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THE ASYLUM ARCHITECTURE – IS IT ADEQUATE?

To set the tone, I want to begin by borrowing lines from an article published in the Sydney Morning Herald in July 2009. In stating the self-evident, the article simply but cogently goes to the essence of why there are refugees and why the international response is inadequate. "It is a troubled world out there", the article posits, "and it is not surprising that in the most desperate parts the people with some enterprise and resources decide to strike out for safety and perhaps prosperity somewhere else". Focusing in on the asylum/migration set of issues, the article goes on: "The refugees can remain in the famous 'queue' of asylum seekers being sorted out by UNHCR for allocation to the migration slots opened by countries willing to help. But these chances are small relative to the demand. They can expect a long indefinite wait while savings and borrowed money fritters away. Hence the last stage: a gamble on the services of a people smuggler". The assessment of the journalist, which UNHCR's experience certainly supports, is that governments who show what is termed "the right degree of toughness" and hope the problem will thereby go away are, however, learning that policies constructed centrally around deterrence are costly, inhumane, at odds with international conventions, can end up losing their popular support base and – perhaps the most persuasive conclusion – are just ineffective.

As to what constitutes the right degree of toughness, let me also refer to a second press article, a couple of days later, this time reporting comments said to have been made by Nick Griffin, a recently elected member of the European Parliament, and the leader of the far right British National Party. "Frankly" he said, "they [meaning EU Member States] should sink several of these boats [meaning the boats carrying migrants and refugees]" and when challenged on whether he was advocating murder at sea, he suggested "they can throw them a life raft and they can go back to Libya". Of course this is an extreme suggestion, but worrying nevertheless if indeed coming from an elected member of the European Parliament.

Many states do honour and deliver upon their responsibilities. Millions of refugees have been able to enter third states, stay at least temporarily and even durably, or otherwise ultimately find the appropriate solution. More than 121,000 refugees were submitted for resettlement consideration by UNHCR in 2008, the highest number in a decade and a half [albeit against the availability of only some 79,000 places, provided variously by around 20 resettlement countries] and more than 67,000 departed. The other side of this picture, though, is the still disturbing number of refugees who do not enjoy the rights which international refugee law and even national legislation formally accords

them. Over quite some years now, I have spoken on the challenges facing refugee protection and the actions necessary to meet them. Reviewing them, I find a worrying consistency when it comes to the issues – narrowing asylum space, weak political will to insulate and protect refugee protection responses, ineffective asylum systems, limited availability of solutions and protracted exile.

Humanitarian space and protection space are not generous at the moment. Where does responsibility for this lie?: clearly with the refugee producers in the first instance, who continue their practices in disregard of human rights obligations and human security; also more generally with those governments remaining blinkered about national interests and how these might be reconciled with international responsibilities; then the international community, writ large and including UNHCR, also must share the blame for programs and responses which are often more reactive than pro-active.

Responding to the needs has, admittedly, been made more difficult by the global economic crisis. Jobs are being lost, remittances are falling, xenophobia is rising, and more people are under pressure to migrate, while those who have migrated may be being forced to return. Humanitarian and development budgets have suffered serious cuts.

These budgets are insufficient measured against the needs. In 2008 there were more than 42 million people in forced exile from their own homes for a variety of reasons. UNHCR had responsibilities of one or other sort for some 25 million persons. Of these approx 15 million were refugees, not including the 4.7 million Palestinians for whom UNWRA has responsibility. If the number of refugees assisted and protected through UNHCR programs was actually down by about a million, this has to be set off against the fact that the number of asylum seekers making individual claims rose for a second year, to 839,000, up 28%. Interestingly, perhaps, South Africa was the largest single recipient of individual claims, and Sudan the fourth largest. IDP figures have remained stable for the last two years, with roughly 26 million people internally displaced as a result of conflict, with 14.4 million persons of concern to UNHCR. About 80% of all refugees are hosted by countries in the developing world – the largest of all being Pakistan with nearly 1.8 million. New internal displacement in Pakistan exceeds 2 million. The governments of Jordan and Syria estimate that between them they host about 1.6 million Iraqis, almost all in urban settings. Chad, Tanzania and Kenya, when taken together, host close to one million refugees. When you set these figures off against the fact that voluntary repatriation has declined continuously since 2004, [with the 604,000 returns in 2008 the second lowest number in the last 15 years], and the fact that around 6 million refugees now live in protracted situations of exile sometimes stretching for generations, the insufficiency of the humanitarian response possibilities comes out in stark relief.

Displacement in 2009 continues to swell the numbers. Persecution continues to drive individuals, families and groups to seek their safety and security outside their own countries. Asylum seekers from Eritrea, Iran, Chechnya, or Myanmar are regularly among them. Conflict, in combination with persecution, or in and

of itself, is a forceful driver of displacement inside and outside countries. As the High Commissioner frequently points out, there are two major types of crises marking our times. The first is an arc of crises stretching from Pakistan and Afghanistan through Iraq and Palestine to Sudan and the Horn of Africa. The potential for these to seriously impact global security – through their increasing interlinkage, their deteriorating state, and the interfaces they bring about between the Islamic and Western worlds – is growing. The second group of crises are the more isolated but multiplying situations evident, for example, in Central African Republic, Colombia, the DRC and Zimbabwe, or Sri Lanka where the conflict-generated needs remain high. If they lack immediate relevance to global security, they are nevertheless a global problem, with impact in terms of displacement going beyond their borders, and in some cases much farther afield. The problem is that, seen as local crises, solutions are approached also in this optic, and it is exceedingly difficult, as a result, to sustain international attention to them and the disparate humanitarian needs accompanying them.

The scale and scope of displacement is a limiting factor when it comes to protection space. The nature of these various conflicts, which are more often internal and asymmetric, involving a multiplicity of irregular actors and an ever greater blurring of the lines between the civilian and military theatres, certainly has contracted humanitarian space. Government attitudes to state sovereignty have hardened, particularly as a by-product of the growth in international terrorism and trans-national crime, and humanitarian actors and their international legal principles have come under deep suspicion. There is just less room to act.

So the needs will continue to outstrip the response, absent new initiatives and new partnerships. A problem of this dimension, whose defining feature for its victims is absence of any effective national protection, means that the refugee plight cannot be one or other country's domestic problem only. In fact and at law, refugees as a global problem are a global responsibility.

This brings me to the central role of the protection architecture, which certainly cannot get off scot free. Doubts about some of its aspects have been a re-occurring and genuine concern of some governments, and for others the alibi for by-passing the principles in favour of pragmatic ad hoc responses. Concerns about lack of fair burden-sharing is a cross-cutting and consistent thread, giving context to and sometimes even providing explanations for the persistence of protection problems. The trend towards blurring important distinctions between asylum and refugee protection is another complication. Both are linked and deserving of careful reflection.

GENERAL CONSTRAINTS OF THE SYSTEM

The most obvious constraint of the system is that there is still no universal sign-on to it. To date there are 147 States which are parties to the 1951 Convention and/or its 1967 Protocol. And even in countries which have acceded to the Convention framework, there can be quite an implementation deficit. This is partly a political will issue, but not exclusively so. The

Convention has gaps. The scope of the definition can be a limiting factor. Many will argue that the 1951 Convention definition, if flexibly applied, covers most of the forced external displacement situations of today. Inherent in many conflict situations are gross human rights violations clearly within the persecution threshold. That there is a mix of push factors cannot negate this fact. That people use the services of people smugglers, or arrive at state borders side by side with migrants who are not refugees, does not strip them of their own refugee character. Similarly so, their claim does not fail because they pass through several countries en route, benefiting from the many possibilities for inter-continental travel that globalisation has opened up.

In all this, though, the emphasis is on flexible interpretation but one which ensures consistency. Otherwise, widely divergent recognition rates between states for the same or comparable caseloads can make asylum something of a lottery. Our research shows, for example, that persons from Iraq, Sri Lanka or Somalia have very different prospects of finding protection, depending upon in which country their claim is lodged. Sometimes it is not an issue of which country but which city within a country receives the claim. The situation in one European country, where the claims of unaccompanied minors are processed in three main towns, is illustrative here. Statistics show that 73% of all claims by unaccompanied minors in one city were accepted, in another some 52% and in the third only 34%. And this is not a feature of the origin of the claimants. To take claims only from Iraqi children, the range was from 92% in one city to 2% in another. Particularly worrying are interpretations of the 1951 Convention which serve to prevent its application to an entire group on the basis of nationality, paying no heed to the non-discrimination approach of the Convention.

It was in recognition of the diversity of reasons why people flee and the limits of the 1951 refugee definition that the refugee concept was formally extended in Africa and Latin America to encompass victims of violence [i.e. conflict and public order disturbances] as well as victims of persecution. This so-called broader definition is the one with which UNHCR works. Many national legal systems remain, however, doggedly pegged to the traditional definition. While UNHCR makes all best efforts to promote flexibility – and lawyers can make a lot of money litigating this – the fact remains that the current global architecture for refugee protection too heavily rests on a definition which allows governments so inclined to restrict the scope of their refugee responsibilities. This is a weakness in the protection architecture.

ASYLUM – THE LIMITS AND POSSIBILITIES

Asylum and refugee status are not one in the same. Asylum is also not in itself a solution, even while it creates the necessary humanitarian space to pursue the best solution. These are two important considerations which will help to determine the possibilities and limitations of the asylum response. Within the international law framework of the 1951 Convention, asylum has closely accompanied the grant of refugee status to the point where the content of asylum has tended to be quite closely tied to the circumstances and needs of more classical refugees. However, asylum is also part of a range of responses

increasingly proving suitable to situations which do not neatly fit the refugee paradigm. Various forms of subsidiary or temporary protection have been resorted to so as to help close a noticeable gap between the protection granted to refugees under the Convention and the protection required by the much larger group of persons forced to flee but not for reasons that can be reasonably brought within the 1951 Convention regime.

Asylum is a practice which has evolved, not an article in a Convention having to be enforced in accordance with the letter of the law. State practice consistently steers clear of endorsing that even refugees have a right to be granted asylum in any particular country. As refugee law experts remind us, refugee law does not require states to admit refugees as permanent immigrants; it only establishes the right of seriously at-risk persons to cross international borders to seek safety until the threat in their home country is eradicated. Insofar as a state's refusal to offer at least initial asylum may expose an individual to risk of violation of basic human rights, its responsibility to make this asylum available is duty driven. The content of the grant of protection, "whether it embraces permanent or temporary residence, freedom of movement and integration or confinement in camps, freedom to work and attain self-sufficiency or dependence on national or international charity" is not so easy to determine.¹

[a] New forms of displacement

Then there is another important consideration when it comes to assessing the adequacy of asylum notions today. There is a high probability that patterns of displacement will be increasingly impacted by environmental factors such as population growth, declining resources and inequality of access to them, ecological damage and climate change. Under the caption: "Predictions of mayhem as the globe gets warmer", the International Herald Tribune of 10 August carried an article predicting "profound strategic challenges" occasioned by "climate induced crises" which could "topple governments, feed terrorist movements or destabilize entire regions". It reported on a recent exercise of the National Defense University of the military in the US, which explored the potential impact of a flood in Bangladesh sending "hundreds of thousands of refugees streaming into neighboring India, touching off religious conflict", among other things. "It gets real complicated real quickly", asserts the responsible US official.

Conflict, extreme deprivation and climate change are also tending to act more and more in combination. Clearly these various drivers will impact different groups and regions in varying ways. Not all those displaced as a result will fall within the mandate of an organisation like UNHCR, or will need, or merit, protection through asylum. But there will be some questions to answer before it can be decided who should be considered meritorious.

The legal implications of displacement driven by forces other than persecution, human rights violations and war have yet to be seriously thought through.

¹ Goodwin -Gill, *The Refugee in International Law*, page 357.

Whatever might be the responses deemed necessary to displacement generated by climate change or other forms of catastrophe, such as financial disasters, asylum will have to find its appropriate place.

It will be fundamentally important over the coming period to ensure that the international protection regime is not only strengthened in areas where it is still weak, but also that it is made flexible enough to accommodate the new challenges of displacement. Clearly, if the legal principles and ethical values that underpin refugee protection and asylum are to be revitalised and be of contemporary relevance to both States and refugees, then they must be encouraged to evolve organically, even while preserving their central integrity.

[b] Asylum, large scale outflows and prima facie status

So in practice, what might this mean? The protection system in my view requires some modification when it comes to larger scale arrivals. At the risk of being accused of turning the clock back, Conclusion 22 of the Excom needs to be given a more authoritative statement. Larger numbers in less classic – meaning not persecution-driven – displacements call for more tailored approaches built around temporariness of stay. This is not to say that the 1951 Refugee Convention should be displaced. The Convention framework has to remain the basic point of reference, there being nothing inherent in the instrument itself which takes large scale arrivals outside its framework. As a protection instrument, not a migration text it can accommodate temporary protection. The refugee regime is a special one, linked to the changing nature of conditions in the country of origin. The treatment provided for in the Convention is made conditional, in the language of the Convention itself, on certain criteria being fulfilled, some of them admittedly better tailored to permanent stay, but others linked more integrally to immediate need. It is quite possible within the Convention to develop a response to group arrivals which, depending on the specific situation, can be predicated on burden-sharing, temporariness and return.

To date, *prima facie* refugee status has largely performed this role, albeit imperfectly. While it is not of pre-determined duration, the working expectation nevertheless has been that beneficiaries will preferably return as soon as situations stabilise to the point where they can do so safely and durably. Alternatively, for those who cannot, resettlement is the open option. Local integration still is rarely talked about and, if it happens, comes at the tail end of a long and protracted exile, usually only for some, in the context of solutions strategies which weigh other options more heavily. As to the rights which have accompanied *prima facie* status, they have usually amounted to no more and no less than the fundamental protections against irreparable harm [*non refoulement* being central among them] and guarantees of physical dignity and security [shelter, health, basic education, protection of the vulnerable against exploitation and sexual and other abuse] which the international community collectively can ensure. *Prima facie* status itself, from a legal point of view, is somewhat ambiguous. Some states work with it as a presumption of status challengeable at any time through individualised procedures which may

consider inclusion and exclusion elements separately. Others take it as a grant of status, although one which is interim or provisional, and hence able to be lost. A recent doctoral thesis² concludes interestingly that the status works in effect as an injunction under the 1951 Convention, with a lower standard of proof, granted mainly on objective information, usually in situations of urgency when the receiving capacity of a host state is surpassed, and done as a discretionary act by the host state. It requires the state[s] to honour at least those Convention rights that prevent irreparable harm to the refugee claimant, but without prejudice to RSD that considers exclusion and non-inclusion from Convention protection. The dissertation concedes, though, that *prima facie* status, although widely practiced along these broad lines, remains poorly understood and often misconstrued. It hence reminds that UNHCR has previously called for both a comparative study of protection-based responses to mass influxes and a clearer articulation of the criteria for *prima facie* recognition for multilateral consideration and endorsement.

Such a “clearer articulation” would have to be based on a review of issues such as the cessation threshold, the criteria and procedures for determining access to protection, the status of the beneficiaries, the nature, content and duration of the protection provided, burden sharing arrangements as necessary and issues related to solutions, including resettlement.³

BURDEN SHARING

Sheltering mass numbers and burden-sharing are linked issues. Just as causes and notions of safety condition the process of determining who is a refugee and what protection is required, so must burdens and responsibilities be allowed to condition the protection which is given, and by whom. Greater solidarity with refugees is most likely to be forthcoming when it is underpinned by solidarity among states. The 1951 Convention is predicated on international solidarity, or the notion that states should address refugee problems collectively, sharing responsibilities to balance the burdens. One difficulty, though, is that there are no agreed indicators, much less formulae, for predictable burden sharing, with the result that burdens and responsibilities are unfairly spread. As host states do not fail regularly to point out, a majority of refugees are to be found in countries without the resources to meet their needs.

There have been a number of tentative, but ultimately shelved, attempts to articulate general benchmarks for burden or responsibility sharing, with the result that the system survives tenuously on undependable funding and promises of cooperation. Burden sharing is a unifying principle for the refugee protection system, but the absence of clear parameters for burden sharing is another important omission from the protection architecture of today.

² Matthew Albert, “*Prima facie* determination of refugee status; Exploring its legal foundation” June 2009, Refugee Studies Centre, University of Oxford.

³ See a general analysis on how to reinforce more effective and coherent approaches to protection in mass influx situations in EC/GC/01/4 of 19 February 2001, “Protection of Refugees in Mass Influx Situations: Overall Protection Framework”.

[a] Elements

Burden sharing is both a framework for cooperation and a set of specific actions. Past burden-sharing arrangements which ultimately worked, such as the Comprehensive Plan of Action for the Indo-Chinese Refugee situation⁴, suggest the value of a number of elements being built in, including: provision for close consultation and negotiated political consensus among concerned Governments; a well-defined and coordinated plan; inter-agency cooperation on the basis of complementarity of mandates and responsibilities; a follow-up mechanism for monitoring and policy adjustment; as well as a coordinating lead agency. The elements must obviously include material assistance and financial assistance to host states, and providers have been encouraged over the years to make this more predictable and reliable, for example through stand-by arrangements for deployments of personnel or refugee emergency funds. Initiatives leading to the sharing or redistribution of responsibilities are gaining currency, including resettlement pools, or emergency evacuation arrangements, supported as appropriate by quotas or centres, for temporary protection until return is feasible. An agreed quota system for humanitarian evacuation or transfer never won too much favour, outside the context of the Kosovo emergency, but this should not preclude it being revisited. In addition, evacuation arrangements are becoming an important tool to address emergency resettlement needs. Discussions have been somewhat more positive on redistribution arrangements for moving refugees from one host state to another. The clearest example of redistribution is resettlement. A complementary if different redistribution arrangement – relocation of refugees among EU Member States – is gaining some currency.

There has also been inconclusive discussion over the years about when and how to trigger such collaborative international responses. The possible criteria for this and the participating entities were never really settled through the discussion. Of course there have been important advances over recent years which have brought greater consistency and reliability to shared efforts to respond to humanitarian crises. We now have cluster arrangements benefiting IDPs, pooled humanitarian funding arrangements, regional funds like the ERF, emergency transit centres to facilitate resettlement and relocation programs benefiting particularly pressured host countries. Burden-sharing is becoming manifest in a more structured way for certain situations and in certain regions. High profile crises with global security implications tend to attract it far more often than humanitarian situations which are forgotten, protracted and largely off the international peace and security radar. Improvements cannot be said to benefit across the board and burden-sharing remains discretionary and largely institution-based, not inter-governmental.

[b] Forms

How to “routinise” the response then becomes the question. Thinking has here focused on what might be the triggers for collective action and what form such

⁴ *UN General Assembly, Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees, Report of the Secretary-General (A/44/523), 22 September 1989, A/44/523.*

action might take. As to the latter, the main options are financial assistance, physical dispersal or relocation of persons, pooled arrangements for strengthened reception and resettlement, and humanitarian evacuation or transfer for temporary protection. The triggers have included the size of the refugee flow, its economic and security impact, the availability of effective protection *in situ*, and repercussions for bilateral or international relations. There is general acceptance that a situation-specific response is one most likely to be effective and adopted. An “outcome-based” approach as opposed to a “justice based” approach also tends more often to be advocated. The latter would have a response built around static indicators such as GDP, population, size of territory etc. The former looks more to the consequences for the host state, in the context for example of reception capacity, and more broadly to the consequences for the refugee arrivals and what will best mitigate them in the interests of all.⁵

[c] Pros and Cons of formalising burden-sharing

Academics and practitioners together continue to ponder over how to reinforce burden sharing. The debate centres on the pros and cons of formalised, institutionalised schemes versus making more routine the still *ad hoc* response through identifying basic triggers and methods. The weight of opinion is settling for the latter, the fear with the former being that insisting on sharing formulae might only result in states being pushed into a lowest common denominator approach. They might, as one writer put it, be encouraged “to define a refugee flow out of existence by declaring it to consist of ‘migrants’”.⁶ “Unlike situations which incline states to co-operate for defense, states have the capacity to ward off refugee ‘threats’ with unilateral action. Unlike international environmental regimes which typically address the causes of a problem, asylum regimes address only the symptoms. This makes the costs of participation in formalised sharing schemes over time uncertain and beyond the control of individual states. States are customarily reluctant to commit themselves to pay for developments over which they have no control.”⁷

CONCLUDING REMARKS

The Convention gave a voice and force to the rights for refugees. It does not, though, say how states should put it into practice. There are procedures and procedures in this regard. In UNHCR's experience the problematic of the Convention is as much a procedural as a textual one. Over the years, the processes in place in many states have become cumbersome, expensive, protracted and have served as an incentive to certain would-be migrants to try their hand through the asylum process.

⁵See Boswell, “Burden sharing in the New Age of Immigration”, *Migration Information Source*, MPI publication.

⁶Suhrke, “Burden sharing during Refugee Emergencies: The Logic of Collective versus National Action” in the *Journal of Refugee Studies*, vol 11 No 4 1998.

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The temptation is strong to take all these ideas and try and turn them into understandings, in one form or another, which will genuinely clarify and make more routine and predictable the response when host states come under, to use a current European notion, “particular pressures”. The understandings would have as their objective to give a stronger underpinning to burden sharing and to bring greater clarity and commonality to an asylum response to influxes of various sorts which, because of their size or their nature, suit best *prima facie* approaches rather than individual RSD. The understandings at one end of the spectrum could take the form of a protocol to the 1951 Convention. At the other end, they could be guidelines from UNHCR endorsed through a process which gives them some multilateral authority, such as through appending them to a General Assembly Resolution or a Declaration of States Parties to the 1951 Convention.

In this regard, close to 33 years ago, the UN General Assembly was formally invited to reconsider, when the time would be ripe, the re-convening of a conference on asylum. With the magnitude and frequency of displacement crises today, with asylum systems in difficulty or under major review in a number of countries, with the pressure mounting for rationalisation of processes, the argument to revisit the architecture of asylum is strong. Perhaps the time for this is rapidly approaching. As the refugee law academic, James Hathaway, stressed some time ago now, we have to “actively re-take refugee law...and truly make the letter of the law conform to the rhetoric of concern”.⁸

The 60th anniversary of the Convention in 2011 might be the right occasion to move on these ideas.

⁸ See Hathaway, in *Refugee*, vol 8 no.2 of December 1988, “Burden Sharing or Burden Shifting”.