

Refugee protection is human rights protection

Amnesty International Statement to the Ministerial Meeting of States Parties to the 1951 Refugee Convention and/or its 1967 Protocol

CONTENTS

1. Introduction - Refugee protection is human rights protection
2. 2001 - A disappointing anniversary
3. The 1951 Convention and 1967 Protocol framework:
Strengthening implementation
4. International cooperation to protect masses in flight
5. Upholding refugee protection in the face of contemporary challenges involving mixed flows
6. Annex: Declaration adopted at the Ministerial Meeting

1. Introduction - Refugee protection is human rights protection

This first meeting of the states parties to the 1951 Convention relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol presents an unprecedented opportunity for States Parties to reaffirm their commitment to the spirit and letter of the Refugee Convention. It also provides a unique opportunity for the international community to make some groundbreaking strides to strengthen the international refugee protection regime.

The Global Consultations on International Protection have proven to be invaluable in bringing governments, the United Nations High Commissioner for Refugees (UNHCR), non-governmental organizations (NGOs) and others together to discuss refugee protection in an inclusive and open discussion. The Global Consultations should provide the starting point for more transparent and informed discussion in the years to come, a discussion which would continue to benefit from the active involvement of NGOs.

The Refugee Convention remains the central instrument of international refugee protection, but over the past fifty years it has been complemented by regional instruments specific to refugee issues -- such as the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa, and the 1984 Cartagena Declaration on Refugees -- as well as by numerous international and regional human rights instruments. One welcome development over the past decade is that international and regional human rights instruments and bodies have increasingly been recognized as tools that can help to address violations of the human rights of asylum-seekers, refugees and internally displaced persons by holding states accountable for these violations and presenting remedies for individuals.

Although these developments have reaffirmed the Refugee Convention's place in the larger human rights context, there remains *in practice* a fundamental failure of the international community to address refugee protection through a rights-based approach. This fundamental failure stems largely from a lack of political will on the part of states; the main issues, which are of relevance to all topics being discussed at this meeting, are¹:

- 1. States fail to effectively address human rights violations in countries of origin, even though this, together with displacement during armed conflict, remains the root cause of forced displacement and violations of the right to return.**
- 2. States fail to respect the human right to seek and enjoy asylum from persecution, implicit in the very existence of the Refugee Convention, and set out in Article 14 of the Universal Declaration of Human Rights.**
- 3. States fail to respect the basic principle of *non-refoulement*, recognized as part of customary international law, which provides that no one should be sent back to a territory where they would be at risk of serious human rights abuses.**

¹There exists no conflict between addressing these human rights concerns and addressing the concerns of governments to "manage migration". This Ministerial Meeting, however, should rightly be mainly concerned with discussing protection issues.

4 States fail to respect and protect the fundamental human rights of non-nationals (including refugees, asylum-seekers, stateless people and migrants) who legally or illegally, arrive or reside in their territories.

In the search for strengthened protection of the rights of refugees and asylum-seekers, and effective solutions to violations of those rights, Amnesty International has advocated increased use of international human rights bodies and mechanisms.² The organization has also worked towards making regional human rights bodies take greater responsibility for exerting demands on states who fail to deliver on the rights of refugees. This is increasingly important in light of the stymied development of international refugee law, the limited ability of UNHCR as both a protection and assistance agency to operate with certainty of access and an adequate degree of independence, and the regressive nature of current challenges by a number of states to some of the core principles of refugee law.

Even though strengthened implementation of the Refugee Convention would be a key element in addressing violations of the rights of refugees and asylum-seekers, this would not be *the* solution to all of the listed concerns. Over the next few years, one of the major challenges and goals for those interested in refugee protection will be to lay claim to the rest of the UN human rights system to assert the human rights of refugees.

2. 2001 - A disappointing anniversary

Regrettably, the 50th anniversary of the Refugee Convention has been an anniversary year marked by the continuance of a familiar pattern of violations of the rights of refugees and asylum-seekers.³ In the wake of the events of 11 September, Amnesty International and other human rights advocates have emphasized that new national and international security measures should not infringe the rights of refugees and asylum-seekers under the Refugee Convention or other human rights norms. The organization has documented a significant “backlash” against refugees and asylum-seekers because of their national or ethnic origin or religious beliefs.⁴ AI has called on governments to live up to their human rights obligations by protecting those at risk, and has also joined the UNHCR in warning that making unwarranted links between refugees and criminals or “terrorists” may put already vulnerable individuals in danger.

²See *The UN and refugees' human rights. A manual on how UN human rights mechanisms can protect the rights of refugees*. Amnesty International and International Service for Human Rights. August 1997. AI index: IOR 30/02/97.

³For a comprehensive look at refugee issues, see *Refugees: Human rights have no borders*. AI Index: ACT 34/03/97.

⁴ *The backlash - human rights at risk throughout the world*. 4 October 2001. AI index: ACT 30/027/2001.

Amnesty International has documented many instances in which anti-terrorism measures have come into conflict with international human rights and refugee law standards. In the United Kingdom, for instance, legislation has been introduced which would threaten some asylum-seekers' access to a fair and satisfactory asylum procedure and open the door for the indefinite detention of non-nationals through derogation from the European Convention on Human Rights and Fundamental Freedoms.⁵ In the United States, hundreds of non-nationals have already been detained following the events of 11 September and very little information has been made available about the grounds for their continued detention.⁶ The current proposal for a joint European Union (EU) arrest warrant appears to lack safeguards on *refoulement*⁷ of people to EU states in cases where they might risk becoming prisoners of conscience or victims of other serious human rights violations.

The Expert Roundtables in the Global Consultations have provided good guidance on some of the issues where certain countries had disagreed over provisions of refugee law, including how the existing exclusion clauses of the Refugee Convention exclude individuals responsible for acts of "terrorism"⁸. There have been other positive developments in some countries on previously contested issues, such as the recognition that the Refugee Convention covers those persecuted by non-state actors in situations where the state is unable or unwilling to offer protection. At the same time, however, newly introduced legislation in some countries aims at narrowing interpretation of the criteria of who can be determined to be a Convention refugee.⁹

3. The 1951 Convention and 1967 Protocol framework: Strengthening implementation

Amnesty International has for some years pressed for States to be held more accountable for complying with their international protection responsibilities under the Refugee Convention. The organization has argued for the creation of an independent, impartial and effective body to secure reports from States, to monitor implementation of the Refugee Convention, to advise on questions of interpretation of the Refugee Convention, and, to receive individual

⁵ *United Kingdom: Emergency legislation: trial not indefinite detention is the answer*. 13 November 2001. AI Index: EUR 45/018/2001.

⁶ *USA: Human rights must not be sacrificed for security*. 4 December 2001. AI Index: AMR 51/174/2001.

⁷ *EU Anti-Terrorist Measures - Amnesty International Final Appeal to EU Ministers*. AI EU Office 5 December 2001.

⁸ See *Summary Conclusions-Exclusion from Refugee Status*. Lisbon Expert Roundtable 3-4 May 2001. EC/GC/2Track/1.

⁹ *Opposition to Proposed Legislation Threatening the Rights of Refugees*. AI Australia 20 September 2001.

complaints from refugees whose rights are being violated. The rights of refugees would be enormously enhanced through a more transparent system of accountability.

States are patently failing to fulfill their obligations under the Refugee Convention; the incidence of violations of the fundamental principle of *non-refoulement* are increasing; there is an acknowledged tension between the assistance and protection agenda of UNHCR. This state of affairs is difficult to reconcile with the view that supervision as it now stands is sufficient. Given the interdependency of the refugee protection regime, it would seem clear that members of the international community have a vested interest in ensuring that states are held accountable for implementing their international obligations towards refugees and asylum-seekers. The establishment of a system of accountability would benefit not just refugees, but governments, UNHCR and NGOs working with refugees.

Since its inception, UNHCR, under its protection mandate, has sought to supervise the implementation of the Refugee Convention. It has provided advice on interpretation and has denounced, sometimes publicly, violations of the rights of refugees. It has also intervened on behalf of individual refugees in order to ensure that their claim to asylum was properly determined and in some instances has been the sole authority responsible for asylum adjudication in countries where there has been no other authority. It is not any failing of UNHCR which is at issue at present; it is rather the failing of the international community to abide by the very standards they agreed to uphold and the *limited ability* of UNHCR to ensure that governments heed their advice.

When considering the most appropriate manner in which to ensure compliance with the Refugee Convention and the development of standards in the realm of refugee rights, it is frequently argued that the nature of refugee protection and assistance is unique in the area of international human rights standard setting, monitoring and enforcement. It is argued that refugee protection and assistance necessarily involve the close cooperation of host governments, governments in countries of origin, donor governments, intergovernmental organisations (IGOs) and, in particular, a host of international, regional and national NGOs. Refugee protection and assistance is characterised by distinct phases of work, ranging from dealing with immediate emergencies to longer-term post-return assistance. However, at each stage there are rights and standards to guide all actors in their protection and assistance work. The need is to recognise that improvements can be made, however modest, through enhancing cooperation by all parties at each stage, including cooperation in monitoring the implementation of international standards.

Much of the discussion of this issue has centred on the scope of Article 35 of the Refugee Convention as the basis for a system for gaining effective implementation of the Refugee Convention. It should be underlined that while Article 35 provides some means of strengthening implementation of the Convention through supervision, it is not on its own the key to resolving the essential problem of strengthening protection of refugees. The crucial

issue is to define a mechanism for the protection of refugees which is independent, impartial (free to operate without political pressure from governments), effective and open to public scrutiny, with a meaningful opportunity for NGOs and IGOs to provide input.

Many major human rights treaties establish an independent body to monitor application through a system of periodic public reporting. This provides an opportunity for states to submit reports on implementation to the monitoring body, which in turn reviews the reports, often in light of information supplied by NGOs. These monitoring functions, which play a key role in the protection of human rights, are performed in public, with states called to account in an open process. Such independent bodies also provide useful interpretation and advice on the implementation of their treaty obligations. Under the Refugee Convention, states have never consistently and publicly reported on their implementation (as required under Article 35). UNHCR, through its protection work, monitors the compliance of states but their protection reports are not made public, for reasons including beliefs about the primary role of diplomacy, and concerns about the potential jeopardising of access by UNHCR and implementing partner NGOs to the country in question if violations of Refugee Convention obligations were made public. Undeniably, the issue of continued access is central to the need for an independent mechanism, as it is clear that as the system as currently configured does not allow UNHCR to function with the required independence.

Part of the mandate of any body responsible for ensuring strengthened implementation should include the ability to determine how the Refugee Convention is to be interpreted. This could happen, for example, by being referred questions on matters of interpretation, and by way of considering individual cases of those who can show a dubious interpretation of their right to protection. It is important to underline at this point that the rights of individual men, women and children are at stake; errors of interpretation or misapplication of the Refugee Convention can cause human suffering and misery, and may well endanger lives. It is not uncommon in the international human rights system to have such authorities with the power to review individual cases and to invoke some form of redress for the victim.

During the process of the Global Consultations it has become clear that many states are reluctant to introduce effective, independent and impartial monitoring of their implementation of the Refugee Convention. Some of the current proposals being advanced, such as the appointment by the UN High Commissioner for Refugees of a Special Advisory Group of experts (which would not lessen the role of the Office of the UNHCR), the re-establishment of a sub-committee on international protection to the Executive Committee of the High Commissioner's Programme (EXCOM), or the appointment of Special Rapporteurs must be seen as interim measures. In any case, these measures do not fully satisfy basic criteria for an effective system of accountability that is independent and impartial and seen to be so. It is important that the debate to explore models for such a system continues.

All relevant actors must be involved in this debate. In the area of assistance and especially in complex emergencies, NGOs are key partners in field operations along with states and other elements of the international community. In the past, however, NGOs have been unwelcome

guests at the table when negotiating and monitoring protection standards. It is crucial that NGOs become partners in all aspects of this debate in future.

4. International cooperation to protect masses in flight

Examples of many of the issues raised in the background paper presented to the Ministerial Meeting (HCR/MMSP/2001/4) can be illustrated by some of the refugee crises that have taken place in the last year. After more than a decade of armed conflict and human rights abuses, there are more than one million refugees, internally displaced people and other war-affected victims in the region of Guinea, Sierra Leone and Liberia. Thousands of civilians, including large numbers of refugees and internally displaced people, have suffered serious human rights abuses, particularly since September 2000 when there was a total breakdown of security along the borders of Guinea, Sierra Leone, and Liberia. In Guinea, Sierra Leonean refugees and Guinean civilians have been killed, beaten, raped and abducted by armed political groups, in cross-border attacks from Sierra Leone. Liberian and Sierra Leonean refugees, accused of being responsible for armed incursions or for harbouring rebels, have been killed, tortured, ill-treated, arbitrarily arrested and intimidated – with impunity – by Guinean security forces and harassed by Guinean civilians, leaving thousands with the “least worst option” of fleeing *back* to their country of origin. The inaction and slow response of the international community left thousands of refugees and civilians vulnerable to abuses and although the relocation of Sierra Leonean refugees to safe areas in Guinea is now essentially completed, very serious concerns remain about the safety of Liberian refugees in the border area between Guinea and Liberia. Meanwhile, the situation of internally displaced persons continues to deteriorate.¹⁰

¹⁰For a comprehensive overview of this issue, see the report *Guinea and Sierra Leone: No place of refuge*. October 2001. AI Index: 05/006/2001.

A crisis which eventually did get the full attention of the international community -- Afghanistan -- was marked by a signal lack of respect for international refugee protection norms. Even though there now seems to be a possibility for making human rights a core agenda¹¹ for Afghanistan, there are still major refugee protection concerns in neighbouring countries. Borders have remained closed, violating the fundamental principle of *non-refoulement*, and leaving thousands of people stranded within Afghanistan, unable to access international protection.¹² Pledges of international assistance at the start of the war have not materialised to the extent needed and thousands of people are living in desperate conditions. UNHCR has reportedly only enough financial means to provide assistance to the end of the year. Refugees stranded in what is often referred to as "no-man's-land" have little or nothing to eat, and no shelter from the harsh winter conditions. Following decades of failure in sharing the responsibility with neighbouring states for one of the largest displaced populations in the world, the international community must now take responsibility for the refugees who have fled the bombing campaign and make a long-term commitment to protect and assist the existing refugee population in the neighbouring countries. The imperative should be to find durable solutions to their plight in a rights-respecting way.

These examples of how international standards of refugee protection are violated in situations of mass influx are unfortunately not unique to refugee protection in 2001. Many of the same concerns have been prominent in numerous crises marked by mass forced displacement in the past decade: Northern Iraq, East Timor, Kosovo and the Great Lakes region, to name but a few. Existing standards and guidelines do provide for a protection framework that could address the majority of these protection concerns. As reaffirmed in the Track 3-discussions of the Global Consultations, the Refugee Convention itself remains the main instrument applicable in situations of mass influx. However, further codification on an international level of the existing norms might be necessary to ensure effective protection in situations of mass forced displacement in the future. The outcome of the discussions in the Global Consultations must be an integral part of those discussions. Amnesty International believes that international solidarity and burden- and responsibility-sharing must be at the core of any such new developments.

5. Upholding refugee protection in the face of contemporary challenges involving mixed flows

The case examples above (Guinea/Sierra Leone/Liberia and the Afghanistan crisis) illustrate the reality many refugees face, including "mixed flows" or "secondary movement" of

¹¹ *Human Rights Agenda for Afghanistan*, 9 November 2001. AI-index: ASA 11/028/2001.

¹² See e.g. *Afghanistan: Protect Afghan civilians and refugees*. 9 October 2001. AI-index: ASA 11/012/2001.

refugees. In some cases refugees are forced to leave the country in which they have first sought protection since they either are subjected to direct human rights violations from the host government, attacks and abuse from the local population or simply cannot enjoy basic means of subsistence. In other cases, they are at constant risk of *refoulement* to their countries of origin. Sometimes refugees and asylum-seekers merely transit a neighbouring country, which according to accepted interpretation of international refugee law, should not constitute a bar on their seeking asylum in another country and have their claims assessed in a fair and satisfactory procedure.

It is commonly recognised that people often lack access to either a secure legal status or any realistic option of reaching a durable solution in the countries they first arrive in or transit. “Irregular” or “secondary” movement is a therefore intrinsic part of the pattern of fleeing populations. With some exceptions, the international community has not proven itself capable of providing adequate rights-respecting protection measures in situations of mass displacement.

Many people leave their countries for mixed reasons. For many of them, applying for asylum is effectively the only way of gaining residence rights. Some industrialized states have claimed that these mixed flows overburden strained asylum systems, foster transnational crime syndicates of traffickers and people-smugglers, block the effective implementation of resettlement programmes, and, in particular after the events of 11 September, result in the influx of prospective threats to national security. This has led to the establishment of a wide variety of generalised and indiscriminate measures aimed at keeping out refugees, asylum-seekers and other immigrants.

In Europe, EU efforts to establish a common asylum system have gone hand in hand with efforts to set up greater obstacles to asylum-seekers and migrants seeking to arrive in its territory. The establishment of the High Level Working Group on Asylum and Migration was alleged to provide another approach by tackling the root causes that force people to leave their countries. It has instead focussed on control and repatriation rather than on protection and prevention, and has barely begun to touch the human rights crises in the countries in question.¹³

In a perverse application of the policies to control entry to the asylum systems, the aim in some cases seems to have been to actively block people who, it is well-documented, are in fact victims of discrimination and human rights abuses. In July 2001, independent reports received by Amnesty International suggested that UK immigration officials based at Prague airport singled out travellers from the country's Roma minority, subjecting them to detailed questioning and often refusing them permission to board their flights. The embarkation

¹³ *The Asylum Crisis: A Human Rights Challenge for the EU*. AI EU Office 25 September 2001.

checks were conducted despite the fact that Czech citizens do not need a visa to travel to the UK.¹⁴

Other countries turned away prospective asylum-seekers arriving from transit countries, often refusing them access to asylum procedures. 2001 saw a “novel” approach being taken by Australia in its attempts to prevent the arrival of “unauthorized” asylum-seekers. Following the Australian government’s deployment of more than 400 shipwrecked asylum-seekers from the Norwegian freighter, the *Tampa*, to disembark on to Australian territory, the passengers were transported to New Zealand and the Pacific island republic of Nauru for processing of their protection claims. This marked the beginning of a most regrettable step in the history of interception, as Australia took steps to make it virtually impossible for asylum-seekers to access Australian territory by sea. A package of measures to further deter asylum-seekers from travelling to Australia followed soon after, including removing Australian islands from its migration zone (which denies the people who land there access to a regular asylum procedure) and openly discriminating against refugees who arrived in an “irregular” manner. The main element of this policy is arguably the dumping asylum-seekers onto Pacific islands in exchange for financial and other benefits. It remains to be seen what durable solutions will be made available to asylum-seekers who are recognized as Convention refugees. This “trade” in human misery ignores the plight of these individuals in the interest of deterring others from arriving to the shores of Australia. The fact that Australia runs one of the most generous refugee resettlement programmes in the world is in light of these approaches not a legitimate reason for these measures directly affecting the rights of thousands of people who have engaged Australia’s protection obligations. These measures have also been reported to have been cited by countries more burdened by refugee influxes than Australia as a justification for refusing calls from the international community to open their borders.

¹⁴*Czech Roma denied entry to the UK*. AIUK 30 July 2001.

Many restrictive measures result in human rights abuses regardless of the status or label given to a non-national. In many cases, the very means of travel such people are forced to resort to is directly life-threatening -- as has been tragically demonstrated in different regions in 2001. When addressing the concerns around mixed flows and irregular movement, the starting point for the international community must be to look at the rights of the individuals who are caught up in these flows and treat them fairly and without discrimination in accordance with fundamental human rights norms. International refugee law alone does not inform this issue. While there is an inevitability to the link between asylum and migration, this debate needs to be firmly placed within the human rights paradigm which applies. It is self-evident that the Refugee Convention does not exist in a vacuum,¹⁵ and Amnesty International welcomes the fact that the Declaration to be adopted at this meeting recognizes that. However, states must demonstrate their political will by translating this into action, and interpret and implement their obligations under the Refugee Convention with the utmost good faith. The purpose, spirit and the letter of the Refugee Convention demand that.

KEYWORDS: REFUGEES1 / HUMAN RIGHTS INSTRUMENTS1 / UNHCR / INTERNATIONAL MEETINGS

¹⁵ For a thorough analysis of this, see the *NGO Background paper on the Refugee and Migration Interface presented to the Global Consultations on International Protection*, Geneva 28-29 June 2001.