convention's protective elements, a protocol was adopted in 1967. This new agreement removed the time and geographical limitations present in the original Convention, updated it in light of recent conflicts and gave it a truly "global" identity, extending its significance and reach beyond Europe to the rest of the world. At the same time, the UNHCR, an agency initially expected to be necessary for a period of only three years, has had its existence prolonged through successive renewals of its mandate.

One has only to scan a daily newspaper published in any of the world's major cities in order to appreciate the scale of humanitarian need that underlies the work of international refugee protection. On any given day, one is likely to find reporting of at least one story about sectarian and ethnic violence, an armed conflict or violent upheavals accompanied by pictures of children and their mothers, the young and the elderly, huddled together in fear or distress. But more often, these masses are not stationary. They are on the move, straining to reach relative safety. As an illustration, in the last month, the following headlines have appeared in numerous papers: *Thousands of civilians in northern Sri Lanka's Jaffna peninsula are feared trapped by fierce clashes between the army and Tamil Tiger rebels: 3,000 people seek refuge in a church; another estimated 12,000 civilians are trapped near the strategically vital Elephant Pass causeway; Refugees from the Mae Kongka camp at the Thailand-Myanmar border, numbering some 10,000, mostly from the Karen ethnic group, face on an almost daily basis, the high risk of coming under attack by Myanmar troops and their allies; On a recent visit to Chechen refugee camp in Ingushetia, the UN High Commissioner for Human Rights, Mary Robinson, expressed her dismay at "the depth of suffering, pain, resentment and frustration" demonstrated by refugees she had encountered who had described, in consistent detail, a tale of human rights abuses by Russian troops.*¹

It is has become quite common to find civilians trapped in situations that involve struggles between groups vying for control of territory or resources. In the midst of such mayhem, civilians have been actual targets of the violent assaults, rather than their incidental casualties. Civilians have served as the pawns of "warlords," instead of receiving protection from any of the parties to the conflict. Approximately 90 percent of these people are children, women and the

1. These reports are extracts from UNHCR's *Refugee Daily* publication—a daily compendium of global news reports.

elderly, categories that in most societies are traditionally viewed as requiring protection in times of violent conflict. The plight of these children, women and men is only partly evidenced by the fact that the UNHCR is currently providing protection and assistance to at least twenty-two million people in 124 countries around the world, including seventeen million refugees, as well as some five million persons displaced within their own countries.

The scale of the tragedy of forced displacement is, however, believed to be far worse than these figures portray. Hundreds of thousands of individuals are known to be trapped internally within the confines of their countries' borders, a population of internally-displaced persons (IDPs), estimated to number some thirty million persons, a population largely "invisible" to the outside world. Unlike refugees, these IDPs fall under the responsibility of no single international agency. In short, no one is accountable or responsible for their protection, and frequently, access to these populations by humanitarian workers is sporadic or totally non-existent.

Refugees and displaced persons constitute a population whose origins are vitally connected to many of the most pressing issues confronting our world: the protection of human rights; the resolution of conflicts; the promotion of economic and institutional development; the conservation of the environment; and the management of international migration. Several refugee issues directly impact on national, regional, and global stability, and often find their way onto the international peace and security agenda. But beyond these implications on geopolitics, the urgency of refugee protection issues stems from the immense human suffering that inevitably accompanies refugee flight.

The causes of such human suffering and degradation have changed little over 50 years. They continue to stem from serious violations of human rights, in times of peace, as well as during violent conflict. The solutions previously relied upon to redress the harm from such displacement, such as asylum, are much more in demand but less available. The possibility of voluntary return to a home country where conditions of normality and safety are present, however, is often a dim prospect for refugees from countries embroiled in prolonged conflicts.

What does the UNHCR have to show for almost 50 years of progressive development of principles and institutions for the protection of refugees? We can only provide a mixed response, pointing out the concrete gains and benefits, along with the problems and challenges that beset this area of international law. The uniqueness of the international refugee protection system lies in its roots—a legally binding and standard setting treaty—which itself borrowed heavily from universal human rights principles and customary international law. International refugee protection has shown a capacity to evolve and develop not only through the experiences, practices and interpretations of its language by principal actors—State signatories and the UNHCR—but also through the contribution of a variety of international instruments, the work of intergovernmental bodies, including regional organizations, and jurists. The treaty's coherence flows from its fundamental basis: a regime of rights and obligations with a precise defini-

tion of who qualifies for protected status and the functional support of a dedicated protection agency.

In the context of the most recent and ongoing refugee situations, as demonstrated by recent events in Kosovo, Sierra Leone, Timor, Central Africa and Bosnia, the international community has tended to rely on this treaty system to respond to humanitarian needs. In these situations, the principles of non-refoulement, asylum, international solidarity and responsibility-sharing, as well as other legal and institutional arrangements, have been employed to ensure a systematic, concerted and principled response to humanitarian crises. Pressure on countries of asylum to open up their borders to fleeing refugees and guarantee their physical protection and access to the UNHCR's services and humanitarian aid can be traced to belief in this international system. These same examples also illustrate the weaknesses of international law and institutions as tools when political will wanes, or when States use a humanitarian response as a substitute for political action to solve the underlying causes of displacement.

Clearly, the international refugee protection system has produced some benefits. Just as clearly, however, it has manifested itself to be weak, vulnerable and unreliable in a number of areas. Negative trends in asylum practice—such as systematic detention and expedited removal procedures, interdiction and forced repatriation of refugees and asylum seekers, have led to a questioning of the effectiveness of the current international refugee protection regime. Admittedly, migratory flows have become increasingly complex. Those crossing borders and arriving without proper documents are seldom composed exclusively of refugees fleeing persecution in the classical sense, but often also include those responsible for creating the conflict, others escaping generalized violence, and still others affected by natural disasters and extreme poverty. This final group, driven predominantly by economic needs, does not qualify as refugees under current international law. In an era of fast-growing international criminal networking, terrorism and human smuggling, concern for national security has led governments, particularly Western industrialized countries, to unleash a series of stern measures and sanctions to deter and punish any type of irregular entry.

As the UNHCR frequently points out to governments, which like the United States in 1996 are driven to “reform” asylum laws, restrictive asylum policies are easy to export and have a tendency to spread. States everywhere, including those in Africa previously extolled for their open and generous asylum traditions, are increasingly insisting on their prerogative to offer asylum on their own terms. Those terms rarely comply with international law principles. Measures gaining popularity include rigid time limits for filing asylum applications and the use of detention, including that which is arbitrary, to deter asylum applications. There is also a trend toward inappropriate use of asylum-related notions such as “safe country,” “internal flight alternative” or “manifestly unfounded claims” by officials in receiving states. A reinterpretation of the context and scope of basic principles such as *non-refoulement*, in the context of interdiction of persons attempting to enter a territory, is gaining acceptability. The fact that

such practices are being replicated in regions where laws and structures regarding the status of refugees are only now being put into place is extremely troublesome for the future of international refugee protection.

In analyzing the impact of these negative developments on the state of international protection today, however, it is important for us not to “throw the baby out with the bath-water.” While decrying the shortcomings of the system we should not confuse the failure to properly apply the existing basic treaty obligations with perceived defects in the instruments themselves. To do so would be to constitute an open invitation to States to move from the agreed legal basis for refugee protection to less binding and more popular political options.

With regard to the adequacy and effectiveness of the UNHCR’s current role, views span a wide range. Some advocate for a refocusing of the UNHCR’s mandate to protection *per se*, while others call for an expansion of the organization’s mandate to include responsibility for the care and protection of the estimated 30 million IDPs found in refugee-like situations in different parts of the world. Critics of the UNHCR’s role within the contemporary refugee protection framework have highlighted its weak legal standing and financial dependency on government contributions as factors that have prevented the organization from exercising independence, standing up to governments and encouraging them to uphold principles of refugee protection.

Without embarking on a defense of the organization, it is worth noting that States are, necessarily, the implementors of refugee protection, while the UNHCR’s role, in the words of Erika Feller, the Director of UNHCR’s Department of International Protection, has been conceived to be that of “a facilitator.” She points out that States are:

[e]xpected to help establish the preconditions for a viable and effective refugee protection regime, namely, political support for the institution of asylum, universal respect for the rule of law, and a stable and secure global environment. [The] UNHCR’s role is to prompt, facilitate, and oversee the process of State responsibility, but can never substitute for it.

Much of the frustration with the failure to find long-term solutions to refugee movements that have resulted in compassion fatigue would be better directed toward urging States to address the root causes of such movements rather than at the UNHCR. Otherwise, the UNHCR and other humanitarian agencies, whose mandates require them to engage when human needs are at stake, will continue to serve as salves to the consciences of States who, knowing full well that the only cure for forced displacement is often aggressive pursuit of political solutions and commitment to conflict resolution and reconstruction initiatives, still prefer to insist on “humanitarian” solutions.

United States Ambassador Richard Holbrooke recently made a suggestion that the UNHCR’s institutional mandate for refugee protection be extended to IDPs. Some see this as the clearest indication yet that the 50-year old system set up for refugees, while not perfect, is valuable. Holbrooke’s suggestion reflects the horrific scale of human displacement and misery within countries of origin in several areas of the world, some of which Mr. Holbrooke has visited.

These include places such as Angola, where almost 20 percent of the population has been uprooted, and Central Africa, where conflicts characterized by mass violations of human rights going back several decades have affected almost every country in that region. Estimates suggest that in Tanzania there are over 300,000 refugees from Burundi alone. These refugees are not the only casualties of the conflict in that country, for several thousands of their compatriots are internally displaced within Burundi. In the neighbouring Democratic Republic of Congo, hundreds of thousands have been displaced internally, while some 130,000 refugees have fled to Tanzania. Similarly, in Serbia, Colombia, Sri Lanka, and in countries of the Caucasus, refugee problems are closely linked to those of internally displaced people, both in terms of the causes and consequences of the displacement, as well as their similar humanitarian needs.

While the UNHCR is currently assisting some five million IDPs, some international body must address the needs of the several million other IDPs without consistent access to international assistance. Efforts to define an international system responsible and accountable for IDPs must be seriously pursued. This system must be invested with coherence, consistency and predictability in a manner similar to that which refugees have under the 1951 Convention and its subsequent protocols. In describing the role of her office to address the problem of IDPs, the United Nations High Commissioner for Refugees, Mrs. Sadako Ogata, stressed her commitment to increasing the extent of the organization's involvement with the internally displaced whenever possible and appropriate. She has cautioned, however, that the UNHCR's involvement will be subject to certain key considerations, such as the need to maintain respect for the right of individuals to seek asylum outside of their country of origin and to preserve the integrity of the agency's uniquely humanitarian and non-political mandate. The UNHCR's presence in a country in order to assist its internally displaced populations would, thus, be questionable where this presence is certain to be exploited by countries of asylum in an effort to justify their denial of admission to those attempting to cross their borders in pursuit of refuge. In any event, admission of refugees and access to asylum procedures must be guaranteed. Furthermore, in the face of the frequent security and political constraints that are characteristic of the complex and combative situations that accompany internal displacement of populations, the UNHCR's effectiveness is seriously undermined. The UNHCR must be able to count on having unimpeded access to the populations of its concern and assurances of conditions of security for its staff and associated humanitarian workers. All too frequently, these conditions are not present.

Another entirely different group of persons requiring international protection are stateless persons. These people, by definition, do not possess the nationality of any country by operation of its laws. Here at least, the UNHCR has been temporarily charged under the 1961 Convention on the Reduction of Statelessness, with a mandate that enables the agency to intervene on behalf of, and to promote solutions for statelessness, including cooperation with States and

providing technical assistance on issues of nationality legislation and related matters.

In closing, I would like to provide a few thoughts on what can be done to revive the spirit of solidarity, humanitarianism and respect for the rule of law that has been responsible for the adoption, development and implementation of international refugee law. It is ironic that dissatisfaction over the *status quo* is shared by States and advocates alike, although, not for the same reasons. The question posed is whether the radical transformation of the current international legal regime for refugee protection that many desire would be realistic, feasible or necessarily curative of the ills identified. A less radical set of solutions may well be feasible. These solutions would involve recommitting the international community to the principles of international responsibility sharing, respect for human rights and upholding the dignity of asylum seekers and refugees. In this respect, the role of civic society is crucial. Too often, governments are left by default to be the sole arbiters as to when and how to comply with their contractual obligations relating to refugee protection. The active engagement of ordinary women, men, students, academics, adjudicators and advocates—members of the civil society—is needed to challenge xenophobic tendencies, particularly when these appear in subtle forms, such as the criminalization of asylum seekers and passage of unacceptable laws, policies and practices that derogate from refugee law standards in their communities. Refugee protection must be accorded its recognized “humanitarian space” in immigration control and management. It is through such involvement and vigilance that the spirit of solidarity and the common appreciation for the essential humanity of refugees can be restored into the practice of States and international organizations. A “culture of protection” must be nurtured and constantly promoted.²

At the same time, the issues of refugee protection go beyond the need to preserve asylum and extend to the need for concrete action to prevent the situations which lead to refugee movements and to create conditions for restoring dignity, security, peace and human rights for refugees in their home countries, where they belong.

2. Guy Goodwin-Gill, “The International Protection of Refugees: What Future?”, address at the Institut Universitaire des Hautes Etudes Internationales, Geneva (Mar. 17, 2000).