

Are the Policies of the Industrialised Countries Undermining the International Institution of Asylum and can its Humanitarian Principles be Upheld?

-A Western European Perspective.

During the last 15 years the increased incidence of Asylum seekers and de facto refugees has prompted European governments to respond with a barrage of interlocking and overlapping intergovernmental and European Union policies designed to deter and prevent access to Asylum [Bloch & Levy: 1999]. This has prompted the characterisation of “Fortress Europe” and even drawn comparison of the legislative and regulatory institutions created to stem refugee flows with those in South Africa, creating a system of Global Apartheid [Richmond: 1994]. The United Nations High Commissioner for Refugees (UNHCR) has been prompted to comment that the “*declining commitment to Asylum and growing interest in policies of confinement and containment is a retrograde development which flies in the face of international refugee law, human rights principles and humanitarian norms*” [UNHCR: 1997]. Although the provisions of the Convention are clearly being undermined and challenged, the principle of protection for those under threat of persecution has become philosophically and institutionally embedded in the Western European social conscience and political discourse. A focus on the core principles, aligned with Industrialised Countries strategic political and economic interests, may offer the route to protection of the institution of asylum.

In order to address this question the genesis of the 1951 Convention relating to the status of Refugees in its post World War 2 context, which determined the principles of protection and the characteristics of the UNHCR requires consideration. The application of the Convention by the Industrialised Countries and the contrasting experience of the Lesser Developed Countries in the period from 1950 to the 1970s needs examination before examining developments in the 1980s and 1990s and the policy responses of European Nations. Alternative policy options and prospects for the future will be outlined.

The Conception and Characteristics of the Convention and UNHCR Statute

The modern expression of Asylum through an international system for the protection of refugees was founded in a European context, from the appointment of a High Commissioner by the League of Nations in 1921, to the creation of the UNHCR and development of the Convention in 1951. All of the institutions created dealt with specific groups in Europe (with the exception of the Palestinians in the Middle East) and, by inference or explicitly, their activities were limited in time [Ferris: 1993]. At the conference for the Convention 17 out of 24 States were from Western Europe and the definitions and institutions were created around the post-war needs of that continent. Those needs extended not only to the uprooted peoples to whom some obligation was felt, but also to the States of Europe so that the rules and institutions were as much about restricting rights and containing the problems posed to states as humanitarian concerns. There was no interest therefore, in creating a powerful, independent agency. Its life was time limited, funding minimal and mandate restricted to existing refugees in Europe. The generation of 15 million refugees by the partition of India was ignored [Ferris: 1993].

Within this European context the post-war refugee system was already intensely politicised. The International Refugee Organisation, the creation of which Russia opposed, had an ostensibly humanitarian justification to resettle Refugees from the Baltic and Eastern Europe, but a political aim in helping them flee communism [Zolberg et al: 1989]. Thus the humanitarian instincts of the international community and moral compulsion toward Asylum, grounded in western religious

protection over the centuries, were underpinned by a deep seated conviction that the competing ideological system was evil [Alston: 1995]. The humanitarian basis for the new system was therefore compromised in its inception and in practice this has meant that state responses to refugees have often been based on political, ethnic and ideological sympathies and considerations of national and international security [Escalona & Black: 1995]. Whilst the USA as the dominant global political force has most explicitly used the system for political ends [Ferris: 1993] other countries have followed suit: Pakistan assisting Afghans but not Iranians, India sheltering Tamils but not Afghans, Honduras helping Nicaraguans but not Salvadorans [Zolberg et al: 1989].

This corruption of the humanitarian essence of the international refugee regime also reinforces the exilic nature of the system as practiced by the western powers, leading to the predominance of resettlement by them during the cold war period, in contrast with the experience of the Less Developed Countries (LDCs). The Convention itself does not refer to voluntary repatriation and resettlement is the only solution contemplated [Coles: 1989]. Refugees would only cease to gain protection if the circumstances in the country of origin changed, and this could not happen if the source of persecution was perceived as the communist system itself. Immigration policy is to serve the interests of the State, by admitting certain categories and excluding others, and Refugee policy arises from legal and moral obligations as members of the international community [Suhkre & Zolberg: 1999]. However, the exilic bias in the system draws the treatment of Refugees into the broader question of migration, intersecting with domestic policy questions of employment, inter-ethnic relations, cultural identity and welfare support [Bernstein & Weiner: 1999].

As a result of the above the West has dealt with refugees both as a foreign policy/security issue [Ferris: 1993] and as a domestic policy issue, with the parameters of refugee migration historically affected by the current labour market [Bloch & Levy: 1999]. Their ability to do so has been facilitated by the scope for discretionary interpretation and action built into the system, which allows for significant differences in national legislation on how asylum is to be requested, the length of process, grounds for appeal, the principles of safe countries of origin and first country of asylum, manifestly unfounded claims, accelerated procedures and many other areas [Eurostat: 1994]. The status of Asylum Seekers is not dealt with in the Convention so that whilst the Universal Declaration on Human Rights provided that everyone shall have the right to seek and enjoy, in other countries, asylum from persecution, there is no corresponding obligation on states to grant such asylum, in deference to the territorial sovereignty of states. Although in practice, and through the principle recommended in the 1967 Declaration on Territorial Asylum, the concept of Non-refoulement is extended to rejection at the frontier, derogation from this is entertained and the 1977 Conference on Territorial Asylum requires only that states use their endeavors in this respect [Goodwin-Gill: 1985]. The scope for flexible application of the principle has enabled a wide range of responses such as that of the USA in extending the grant of Asylum to persons still resident in hostile (communist) countries but also interdicting, on the high seas, refugees from a friendly regime such as Haiti.

Developed within the European post-war context the UNHCR statute affirms its role will relate to groups and categories of persons, but the application of the convention is individualistic, providing protection for individual Activists and Targets, but not the mass of Victims caught in the cross-fire of conflict [Zolberg et al: 1989]. The time and geographic limitations of the Convention were removed by the 1967 Bellagio Protocol as part of the western powers strategy for 3rd world stability to stave off the advance of communism [Bernstein & Weiner: 1999]. However the Convention's lack of application to their experience of mass refugee movements of victims prompted the inclusion of this concept in the Organisation of African Unity Convention in 1969. This also included explicit provision of non-rejection at the frontier and the development of the concept of temporary residence, so that such mass refugee populations were essentially protected guests in the country of Asylum. Whilst there is a similar approach in the Cartagena Declaration, elsewhere it is the application of Non-refoulement through time that emphasises the international community's

responsibility to find solutions to large-scale problems [Goodwin-Gill: 1985] but without the rigour of a specific obligation. This has been authorised through UNHCR mandate extensions to include internationally displaced persons and the 1972 power to assist in those humanitarian endeavours of the United Nations for which the UNHCR has particular experience and expertise which would later include Internally Displaced Persons [Bernstein & Weiner: 1999].

Whilst the Eurocentric nature of the Convention and UNHCR has been removed in the geographical sense, it lives on in the organisational framework and principles. This facilitates policy control through the funding arrangements, the development of international policy and practice on an ad-hoc basis to suit funders' interests and the adoption of national refugee policies filtered through foreign and domestic policy, security and economic considerations. Nevertheless, the right of asylum has become a norm of civilised behaviour in Europe, expressly included in the constitutions of various European countries such as Italy, France, Germany and Spain [Escalona & Black: 1995] and the concept of absolute territorial sovereignty itself has been qualified by the rights of refugees [Adelman: 1988].

The Experience from the 1950s to the 1970s

Three categories of refugees seeking asylum in Western Europe can be identified in terms of their origin [Black: 1993]; those from Eastern Europe and the USSR (and its successor nations), quota refugees such as those from South East Asia or Chile and those arriving spontaneously by air or sea from Africa or Asia. After the initial flow from East to West Europe, the “Iron Curtain” made it virtually impossible to reach the west until restrictions eased in the 1980s. Only a small fraction of mass Refugee movements affected Europe such as those from Chile in 1973, Ugandan Asians in 1972 or the Vietnamese from 1975 onwards [Joly: 1996] and few individual refugees reached the north from the south [Suhkre & Zolberg: 1999]. Industrialised country policies tended to be about choosing and screening out individual applications, whereas the South was pre-occupied coping with large numbers of people and arranging for their return [Bernstein & Weiner: 1999].

If the cold war provided the “moral” justification for refugee policy then the post-war labour shortage in the industrialised European states provided the economic imperative for a domestic policy of immigrant labour or guest workers, which continued into the 1960s with the Eurodollar boom. European countries attracted estimated 20-30 million guest workers from southern Europe and North Africa from the mid-1950s to the mid- 1970s [Martin: 1999], with over two thirds of these to Germany and France. In addition a further 2million had immigrated from former colonies primarily into France, the United Kingdom and the Netherlands. By the early 1970s in France, with over 3m foreign workers, a quarter of the industrial labour force was immigrant with similar proportions in Belgium and Switzerland. In Germany and the UK one seventh of all manual workers had arrived as immigrants prompting *Fortune* magazine to comment that “*migrant workers now appear indispensable to Europe’s economy*” [Webber: 1991] and *Kindleburger* to argue that they sustained export led growth in Europe by suppressing wage inflation, sustaining profits and investment [Martin: 1999]. Economic conditions strongly influence the attitudes of the state and individuals towards the acceptance of refugees, perceived as a category of immigrant, and in addition many refugees were able to enter as labour migrants during this period without the need to seek asylum [Joly: 1996].

In the South, however the situation was very different as the legacy of colonialism, combined with cold war politics, fomented unrest and conflict creating mass refugee movements. With independence, colonially contrived states sought to consolidate themselves but were often wrought by deep social, economic and ethnic cleavages [Ferris: 1993], which exacerbated the normal consequences of social change whereby even the liberal western democracies originated in violent social upheaval [Zoberg et al: 1989]. This was particularly severe in post-independence African countries where three models of colonial state building had set the stage for highly exclusionary politics, internal war and refugee flight. Radical separation such as in Chad or Sudan, creation of a governing class such as in Rwanda, Burundi and Uganda or a Paternalism that constrained development such as in Angola or Zaire [Anthony: 1991], created weak predatory states where political power is the source of economic power. Postcolonial ethnically divided states also wracked South Asia whilst in East and South East Asia and latterly, Latin America, class formation and the cold war geo-politics drove conflict [Zolberg et al: 1989].

In the 1960s only a few 100,000s of refugees in the developing world were receiving assistance via the UNHCR which had a budget of just US\$8.3m in 1970 but, in line with the sharply increasing numbers of refugees produced by conflict in the Horn of Africa, Southern Africa, Indo-China and Latin America, expenditure rose to US\$69m in 1975 and a dramatic US\$496m by 1980 [Suhkre & Zolberg: 1999]. As the incidence of conflict grew in the 1970s a new phenomenon of the arrival of refugees from the crisis torn areas of Africa, Latin America and Asia, geographically and culturally distant from the industrialised states, posed a new challenge to the collective moral conscience of the industrialised nations and the focus of East-West relations started to change to one of North-South [Cohen & Joly: 1989]. The exilic bias that suited cold war politics which had effectively de-

politicised the domestic discourse on refugees, and had allowed the extension of the principle, by necessity, to those from the developing world, was starting to be questioned [Chimni: 1998].

Developments in the 1980s and 1990s

In the 1980s three significant factors converged to interact and produce a radical shift in the approach of the industrialised nations toward refugees, from the “*uncoordinated liberal policies*” of the 1970s to the “*coordinated restrictive policies*” of the 1980s [Joly: 1996]. The ongoing economic downturn and severity of the early 1980s recession in the industrialised countries, the substantial increase in refugees from the developing world and the effects of the collapse of the social and economic system in the USSR and Eastern Europe.

As a result of the economic downturn in the 1970s and the move to the post-industrial societies, countries across Europe followed the lead of the United Kingdom that had introduced formal restrictions on ex-colonial immigration in the early 1960s [Spencer: 1996]. Alongside restrictions introduced in Belgium, Holland and Sweden, France also tightened the control of immigrant workers from Africa, three times during the 1970s, [Webber: 1991] and an inflow of 100,000 workers to France in 1973 had reduced to just 15,000 by 1989 [Ferris: 1993]. For those seeking asylum, the cloak of immigrant labour requirements was removed and the situation reversed as for the first time, with demand for immigration exceeding supply, economic migrants started to use the asylum process to gain entry through an otherwise closed door [Suhkre & Zolberg: 1999]. However, economic decline was also associated with the rise of racist and fascist ideologies and the association of “Black” with crime and crime with illegal immigration [Webber: 1991]. This prompted mainstream parties to respond with refugee and immigration restrictions to halt the rise of right wing parties such as the *Front National* in France and *Republikaners* in Germany [Miller: 1999].

The global recession took an even greater toll in developing countries, weakening states that retreated from roles in welfare, health and education and lost their ability to perform basic functions such as tax collection or act as a social and political mediator in the face of civil unrest and conflict [UNHCR: 1997]. Class consciousness did not manifest itself in opposition to the exigencies of capitalism but was transformed into ethnic conflict and demands for regional autonomy, exploited by local elites in their struggles for power [Richmond: 1994] often using private agents of violence directed against civilian populations and the new phenomenon of ethnic cleansing. Both the scale of numbers, 12m under UNHCR protection in 1987 rising to 22m in 1997, and the intensity of movements from countries such as Rwanda, Liberia, Iraq and Yugoslavia increased dramatically [UNHCR: 1997]. Against this backdrop of economic decline and restrictive policies in the industrialised countries the numbers of refugees seeking asylum in Western Europe from ongoing conflict in Africa and new conflicts such as those in Sri Lanka, Lebanon and the Iran-Iraq war continued rising from 13,000 in 1970 to 158,000 in 1980 and, as they were joined by those from Eastern Europe, to 425,000 in 1990 [Joly: 1996]. Over 70% of the asylum applications to Europe during the 1980s originated from the 3rd World [Black: 1993] and this increasing burden came on top of the demands for additional funding, from the ICARA conferences, to meet the huge scale of the problem in Africa together with the cost of resettlement of refugees from Indo-China.

In the latter part of the decade and into the 1990s, the patterns of refugee flows shifted with the reforms and lifting of travel restrictions in the USSR and Eastern Europe. As a result the proportion of European applicants to EU countries rose from 10% in 1985 to 57% in 1992, before dropping away again [Bocker & Havinga: 1998]. The number of countries with competitively elected civilian governments has doubled since 1984 but many of these did not have the social and political cohesion and civic culture to underpin the rapid and far-reaching reforms. New “freedoms” were associated with decline in physical, material and legal security and ethnic conflicts [UNHCR: 1997]. In 1989 and 1990 1.3m people moved from Eastern Europe and the former USSR to Western

Europe as refugees or others [Ferris: 1993] and within the Commonwealth of Independent States over 9m people were displaced, but the greatest challenge to Europe was to come from the disintegration of Yugoslavia where 4m displaced people threatened to spill over into the world of the affluent democracies [UNHCR: 1997] and directly challenged the myth that all non-convention refugees are economic migrants [Joly: 1996]. For the first time since the inception of the Convention, Western European countries faced similar mass refugee movements to those that had been coped with by developing countries for many years. Their response with policies of internalisation, containment and temporary protection with visa requirements to restrict individual arrivals [Joly: 1996] was in stark contrast with countries such as Cote d'Ivoire and Guinea that sheltered 750,000 Liberian refugees [UNHCR: 1997] or Iran sheltering over 2m in 1996 [Chimni: 1998] with de facto status. Western nations continued their process of individual selection, European states granting only 214 out of 20,347 individual applications from Liberians [UNHCR: 1997].

As capitalist liberal democracy triumphed over the bureaucratic socialist system and global capitalism ravaged the economies of the developing world, so the effect of the resultant social discord, conflict and even disintegration of states rebounded to confront the West. In the past only refugees with a special interest to the west would generally be resettled there, such as those from Cuba or Vietnam. Since the end of WW2 95% of refugees accepted by the United States had been from communist countries whilst 98% of Guatemalans, Haitians and Salvadorans were refused refugee status, despite documented abuses, as they came from friendly, non-communist nations [Ferris: 1993]. With the end of the cold war these strategic or political imperatives to grant asylum had disappeared exposing the moral and humanitarian principles to scrutiny, but these were found wanting and having lost their political status, refugees from the former communist states found themselves transformed into economic migrants [Escalona & Black: 1995]. Together with refugees from the rest of the world they faced the coordinated development of "comprehensive refugee policies" and their elements of *Controls* to limit numbers, *Integration* of those allowed to enter and *Policy Interventions* to modify the causes of the outflow at source or provide in country "protection" [Suhkre & Zolberg: 1999].

The European Policy Response and Challenges to the International System

The perceived challenges to their economic and cultural security and territorial integrity, were shared by Western European states, and a further imperative to deal with this threat collectively arose from the impending implementation of the Single European Act (1987) within the EU in 1993 that would allow freedom of movement within the boundaries of the Union. The coordinated policy responses were not however developed within the structures and institutions of the EU, which had no competence in police and security matters, but outside them in a series of ad-hoc and secretive bodies and through separate inter-governmental arrangements, the main mechanisms of which were the Trevi Group of Ministers, the Ad-hoc group on Immigration and the Schengen Accord [Bunyan: 1991].

Trevi (Terrorism, Radicalism, Extremism and Violence International), had been set up, at the instigation of the UK, in 1976 as an intergovernmental forum to combat terrorism but in response to the single European Act extended its remit, through the establishment of Working Group 4, to include the policing and security implications of the single European Market. These matters included immigration, asylum seekers and border controls in respect of which a range of information sharing and administrative control measures were established. The extension of its remit into this area prompted the MEP, John Tomlinson to say " *I regard the Trevi group as positively dangerous and undemocratic... they are managing to equate immigration policy and free movement of people with the same level of imperative secrecy as ...counter terrorist activities and counter drug activities*" [Bunyan: 1991].

The Ad-hoc group on Immigration, of Interior Ministers of EU states, similarly operating outside EU structures, was established in 1986, again at the instigation of the UK, and a sub-group on Asylum set up with the aim of ending “*the abuses of the asylum process*”. By April the following year agreements had been reached on restrictions and penalties for airlines bringing in undocumented asylum seekers and procedures for coordinating the processing of asylum requests [Bunyan: 1991]. The group produced a programme of reforms, implemented through Conventions and, more speedily, by way of inclusion in national guidelines, procedures and legislation [Joly: 1996] including;

the Convention for Determining the State Responsible (for the treatment of requests), in order to prevent multiple asylum requests in different countries, was signed in Dublin in 1990 and eventually ratified in 1997

draft Convention on the Crossing of External Frontiers, presented to the EC in 1994

the Resolution on Manifestly unfounded Applications for Asylum, dealing with the summary refusal of claims where there is not considered any substance to the fear of persecution or the claim is considered deceptive or an abuse of the system

the Resolution on a Harmonised Approach to Questions Concerning 3rd Countries, which provides for claimants to be referred back to a country they have passed through if they did or could have made application there without fear of persecution

the Conclusions on Countries in which there is Generally No Serious Risk of Persecution, concerning agreement on criteria for producing lists of countries where an assumption would be made that protection from persecution would not be absent

the Recommendation Concerning Checks on and Expulsion of 3rd Country Nationals Residing or Working Without Authorisation

Together the Trevi and Ad-hoc group were overseen by a ministerial group of co-ordinators from EU states and set the agenda for the measures needed by 1992 to “protect” the European Community from immigrants and refugees [Bunyan: 1991]. This agenda was taken forward through the 3rd Pillar, Justice and Home Affairs, of the Maastricht Treaty after 1993. The Amsterdam Treaty of 1997 envisages bringing asylum, refugee and immigration policy under the 1st Pillar within the remit of the European Court of Justice [Bloch & Levy: 1999], where EU competence of the Parliament and Commission may eventually give greater transparency and democratic control over policy and process. However there is a 5-year interim period, during which the intergovernmental approach still holds sway.

The Schengen Accord was signed by Germany, France, Belgium, Holland and Luxembourg in 1985 and, together with Schengen II in 1990, sought to harmonise policy including a common list of countries where visas are required and the permission to stay and travel within its borders. Alongside this the exchange of information including new asylum law, new arrivals, emerging groups was planned via a major new international intelligence system. Despite criticism by the European Parliament that the Accord could, inter-alia, have a detrimental effect on the rights of refugees, the Accord was later joined by Italy, Greece, Spain and Portugal [Bunyan: 1991] with newly enacted immigration law in Italy, to facilitate accession, resulting in thousands of deportations, refusals of admission at the border and the refolement of 17,000 Albanians without consideration within the asylum system [Ferris: 1993]. Schengen principles and provisions will now become incorporated into the EU politically and institutionally by way of the Amsterdam Treaty provisions [Bloch & Levy: 1999].

Whilst the harmonisation of border controls and access to territory have been advanced through the above mechanisms, there has been no corresponding action on the criteria whereby asylum claims are assessed due to a reluctance to cede sovereignty in this area [Escalona & Black: 1995]. Individual countries generate their own national policies and UNHCR has identified the tightening of policy in one country displacing refugee movements to another [UNHCR: 1977]. In the absence of any supranational jurisdiction individual countries are therefore prompted to follow a downward

spiral, searching for the lowest common denominator, resulting in the general tightening of policy, albeit still with significant variations [Levy: 1999] leaving asylum seekers with the worst of both approaches. These policy developments may be placed in three categories;

Narrowing Refugee Definitions and the Interpretation of the Convention- in a general sense the problem of too many genuine refugees has been approached by redefining them as large numbers of spurious asylum seekers [Hayes: 1998], which secures the mandate to take restrictive and even repressive action to exclude, deter and detain them. Virtually all European states have moved to adopt some form of protection status outside of the Convention such as “B status” or Exceptional Leave to Remain, giving permission to remain on humanitarian grounds, which facilitates much more flexibility in their treatment and the opportunity to keep cases under review, without conceding re-settlement and these now comprise the majority of those granted permission to stay [Suhkre & Zolberg: 1999]. Another challenge to the principles of the Convention has been posed by those states that argue that refugee law is not binding on a state outside of its own territory, using this interpretation to justify interdiction at sea [UNHCR: 1995], such as Italy, Greece and Spain [Escalona & Black: 1995]. In a further threat to protection, the EU Convention on Extradition abrogates the notion of a political offence [Landgren: 1998]. However the most cynical and threatening deviation from the norms of interpretation is the action of those states that are excluding, or qualifying, the recognition of persecution by non-state agents, such as the German and French rulings that persons fleeing Somalia, Sierra Leone and Liberia are excluded on the grounds that the state does not exist. In Germany the Federal Administrative Court ruled that persons fleeing the actions of the Taliban in Afghanistan could not be considered refugees as this organisation does not constitute a government [UNCHR: 1998].

Legal and Administrative Barriers and Deterrents- visa restrictions have been used generally by European states to restrict the ability of refugees to travel to asylum destinations, alongside border closures to prevent access to refugees from Croatia and Bosnia-Herzegovina [Suhkre & Zolberg: 1999]. For those who do arrive to claim asylum, the increasingly strict application of criteria across Europe has resulted in the acceptance rate declining from around 65% in 1980 to just 10% in 1990 [Webber: 1991] and in 1992, the peak year for applications to European countries, only 5% of German and 3% of United Kingdom determinations were accepted [Eurostat: 1994], presumably deterring further applicants from trying. Lists of “safe countries” presume that protection is available in the country of origin and procedures for “manifestly unfounded claims” are accompanied by rapid procedures for determination. Checks on documentation are undertaken on board aircraft and Carriers, made liable for those without the correct papers, are given de facto competence to determine asylum claims [Bloch & Levy: 1999]. If they manage to arrive, asylum seekers may be contained in “extra-territorial zones” at airports, seaports and railway stations or taken to special “extra-territorial” detention centres, legal fictions designed to suggest they have not actually entered the country [UNHCR: 1998]. Elsewhere, in the UK, Denmark, Finland and Sweden (in “prison ships”) they may be simply held in detention centres pending determination [Black: 1993]. The Borders Convention, which the UNHCR says would contravene Article A of the Convention, would require that refugees cross only at official points in normal opening hours [Bloch & Levy: 1999] but the imperative for its ratification has receded in the context of the provisions developed regarding Safe Third Countries.

The latter principle was developed through the Ad-hoc group for application within the EU, but was extended through the London Resolution in 1992 to include all countries outside the Community that are deemed to be safe and have ratified the Convention [Lavenex: 1998]. This provision was supplemented by the model “re-admission agreement” in 1994 [UNHCR: 1998], based on the German-Poland agreement, that states in the West have used to extend the practical application of the safe third country principle to a swathe of Central and Eastern European nations. This process was absorbed into the EU Association and Co-operation agreement arrangements with external states and integrated into the enlargement strategy. Funding through the PHARE programme, to

facilitate the administrative infrastructure in Eastern European states, was also provided with the cumulative effect of creating a buffer zone around the Union [Lavenex: 1998]. With their objections proving futile, and funding and or EU admission dependent on cooperation, the Central and Eastern European states moved to enact similar restrictions and safe third country provisions with their neighbours resulting in a domino effect spreading eastwards to countries without the necessary functioning systems of legal and administrative provisions for refugee protection [Lavenex: 1998].

Containment, Temporary Protection and Voluntary Repatriation

The phenomenon of 4m displaced persons from the former Yugoslavia (FRY) on the doorstep of Western Europe posed a direct challenge not encountered since the 1940s, but the response in the 1990s was very different [Black: 1993], although the scale was no bigger [UNHCR: 1997] and the economic capacity of the nations concerned clearly much greater. The situation prompted new policy approaches: firstly to internalise the problem within the area of origin by the use of “safe havens”, secondly to contain those populations within the area of FRY and if this failed then to offer temporary protection within the EU states for those coming directly from a war zone [Joly: 1996]. This approach, founded in security and economic considerations, was rationalised through a perverse application of human rights, in the form of “the right to remain”, which disregards and is clearly subsidiary to actual Human Rights such as Articles: 14, the right to seek asylum in other countries; 13, the right to leave any country; or 3, the right to life, liberty and security of person, which patently was not offered by internal containment. This approach also extends to what *Hathaway* describes as “the evil side of this supposed right to remain” [Hathaway: 1995] in the invocation of this “right” to justify the pressure to return and subsequent *refoulment* of Bosnians by Germany [Landgren: 1998]. These notions of humanitarian access and in-country solutions have gained pre-eminence due to the Industrialised Countries unwillingness to admit large numbers of refugees and are accompanied by the development of the notion of voluntary repatriation, beyond the concept of “cessation” already incorporated into the Convention. Voluntary return is being undermined by state enforced repatriation to unsafe situations, threatening the concept of protection [UNHCR: 1997]. Outside Europe, donor states appear less willing to fund long-term temporary settlements, wishing to see a speedy end to the assistance programme for Rwandans in Tanzania and Zaire, quoting limited and diminishing funds [UNHCR: 1997].

These developments are a clear distortion of the role of the UNHCR, asked to focus on the prevention of refugee flows rather than the alleviation of the lack of protection suffered by the victims of persecution, that is its rightful role. With less than 2% of its funding guaranteed through general allocations from the General Assembly, the UNHCR is forced into its new in-country role in the face of demands from the states that fund and, therefore, control it. It searches for intellectual justification in terms such as “*the 1990s have seen a rediscovery of many ideas that were current during the inter-war period, but which were frozen out with the onset of the cold war*” [UNHCR: 1995]. In the internalisation of the Industrialised Country agenda 1992 was declared “The Year of Voluntary Return” by UNHCR [Ferris: 1993] and repatriation and integration remained its policy for the 1990s [Landgren: 1998]. Funding is correspondingly distorted, in the mid-1990s UNHCR was spending more in non-convention intervention in the former Yugoslavia than on its work in the whole of the African continent, with four times the number of refugees [Hathaway: 1995]. Together, these distortions not only weaken the UNHCR itself but through its involvement legitimise the new policies of non-entrée which threaten the foundation of the Convention itself, the principle of protection. The principle, within the developing world, of hosting mass numbers of refugees until voluntary repatriation could be achieved, expressed through the special provisions of the OAU Convention and the generosity of many African nations over the years, was dealt a severe blow by the forced expulsion of Rwandans by the Tanzanian government [UNHCR: 1999] under the influence of funding pressure and the example of Industrialised Countries own practice. In recent years Afghan refugees have been refused entry by neighbouring states, Hutus from Burundi excluded by Tanzania and Zaire and Thailand has forcibly repatriated 100,000 Burmese women and

children. But as the UNHCR has said “*when the very countries responsible for establishing the international refugee regime begin to challenge its legal and ethical foundations then it is hardly surprising that other states, especially those with far more pressing economic problems and much larger refugee populations, have decided to follow suit*” [UNHCR: 1997].

Policy Options and Conclusions

It is clear then, that the actions of the Industrialised Countries are undermining the core principles of the system and distorting the humanitarian concepts on which it is founded. Yet it is equally clear that those states will, as they always have done, will act only in their own strategic or political interest and that the interests of asylum seekers can only be accommodated where they coincide with these, or at least do not conflict with them. These states can ensure that their interests are met through control of the system through the voluntary nature of funding, so that whilst the principle of an autonomous, securely funded organisation, granting asylum through a common process, with unified criteria [Suhkre: 1992] may be an ideal, it is unlikely to be achieved. Direct control is the key to autonomy, which in this context is the expression of sovereignty, that states have been reluctant to concede from the inception of the system and this is highlighted by the case of Australia. Although there had been a long-term experience of official immigration, including from South East Asia, when this formal system was usurped by the spontaneous and uncontrolled arrival of asylum seekers from South East Asia in the late 1980s and 1990s it prompted similar policy responses to those in Europe, even though the numbers were within Australia’s immigrant quota. *Nicholls* postulates that it was the lack of control over the process in terms of selection, planning and foreign policy concerns that prompted this [Nicholls: 1998].

It is argued that the end of the cold war and the increasing numbers of refugees mean that a new approach is needed [Roberts: 1998] yet the notion that there is anything new in the nature of current refugee flows can be demonstrated a myth [Chimni: 1998] it is simply that Western Europe has been faced with a problem that LDCs have had to deal with for many years and their long-term rationale has disappeared with the end of the cold war. The numbers are not the real issue, 50m refugees were resettled from Europe between 1912 and 1969, but within the terms of the strategic interests of the western nations [Chimni: 1998]. It has been suggested that the refugee regime should be reconceived around human rights law [Hathaway: 1991], using the basic test of contravention of a human right as the test for refugee status or that this test should be based on the principle of anyone who is forced to abandon their countries of origin due to violent conflict or insupportable living conditions [Zolberg et al: 1989]. However, such proposals to reconstitute the basis of refugee law, not only seem naïve in terms of today’s political climate, but in the light of experience of the perversion of human rights concepts in recent policy approaches and the restrictive outcome of co-operation on refugee law in Europe to date, any review of fundamental principles seems likely to result in a diminution of protection rather than improvement.

The UNHCR suggests that a major threat is posed to the regime by the growth of asylum seekers with weak or no genuine claims [Black: 1993] and that the key question is to distinguish between refugees and migrants [UNHCR: 1997] but the system is already founded upon the genuine fear of persecution and the varying acceptance rates in different countries for asylum seekers from the same situation seems to suggest that national policy produces low acceptance rates rather than a general predominance of “bogus” applications [Bocker & Havinga: 1998]. On the contrary, whilst there are undoubtedly unfounded applications, economic oppression often links with political oppression [Ferris: 1993] and there is evidence that many genuine refugees are refused asylum due to restrictive interpretations, denial of access and refolement [Amnesty: 1997]. So how can the principle of protection be preserved for those who need it? The concept of comprehensive refugee policies incorporating migration management is disingenuous, since there is no real will to address the underlying problems. Many of the causes are exacerbated by the actions of the Industrialised

Countries [Suhkre: 1992a], such as Structural Adjustment Programmes, the lack of Debt Relief, cuts in Development Aid and the fundamentals of the international trading system.

Pragmatically this can only be approached via consistency with the interests of the industrialised countries and must address their need for control over entry, in order to sustain the concept of sovereignty alongside stability in order to maintain markets for western capital and protect essential commodity supplies such as oil. With the withering of support for the solution of resettlement attention could focus on the granting of temporary protection to individuals who claim asylum, for a period significant enough to allow for the resolution of their lack of protection, but nevertheless limited in principle. This could facilitate the decoupling of the asylum question from that of immigration, thus rehabilitating the humanitarian appeal in host countries and deterring unfounded applications from others. Within such a framework genuine claims could be more fairly acknowledged and others rightly refused, giving host nations more sense of control and autonomy. Clearly, on humanitarian and practical grounds temporary protection could not last indefinitely for individuals, for some a permanent status would have to be granted after a period of years, but the principle could still be maintained. With an accompanying right to work, the need for a cheap pool of labour that refugee immigrants have provided in the past, representing a privileged source of profit for employers [Black: 1993], would continue to be satisfied. This would be consistent with the Industrialised Countries' interests, meeting the requirement of the new economic models for a flexible labour force.

This does not address the question of mass refugee movements of victims of general conflict and the distortion of the palliative role of UNHCR by its involvement in containment. The principle of temporary hosting expounded in the OAU Convention seems to remain the best approach, but in practice this has always been mediated through national and international political and strategic interests. Refugees within the Horn of Africa have been treated differently according to political alliances for many years. Thailand, the host for so many refugees in Indo-China, responded to domestic and international political needs with forced refolement of Vietnamese and Cambodians in 1979, resulting in many deaths [UNHCR: 1997]. There seems no doubt that political and strategic needs will continue to usurp purely humanitarian principles and that a case by case pragmatic approach is likely to continue. However, the recent experience in Europe may result in a greater recognition of the burden in LDCs and encourage assistance to them. In some situations, as *Harrell-Bond* has suggested in the case of Tutsi refugees formerly in Uganda, development to facilitate long-term integration outside the country of origin could be a better solution [Harrell-Bond: 1995], as indeed may prove to be the case in respect of the former Yugoslavia in retrospect, but each situation will require and produce a different response. Within the strict limitations of its autonomy the UNHCR should, however endeavour to avoid involvement in situations of containment that are outside its remit and are the concerns of other regimes, in order to maintain the integrity of the principle of protection, although this may be a difficult task. To maximise protection in a world where long-term mass displacement is less tolerated the UNHCR should, however, become involved with and promote the protection of individuals within mass populations who may face personal threats of persecution on their return.

The suggestion therefore, as *Hathaway* has latterly argued [Van Hear: 1998], is that the core principles and modest aspirations of the existing regime should be upheld, alongside a reconception of the solution mechanism toward temporary humanitarian protection and the avoidance of involvement of the UNHCR in interventionist activities, focussing on the protection of refugees as defined in the Convention. A conceptual detachment from the immigration question might allow a refocusing of the public debate, that NGOs should promote, in the short-term. In the medium to longer term, negative population replacement in the industrialised countries is likely to give rise to a need for immigrant labour, in order to maintain levels of production and wealth, [Black: 1993] that may desensitise the issue politically, enabling a more rational, humanitarian approach. The UN Population Division has forecast that, over the next 50 years, the populations of nearly all European

countries will decline as well as age [United Nations: 2000], requiring immigration at the levels of the 1990s within the EU to maintain population at current levels and double that within Europe as a whole. Whilst this ignores productivity increases, the even greater numbers projected to be required to prevent decline in working age populations is so large that, inter alia, comprehensive reassessment of policies and programmes relating to international migration will be required, the alternative being a general rise in the European working retirement age to 75 years [United Nations: 2000] and substantial labour immigration seems likely to become the norm again. Labour shortages in specific areas, such as IT are already giving rise to government sponsored labour immigration policies in the UK, Germany and the US [Guardian: 2000]. It is possible therefore, that asylum seekers could be treated on humanitarian grounds, but also be conceived as meeting host country labour immigration requirements. Not only are many asylum seekers well educated but traditionally they have also been willing to work below their skill levels, meeting the need for certain unskilled labour requirements that indigenous populations have been reluctant to fill [Black: 1993].

In these scenarios it is possible that a sense of control and consistency with Industrialised Country needs could be used to promote and protect the institution of asylum and maintain their support to other, less wealthy nations : essential to its preservation.

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