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The Evolution of the International Refugee Protection Regime

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I. INTRODUCTION

The inauguration of the Institute for Global Legal Studies is to be commended, not only for the promise it holds for the expansion of human rights activities at Washington University School of Law, but also for the recognition reflected in today's agenda that refugee protection is a human rights issue, rather than principally an act of charity at the discretion of States. It is a pleasure for me to be here for the grand kick-off event.

Under the theme 'the history of the United Nations (UN),' I have been asked to speak on the protection of refugees. Therefore, a short historical perspective on the United Nations High Commissioner for Refugees (UNHCR) is followed by a review of how the international refugee protection regime has evolved over the past half century. The year 2001 marks the fiftieth anniversary of the 1951 Convention Relating to the Status of Refugees (1951 Convention). It is an opportunity for us to seriously reflect on current refugee protection and where it could, or should, go from here. I would like to offer some observations from UNHCR's perspective.

When UNHCR first came into existence in 1951, refugees were welcomed noncitizens in many countries. This was not least because, in postwar Europe, they came mainly in manageable numbers from neighboring countries with some ethnic affinities; their intake reinforced strategic objectives during the Cold War; and, as an added plus, they helped to meet labor shortages. However, today the term "refugee" has a certain stigma attached which has seriously complicated UNHCR's responsibility to ensure that international protection is available to them, as a surrogate for the protection of

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their national authorities, which they have lost. There are, of course, many reasons for this increase in complexity, which differs country by country, region by region. In aggregate, the reasons include: the changing nature of displacement; the costs, of many sorts, of hosting refugees; the spread of irregular migration and trafficking of people, which has blurred the “migrant/refugee” distinction; and a growing gap between the people in need of protection today and the instruments and tools we have available to provide it. Now, I will trace some of these developments in more detail.

Refugees have existed as long as history, but an awareness of the responsibility of the international community to provide protection and find solutions for refugees dates only from the time of the League of Nations and the election of Dr. Fridtjof Nansen as the first High Commissioner for Russian refugees in 1921. The League of Nations defined refugees by categories, specifically in relation to their country of origin. Dr. Nansen’s mandate was subsequently extended to other groups of refugees, including Armenians in 1924, as well as Assyrian, Assyro-Chaldean, and Turkish Refugees in 1928. Up until 1950 the League of Nations, and thereafter the UN, established and dismantled several international institutions devoted to refugees in Europe. The International Refugee Organization (IRO) was the last to precede UNHCR. The IRO was created in 1947 to deal with the problem of refugees in Europe in the aftermath of the Second World War and was to be terminated by June 30, 1950. It was soon apparent, however, that the comprehensive nature of the task it had been assigned—to address every aspect of the refugee problem from registration and determination of status, to repatriation, resettlement, and “legal and political protection”—precluded winding up of that international effort. There was also a growing conviction of the importance of a multilateral approach to resolving refugee problems.

Thus, in December, 1949 the General Assembly decided to replace the IRO with UNHCR, which was established for an initial period of three years, as a subsidiary organ of the General Assembly under Article Twenty-two of the UN Charter. On December 14, 1950 the General Assembly adopted the Statute of the UNHCR. UNHCR’s tasks stated therein were to provide international protection for refugees and to seek permanent solutions to their problems by assisting governments to facilitate their voluntary repatriation or their

assimilation within new national communities. On January 1, 1951 UNHCR began its work with a staff of thirty-three and a budget of \$30,000.

Half a century later, the augmentation in the statistics is impressive: whether in the numbers of persons of concern to the Office—some twenty-two million; the annual budget—just under \$1 billion; the number of staff—5000 persons; or the level of its global representation—present in 120 countries. The statistics are a telling illustration of the quite marked, even dramatic, expansion in UNHCR's work since it was a set up for a three-year period, fifty years ago.

II. THE 1950S: DEVELOPMENT OF THE INTERNATIONAL REFUGEE PROTECTION REGIME

When UNHCR was established, the problem presented was essentially one of dealing with the approximately one million individuals who had first fled Nazism, and later communism, in Europe. UNHCR's work was mainly of a legal nature, to ensure entry and ease integration in accordance with the 1951 Convention. The 1951 Convention was the first, and indeed remains the only, binding refugee protection instrument of a universal character. It was actually an instrument of rather limited intent, addressed particularly to the question of the status of refugees, not to solutions or to causes. While it traced its origins broadly to human rights principles, it was more about states' responsibilities than individuals' rights. One principal contribution of the 1951 Convention was to put in place a global definition of refugee—a person who flees their country because of a well-founded fear of persecution on the grounds of race, religion, nationality, membership in a particular social group, or political opinion. In 1967 the main caveat attached to the universalist character of this definition—a geographical and time limitation—was lifted comprehensively through the enabling of a protocol, presently the only one, to the 1951 Convention.

The 1951 Convention did put in place the enduring foundations of refugee protection by setting out baseline principles on which the international protection of refugees was to be built. These principles stated: refugees should not be returned to face persecution or the

threat of persecution—the principle of nonrefoulement; protection must be extended to all refugees without discrimination; the problem of refugees is social and humanitarian in nature, and therefore should not become a cause of tension between states; since the grant of asylum may place unduly heavy burdens on certain countries, a satisfactory solution to the problems of refugees can only be achieved through international cooperation; 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 for being illegally in, the country where they seek asylum; given the very serious consequences the expulsion of refugees may have, such a measure should only be adopted in exceptional circumstances directly impacting national security or public order; and cooperation of states with the UNHCR is essential to ensure the effective coordination of measures taken to deal with the problem of refugees.

III. THE 1960S AND 70S: EXPANSION OF THE INTERNATIONAL REFUGEE PROTECTION REGIME

If the 1951 Convention was the baseline, it also contained, to some extent, only the basics. This became clear in the decade that followed, with UNHCR's protection activities having to reach well beyond Europe into countries, particularly on the African continent, experiencing the painful process of decolonialization. The individualized and persecution-based approach to defining beneficiaries and their rights in the 1951 Convention was not so helpful here. The mass numbers of refugees and the generalized conflicts which precipitated their displacement ensured a growing mismatch. The General Assembly felt it necessary to extend UNHCR's mandate to protect and assist groups of refugees falling outside the definition and geographic ambit of the 1951 Convention, and thus UNHCR had begun the process that would lead eventually to the 1967 Protocol.

Simultaneously, regional instruments were under development that, in effect, updated the 1951 Convention definition by expanding it to include a broader category of persons. These instruments included, significantly, the 1969 OAU Convention on the Specific

Aspects of Refugee Problems in Africa (OAU Convention). While incorporating the existing 1951 Convention refugee definition, the OAU Convention added a paragraph specifying that the term “refugee” shall also apply 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, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. In other words, the notion of “refugee” was broadened beyond victims of generalized conflict and violence. The OAU Convention was also a significant advance from the 1951 Convention in its recognition of the security implications of refugee flows, in its more specific focus on solutions—particularly on voluntary repatriation, in contrast to the integration bias of the 1951 Convention—and through its promotion of a burden-sharing approach to refugee assistance and protection.

The 1970s were in fact a decade of repatriation. Millions of refugees returned home to countries like Angola, Mozambique, Guinea-Bissau, or Bangladesh. This period also proved to be an important one in terms of fostering the concepts of international solidarity and burden sharing in the difficult search for solutions. One of the more important milestones in this regard was the International Conference on Refugees and Displaced Persons in Southeast Asia, at Geneva in 1979. It came at a time when the world was following with grave concern the plight of Vietnamese fleeing their country in flimsy boats, confronting the perils of the sea and pirates only to be pushed back as they reached the shores of neighboring countries. A three-way agreement emerged from the Conference: ASEAN countries promised to provide temporary asylum; Vietnam undertook to promote orderly departures in place of illegal exists; and third countries agreed to accelerate the rate of resettlement. Important burden-sharing schemes subsequently were put in place to ensure the continuing rescue at sea of the Vietnamese “boat people.” The Comprehensive Plan of Action (CPA) for Indo-Chinese refugees was the first attempt to implicate all concerned parties—countries of asylum, of origin, and of resettlement—as well as the donor community in a coordinated, solutions-oriented set of arrangements for the sharing of responsibilities for the refugee population.

IV. THE 1980S AND '90S: RESTRICTIONS ON THE INTERNATIONAL REFUGEE PROTECTION REGIME

In the 1980s and '90s, substantial changes came about in the environment in which international refugee protection was to be realized. These changes not only put basic concepts into question, they also impacted indelibly on both political will and that of local host communities to continue to offer asylum on the generous terms of the past. The number of refugees grew exponentially—no longer as a product of colonialism but due to the steep rise in internal interethnic conflicts in the newly independent states. The conflicts were fuelled by superpower rivalry and aggravated by socioeconomic problems in developing countries. Solutions to refugee problems became even more elusive—whether in Afghanistan, where 2.5 million Afghan refugees remain in exile today, in the Horn of Africa, or in Southern Africa. Human rights abuses and breaches of humanitarian law were no longer by-products of war, but often a conscious objective of military strategy, so that even low levels of conflict generated a disproportionately high degree of suffering and massive displacement among civilians. To give some examples, 2.5 million people were displaced or fled to Iran from Northern Iraq in 1991; in former Yugoslavia the number of refugees, displaced and others assisted by UNHCR, exceeded four million; and the Great Lakes crisis of 1994 forced three million people to flee their countries. With the prospects of lasting political solutions to refugee-producing conflicts ever more distant, UNHCR had little option but to embark on prolonged aid programs for millions of refugees in overcrowded camps. And the refugee population steadily increased from a few million in the mid-1970s to some ten million by the late 1980s. In 1995 the number of persons needing assistance rocketed to around twenty-five million.

Asylum countries became increasingly worried about receiving large numbers of refugees without a possibility of early repatriation. Large-scale refugee flows increasingly were perceived as a threat to political, economic, and social stability, and in traditionally hospitable asylum countries, were starting to provoke hostility, violence, physical attack, and the rape of refugees. Governments resorted to closing borders or pushing refugees back to face danger or

even death. Guinea closed its borders to the Sierra Leonean refugees, many of whom were women and children who had had limbs amputated by machete-wielding rebel forces, manifesting a graphically horrible example.

The “voluntariness” aspect of solutions, inevitably, assumed quite a relative place. Refugees returned to countries emerging from long, drawn-out war, where peace was fragile, infrastructure weak, the human rights situation not yet stabilized, and the basic necessities of life in uncertain supply. The factor precipitating return was seldom durable change in the host country, making their return the lesser of the evils. In some cases, rapid outflows were followed by an equally sudden and large-scale return of people to their country, from which they were compelled to depart again to exile within a short period.

In the developed world, with sophisticated asylum systems and a long tradition of active political support for refugee protection, the changes were no less significant. Particularly over recent years, there has been a major reshaping of asylum policies, provoked by a shared concern in the industrialized countries about overburdening the structures they have in place to handle claims, rising costs of various types associated with running their systems, problems stemming from difficulties in applying refugee concepts to mixed groups of arrivals, and by a significant misuse of the systems. Trafficking, or human smuggling, has been a compounding feature. Increasingly, asylum seekers have opted for what has become an important option; being smuggled to sanctuary. This option, however, carries a price tag. Asylum seekers who resorted to traffickers seriously compromised their claim in the eyes of many states, producing, as a result, a sort of double criminality—not only have the people flouted national borders, but they have consorted with criminal trafficking gangs to do so—to the point where the claim for asylum becomes tainted and measures which restrict elementary privileges have thereby been viewed as more than justified.

There has been a slow but steady growth in processes, laws, and concepts whose compatibility with the prevailing protection framework is ever more tenuous. Some states have reverted to an overly restrictive application of the 1951 Convention and its 1967 Protocol, coupled with the erection of a formidable range of obstacles to prevent legal and physical access to territories. This has been

accompanied by the growth of a bewildering myriad of alternative protection regimes of more limited duration and which guarantee lesser rights when compared to those of the 1951 Convention. Increased detention, reduced welfare benefits, and severe curtailment of self-sufficiency possibilities, coupled with restricted family reunion rights, all have been manifestations of this trend.

V. THE REALITIES AND THE WAY AHEAD FOR THE INTERNATIONAL REFUGEE PROTECTION REGIME

Taking stock of where we came from, UNHCR's perception is that refugee protection stands at a crossroads. Its most important tool—the 1951 Convention—sets out a basic framework that remains directly relevant to many, but not to all, displacement situations. Concerns about the 1951 Convention, specifically for what it does not address, have led some states to go so far as to question its continuing value. A great many more states increasingly disregard it or find ways around it, even in situations it directly addresses. Furthermore, alliances on protection are shifting. Some states that were formally devout practitioners are starting to distance themselves from its basics as they seek to redefine their responsibilities in the face of the changed nature of conflicts, ever-larger numbers of vulnerable people, and a globalized irregular migration movement. Waning public support for refugees and a resurgence of xenophobia have found their political expression, in many countries, in taking a harder line toward those who come uninvited. This harder line often is rationalized on the basis of arguments that rest on a few challengeable assumptions.

The first assumption is that the 1951 Convention is outdated, unworkable, irrelevant, or an unacceptably complicating factor in today's migration environment. The fact, from our perspective, is that the 1951 Convention was never conceived of as an instrument of migration control. Its terms impact, it is true, the sovereign right to regulate entry across borders, but with a view toward introducing a needed exception for a clear category of persons. States' inability otherwise to control their borders, or to deport aliens with no valid claim to continued residence on their territories, should not be blamed on the 1951 Convention.

The second assumption is that illegal entry is incompatible in important ways with refugee status. The fact, however, is that refugees have always entered countries illegally—often without proper documents and with the help of traffickers. None of this detracts from their refugee status. On the contrary, these facts may confirm it. Economic migration is not new, and the attempts by would-be migrants to use asylum channels for entry in the absence of migration programs does not invalidate the asylum process.

A third assumption is that unsuccessful asylum seekers are all bogus. The fact is that a narrow interpretation of the refugee definition is applied by an increasing number of states. Many asylum seekers who are unsuccessful are the victims of this restrictive interpretation, which incidentally is not so applied in the south.

The 1951 Convention is fifty years-old, but not outdated; human rights principles are not weakened by age. UNHCR decided to take the opportunity of the forthcoming fiftieth anniversary of the 1951 Convention to initiate a process of open dialogue, or Global Consultations, with governments, nongovernmental organizations, and refugee experts with a view to revitalizing the 1951 Convention regime. Our purpose is both to preserve its centrality and to buttress it by harmonized additional protections.

We have a working framework for these Global Consultations in the form of three circles. The first circle should be taken as representing the basic, globally agreed framework principles of the 1951 Convention. We hope that the fiftieth anniversary of the 1951 Convention will be the opportunity for states parties unequivocally to reaffirm their commitment to full and effective implementation of the 1951 Convention and to examine ways to strengthen this commitment through better supervisory mechanisms. Ideally, a first-ever meeting of states parties next year would serve as the occasion for this process.

In the second circle of issues, we have publicized open interpretative questions regarding the 1951 Convention. Our interest here is in examining how and in what directions the law has developed over recent years, that is, in a stock-taking exercise that would allow decision makers to be better informed about how the 1951 Convention is understood and applied today. We will organize round tables of experts, informed by background papers on topics

such as the interpretation of the cessation and exclusion provisions, membership in a particular social group, and gender-related persecution. We also want to look at nonrefoulement, nonexpulsion, and nonpenalization for illegal entry provisions of the 1951 Convention. We hope to publish the papers, together with the conclusions resulting from these discussions, as a contribution to the fiftieth anniversary.

Finally, in the third circle, there are the gaps—the situations the 1951 Convention does not adequately, or at all, cover. Examination of these issues, which will take place within the framework of UNHCR's Executive Committee, will be structured around these main challenges for UNHCR: protection of refugees in mass-influx situations; protection of refugees through individual asylum systems, including the problems inherent in the migration/asylum interface; and realization of protection-based durable solutions. The overarching theme that has to run through the entire process is responsibility sharing, based on international cooperation and solidarity. We hope that the process will serve to better define the problems, as well as to identify new approaches, tools, or guidelines.

VI. CONCLUSION

This is not an exercise without dangers. Some refugee advocates fear that if we put the convention in any way into discussion, we may end up provoking a consensus around a protection regime of much more limited rights. We acknowledge the dangers, but do not see it quite this way. Refugee protection is confronted by a number of major challenges which well could overtake the existing protection principles unless we act to secure their enduring place. We have to contend with a troublesome level of disillusionment about aspects of the 1951 Convention; with a deteriorating quality of asylum worldwide; with hundreds of thousands of refugees without access to timely or safe solutions; with less reliable partners for our traditional protection activities; with more concerted efforts now, than in the past, to regionalize responsibilities and give them a particular understanding not always consistent with international approaches; and with a protection system, generally, with gaps and strains now beginning to materialize.

If the evolution of the international refugee protection regime as outlined earlier highlights anything, it is that refugee protection is, and must remain, not a static, but rather a dynamic and action-oriented function. Defining the future agenda for protection, which is the overall aim of the Global Consultations, must be firmly grounded in consensus around the fact that refugee protection is first and foremost about meeting the needs of vulnerable and threatened individuals, not those of states. To be effective, however, it also must take into account the exigencies of the environment in which protection must be delivered, which does include the legitimate concerns of states. Leadership in defining the protection agenda is currently called for: To fail to appreciate this would be an abrogation of responsibility on our part, and also would be a seriously missed opportunity.

