

**THE INTERNATIONAL SYSTEM
PROTECTING REFUGEES AND PERSONS IN
REFUGEE LIKE SITUATIONS
AND THE ROLE OF UNHCR**

*Oldrich Andrysek**

* Head of Liaison Office, UNHCR Chisinau, Republic of Moldova. The opinions presented are those of the author and not necessarily those of UNHCR.

* Awaiting publication in “*Republique de Moldova. Droits et Libertes*”, Law Center of Advocates, Chisinau, 1998 on the occasion of the 50th Anniversary of the UDHR, sponsored by UNHCR, LO Chisinau.

1. INTRODUCTION

Given the specificity of the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR) this paper will attempt to shed some light on the purpose and relevance of the international protection system and on the obligations incumbent on a State committed to the rule of law. Contemporary refugee law, a part of human rights law, is essentially founded on the presumption that everyone in the jurisdiction of a State is endowed with inalienable human rights and that the authorities have specific obligations derived from human rights standards. UNHCR, the UN agency tasked with providing protection to refugees - and, in some cases, to returnees and/or internally displaced persons - has a global mandate to ensure that the human rights of its beneficiaries are upheld in accordance with the international obligations of States hosting them. The key provision of contemporary international refugee law is the principle of *non-refoulement* that obliges a State “...not to expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened...”¹

Enforcing human rights standards has never been a simple task. While the last decade of the 20th century has allowed many nations to escape totalitarian rule, aspirations of a more just future and economic prosperity are more elusive. The transition to market economies is not straightforward and exacts a painful toll. Entire regions are susceptible to tensions that in some instances lead to turmoil and massive population displacements, exacerbating further contemporary irregular migratory pressures. As has been observed, in contrast to the *status quo* of the past, our turbulent present poses enormous challenges to democratically elected Governments and directly threatens peace and stability. The situation is particularly complex in the field of asylum and numerous difficult questions beg attention and compete with other pressing priorities. Governments inundated with problems wonder how given all the pressing and immediate needs, can they be expected to meet additional obligations, be they legal or ethical. What can be done when resources are either already overstretched or in some cases, simply unavailable? Can human rights standards be set aside, at least temporarily?

The field of asylum has always generated more questions than answers. Even established Democracies with considerable economic muscle and with a firm commitment to the rule of law struggle with the dilemmas posed by the obligations incumbent on them. If not in spirit, definitely the letter of international law has evolved since the drafters of the Universal Declaration of Human Rights formulated Article 14 which states that “*Everyone has the right to seek and to enjoy in other countries asylum from persecution*”. In spite of established standards and goals set by the international community, the reality is that for centuries countless millions have either opted to flee or were deliberately up-rooted from their native environments. The fortunate ones who manage to escape rely on the hospitality of others, often arriving with few possessions other than their dignity. It is obvious that being denied asylum can have irreversible consequences for the individual but we should also recall how much our world would have lost if such eminent personalities as are Sigmund Freud or Albert Einstein were denied the right to asylum.

Even a cursory review of human history reveals that persecution and conflict have been the prime causes of flight. At the same time human nature tends to awaken an admirable capacity to find safety, defying obstacles placed in its way. The author would also like to make a point that the cumulative time and resources “humanity” dedicated to perfecting cruelty, arbitrariness and the rule of the strongest is thousandfold longer than the relatively recent period characterised by

¹ There is a growing body of opinion that this rule has entered customary international law. See Article 33(1) of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto (1951 Convention). In force 22 April 1954: 189 UNTS No. 2545; for the 1967 Protocol see 606 UNTS No. 8791. At 6 May 1998, 136 States were party to the 1951 Convention and/or the 1967 Protocol.

a concern for human rights. Even shorter is the actual period in which States generally accept, at least rhetorically, that human rights are not a purely an internal affair, that even a "Sovereign" power is no longer "absolutely free" to treat persons in its jurisdiction arbitrarily. In the light of these developments, enlightened elements of the international community have managed to develop an impressive array of human rights standards that today protect both individual and group rights.

It is perhaps also useful to recall that providing "a safe haven", or a "sanctuary", is no recent phenomenon and that history furnishes us with many examples of *asylum*.² The Greek word *Asylon* literally means "not subject to seizure" and the fact that it has acquired this meaning in so many languages is proof of its widespread application. In antiquity, Oedipus, the hero of Greek mythology, escaped persecution by seeking protection/asylum from his own family with King Theseus of Athens.³ Turning to the Old Testament we will find that the People of Israel were required to found six cities, which would provide protection to innocent victims of persecution. Indeed, the Hebrew faith frequently alludes to the rewards for providing hospitality:

"Do not ill-treat or oppress a foreigner: you know how it feels to be a foreigner because you were foreigners in Egypt".⁴

Christianity stresses that Christ was a foreigner and the Holy family, in order to save the child's life, fled from King Herod's reach to Egypt. Jesus is in fact associated more with Nazareth where his family sought refuge (integrated in modern parlance), than with Bethlehem, his birth place. Also Mohammed sought refuge twice, once in Abyssinia, the second time in Medina.

One need not, however, look only towards religion for examples. Plato in "*The Laws*" elaborates on the need to protect foreigners from an ethical perspective. He argues that a foreigner is more vulnerable simply by virtue of his isolation from his family and people. In moral terms a foreigner's increased needs in terms of protection therefore provide a solid ethical basis for asylum ("positive discrimination"). Tracing the origins of the concept of asylum in the legal sphere reveals that today's rules are largely based on the teaching of H. Grotius, one of the founding fathers of international law.

2. THE ESSENTIAL ELEMENTS OF ASYLUM

To opt to leave one's native country and risk the uncertainty of exile is no simple matter. Neither is such a decision really a question of free choice. Indeed, in order to become a "refugee" two elementary conditions need to be met:

- a) **the possibility to leave** ⁵

and, most importantly,

- b) **the possibility of finding safety in another country**⁶.

² The Encyclopedia of Public International Law, Vol. VIII. (pp. 41-46), distinguishes between the concepts of *diplomatic* and *territorial* asylum. The latter is of concern to this paper.

³ Similar examples can be found in most civilizations. The Aztecs considered certain places as sanctuaries - inviolable, protecting those who fled to them.

⁴ Exodus 23 v. 9.

⁵ The right to leave one's country as laid down in Article 13(2) of the Universal Declaration of Human Rights (UDHR), Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 2(2) of Protocol No. 4 to the European Convention on Human Rights and Fundamental Freedoms.

The latter depends on the willingness of the Government concerned to honour the concept of asylum. While the granting of asylum should be motivated by humanitarian considerations and ought not be considered a hostile act, in reality it is not always the case. Moreover, providing asylum requires tolerance of the indigenous population, it presumes the fundamental generosity to allow an asylum-seeker/refugee to re-start, at least temporarily, a new life. Given the costs involved, a Government, especially in hard economic times, may also view the provision of asylum rather as a burden than as an act of international responsibility sharing. Economic considerations, especially when there is no mechanism, legal or practical, the authorities stand little chance of coping with “uninvited guests”.

Although from a historical perspective the phenomenon of asylum is not new, the challenges posed by influxes of refugees and the need for their protection has been tackled and systematically regulated only recently. Significantly, in contrast to the past when aliens residing on the territory of any State were as a rule subject to less favourable treatment than indigenous populations (citizens), today the principle of non-discrimination, save a few exceptional circumstances (*e.g* the right to vote or to be drafted into the military), underpins contemporary legal thinking. The protection of refugees has become a matter of international concern and efforts to restore peace are invariably inter-twinned with arrangements to restore the right of those who have fled, or who were driven out, to return to their homes. Present day concepts and mechanisms have taken decades to evolve, at first under the auspices of the League of Nations, and later, within the framework of the United Nations or regional arrangements.

3. ASYLUM UNDER THE LEAGUE OF NATIONS

Actually, it was the Bolshevik Revolution of 1917 and the ensuing civil war, which prompted sufficient international concern to generated concerted action to deal with an unprecedented mass of refugees and displaced persons that headed towards Western Europe. The League of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, true to their humanitarian principles, appealed to the international community to intervene. The League of Nations, the predecessor of the United Nations, responded and nominated Dr. Fridtjof Nansen as the first High Commissioner for Refugees.

Typical for the first international refugee systems, *i.e.* those devised in the inter-war period, was that they were not comprehensive and lacked universality. Arrangements were limited either to particular events or to specific categories of persons. So, for example, from 1933 the international community assisted non-Arian Germans and persons placed under the mandate of the first High Commissioner. They received the status of privileged aliens.⁷

The system evolved and in 1943 the United Nations Relief and Rehabilitation Administration (UNRRA) was established. At the same time the San Francisco Conference (which drafted the UN Charter) considered the usefulness of creating a new international authority responsible for the refugee problem.

In 1946 the first session of the United Nations General Assembly adopted Resolution A/45 that laid foundations for UN activities for refugees. It mandated the Economic and Social Council

⁶ Article 14(1) of the 1948 UDHR recognizes the right to seek and enjoy asylum from persecution, however, the drafters of the 1966 ICCPR evaded the issue, leaving it thus outside the scope of positive law. The right to enter a foreign country, however, is not absolute.

⁷ See also arrangements of 12 May 1926 concerning Russian refugees or of 30 June 1928 concerning Assyrian refugees; the Conventions of 28 October 1933 concerning Spanish refugees; of 10 February 1938 concerning German refugees.

to establish a specialized agency of the UN - the International Refugee Organization (IRO) - the predecessor of the United Nations High Commissioner for Refugees (UNHCR).

4. ASYLUM AFTER THE SECOND WORLD WAR

The atrocities perpetrated by National Socialists, the cataclysm of the Second World War (including thirty million displaced persons) and the massive flight resulting from decisions taken in Yalta and Potsdam that separated Europe into East and West, generated sufficient consensus amongst the democracies of the world to seek a structured solution to the problem. In other words, civilization matured to the point of creating a mechanism to alleviate the consequences of becoming a refugee. It is noteworthy that several decades later, we can witness to efforts of the international community to venture yet further - seriously exploring the concept of humanitarian intervention, addressing the root causes and linking development aid and peace-making to the refugee issue. Not surprisingly, the goal to adequately prevent the phenomenon completely is infinitely more elusive..⁸

5. ROLE OF UNHCR AND ITS LEGAL BASIS

The United Nations General Assembly created UNHCR on 14 December 1950. The *Statute of the Office of the United Nations High Commissioner for Refugees (Statute)* was adopted by the GA Resolution 428(V) and the Office commenced operations on 1 January 1951.

The *Statute* is a constitutive deed giving the Organization a Mandate and a special role with regard to refugees. In Chapter I it stipulates that, under the auspices of the United Nations, the Office shall assume two basic functions:

- a) provide international protection;
- b) seek permanent solutions.

It also underlines that the work of the High Commissioner is entirely non-political, humanitarian and social in character. The UNHCR *Statute* also defined the term refugee (see below) and constitutes a legal basis of international protection in countries which have not ratified the Convention or which do so with limitations (so called "mandate refugees" as opposed to "Convention refugees", *i.e.* those recognized by States).

6.1. 1951 CONVENTION

The 1951 Convention was adopted by a Conference of Plenipotentiaries on 28 July 1951. Its Preamble builds on the Charter of the United Nations and the Universal Declaration of Human Rights and although limited in time (*ratione temporis*) and sometimes in scope (*ratione loci*), it affirmed that UNHCR possesses the legal authority to deal with the refugee issue on behalf of and in cooperation with the international community. In Europe, all but a handful of States, including Moldova, have acceded to the *1951 Convention* and/or *1967 Protocol*. Only one country maintains the geographical reservation (Turkey).

The key elements of the 1951 Convention are:

- a) a universally applicable definition of the term "refugee":

⁸ See for example the "Declaration of minimum humanitarian standards", UN Doc. E/CN.4/Sub.2/1991/55. The Moscow CSCE meeting had discussed the question whether national sovereignty should be set aside in favour of human rights.

"... a person who (...) owing to a well-founded fear of persecution 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..."

- b) a definition of the legal status of refugees (certain civil, economic, social and cultural rights) and arrangements with regard to expulsion or *non-refoulement* (Article 32 and 33.1); the principle of "non-refoulement" applies also to asylum-seekers as it includes the prohibition of rejecting a person at a frontier and permits no derogation (Article 42);⁹
- c) grounds for co-operation between States and the Office of the High Commissioner (Article 35.1).

It should be noted that unlike the definition contained in the *Statute*, the competence *ratione personae* in the *1951 Convention* is limited by a dateline and allows for a geographic reservation. Moreover, the *Statute* did not include the words "membership of a particular social group". Exclusion and cessation clauses limit the application of the definition to certain situations.

Equally noteworthy is that the international community had been overtly optimistic. It had hoped that refugee situations would be of a temporary nature by circumscribing the definition "... by events occurring before 1 January 1951". By linking the issue to the immediate aftermath of the Second World War, UNHCR was initially endowed only with a three-year mandate. When the need for the Organization failed to subside, it was extended for an additional five years, a decision duplicated since.

As the *1951 Convention* failed to address the refugee issue exhaustively, the General Assembly on several occasions extended the High Commissioner's competence to act on behalf of refugees not falling under the statutory definition (e.g. internally displaced persons).¹⁰ Thus, persons who find themselves in "a refugee like situation" fall into the broader competence of the Office, even though they may not have an individualised "*well-founded fear of persecution*" in the strict sense of the word (Hungarians in 1956 or some of the Yugoslavs or Bosnians in the nineties who were granted "temporary protection").

In 1957 the General Assembly called upon the Economic and Social Council (ECOSOC) to create an Executive Committee (EXCOM) of the UNHCR Programme. To date EXCOM has adopted numerous *Conclusions and decisions on international protection issues*.¹¹

5.2 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

The 1967 Protocol was signed in New York on 31 January 1967 and has been ratified by practically all States which adhered to the *1951 Convention*. The Preamble of the *1967 Protocol* states "... that equal status should be enjoyed by all refugees (...) irrespective of the dateline 1 January 1951".

⁹ The 1951 Convention does not provide for assistance to refugees. The *Statute*, however, envisages "Searching for lasting solutions".

¹⁰ The High Commissioner for Refugees was, for example, requested by the Secretary-General to consider lending her good offices to bring relief to internally displaced persons (IDP's) affected by the Yugoslav conflict.

¹¹ Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme, Geneva. Adopted by consensus they are not legally binding, but carry considerable moral weight. Over the years they have acquired significance by influencing State practice and contributing to the development of refugee law.

6. OTHER SOURCES OF REFUGEE LAW

Most observers would agree that human rights standard setting has been by and large completed¹² and that the list of instruments with a bearing on refugee protection is impressive. Implementation and supervision are the areas both Governments and human rights activists concentrate on today. It is noteworthy in this respect that the Republic of Moldova in its short history has taken to sign and ratify many human rights instruments and that it was one of the first CIS States to accede to the European Convention on Human Rights. While it would be outside the scope of this paper to go into detail, the most relevant international standards are:

- a) the International Covenant on Civil and Political Rights (ICCPR)¹³ and the individual complaints procedure under its Optional Protocol¹⁴
- b) the procedure foreseen under Article 22 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT)¹⁵
- c) the standards established by the Convention of the Rights of the Child¹⁶
- d) the European Convention on Human Rights and Fundamental Freedoms (ECHR)¹⁷

An important part of this set of mechanisms is also the jurisprudence relevant to persons seeking asylum and protection from *refoulement*.¹⁸

6.1 AFRICAN REFUGEE CONVENTION

The most important needs generated by refugees in Africa led the Organisation of African Unity (OAU) to adopt on 10 September 1969 in Addis Ababa a Convention promoted by UNHCR, which addresses specific concerns to this region. It has been ratified by some 43 countries representing 80% of the continent. The OAU Convention knows no dateline or geographical reservation. It also expanded the concept of a refugee by incorporating a broadening clause stipulating that the term:

"... shall apply also to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality ..."

In this respect the OAU Convention does not refer to the subjective element of fear harboured by an individual, but rather to objective conditions (armed conflict or other man made disasters). Thus, in addition to individual persecution, also events of a general nature, which involve the whole community, become relevant.¹⁹

6.2 THE BANGKOK PRINCIPLES

12 *E.g.*: UN Charter Preamble Article 1, UDHR (1948), ICCPR (1966), IESCR (1966), 1st & 2nd Optional Protocols to ICCPR, CERD (1965), CEDAW (1979), CAT (1984), CR C (1990) and the Convention on Migrant Workers (not yet in force).

13 Entered into force on 23 March 1976. Adopted by the General Assembly of the United Nations in 1966. As of 6 May 1998 the number of States Parties was 140.

14 Entered into force on 23 March 1976. As of 6 May 1998 the number of States Parties was 93.

15 Entered into force 26 June 1987. Adopted on 10 December 1984 by the General Assembly of the United Nations. As of 6 May 1998 the number of State Parties was 105.

16 Entered into force 20 September 1990. Adopted on 20 November 1989 by UNGA Res. 44/125. As of 6 May 1998 the number of State parties was 191.

17 Entered into force 3 September 1953.

18 See O. Andrysek, Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures, IJRL, Vol. 9, No. 3, 1997.

19 The principle of *non-refoulement* is contained in Article II and according to Article V repatriation must be voluntary ("*...no refugee shall be repatriated against his will*").

In 1966 the African-Asian Consultative Committee, assisted by the UNHCR, adopted the *Principles Concerning Treatment of Refugees*. The refugee definition it employs does not contain any dateline and includes "colour" as an additional criterium for fear of persecution.

6.3 THE 1984 CARTAGENA DECLARATION ON REFUGEES

The *Cartagena Declaration* was adopted on 22 November 1984 by a Conference held under the auspices of UNHCR to examine the specific problems of the refugee situation in Central America.

The Declaration proposes an extension of the *1951 Convention* definition of a refugee to include:

*"... persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human right or other circumstances which have seriously disturbed public order."*²⁰

Notably, much of what was included into the *Cartagena Declaration* has found its way into domestic legislation of the countries of the region.

7. THE ROLE OF THE STATE

To describe the role of the State with regard to securing human rights would in itself demand a dissertation, however, in in interest of brevity, for a State to discharge its duties under international reefugee law, which includes preventing human rights violations, national authorities need to commit themselves at least to the following:

- a) have the political will to enter into and fulfill obligations in good faith;
- b) establish refugee specific national infrastructures (responsible Central authority adequate legislation, status determination procedures, an independent judiciary and the strengthening of democratic institutions as such);
- c) ensure that persons who seek refugee status are entitled to due process and to enjoy all rights provided for in international instruments without discrimination in quasi judicial procedures, *e.g.* an asylum-seeker has the right to have his application registered and adjudicated on; asylum-seekers (aliens claiming surrogate international protection) normally possess all the rights accorded to citizens (with the exception of those reserved for citizens - *e.g.* the right to vote).

Finally, the introduction and compliance with human rights standards is today also closely followed from another corner. Non-governmental organizations have an important role to play in assisting Governments to meet their obligations.

8. CONCLUSION

The concept of asylum transgresses time and political boundaries. Although the concept was distorted and the criteria were highly discriminatory, the institution found its application even under Soviet rule when many foreign nationals who could have been considered as refugees pusuant to international standards were provided with protection. It is, however, only in this century, that there has been a conscious effort to codify binding rules which would be applicable to all without discrimination. The creation of UNHCR, a "semi-permanent"

²⁰ With regard to "non-refoulement" Conclusion No. 5 of the Cartagena Declaration states that it "should be acknowledged and observed as a rule of *jus cogens*".

specialised agency responsible and accountable to the international community, with a duty to extend protection and to seek durable solutions, is, in view of this author, not solely a reflection of increased sensitivity to moral and ethical values. It also reflects the desire of States to ensure the dual and closely inter-connected goals of protecting the safety of dignity of all human beings and ensuring thereby the broader objective of maintaining peace and stability.

In this regard, pursuant to Article 35 of the 1951 Convention (“...*States undertake to cooperate with the Office of the UNHCR ...*”), the Office is committed to share knowhow and to implement concrete programmes designed to assist the Governments, including the Government of the Republic of Moldova to fully assume the duties that emanate from its international obligations. Achieving this objective will certainly not be simple and will require in addition to political commitment, much work on amending existing and drafting new legislation as well as establishing specialised structures. Attaining the goal will certainly also require the involvement of civil society structures and as much as the ultimate objective may seem unattainable, UNHCR stands ready to assist in the process.

As mentioned earlier the Republic of Moldova has taken bold steps on the path to democracy and has established an admirable record when one looks at the speed with which it separated powers, reformed the judiciary and acceded to key international treaties codifying human rights standards. While it remains true that much remains to be done in all sectors of social and economic life, and although the unresolved problem of uncontrolled areas still awaits political solutions, in the legal sphere, the Constitutional guarantees, notably Article 4, which gives international obligations higher force than domestic legislation, demonstrate a resolute commitment to observe international norms.

In practical terms, although many of the immediate consequences of the 1992 conflict have been addressed, substantial numbers of internally displaced persons and those who sought asylum abroad (refugees) still await the possibility to return to their homes or just struggle to relaunch their lives. The Office of the United Nations High Commissioner for Refugees has not remained indifferent to such outstanding problems and our programmes, executed in close coordination with the Moldovan Government, remain focussed on assisting those who are most critically affected. At the same time, UNHCR in Moldova has since 1997 launched a number of initiatives designed to help the Government to tackle the broader, but no less immediate problems of providing international protection to persons arriving in Moldova fleeing ongoing persecution in less fortunate parts of the world.

Although the rule of law and compliance with international obligations are the most effective guarantees against violations of human rights, avoiding established rules, especially when ignoring protection needs, not only violates the rights of an individual, but also implies shifting the burden to neighboring States and ultimately undermines the values that are the foundation of democratic societies. The infrastructure and procedures that need to be created by any State at the municipal level should be continuously supplemented by efforts designed to nurture a human rights culture, the most effective guarantee against violations of human rights.