

THE EVOLVING ROLE OF THE UNHCR: SHOULD THE CONVENTIONAL ROLE OF THE UNHCR BE EXPANDED?

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ABSTRACT

This paper focuses on the question of whether the UNHCR should be governed only by its original 1950 mandate to provide international protection to refugees or should its role be re-defined in order to cover those who are not refugees, yet in refugee-like conditions. The purpose of this study is to scrutinize what rights UNHCR already possesses with regards to its newly-evolved tasks and what sort of legal framework is required today.

ÖZ

Bu makale, BM Mülteciler Yüksek Komiserliği'nin (UNHCR) mülteci koruma görevini nasıl bir yasal çerçevede gerçekleştirmesi gereği sorununu irdelemektedir. Bu bağlamda çalışma, UNHCR'in 1950 yılında çizilmiş bulunan ana yetki çerçevesinin mülteci olmadığı halde mülteci konumuna yakın insanları da kapsayacak şekilde genişletilip genişletilmemesi sorununu merkezine alarak, UNHCR'in mevcut ve yeni gelişen rolleri bakımından nasıl bir yasal çerveye muhtaç bulunduğu sorusuna yanıt aramaktadır.

Keywords: *Refugees, Convention, UNHCR, IDPs, original mandate, voluntary repatriation, Cold War, in country protection, persecution, country of origin, habitual residence.*

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I. INTRODUCTION

The Convention Relating to the Status of Refugees of 1951¹ (the “Refugee Convention”) focuses on the protection of the victims of persecution. However, in order for an individual to receive protection, he/she should fall within the scope of the definition of refugee.² Indeed, the Refugee Convention, which came in response to the atrocities of World War II,³ was not meant to cover every refugee, thus various limitations were envisaged from the start as to its scope.

The refugee, within the meaning of the Convention, can be distinguished from other migrants, internally displaced people, and other individuals who need humanitarian assistance.⁴ The limited scope of the definition, and the list of the five grounds, enshrined in Article 1 (2), explain why many scholars believe that the term refugee, as defined in the Refugee Convention, is excessively restrictive and thus not practical.⁵ Moreover, this definition also contains a new element in the definition, highlighting that a refugee is someone outside his/her country of origin or habitual residence. This concept underlines the notion of respect for State sovereignty, implies the territorial nature of the protection regime, and emphasizes the inability of an international organization to provide in-country protection.⁶ This issue constitutes the core of the heated debate with regards to the conventional mandate of the UNHCR and a possible expanded nature, which will be examined in detail below.

¹ Jul. 28, 1951, 189 U.N.T.S. 150.

² The definition of the refugee was first set out in Article 1 of the Statute of the Office of the United Nations High Commissioner for Refugees of 1950, U.N. G.A. Res. 428 (V) (Dec. 14, 19 [hereinafter the “UNHCR Statute”].

³ Jack I. Garvey, *The New Asylum Seekers: Addressing Their Origin*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S 182 (David A. Martin ed., Kluwer Publishers, 1988).

⁴ Paul Weiss, *The International Protection of Refugees*, 48 AMERICAN JOURNAL OF INTERNATIONAL LAW 193, 193-94 (1954).

⁵ See Francis M. Deng, *The International Protection of the Internally Displaced*, INTERNATIONAL JOURNAL OF REFUGEE LAW 74, 77 (Special Issue 1995).

⁶ See Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INTERNATIONAL JOURNAL OF REFUGEE LAW 238, 247 (2002).

II. THE ORIGINAL MANDATE OF THE UNCHR

The Office of the United Nations High Commissioner (UNHCR) was established by the General Assembly⁷ as a subsidiary organization to be concerned with refugee protection. The main role of the UNHCR, as outlined in the UNHCR Statute, is to provide “international protection” for refugees and “to seek permanent solutions to the problem of refugees by assisting governments, in cooperation with NGOs and other international organizations, to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”⁸ Indeed, according to the general principles of international law, States are obliged to protect all the individuals living within their national boundaries.⁹ The prime responsibility for the protection of refugees thus lies with the country in which the refugees are present. The role of the UNHCR is, therefore, complementary to the protection that States are supposed to accord to the refugees involved.¹⁰

Although the principal mandate of the UNHCR is to provide international protection, it can expand to in-country protection as well. This is particularly true when the UNHCR becomes involved in the voluntary repatriation of refugees or when it assists refugee groups, where there are also mixed populations or people who are in refugee-like conditions.¹¹ Normally the traditional mandate of the UNHCR is limited to refugees as defined by the Convention and does not extend to internally-displaced persons or other displaced persons that do not fall within the definition of refugee. However, the role of the UNHCR, in accordance with paragraph 9 of the Statute, may be expanded by the General Assembly and the Economic and Social Council (ECOSOC).¹² The Secretary-General¹³ and the Security Council may also ask

⁷ See Statute of the Office of the United Nations High Commissioner for Refugees of 1950, U.N. G.A. Res. 428 (V) (Dec. 14, 1950)[hereinafter the “UNHCR Statute”] available at http://www.unhchr.ch/html/menu3/b/o_unhcr.htm.

⁸ Chapter 1 of the UNHCR Statute; see also Guy S. Goodwin-Gill, *THE REFUGEE IN INTERNATIONAL LAW* 7 (Oxford Univ. Press, 1996).

⁹ Myron Weiner, *Ethics, National Sovereignty and the Control of Immigration*, 30 INTERNATIONAL MIGRATION REVIEW 171, 172-73 (1996).

¹⁰ Antonio Fortin, *The Meaning of 'Protection' in the Refugee Definition*, 12 INTERNATIONAL JOURNAL OF REFUGEE LAW 569 (2000).

¹¹ Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. (Apr. 11) available at <http://www.icj-cij.org/docket/files/4/1835.pdf>; see also ECOSOC resolution 1705 (LIII), (27 July 1972).

¹² In 1957, the General Assembly first authorized the High Commissioner to ‘use its good offices’ to assist people who did not fall within the Refugee Convention’s refugee definition. U.N. G.A.

the UNHCR to become involved in situations,¹⁴ which are not normally within the traditional mandate of the UNHCR.¹⁵

III. THE EMERGING ROLE OF THE UNHCR

From the beginning, the role of the UNHCR has evolved dramatically because the character of conflicts and political dynamics have changed dramatically; that is, within the Cold War era, the recognition of persecution, or provision of asylum, was mainly used as a means to illustrate the failure of "Communist regimes."¹⁶ Today, however, with the changes in the current political climate, repatriation is considered to be the most viable solution to refugee crises.¹⁷ Given the fact that today the most distinctive feature of the refugee problem is the ever-increasing reluctance of potential asylum and resettlement countries to fulfill their international obligations, it should not be surprising that repatriation has been heavily emphasized as the paramount solution to this problem.¹⁸

Currently the UNHCR is highly involved in conflict-torn countries, providing assistance and protection, to the extent possible, to internally-displaced persons (IDPs) and to other displaced persons.¹⁹ Generally, the UNHCR's involvement with the internally displaced has often been in the

Res. 1167 (XII), Chinese Refugees In Hong Kong (Nov. 26, 1957). With regards to internally-displaced persons, the first reference to the expansion of the UNHCR's mandate came in 1972. See U.N. G.A. Res. 2958 (XXVII), Assistance To Sudanese Refugees Returning From Abroad, (Dec. 12, 1972; see also Goodwin-Gill, *supra* note 8, at 11.

¹³ See UNCHR Statute, *supra* note 2, paras. 17 and 18.

¹⁴ See U.N. Sec. Council Res. 688 (Apr. 5, 1991).

¹⁵ Erin D. Mooney, *Presence, Ergo Protection? UNPROFOR, UNHCR and the ICRC in Croatia and Bosnia and Herzegovina*, 7 INTERNATIONAL JOURNAL OF REFUGEE LAW 407, 419 (1995).

¹⁶ HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY A GLOBAL CHALLENGE 627 (Kathleen E. Mahoney and Paul Mahoney, eds., vol. II, London 1993); see also Gil Loescher, THE UNHCR AND WORLD POLITICS: A PERILOUS PATH 7 (Oxford 2001).

¹⁷ See Barbara E. Harrell-Bond, *Repatriation: Under What Conditions is it the Most Desirable Solution For Refugees?: An Agenda for Research*, 32 AFRICAN STUDIES REVIEW 41 (1989).

¹⁸ See Garvey, *supra* note 3, at 182-183; Charles B. Keely, *The International Refugee Regime(s): The End of the Cold War Matters*, 35 INTERNATIONAL MIGRATION REVIEW 303, 306 (2001).

¹⁹ IDPs are defined as "persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife or systematic violations of human rights, and who have not crossed and internationally recognized state border." Luke T. Lee, *The Refugee Convention and Internally Displaced Persons*, 13 INTERNATIONAL JOURNAL OF REFUGEE LAW 363, 363 (2001).

context of the voluntary repatriation of refugees, where return movements and rehabilitation/reintegration programs have included both returning refugees and displaced persons in circumstances where it was neither reasonable nor feasible to treat the two differently.²⁰ After the late 1980s, however, the UNHCR has taken on different responsibilities -- it has become more active in countries of refugee origin by granting humanitarian aid, monitoring human rights violations and trying to prevent the flow of refugees.²¹ Today, the UNHCR's role has been expanded so that it covers both the victims of war and gross human rights violations, as well as people who have not crossed an international border. In this regard, one scholar has noted that the "UNHCR's role has changed so much that it now officially provides assistance even to those who are not displaced."²² UNHCR also helps "potential source governments" in their stabilization process.²³

IV. SHOULD THE ROLE OF THE UNCHR BE EXPANDED?

Some scholars point out that the new mandate of the UNHCR fosters the non-admission policies of the affluent Western States; these policies became particularly apparent after the Cold War period when refugee admission policies lost their political importance. The distinction between the UNHCR and other agencies has become vague since the UNHCR has been diverted from solely refugee protection, and is now being asked to focus on human rights protection and to provide humanitarian aid in certain circumstances. Further, the non-political character of the UNHCR is fading away as it increasingly involves itself with in-country protection, which, by its nature, has significant political consequences.²⁴ Indeed, the UNHCR involves itself in highly politicized civil wars, which reduces its role to the distribution of material assistance to victims who cannot escape from perilous circumstances due to closed borders.²⁵ In this context, it is posited that if the UNHCR embarks on political activities, the

²⁰ Geoff Gilbert, "*Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order*," 10 INTERNATIONAL JOURNAL OF REFUGEE LAW 355 (1998) (citing UNHCR, UNHCR STRATEGY TOWARDS 2000, para. 1 and 5 (1996)).

²¹ See *The UNHCR Note on International Protection You Won't See*, 9 INTERNATIONAL JOURNAL OF REFUGEE LAW 267 (1997).

²² Michael Barutciski, *A Critical View on UNHCR's Mandate Dilemmas*, 14 INTERNATIONAL JOURNAL OF REFUGEE LAW 365, 380 (2002).

²³ See *supra* note 20.

²⁴ See *supra* note 21, at 267-68.

²⁵ Michael Barnett, *Humanitarianism with a Sovereign Face: UNHCR in the Global Undertow*, 35 INTERNATIONAL MIGRATION REVIEW 244, 244-45 (2001).

result would likely be a further reduction in the international commitment to asylum that could temporarily be disguised as a creative solution to refugee problems.²⁶ Moreover, UNHCR is not a humanitarian relief agency; there are specialized international agencies that are a much better fit for the performance of such tasks. Therefore, the mandate of the UNHCR should be distinct, and clarified in relation to other international institutions.

It has been also rightly suggested that IDPs should be protected by other international institutions and NGOs,²⁷ because the root causes of the refugee problem are so complex that the UNHCR's mere presence in the countries of origin cannot effectively change the circumstances that give rise to the flow of refugees. This is particularly true given that the issue is highly dependent on the political will of States. The concepts of 'preventive protection' and the 'right to remain' are of illusory character, and the truth is that such concepts usually help governments to foster their protective immigration policies.²⁸

There are also arguments, however, advocating that the role of the UNHCR should be re-regulated according to the new circumstances that challenge the current international refugee protection.²⁹ In this vein, it has been pointed out that the number of IDPs is much higher than refugees, and unlike refugees, IDPs are stuck within the borders of their country, remaining under the threat of persecution.³⁰ Yet, to date there is no specific international organization designed to protect IDPs.³¹ This is, no doubt, not only unequal, but also leads to serious human suffering that should be redressed without delay.³² Having said that, one cannot deny that there is a direct linkage between the flow of refugees

²⁶ See Barutciski, *supra* note 22.

²⁷ See *supra* note 21, at 270.

²⁸ See Guy S. Goodwin-Gill, *Refugees: Challenges to Protection*, 35 INTERNATIONAL MIGRATION REVIEW 130 (2001).

²⁹ See Gil Loescher, *The UNHCR and World Politics: State Interests vs. Institutional Autonomy*, 35 INTERNATIONAL MIGRATION REVIEW 33 (2001).

³⁰ Francis M. Deng, *Dealing with the Displaced: A Challenge to the International Community*, 1 GLOBAL GOVERNANCE 45, 52 (1995); Jeff Crisp and Erin Mooney, *Report on the Workshop on Internal Displacement in Africa, Addis Ababa, October 19-20, 1998*, 33 INTERNATIONAL MIGRATION REVIEW 468, 470-71 (1999).

³¹ It should be briefly noted that the unclear nature of the UNHCR's mandate regarding to when to take action on behalf of IDPs and other displaced that were covered by OAU Convention and Cartagena Declaration is of another concern. For a detailed discussion in this respect see Catherine Phuong, *Improving the United Nations Response to Crises of Internal Displacement*, 13 INTERNATIONAL JOURNAL OF REFUGEE LAW 491, 498 (2001); see also *supra* note 21, at 270.

³² See Deng, *supra* note 30, at 53-54.

and internal displacement wherein the involvement of the UNHCR might be quite essential.

V. CONCLUSION

At present, the reality of the world regarding refugee policy is simple and cruel; the increasing number of internal conflicts discourages States from granting asylum to refugees. The political interest in accepting large numbers of refugees faded away with the end of the Cold War. Furthermore, Northern countries are facing large migratory flows, which led them to adapt measures that are increasingly more protective. The situation is becoming more aggravated, particularly in the face of the blurred distinction between asylum seekers and migrants.³³ Besides, the notion of burden-sharing and international responsibility does not encourage the international community to adhere to the principles of international refugee law.³⁴ These reasons are compelling enough to reconsider the role of the UNHCR.

First, the legal position of the UNHCR should be reassessed in light of current conditions. The role of the UNHCR should also be reformed to ensure predictability and consistency. It is clear that the original mandate of the UNHCR does not meet the practical realities of the 'new world [dis]order'. Today legal clarity is needed, more than ever, to reduce arbitrary decisions (motivated by political and economic considerations) as to the UNHCR's activities.³⁵ Indeed, the new role of the UNHCR should be defined in a clear manner that enables the UNHCR to act on its own principles,³⁶ and to preserve, to the possible extent, its non-political character.

³³ Sadako Ogata, United Nations High Commissioner for Refugees, "World Order, Internal Conflict and Refugees," Address at the Harvard University John F. Kennedy School of Government (Oct. 28, 1996) (text available at <http://www.unhcr.org/admin/ADMIN/3ae68fbc4.html>); see also Eduardo Arboleda, *Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention*, INTERNATIONAL JOURNAL OF REFUGEE LAW 89, 91 (Special Issue 1995).

³⁴ Since there is no legal responsibility of the State of origin, under existing international refugee law, the international community is gradually focusing on the concept of state responsibility with respect to the refugee flows. See G. A. Res. 35/124 (International Co-Operation to Avert New Flows of Refugees), U.N. Doc. A/RES/35/124, (Dec. 11, 1981).

³⁵ See Nicholas Bwakira, *From Nansen to Ogata: UNHCR's Role in a Changing World*, 35 INTERNATIONAL MIGRATION REVIEW 278 (2001); see also Deng, *supra* note 5, at 74-75.

³⁶ Nicholas Morris, *Protection Dilemmas and UNHCR's Response: A Personal View from within UNHCR*, 9 INTERNATIONAL JOURNAL OF REFUGEE LAW 492, 497 (1997).

The UNHCR's new mandate should cover the displaced, who face the same misery as refugees and deserve similar protection. Such a mandate must also take in account the mandates of other international organizations in order to prevent murky overlaps from occurring. Although the UNHCR has the greatest experience and expertise in the protection of refugees, the UNHCR cannot be expected to do everything.³⁷ Furthermore, the expanded role of the UNHCR should not foster affluent Western States' non-admission asylum policies.³⁸ At the present juncture, it appears hardly possible to generate the necessary international political will, or sufficient funds to frame neither a distinct international instrument, nor an agency specifically concerned with displaced people. Thus, as Lee suggests, an additional protocol to the Refugee Convention, which would redress the identified shortcomings of the Convention,³⁹ might bring the refugee protection mechanism in line with the requirements of the new world [dis]order. Such a solution might also harmonize the international refugee protection system within existing regional systems.

³⁷ As the UNHCR points out, “[d]espite what has been achieved . . . UNHCR experience also shows that in the absence of a political resolution of a conflict, humanitarian assistance and international presence cannot by themselves provide effective protection to victims nor prevent further displacement and refugee flight.” UNHCR, Note on International Protection, para. 54, UN Doc. A/AC. 96/815 (31 Aug. 1993).

³⁸ In-country protection should not hinder the right to seek asylum, which is enshrined under Article 14 of the Universal Declaration of Human Rights. *See* Mooney, *supra* note 15, at 420.

³⁹ Lee, *supra* note 19, at 363-366.

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