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Forced International Migration: A Need for New Approaches by the International Community

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FORCED INTERNATIONAL MIGRATION: A NEED FOR NEW APPROACHES BY THE INTERNATIONAL COMMUNITY

*Arthur C. Helton**

INTRODUCTION

Forced international migration, including conventional refugee flight, has reached disturbing proportions at the end of the twentieth century. In the context of new political relationships, states are seeking to cope with increasing numbers of asylum seekers and others who are moving across borders. This is, indeed, a key challenge for the international community in this new world disorder. Established legal and institutional arrangements are proving inadequate in the attempts to address the coerced movements of people, and human rights and national interests are juxtaposed in the efforts to formulate new policy responses.

An unprecedented number of refugees are currently fleeing persecution — approximately twenty-four million, according to the United Nations High Commissioner for Refugees. An additional twenty-six million people are displaced within their home countries due to armed conflict or other similar compulsion. These are only part of an estimated 125 million international migrants, many of whom are forced to move on account of a variety of artificial disasters, including war, persecution, poverty, economic insecurity, population growth, environmental degradation, or other grave failures of governance.

This Essay discusses the current international system for managing forced migration and makes recommendations for improvements. The international regime that currently seeks to protect and assist refugees is not able in many instances to assuage the concerns of states or ensure respect for the basic human rights of those forced to move. A more comprehensive and effective international regime must be established to better manage this explosion of human misery over the next century. Specific regional circumstances in Africa and the countries of

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the former Soviet Union are examined. Particular proposals are made to prevent and ameliorate the coerced movements of people in those regions.

I. *THE INTERNATIONAL LEGAL FRAMEWORK: THE NEED FOR REFORM*

At the international level, an individual has a right to leave any country including his or her own, but no corresponding right of admission into another country. This right to leave, coupled with but a privilege of admission elsewhere, reflects a basic dilemma in current practice: a lack of symmetry to the freedom of international movement. As a special category, refugees have a right abroad to seek and enjoy asylum in other countries from persecution, but no corresponding right to receive asylum in any particular state. Asylum, instead, is regarded generally as the act of a state to provide protection to refugees by permitting entry into a territorial jurisdiction. Once in the territory of the state of refuge, such protection presumably includes upholding fundamental human rights, including the civil, political, economic, social, and cultural rights declared in the international human rights instruments that taken together constitute the International Bill of Rights.

The universal treaty regime concerning refugees, the 1951 United Nations Convention relating to the Status of Refugees, and its 1967 Protocol, articulates a refugee concept and declares various rights and obligations pertaining to refugees. This includes rights that must be respected even when asylum seekers are unlawfully present in a territory. As of this writing, 127 states have acceded to this universal treaty regime.

The concept is well-established. A refugee has to be outside of his or her home country and in reasonable fear of "persecution" upon return. The Refugee Convention and Protocol in Article 33 expresses the right of a refugee not to be forcibly returned to a place where his or her life or freedom would be threatened. This principle of *non-refoulement* is the foundation of all refugee protection.

Indeed, many commentators opine that Article 33 of the Convention and Protocol has achieved the status of customary international law in that it is reflective of state practice and recognized by states as legally binding. Even non-signatory states

would thus be bound to observe the principle of *non-refoulement*. But commentary is not uniform, and there have been disturbing examples of antagonistic state practice — most notably, the recent U.S. program to return Haitian asylum seekers directly to Haiti without any form of examination of their protection claims.

The implications of a right of non-return, of course, are far-reaching. Non-return necessarily implies a right to a temporary stay in a place of asylum, as well as a right to a reliable determination of refugee status and humane treatment during the period of such a stay. It may even be possible to imply a right to a durable solution to a refugee's need for a new permanent home. State practice, however, is mixed in terms of the unquestioned establishment of these implications.

The limited contours of the refugee concept are more basic. A fundamental inadequacy of the current refugee regime is the omission of those who have been displaced but not yet crossed an international border, i.e., the internally displaced. Another deficiency is the omission of persons who have been externally displaced for reasons other than on account of the individualized concept of persecution, including displacement by reason of armed conflict and civil strife, or simply invidious discrimination. Millions of persons are outside the scope of international protection by reason of these limitations.

The specific arrangements for refugees, of course, are but one manifestation of the human rights of non-citizens. The 1948 Universal Declaration of Human Rights is cited in the preamble of the Refugee Convention. General sources of rights for non-citizens include the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as several more specific human rights instruments concerning women, children, workers, and stateless persons. Those instruments often have application to an exiled population, and the rights articulated are generally applicable to non-citizens, with limited exceptions. For example, the detention of a non-citizen, an all too frequent occurrence in current state practice, can be analyzed under prohibitions upon arbitrary detention under general human rights law.

Regional human rights instruments, such as the European Convention on Human Rights, can provide additional sources of

protection for asylum seekers. National laws, of course, can be more generous in terms of protection than would be required by minimum international obligations.

In addition, humanitarian law, as embodied in the 1949 Geneva Conventions and the additional 1977 Protocols, concerns the protection of civilians in times of war and other situations of armed conflict, including non-international conflict. This includes the right of protected persons to access humanitarian assistance under certain circumstances. Displaced persons are often present in such situations.

There are broader refugee concepts in operation in certain regions, including under the terms of the 1969 Organization of African Unity ("OAU") Convention concerning African refugees, which contain an expanded definition of the refugee character protecting individuals in flight from civil strife and public disorder. A similar broadened concept of the refugee character is reflected in state practice in Latin America.

The universal refugee treaty provisions are implemented by states in the framework of a specialized United Nations agency under the direction of the United Nations High Commissioner for Refugees ("UNHCR"), which was established in 1950. UNHCR's work is overseen by an executive committee of some forty-seven governments. The agency currently has 207 offices in 115 countries, over 5000 employees, and a budget of over US\$1.3 billion. Other international institutions concerned with migration include the International Organization of Migration ("IOM"), which was established in 1951 and is overseen by fifty-five member governments. IOM has seventy-three field offices with about 1000 employees and is involved mainly in logistical arrangements regarding the movement of refugees and migrants. IOM's 1994 budget was approximately US\$200 million, and the largest donors were the United States, Germany, and Canada. UNHCR and IOM both subsist largely on government donations to meet emergencies and temporary needs that have become increasingly chronic. Neither institution is ordinarily involved to any great extent in efforts to develop devastated countries or promote and nurture civil society after an emergency has subsided.

The universal human rights instruments are ordinarily implemented through various monitoring and reporting mecha-

nisms, with petitioning procedures to redress grievances available to individuals under certain limited sets of circumstances. Similar mechanisms are provided under regional instruments. Humanitarian law may be enforced in certain respects in the proceedings of international tribunals, but it is ordinarily implemented by a singular non-governmental entity — the International Committee of the Red Cross, which pursues its humanitarian work under strictures of neutrality and impartiality.

Regional institutions concerned with issues of migration include, for example, the Organization for Security and Cooperation in Europe (“OSCE”), a group of fifty-two governments that has begun to consider questions of the human dimension of migration. OSCE, however, is more of a political mechanism than an institution with a significant operational aspect. The OAU has a Refugee Bureau at its headquarters in Addis Ababa, Ethiopia, but it has only a tiny staff whose work has largely been limited to providing scholarships to urban refugees to pursue studies outside Africa. National institutions and practices, of course, vary widely in the ways in which they address the rights and responsibilities of non-citizens.

There is actually relatively little international cooperation on issues of migration. Recent multilateral initiatives include arrangements in Asia to deter the outflow of Vietnamese boat people and certain Laotian asylum seekers, as well as asylum-sharing agreements among several Western European states. But issues of international migration remain largely in the province of state discretion, including issues even pertaining to refugees despite the articulation of international standards and the existence of international institutions concerned with the subject.

A new international regime concerning forced migration is needed. Such a universal arrangement should include a refugee definition that comprehends displacement by virtue of the wide variety of artificial disasters evident in current practice. In addition, refugees should have a right to receive asylum abroad when the causes of flight cannot be avoided. This implies an equitable burden sharing among states so that no single state is disproportionately impacted by the sudden arrival of asylum seekers. Effective remedies should be available to concerned individuals to enforce the right to asylum, such as a right of petition to an appropriate U.N. body or other appropriate inter-governmental entity. Currently, enforcement under the refugee treaties is lim-

ited to state-initiated actions in the International Court of Justice — a remedy that, not surprisingly, has never been invoked. In order to achieve such fundamental reforms, a new treaty would have to be concluded.

Furthermore, a far more comprehensive approach is needed. New standards and institutions are needed to guide the international community in efforts to avert the causes of flight. Preventive diplomacy and conflict resolution are optimal strategies that should be pursued when feasible. The work of the OSCE may provide an embryonic exemplar of this preventative approach. Also, standards and institutions are needed to address issues of post-emergency rehabilitation and development, as well as the ultimate promotion of open societies. Recent efforts in Latin America, which were adjuncts to the peace process there, may suggest a useful direction.

Fundamentally, a stronger, more capable U.N. system will be necessary to systematically ameliorate the causes and consequences of forced migration. This should include adequate assessed contributions from states in anticipation of migration emergencies, as well as integrated early warning mechanisms to facilitate early action to mitigate such disasters.

II. *THE PLACES OF POTENTIAL DISPLACEMENT: PRESCRIPTIONS FOR PREVENTION*

There are many places in the world where forced migration may occur over the foreseeable future and present serious problems calling for international responses. For example, many of the over four million persons displaced in, or from, the former Yugoslavia will require new permanent homes when, or if, that conflict abates. Kurdish people in northern Iraq live in a perpetual state of insecurity and could be forced to flee again by renewed conflict. These are among the many current circumstances around the world which may result in mass international homelessness. Two regions, however, seem particularly destined to concern migration managers and refugee policy proponents over the next several years — Africa and the newly independent states of the former Soviet Union. Preventative and ameliorative approaches are needed now in these regions.

A. Africa

Human displacement seems endemic in Africa. International attention, however, is waning and it is incumbent upon the emerging independent sector in Africa to become more active in preventing and ameliorating forced migration.

There are over seven million refugees and an additional fifteen million internally displaced people in Africa, the largest numbers on any continent. Many of these persons are from or in Angola, Mozambique, Rwanda, Somalia, Tanzania, Uganda, and Zaire. Conflict has been widespread and, most recently, haunting images of genocide in Rwanda have been seared into the public consciousness, resulting in massive displacement and the flight of 2.2 million Rwandese into neighboring countries in 1994. Many commentators now fear a recurrence in Burundi.

International migration, furthermore, has placed great stresses on host countries in Africa. For example, the small country of Malawi has hosted in relatively terms a huge number of Mozambique refugees for many years. A sub-regional conference held in 1995 in Bujumbora, Burundi under the auspices of the OAU and UNHCR emphasized the problem of refugees and displaced persons in countries in Central and East Africa.

General movements of people in Africa also presents problems. South Africa, the most stable and economically viable country in the region, is currently experiencing a significant immigration of people. The estimated number of unauthorized migrants in South Africa is placed at almost ten million by some, but most estimates place the figure at between two and five million. Limited infrastructure and resources are seriously impacted.

Moreover, Africa no longer has the same strategic value for those great powers that were involved in the ideological confrontation that characterized the Cold War. Recent developments in Somalia have only underscored the reluctance of the international community to become involved in complex humanitarian operations in Africa. International institutions remain engaged, but aid levels are falling. Approaches to potential and actual displacement in Africa thus are likely to originate mainly in Africa over the next decades, and come increasingly from the non-governmental sector.

A promising development is the emergence of democracy

in Southern Africa. South Africa's change in government has been a catalyst for change elsewhere in the region. The end of apartheid resulted in both the loss of support for insurgent groups and new political pressures for peace and democratization.

As a result, almost every country in Southern Africa is experiencing a possible transition to democracy from authoritarian regimes, military dictatorships, and civil war. The 33-year war in Angola may be nearing its end. Namibia became a multi-party republic in 1990. Established political leadership accepted defeat in Zambia's elections in 1991. Pressure from President Nelson Mandela restored Lesotho's fledgling democracy in mid-1994. In May 1994, Malawi's leadership since independence gave way to the first democratically-elected government in that country. Mozambique's 16-year civil war culminated in the country's first democratic elections in October 1994; approximately 1.6 million refugees have now returned to Mozambique from nearby countries. While Robert Mugabe has held power in Zimbabwe since the country's independence from Britain in 1980, pressures are building as well for political change in that former front-line state. Of course, there are legacies of conflict, such as landmines, which pose real obstacles to normalization, particularly in Angola and Mozambique; but there are also clearly positive prospects.

The situation in Southern Africa, however, is fragile. Elements of instability include human rights violations, economic distress, tribalism, ethnicity, xenophobia, religious intolerance, and cultural differences. These circumstances are aggravated by the large number of non-citizens who are culturally diverse and economically dependent on host countries. The best way to ensure that refugee flows are stanching, of course, is to encourage stability in the countries of origin. But exile remains widespread and the integration, assimilation, and repatriation of the large refugee populations could help to ensure that their presence in host countries does not continue to aggravate social tensions and conflict in those communities.

A regionalist philosophy and widespread respect for human rights should be encouraged as indices of an open society. Toward this end, a consortium of non-governmental organizations ("NGOs"), both indigenous and international, should be immediately organized to facilitate implementation in Southern Africa

of rehabilitative and human rights strategies. NGOs often work in fragmented and uncoordinated ways due, in part, to the fragmented and uncoordinated character of the international and national systems to which they relate.

A comprehensive and pro-active network of NGOs, indigenous and international, could better articulate and implement integrated strategies of rehabilitation and promotion of open societies in the region. Such a network could pressure international institutions, including encouraging greater attention to the issues by the OAU, and seek to sustain, or indeed augment, financial contributions and ensure greater accountability in the implementation of assistance and development schemes. This network could also serve itself as a resource to prevent and ameliorate future refugee crises in the region.

B. *Former Soviet Union*

Forcible displacement will be a critical issue in many of the fifteen countries that have emerged or re-emerged upon the dissolution in 1991 of the Soviet Union. The Russian Federation is a leading protagonist in the region, seeking to address this phenomenon. This is perhaps not surprising, given its size and the political configurations in the region. Russia has thus designed specific domestic legal and institutional frameworks to address the circumstances of certain migrants and refugees. Regional norms are also emerging, and an upcoming international conference could assist in fortifying and implementing these precepts.

Not very long ago, international policymakers feared significant east-to-west movements of people after the dissolution of the Soviet Union, home to some 130 ethnic groups, twenty-two of which consist of more than one million people. But such mass migration has not materialized. Rather, significant movements have occurred back to the Russian Federation, including the return of ethnic Russians and Russian-speakers from nearby countries. Also, ethnic tensions and conflict have caused significant dislocations, both internally and externally across international borders. In 1994, nearly 620,000 displaced persons were reported registered by the Federal Migration Service ("FMS") of the Russian Federation. These movements are perhaps not surprising given a century-long history of campaigns of deportation

and population management, including policies of "Russification" in the region.

The potential for dislocations is enormous. Approximately seventy million people live beyond their nations of ethnic origin; some twenty-five million Russians live outside the Russian Federation; and more than twenty-six million non-Russians live in Russia. While only a discrete portion of these vast numbers of people are likely to be dislocated at any particular juncture, displacement of even a small portion could pose significant national security issues in the region. The principal circumstances that may give rise to such dislocations could include armed conflicts and widespread human rights violations (such as the concatenation of human rights offenses known as "ethnic cleansing"). In other instances, the reasons underlying the decisions of individuals to migrate may be somewhat more prosaic, including economic betterment, new perceptions of unease or insecurity (often with ethnic overtones), fear of future discrimination, or simply loss of privilege in new social orders and abrupt life reversals.

The magnitude of the problem even now is disturbing and growing, with movements that have occurred against the background of a deepening economic and socio-political crisis in the region. Approximately 2.5 million refugees and migrants (mainly Russians or Russian-speaking people) have already entered the Russian Federation. The FMS estimates that during 1994-96, anywhere from 800,000 to four to six million people could migrate to Russia. In particular, according to FMS, 400,000 Russians, including refugees and forced migrants, are likely to return over the next few years from the Transcaucasus region, as well as 2.9 million from central Asia and 600,000 from the northern Caucasus region.

The phenomenon is regional in character. Ethnic conflicts in the Caucasus, Central Asia, and Moldova have forced the international movement of about one million people. There are substantial refugee populations recently reported by various governmental and inter-governmental sources in Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. The government of Azerbaijan estimates that more than 900,000 people have been displaced by the six-year-old conflict in Nagorno-Karabakh alone.

Internal displacement is also substantial. Well over one million persons are reported to have been internally displaced by conflicts in the former Soviet Union. Georgia alone is reported to have nearly 300,000 refugees and internally displaced persons. While many of those displaced in Tajikistan have reportedly now returned to their places of origin, the devastation has been severe, including the destruction of an estimated 17,000 homes directly affecting more than 100,000 persons. Most recently, some 450,000 individuals have been displaced, mostly internally, by reason of the conflict in Chechnya.

The enumeration of affected individuals is uncertain and the situation changes quickly. While information is sketchy, particularly concerning the circumstances of those displaced (either internally or externally), it is clear that the humanitarian needs caused by dislocation are enormous. The official systems responsible for meeting these needs are embryonic and easily overwhelmed, as is the case in the current Chechnya emergency. Only in 1993 did the Russian Federation, for example, enact laws concerning forced migrants and refugees, and full implementation of these laws has not yet been realized. As resources in the independent sector are diffused and non-governmental organizations are still in formation, suffering and loss of life results.

In terms of legal framework, four of the countries in the region, Armenia, Azerbaijan, Russia, and Tajikistan, became parties in 1992-93 to the universal refugee treaties — the 1951 Refugee Convention and its 1967 Protocol. Additionally, at the regional level, the successor states of the Soviet Union often pay homage to the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe, which includes provisions that promote freedom of international movement. Several international and regional institutions involved with issues of forced migration are present in the region, including UNHCR, IOM, and OSCE. Some international relief agencies are present in the region but, in general, the independent sector of non-governmental organizations is relatively underdeveloped.

Of particular note is a multi-lateral CIS Treaty concluded in 1993 that addresses issues of forced migration. The CIS Treaty, in its preamble, specifically invokes “accepted principles of international law and humanism” and confirms “obligations, connected with international agreements aimed at protection of

human rights."¹ The agreement defines a refugee as:

a person who, not being a citizen of the country providing asylum, was forced to leave the place of his permanent residence in another country as a consequence of violence aimed at this person or members of the person's family or persecution in another form, or a real danger of persecution on the basis of racial or ethnic identity, religion, language, political views or membership in a certain social group in connection with armed and inter-ethnic conflicts.²

The agreement defines a forced migrant as:

a person who, being a citizen of the country providing asylum, was forced to leave the place of his permanent residence in another country as a consequence of violence aimed at this person or members of the person's family or persecution in another form, or a real danger of persecution on basis of racial or ethnic identity, religion, language, political views or membership in a certain social group in connection with armed and inter-ethnic conflicts.³

Both "refugee" and "forced migrant" are terms to be understood under accepted norms of international law and national legislation, according to the treaty.

Under the CIS Treaty, "states of exit" are to provide for the "evacuation of the population from zones of armed and inter-ethnic conflicts, . . . providing [refugees and forced migrants] with the possibility for free, unobstructed exit to the territory of one of the Parties."⁴ These states are also obliged to "provide the personal security for people being evacuated and their property, and make efforts aimed at a cease-fire and the protection of public order during the evacuation."⁵

Under the CIS Treaty, the "party providing asylum takes upon itself the following obligations: to provide the necessary social and material support to the refugees and forced migrants," as well as to "support refugees and forced migrants with employment assistance in accordance with legislation on em-

1. Agreement on Support to Refugees and Forced Migrants, Sept. 24, 1993, C.I.S., pmbi.

2. *Id.* art. 1.

3. *Id.* art. 2.

4. *Id.* art. 4.

5. *Id.*

ployment adopted by each respective Party.”⁶

The obligations undertaken by the CIS Treaty members include providing documentation concerning status and citizenship; facilitating provision of documentation (e.g., marriage and birth certificates, etc.) necessary for pension and other purposes; and providing information on relatives and property left behind. The states of exit also undertake to compensate those who have left, according to rates to be established by the countries of origins, for loss of property or income, as well as for any personal injuries sustained in the course of the sojourn. The CIS Treaty also makes provision for the establishment of an inter-state fund to support refugees and forced migrants. In terms of enforcement, however, all that the treaty actually provides is an acknowledgement that refugees and forced migrants may seek redress in the courts in the respective territories of the Treaty parties.

The treaty regime that is emerging in the region promises a more definite framework of laws and institutions to address issues of migration. Such arrangements, while they have not yet been realized, could ameliorate individual hardships and encourage political stability. Indeed, a comprehensive approach, including prevention and post-emergency strategies, should be promoted. Towards this end, an international conference under the auspices of the United Nations is currently contemplated which will address issues of migration in the region.

In particular, recognizing the gravity of the issue, the UNHCR, in conjunction with IOM and OSCE, has agreed to organize an international conference to address problems concerning refugees and displaced persons in the countries of the former Soviet Union. The conference, which is tentatively planned for early 1996, will provide a forum where the dynamics of population displacements, needs for capacity and confidence building, legal and practical protection for displaced persons, and possible solutions can be addressed by the international community well into the next century. The outcome of the conference could include the promulgation of standards and a program of action to mitigate the situation. One of the more concrete accomplishments of such a meeting might be the establishment of effective implementation measures and enforcement mechanisms for affected individuals.

6. *Id.* art. 5.

An international conference could put regional issues pertaining to migration on the agenda of the international community. Currently, there is relatively little international attention to these regional issues. A conference also could assist policy makers and donors in their efforts to address new responsibilities. A regional framework of laws and institutions could be promoted, as could a truly comprehensive approach, including preventative and post-emergency strategies to address the evolution of humanitarian action from relief to rehabilitation and longer-term development, as well as from securing essential protection of individuals to promotion of respect for fundamental human rights. Specific guarantees, for example, could be articulated to protect internally displaced persons, to ameliorate the risks of statelessness, and to secure access by affected populations to humanitarian assistance in situations of conflict.

The United Nations conference could internationalize key aspects of the efforts to address the underlying social crises, and could thus enhance prospects for the amelioration of forced migration, including provisions for early warning, early humanitarian action, capacity building, conflict resolution, monitoring, and nurturing of a concerned independent sector. This would be a clear contribution to the development of open societies in the region.

CONCLUSION

The need to strengthen protection for those forced to migrate internationally is pressing. Governments, acting through the United Nations and regional intergovernmental organizations, must not only expand the coverage of international law, but also improve its enforcement.

Until governments establish comprehensive international standards and meaningful implementing mechanisms, the treatment of those in need of protection will continue to be inadequate, abusive, and discriminatory. Many internationally homeless persons will simply remain insecure and subject to human rights violations. The international community in its widest sense must therefore act immediately to provide real solutions for the world's dispossessed.