After the Cold War:
asylum and the refugee concept move on

by Guy S Goodwin-Gill

The international protection of refugees, considered the responsibility of the international community, has a long and distinguished history dating back to the first efforts of the League of Nations.

The 1951 Convention relating to the Status of Refugees, updated by the 1967 Protocol, was a step in the evolution of refugee protection. By comparison with earlier instruments, it provided for a broader, if still restricted, refugee definition and for a comprehensive standard of treatment, particularly for the settled or lawfully staying refugee. But, as its title implies, it was not and is not a comprehensive document. It did not deal with, and was not intended specifically to deal with, large-scale refugee movements, the question of asylum or admission to asylum, the details of international cooperation or the promotion of solutions other than those related to the status of the individual as a refugee.

By the early 1980s, although there were still grey areas, it had been established that:

- The refugee in international law included both the individual having a well-founded fear of persecution and a range of others having valid reasons for not being required to return to their country of origin.
- *Non-refoulement* encompassed both non-expulsion to persecution of those already within state territory as well as non-rejection at the frontier.
- International solidarity and cooperation were key fixtures in a regime directed towards protection and solutions.
- Procedures for the determination of refugee status were crucial.
- Refuge pending solution should be granted.
- Refugees had human rights.
- The protection of refugees was a universal principle.

In short, the international community had developed a regime with a strong legal content, premised upon a particularly strong conception of human worth and upon the individual's entitlement to respect for his or her dignity and integrity as a human being. In general, up until the mid 1980s the system worked reasonably well.

The ending of East-West tension has brought with it a move to re-examine obligations and institutional roles and possibilities. Where they were once content to react on the basis of obligation and expectation, states now commonly extend their reach, acting extra-territorially to prevent obligations ever being triggered. Duties, once freely assumed, are taken less seriously. The human rights dimensions to the movements of people are increasingly downplayed, while governments and international organisations have failed effectively to manage and control themselves, to respond coherently to large movements or to deal with the changing character of causes, to take decisions, to set strategic goals or to determine tactical means.

States no longer seem so willing to work towards standards for the common good.

The nature of some of the present predicaments can be illustrated by two competing models.

i) The security model

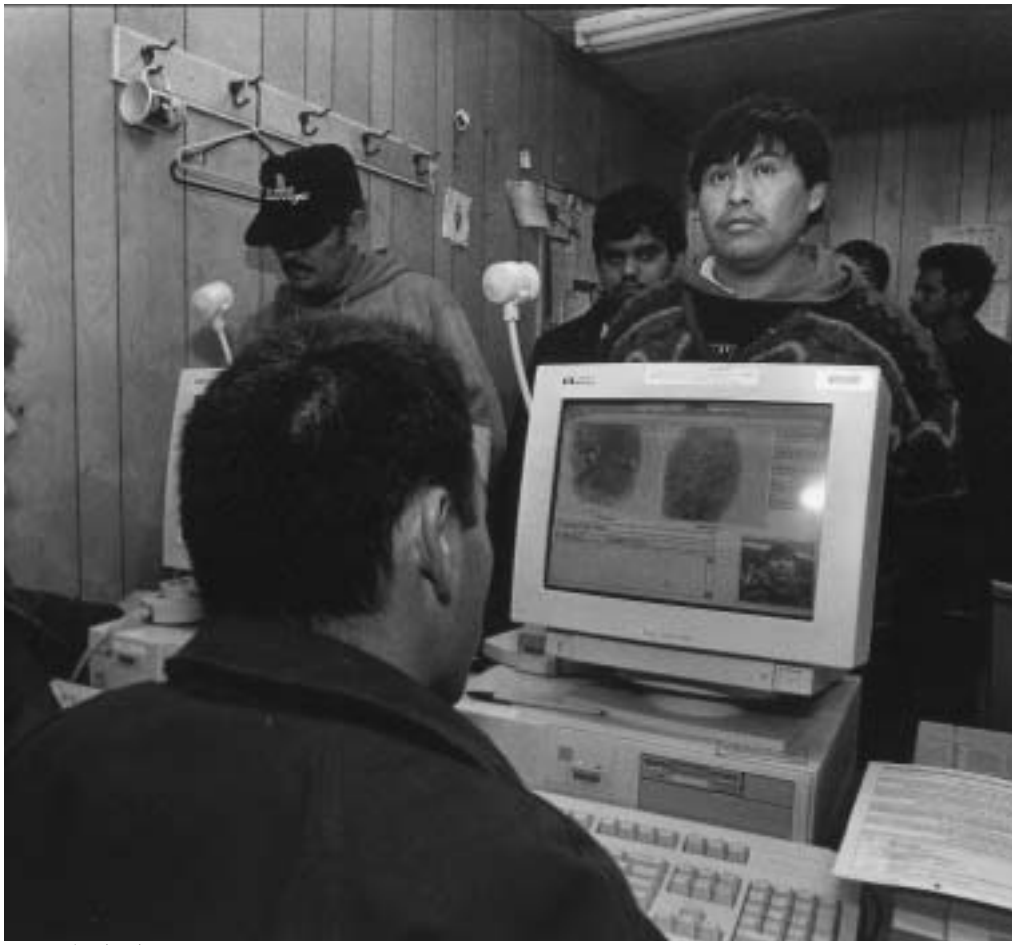
Premised upon ancient notions of sovereign rights, the security model sees, and reacts to, the phenomenon of refugee (and migratory) movements essentially with a view to control. Refugees, asylum seekers and migrants are perceived or represented as threats to national, regional and even international security. This characterisation is not neutral, is not or not inherently benign; rather it opens the door to ways of dealing with people in disregard of their dignity and worth as individuals.

Two related and often combined aspects to the statist/security model are apparent:
i) internal/sovereigntist and
ii) external/protectionist.

The internal aspect is illustrated, first, by control mechanisms directed at people moving or seeking to move – visas, carrier sanctions, restrictive immigration and refugee protection laws and policies, deterrence measures, such as detention, and greater or lesser denials of rights. It is generally accompanied by a certain rhetoric in public discourse, which serves to heighten a sense of national alarm, or claims to protect new and established communities, or raises the spectre of social tensions.

The external aspect to the security model looks outward; it is evident in foreign policies, in the conclusion of 'readmission agreements', in support for solutions by resolution in the Security Council, in support of interventions and in the more or less effective 'steering' of international, particularly UN, agencies ('preventive protection', regional protection and so forth).

In resolutions adopted under Chapter VII, the UN Security Council has linked



Panos Pictures/Clive Shirley

Mexico/US border

situations of internal disorder and resulting population displacement to threats to international peace and security.[1] And certainly it makes good sense to recognise, finally, that causes must be addressed politically and that this may indeed mean by way of enforcement action under Chapter VII. But it is only a small step to seeing refugees themselves as the threat and to putting their lives and well-being and security as individuals at serious risk. Not surprisingly, the individual rights model is widely seen as an essential counterweight.

ii) The individual rights model

In opposition to the security model stands the individual rights model. Drawing on a certain stream of state practice, a particularist reading of the 1951 Convention and, especially, human rights doctrine, it opposes the claims of the state premised on generalised and suspect powers. Instead, it demands that refugees, asylum seekers and migrants be considered as individuals, each potentially with a justifiable claim to protection, whether from persecution or in respect of other relevant human rights; and that each individual claim should be determined on its merits. The bases for this model are readily found. Even within the limited regional context governed by the European Convention on Human Rights, a considerable body of jurisprudence has already developed under articles 3, 8 and 14, clarifying the limits on the competence of the state to refuse admission, expel or remove an individual, where such action violates his or her human rights. Protection against and remedies for arbitrary and unlawful administrative action are woven into the tapestry of the rule of law. At the universal level, the 1966 International Covenant on Civil and Political Rights, the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 3 in particular) and the 1989 Convention on the Rights of the Child all extend the protection regime for individuals.

The refugee and asylum today

With this 'clash of cultures' in mind, and when thinking about where the refugee and asylum seeker stand today, it helps to recall what was not achieved, both before the end of the Cold War and since. The list of goals still to be attained is a forbidding one:

- fair, efficient and expeditious procedures for the determination of refugee status/entitlement to protection, including in situations involving large numbers
- regional and international capacity to prepare for sudden movements, to mediate and to intervene
- regional (and international) capacity to share responsibility in protection and solutions
- flexible policies and programmes, capable of moving between immediate protection, longer-term asylum and third country resettlement
- national and international institutional mechanisms competent to deal with and promote migration and migration management, from both ends
- integration of human rights doctrine into legislation, administration and policy making

Instead of looking to the future and strengthening capacity, more often than not the national and regional responses to refugee and other migratory movements have been reactive, narrowly focused on control, inhibition and deterrence, and grounded in insular sovereignties rather than international solidarity.

States no longer seem so willing to work towards standards for the common good. This is the present political reality. The challenge for law is to identify and comprehend the relevant areas of state concern, to come to terms with the problematic – whether it be Turkey's closing of the border in 1991, or UNHCR's own *refoulement* agreement with Tanzania, or 'perverse' interpretations of refugee criteria or the rules of state responsibility – and to work through the practice to develop rules more clearly compatible with the integrity and human worth of every refugee.

Despite decades of experience, few states have yet managed to marry compliance with international obligations to national procedures for protection. The determination of refugee status continues to play its part in the management of claims, and the following **general principles** will each require elaboration and translation into national systems, if the rule of law is to prevail:

- compliance with the 1951 Convention/1967 Protocol, including the refugee definition, *non-refoulement* and cooperation with UNHCR
- procedures to be regulated by law
- every application to be considered individually, objectively and impartially, by qualified and informed personnel
- refugee status determination to involve a 'shared responsibility' between decision maker and applicant (who should have an adequate opportunity to present his/her case)
- due process, including the opportunity to apply for refugee status/asylum at the border and the right to an interpreter, legal advice, access to UNHCR and a personal interview
- written, reasoned decisions
- appeal or independent review of negative decisions
- entitlement to remain pending decision
- recognition of status where the criteria are satisfied and of recognised refugees' presumptive entitlement to residence

If the rule of law is to prevail, the solutions proposed must be realistically attainable. For example, in situations of mass influx, other priorities may prevail and different considerations enter the picture; the emphasis on individual procedural rights may be replaced by a group or categories approach, provided however that the fundamental principles of protection, such as *non-refoulement*, are maintained. A groups or categories approach may also introduce other rights-based concerns, such as the standard of treatment to be accorded to the group, within a social and political context in which fundamental human rights continue to be protected. A considerable body of experience and research exists on temporary protection but still needs to be consolidated into an authoritative statement of international practice.

The role of the UN

The exponential growth in organisations dealing with refugees, both in overall numbers and unit size, has brought severe challenges of strategic management. Clarity of mandate and purpose has frequently yielded to the demands of emergency relief. In order to be effective, international organisations need both a clear understanding of mandate objectives and division of responsibilities for achieving particular goals. The current debate on responsibility for the protection of and assistance to the internally displaced is but one example of a range of complex and inter-connected issues.

For an organisation such as UNHCR, whose principal mandate is clear enough, the ineluctable consequence should be an internal ordering of functions such that the principles of international protection are integrated into policy and operations planning, both from the ground up and at the point of decision. Unfortunately, this has not been the case for some time. The consequences have often been disastrous.

A culture of protection is required

The challenges of organisation are not only internal, however. Within the UN system, the mutual recognition of others' generally complementary mandates is also required, as is acceptance of the responsibilities of cooperation. The 'lead agency' role may need to be rejected, precisely because the politics of resolution sully organisational first principles and compromise autonomy. Conflicts of interest will also need to be resisted, for example by reliance on third party input to country of origin assessments, both in refugee determination and the promotion of repatriation.

Structures alone are not enough to ensure either that goals will be achieved or that policies will be premised on primary directives. A culture of protection is required and, given the level of institutional changes over the past years, more than structural alteration may be called for.

There is a further, relatively unexplored dimension here that requires attention – accountability. Accountability is the duty to give an account of conduct in office, for actions taken or declined within the area of mandate responsibility. In the early decades of the UN, international agency accountability may have been satisfied by annual reporting to the General Assembly but the evolution of the international system in the last ten years has created other expectations. Accountability still translates somewhat imperfectly into the UN but successive evaluations – the Great Lakes, Rwanda, Kosovo – confirm that the activities of international organisations, even those specifically mandated to particular goals, can no longer be assumed to conform to organisational principle. The means to ensure that they do so must therefore be found.

Conclusions

The future of the refugee concept and the institution of asylum will depend not only on the will to protect and to abide by international legal obligations but also on the will to deal cooperatively with migration, involving issues still considered sovereign. A new framework for the better management of migration must be premised on the foundations of international human rights law, the essentials of which are obligations *erga omnes* (that is, international obligations owed to the international community as a whole), and much of which draws its authority from peremptory rules of international law. But it must also promote effective cooperation to these ends by institutionalising mechanisms whereby states are able to fulfil the obligations which, as states of origin, they owe towards their citizens. This is a matter both of individual rights and of responsibility in and towards the international community. While some attention has been given to the right of the refugee to return and to the obligation of the state to re-admit, far too little has been paid to those responsibilities in the everyday, unexceptional context of migration.

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1 Iraq: SC res. 688/1991; Somalia: SC res. 733/1992; SC res. 794/1992; Haiti: SC res. 841/1993; Rwanda: SC res. 929/1994; Kosovo: SC res. 1199/1998.