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REFUGEE PROTECTION: THE INTERNATIONAL CONTEXT

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There are many people in the world whose lives, liberty or security are in jeopardy. Some are threatened by political oppression, some by natural disasters, others by economic conditions that make even a subsistence existence difficult or impossible. Still others flee war or civil strife. Such situations force many individuals to leave their homes to seek refuge and security elsewhere, either in other countries or in different parts of their own country. In a general way, all such people may be called "refugees." In international and national legal systems and practice, however, the term carries a much more limited and technical meaning. Those who fall under the rubric "refugees" in this more technical sense are the subject of this paper, which provides an overview of the international system that has developed to protect the human rights of refugees.(1)

THE UNITED NATIONS CONVENTION

The 1951 United Nations *Convention Relating to the Status of Refugees* is the main document governing the treatment of refugees by states in whose territories the refugees are found. Some 145 states have acceded to the Convention and/or its Protocol, the most important parts of which are its definition of "refugee" and its prohibition against *refoulement*.

A refugee is defined in Article 1 of the Convention as a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; …

(1) Including the internally displaced and others of concern, the Office of the United Nations High Commissioner for Refugees listed 17,093,400 people of concern to that office as of 1 January 2004.

Article 33 goes to the heart of a state's duty to protect the human rights of refugees, although it is important to note that the protection granted has also become part of customary international law. Entitled "Prohibition of Expulsion or Return ('Refoulement')," Article 33 states:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

It is important to recognize what the Convention does not do:

- It does not create an expansive definition of "refugee." The rights of refugees under the Convention arise only for those who have crossed an international boundary in consequence of persecution on racial, religious, political or social grounds. Those whose need for refuge flows from other than what are essentially political origins – that is, from war, famine, flood, statelessness, poverty and so on – and who may be of great humanitarian concern, have no claim on other states that can be asserted by reliance on the Convention.

- Although both customary international law and the Convention require that contracting states not return (*refoule*) refugees to the country where they fear persecution, such states are not required to permit them to stay permanently. As well, they are not prohibited from returning refugees to a third country, unless that country would likely return them to the country where they fear persecution.

- The right of refugees not to be *refouled* is not absolute. A state is entitled to place its own security interests ahead of the rights of the refugee; it also has the right to refuse refuge to people convicted of serious crimes and who thereby pose a danger to the receiving society.

The Convention Against Torture (CAT) is also relevant, as it contains a provision prohibiting *refoulement* where there are substantial grounds for believing that a person would be in danger of being subjected to torture. Many states, including Canada, have included protection under the CAT in their refugee determination procedures.

There are also two regional agreements, for Africa and for Central America, that extend the meaning of the concept of refugee for their signatory states in an attempt to respond to their particular needs. In practice, many Western countries, to varying degrees and under varying conditions, also extend protection to a broader range of individuals than mandated by the Convention, even though such individuals are not recognized as refugees under the narrow Convention definition.

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

A. The Mandate

In 1950, with the adoption by the General Assembly of the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR), the current institutional framework for the protection of refugees came into being. Currently, UNHCR's staff, including short-term employees, number more than 6,200 (most of whom work in the field) in 115 different countries, as well as at headquarters in Geneva. Its budget is approximately US$1 billion. The general mandate of UNHCR is twofold: to protect refugees and to seek permanent solutions for their problems. It currently assists more than 17.1 million people.

B. Fulfilling the Mandate

1. Protection

The characteristic that most distinguishes Convention refugees from other migrants (for example, those seeking better standards of living, often confusingly called "economic refugees") is their need for protection. In crossing an international border and being unwilling or unable to return, refugees place themselves outside the realm of protection normally provided by a state to its citizens. The central aspect of UNHCR's role, then, is to ensure that refugees receive that protection by: providing protection against *refoulement*, providing for their basic physical needs (shelter, food and so on), and ensuring respect for other basic human rights.

2. Finding Durable Solutions

There is a commonly accepted hierarchy of permanent solutions to refugees' problems: repatriation to the country from which the refugees fled, integration into the country of first asylum, and resettlement in another country.

a. Repatriation

Repatriation can be a risky business. There can be serious threats to refugees who return to areas where the situation that caused them to leave has not improved. Nevertheless, repatriation, when it is possible and provided it is undertaken voluntarily, is usually thought to be the best durable solution, since it permits refugees to reintegrate into familiar surroundings and culture. Many refugees repatriate on their own, but when movements are planned and organized

UNHCR plays a key role in ensuring that returnees have accurate information about conditions in their former homeland, that the individuals are moving voluntarily, and that their human rights will be protected. UNHCR also has a role to play in monitoring their treatment after return, and in assisting returnees to re-establish themselves. This assistance includes, depending on the circumstances, providing returnees with transit centres, grants, food, housing materials and agricultural implements to assist them in their initial year of return.

b. Local Integration

Whether a country to which refugees initially flee can ultimately integrate them into its economic and social fabric depends on a variety of factors: the number of refugees, the economic and demographic structure of the country, the nature of its society (including racial and religious differences), the political and security situation, and the environmental impact of the newcomers.

Local integration can have benefits for the refugees, UNHCR and the host country. The establishment of refugee camps may be essential for emergency care, but ongoing camps often act as a disincentive to longer-term economic self-sufficiency, and can adversely affect the refugees' pride and self-respect. Camps are also very costly to operate year after year; thus, even partial self-sufficiency lightens the load on UNHCR. From the point of view of the host country, money spent on self-sufficiency projects also aids the country generally.

c. Resettlement Outside the Region

In some situations where repatriation is impossible and countries of first asylum are unwilling or unable to offer continuing protection to refugees, resettlement, typically in developed Western countries, may be the only option available. Its use is circumscribed, however, by the availability of resettlement places and by the financial demands of sponsorship. For example, each of the approximately 7,500 government-assisted refugees that Canada is prepared to admit yearly will be financially supported for a period of one year, or until employment is obtained, whichever comes first.

The Convention itself does not place any duty on countries to resettle refugees, although one clause of the Preamble does urge that states recognize the importance of an international approach to refugee problems. The largest resettlement movement in the post-war period has been that of the Indochinese refugees from the mid-1970s onward.

OTHER ORGANIZATIONS

Numerous international organizations play an important role, directly or indirectly, in assisting refugees. These organizations include the International Organization for Migration, the Red Cross, UNICEF, the World Food Program, the World Health Organization, and the UN Disaster Relief Organization.

In addition to international organizations, non-governmental organizations in various countries assist in the settlement of refugees and, particularly in Western countries, play an important advocacy role in asserting refugee rights, particularly when these appear to conflict with the interests of states as perceived by their governments. Such organizations can also be effective advocates of the rights of individual refugees who appear to have been treated unfairly or whose refugee claims appear to have been incorrectly assessed.

THE ROLE OF INDIVIDUAL STATES IN PROTECTING REFUGEES' HUMAN RIGHTS

It is an important, if self-evident, fact of the modern world that refugees flee from and to individual countries, and are sometimes resettled in still others. UNHCR has no independent authority to enter any state, even to monitor or assist in refugee camps, without the permission of the country in question. Individual states contribute to the protection of refugees' human rights in three main ways: through economic assistance, resettlement, and protection against *refoulement*.

A. Economic Assistance

Without financial assistance, many countries of first asylum, most of which are in the Third World, would be unable to shoulder their burdens, particularly where there have been mass influxes of refugees. Thus, financial assistance to UNHCR and to other humanitarian agencies is essential to enable them to deliver emergency aid and longer-term protection. Donations for food aid are also important.

B. Resettlement

As discussed above, resettlement in countries out of the region that generated the refugees is the least preferred durable solution, but is nevertheless sometimes unavoidable. The primary countries of resettlement in terms of actual numbers accepted are the United States, Canada and Australia, but other countries also share the burden, with some concentrating on the hard-to-place refugees, such as the disabled. As mentioned, the largest single resettlement effort in the last 40 years was that for Indochinese refugees.

It should be noted that providing resettlement opportunities for refugees does not affect states' interests as spontaneous arrivals may. States retain full sovereign rights on whether or not to admit refugees from abroad, on which people to admit, and on how many. They may select refugees on the basis of who will best settle in the country (as does Canada), or according to other criteria, as they wish. Spontaneous arrivals, on the other hand, prevent the state from exercising some of those choices. The problems that this poses will be discussed below.

C. Protection Against *Refoulement*

In addition to economic assistance and the provision of resettlement opportunities, a state's most important duty is to ensure that individuals are not forcibly returned to countries where they claim to have a well-founded fear of persecution. This protection can be temporary or long-term and it exists independently of the Convention as part of customary international law. The Convention itself is silent about procedures to be used to determine the *bona fides* of a refugee claim. Indeed, many signatories have no formal procedures at all, relying instead on UNHCR. Others, primarily Western countries, have developed administrative or quasi-judicial procedures to determine whether a claim should be recognized.

Refugee recognition is often bound up with politics, procedures, and state requirements. Thus, it should not be surprising that overall refugee recognition rates vary greatly from country to country, or that certain nationalities will enjoy more success than others in having their claims recognized.

D. International Agreements

1. Harmonization in the European Union

The move towards the harmonization of asylum processing in the European Union (EU) has been a complex and difficult process, one that is still ongoing. While Member States process asylum applications independently of one another – often applying different legal standards – a great deal of effort has been put into determining which state should be responsible for the examination of an asylum application.

Beginning with the Schengen asylum chapter,[(2)] Member States have been striving to address the concerns of "asylum shopping" and multiple claims. The 1997 Dublin Convention[(3)] provided a mechanism for determining the state responsible for examining asylum applications lodged in the EU and set out applicable criteria.[(4)] Although signed in June 1990, it did not come into force until September 1997, due in large part to difficulties in national parliaments. Article 63 of the Amsterdam Treaty (signed in October 1997; entered into force in May 1999) provided for the establishment of a Common Asylum System. At a meeting of the

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(2) In 1985, France, Germany and the Benelux countries, working outside of the European Community framework, signed the Schengen Agreement, which provided for the gradual abolition of inspections at their common borders. To address the security concerns arising from this process, between 1985 and 1990 these states negotiated the Schengen Treaty. One aspect of this Treaty addressed the movement of non-EU nationals and, in particular, asylum seekers: Title II, Chapter 7, of the *Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders*, 19 June 1990.

(3) *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention*, Official Journal C 254, 19/08/1997, pp. 0001-0012.

(4) The Dublin Criteria for determining Member State responsibility are, in order of priority:

1. If the applicant has a family member who has refugee status and is legally resident in a Member State, that state will be responsible if the applicant so desires: Article 4.
2. If the applicant has a valid residence permit, the issuing Member State will be responsible: Article 5(1).
3. If the applicant has a visa, even an expired one, the issuing Member State will be responsible: Article 5(2) to 5(4).
4. If it can be shown that the applicant irregularly crossed the border into a Member State from a non-Member State, that Member State will be responsible: Article 6.
5. The Member State responsible for controlling the entry of the person into the EU will be responsible unless there was a waiver of the visa obligation in the first Member State *and* the Member State in which the applicant is now present: Article 7.

If none of the above apply, the first Member State in which the application for asylum is lodged is responsible: Article 8.

European Council held in Tampere (Finland) in 1999, the EU declared its intention to implement the provisions of the Amsterdam Treaty with regard to asylum by establishing a Common European Asylum System based on the full and inclusive application of the Geneva Convention. As part of this process, the Dublin Convention was replaced by Council Regulation No 343/2003 (the "Regulation") in February 2003. This Regulation is sometimes referred to as "Dublin II." The purported goal of the Regulation is to identify which Member State will be responsible for determining an individual asylum claim and to ensure that only one State hears the claim. The Regulation mirrors much of the Dublin Convention and is considered a further stepping-stone in the harmonization process.

A key consequence of the Amsterdam Treaty was that, following amendments to the Treaty on European Union, immigration and asylum policies moved from the third EU pillar to the first, as of May 2004.(5) Under the third pillar, unanimity of member states is required in decisions and the decision-making process is intergovernmental. In the first pillar, the EU institutions play a larger role. For example, the European Commission now has the sole right of initiative (i.e., the sole right to propose legislation) and the Council of Ministers(6) can make decisions by qualified majority voting.

On another front, the EU agreed on a Charter of Fundamental Rights at the European Council meeting in Nice in December 2000. The Charter includes a right to asylum; its Article 18 reads: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

Many human rights advocates argue that the harmonization experiment in the EU has resulted only in the piecemeal adoption of "a lowest common denominator of restrictive measures."(7) Even the United Nations High Commissioner for Refugees, an office that has supported harmonization and safe third country policies in the past, is now warning that recent

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(5) The first pillar is made up of the three European Communities: the European Community (which used to be called the European Economic Community); Euratom (the European Atomic Energy Community); and the European Coal and Steel Community. The second pillar (a common foreign and security policy) and the third pillar (cooperation in justice and home affairs) are areas where member states have agreed to gradually develop common policies.

(6) Also known as the Council of the EU, this body is made up of representatives of Member States and its main task is to lay down and implement legislation.

(7) Jacqueline Bhabha, "European Harmonization of Asylum Policy: A Flawed Process," *Virginia Journal of International Law*, Vol. 35, 1994, p. 101.

EU initiatives could result in the deterioration of refugee protection standards. The current High Commissioner, Ruud Lubbers, has highlighted three specific concerns – "safe countries," border procedures and the right to remain during an appeal – suggesting that recent asylum harmonization developments might be "at variance with established international law."(8) Other experts have also criticized the EU experiment, suggesting that it has resulted in the violation of fundamental protections, such as the right to be protected against refoulement.(9) Some have gone so far as to suggest that under the guise of harmonization, European governments have effectively renounced their commitment to an inter-regional system of asylum.(10)

2. The Canada-U.S. Safe Third Country Agreement

Under Canada's *Immigration and Refugee Protection Act* (IRPA), the Minister may designate a country as a state to which refugee claimants may be returned to make their claim for protection.(11) The provision for naming a so-called "safe third country" has existed in Canadian law since 1989 but has only recently been implemented. In August 2002, an agreement between Canada and the United States was signed, representing the first step in this process. Two years later, the agreement came into force. As of 29 December 2004, certain asylum seekers are required to make their claim in the country where they were last present.

The Agreement between Canada and the United States is based upon the same burden-sharing premise as the EU arrangement, but differs in some respects. Most significantly, the Canada-U.S. Agreement is limited in its application to people claiming refugee status at a land border Port of Entry. As well, it is more limited in scope than the vast array of European instruments, directives and regulations, which aim to eventually establish a fully harmonized

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(8) "Lubbers Warns EU Asylum Law May Erode International Standards," UNHCR Press Release, 24 November 2003, Geneva.

(9) See, for example: Gretchen Borchelt, "The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards," *Columbia Human Rights Law Review*, Vol. 33, 2002, p. 473; Gabriela I. Coman, "European Union Policy on Asylum and its Inherent Human Rights Violations," *Brooklyn Law Review*, Vol. 64, 1998, p. 1217; Maryellen Fullerton, "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection," *Texas International Law Journal*, Vol. 36, 2001, p. 231; Agnes Hurwitz, "The 1990 Dublin Convention: A Comprehensive Assessment," *International Journal of Refugee Law*, Vol. 11, 1999, p. 646; Sabine Weidlich, "First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection?" *Georgetown Immigration Law Review*, Vol. 14, 2000, p. 643.

(10) James C. Hathaway, "Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration," *Cornell International Law Journal*, Vol. 26, 1993, p. 719.

(11) See sections 101(1)(e) and 102 of the IRPA.

system wherein common determination procedures will exist. The Canada-U.S. Agreement is, however, similar in respect of the exceptions that are made for particular individuals who would otherwise be subject to the safe third country rule, such as unaccompanied minors and applicants with family members who have previously been given refugee status in the destination country.(12)

CURRENT THREATS TO THE HUMAN RIGHTS OF REFUGEES

Many of the current threats to the human rights of refugees have existed from time immemorial – repressive regimes, civil conflict, ethnic clashes, poverty, and so on. It is a truism to state that the world needs to pay more attention to these root causes of refugee movements. Meanwhile, refugees are with us now, and will be in the future. They will continue to be dealt with by the laws, institutions, and state practices that constitute the loose refugee protection "system" described above. In the past decade, however, a number of additional pressures have been placed upon the system and its component parts.

A. Migratory Pressures on Western Countries

In the last two decades, European and North American countries have increasingly experienced increases in the numbers of individuals seeking asylum. In Canada, a system designed to handle small numbers of claimants was flooded in the 1980s, resulting in a backlog of some 95,000 claims by the end of 1988. Currently, over 20,000 new claims per year are being received.

Large influxes put significant pressures on determination systems designed to handle far fewer applicants. Moreover, many of those seeking asylum are perceived as migrants seeking immigration opportunities, rather than *bona fide* refugees. Others seek shelter for reasons relating to war or civil strife and therefore do not fall under the strict definition of refugee found in the Convention. Moreover, the higher the number of claimants, the more difficult it is to separate valid from invalid claims in an acceptable period of time.

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(12) The House of Commons Standing Committee on Citizenship and Immigration conducted a study on implementing regulations for the Safe Third Country agreement in late 2002. Its report, *The Safe Third Country Regulations*, 2nd Session, 37th Parliament, sets out some of the concerns relating to the impact of the agreement.

Arrivals of refugee claimants are described as “spontaneous” in the sense that they occur outside normal immigration channels and in an unpredictable fashion. Even apart from the practical difficulties of dealing with relatively large numbers, such movements affect the ability of a sovereign state to control its borders and are seen as threatening on that ground alone. Even immigrant-receiving countries such as Canada are very concerned about control issues, particularly since it is clear that public support for a generous refugee program depends on its being controlled, with only genuine refugees being assisted. In addition, spontaneous arrivals make it difficult to identify criminals and security risks among the claimants, a situation that may further erode general public support for genuine refugees.

In response to these migratory pressures, Western countries began in the 1980s to tighten up their determination systems and to introduce controls designed to deter spontaneous arrivals. Methods include visa restrictions, fines imposed on airlines that carry undocumented passengers, returning claimants to third countries, detention of claimants, and restricted rights to employment. Further measures also included the development of the multilateral agreements discussed above.

It should be realized that only a very small percentage of refugees ever leave their own region to claim asylum in the West. On the other hand, refugee determination systems in developed countries are individualized, bureaucratic, often lengthy, and very costly. Further, refugees become entitled to benefit from extensive social support systems paid for by taxpayers.

Indeed, although greatly increased migration has been discussed in terms of the recent restrictive response of governments and the threat this presents to genuine refugees, there is no doubt that spontaneous arrivals in the West consume a disproportionate share of the world’s resources devoted to refugees: states spend many times the amount of the entire budget of UNHCR on spontaneous arrivals.

Furthermore, it may be argued that those who arrive spontaneously in the West are not representative of the refugee population as a whole, being largely male, young, and resourceful enough to manipulate visa and control systems in order to travel to the West. Meanwhile, a disproportionate number of residents of refugee camps are children and women.

Despite these contradictions and difficulties, the concept of asylum remains at the heart of any system of refugee protection. In all Western countries, the challenge of the future will continue to be how to coordinate responses and streamline refugee determination systems without sacrificing fairness and reliability, and how to institute appropriate border controls without impairing the ability of individuals in genuine need to find refuge.

B. A Changing World

In the close to 50 years since UNHCR came into existence, the world has changed dramatically. The number of refugees has steadily increased and, while a number of refugee problems have been solved, many more show no signs of resolution. Indeed, events in the former Yugoslavia put immense pressures on international organizations as well as on European states in which the displaced sought refuge. Many of the world's refugees now originate in the Third World and do not necessarily fit the Convention's narrow definition of "refugee"; mass movements also defy the Convention's implied individualized concept of persecution. Moreover, as noted above, large-scale migration from South to North, and potentially in significant numbers from East to West, threatens the institution of asylum in the West. It will be continually necessary to adapt to these changes and respond to the current pressures on the system. UNHCR's Executive Committee has established a working group to study all aspects of refugee protection today. No one, however, is suggesting that there are easy answers to these questions.