

# Some Thoughts on the Ethical Dimensions of the Project to Reformulate International Refugee Law

John Haley

fective integration of the returning refugees; the relationships between refugee-specific development assistance and general development assistance, specifically, how to avoid developed states simply reallocating existing funds to refugee-generating states, effectively penalizing those governments which do not produce refugees; and a reasonably clear definition of those kinds of development assistance which should most logically be funded in order to achieve the baseline objective of assisting the reintegration of refugees.

In the balance of this edition of *Refuge*, we extract portions of the analysis offered by each of the Studies in Action, the key questions raised by those invited to discuss this research, and the conclusions arrived at both in the Workshops devoted to each of the five "building blocks" and in plenary session. The Studies in Action have been substantially abbreviated for this edition and therefore do not capture the full scope of the authors' work. Anyone interested in exploring the ideas more fully or in using these papers as reference materials should consult the originals. Full versions of the papers will be available in published form in mid-1996. The papers in their entirety offer a comprehensive exploration of the critical elements involved in reform and provoke meaningful debate about some of the fundamental concepts involved in protecting refugees. Anyone interested in reading the full versions is encouraged to consult the information at the end of this edition.

What is presented here is a work-in-progress. Some of the questions and concerns remain to be answered. The research is ongoing, and we welcome the participation of readers in our work. As we now move to the next phase of the project, we are seeking broad consultation. Please consider becoming involved. Again, details are provided at the end of this edition. We are extremely grateful to all those who have worked with us to-date, and look forward to benefitting from the advice of new participants in this Project. ■

James C. Hathaway *Guest Editor*

The Reformulation Project was initiated from the conviction that the present system for the protection of refugees is seriously flawed. These flaws can affect those seeking protection. They can also affect those providing protection. All of these perceived flaws have a moral/ethical dimension.

Access to the system by those in need has always been a matter of moral concern. This concern has grown as various nation-states have placed more and more barriers to access, either unilaterally or conjointly with other states. This includes the need to cross an international border, into an-

is morally and ethically wrong, especially when the results may well have life and death implications.

Still another example of a flaw in the present system is that countries of the North spend an enormous amount of money on their own particular determination processes. This provides protection to only a small minority of the world's refugee population. Over 80 percent of the world's refugees remain in the South. Their protection needs are primarily met by the UNHCR, operating on a budget which is one-quarter that spent on refugee determination in the North.

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other state, in order to be eligible for refugee status. Recently, states have made increasing use of deliberate strategies to interdict the flow of refugees, thus seriously inhibiting the ability of those in flight to seek protection from the international community.

A second flaw in the current system is that success rates of claimants are widely divergent. Those coming from similar situations should experience largely similar results. After all, the various countries which are parties to the Convention are using the same definition. But this is not the case. The definition is not applied in a uniform manner. The differences can be extreme. To subject refugee claimants to an uneven application of the definition

Several other limitations in the current system have an impact upon those seeking protection. There has been a growing recognition that the current definition fails to protect claimants who are genuinely fearful of serious harm, but who cannot establish that they are at differential risk because of their civil or political status—the core of the present definition. Regional agreements in Africa and the Americas have recognized this and extended protection on a broader basis. The conceptual narrowness of the definition needs to be addressed if protection is going to be effectively and equitably available to all those in need.

There is a conundrum in the present system. The claim for protection may be favourably determined on a group basis when it can be established that the claimant is a member of a group that is at risk. However, thereafter, that group-linkage is largely ignored. The

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communitarian aspect of refugee life is generally dismissed and often actively discouraged during protection and resettlement. The refugee's right and need to freely associate with members of his or her community is violated and overlooked.

Some of the flaws in the present system are experienced by countries of asylum. Perhaps most notably, there is no operationalized system of responsibility and burden sharing. Each country is responsible for its own determination system and providing

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protection to those refugees who enter their territory. For countries too impoverished to meet even the most basic needs of a refugee population, the UNHCR has undertaken to meet these needs. But the financing of the UNHCR is uncertain at best, meaning that the conditions in which refugee populations are required to live are often woefully inadequate. There is no consistent and coherent means of sharing the operational burdens that are part and parcel of refugee protection.

Against this backdrop, it is clear that a project which seeks to reformulate the international system for refugee protection is a noble endeavour. It will succeed only when the politicians see that somehow this new system is in their own interests. It will also be important to satisfy the dreamers, the visionaries, and the passionate advocates for justice and human rights. It is important to make it clear that the moral and ethical dimensions of the protection of refugees have been considered at every step. ■

*Excerpts from the Five Studies in Action:*

## I. International Administration

Kathleen Newland and Galina Vitkovskaia

*The authors were asked to consider the best means for international administration of the proposed reformed system of international refugee protection. They suggest that the UNHCR, in its present form, would not be able to administer the proposed system. They explore the possible shape of a successor organization, perhaps a revamped UNHCR, with secured levels of funding, a greater vesting of authority in regional bodies and an enhanced role for non-state actors, which would actively engage in refugee determination and allocation of responsibility for temporary protection among states. This is a substantially abbreviated version of the authors' original work. Please refer to the notice at the end of this section if you are interested in obtaining a full copy of the paper, which is expected to be published in mid-1996.*

Neither states, nor refugees, nor the institutions that mediate between them can be wholly satisfied with the current system of international protection. It is arbitrary, expensive and uncertain in outcome. Its recent history has been one of *ad hoc* responses, some effective and some not, to a rapidly growing and changing set of demands. After forty-five years of experimentation, it is time to reassess the adequacy of the legal and institutional framework of international protection.

That a new system of refugee law should be internationally administered is one of the key operational concepts of the Reformulation Project, which proposes a central International

Supervisory Authority to oversee the identification and protection of refugees. The three principal characteristics of the Authority are: 1) it would facilitate the operation and implementation of a new regime centered on human rights principles and operationally based on temporary protection rather than permanent asylum, 2) the diverse interests of the various major stakeholders in refugee issues would be represented (including states, refugee communities and non-governmental organizations active in refugee affairs), and 3) a degree of equality in participation would allow each of the major actors to safeguard its interests in the system. The Authority would operate within a more general framework of respect for national and community values, consistency with the norms of international human rights law, and effective international burden sharing.

The Reformulation Project's goal of a universally accessible legal regime that offers a consistent degree of protection to refugees everywhere argues for a central (although not necessarily centralized) international refugee agency. An international refugee agency does, of course, exist, in the form of UNHCR. Should this be the agency to take on the administration of a reformulated system of refugee law? UNHCR in its present form has significant weaknesses that impede its functioning, many of which spring from the fiction that it is a temporary body. This is reflected in its financing (voluntary contributions), structure (not fully articulated below the level of High Commissioner and Executive Committee, and dependent on renewal of its mandate every five years), and culture (emergency and short-term oriented). Here we propose moving towards a

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