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**The concept of ‘effective protection’ in the context of irregular  
secondary movements and protection in regions of origin**

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## Introduction

There has been much recent talk about the new approaches to refugee protection and central to this discussion is the concept of ‘effective protection’. For instance, the UNHCR three-pronged proposal mentions the expression ‘effective protection’ on several occasions: it envisages the “return of asylum-seekers and refugees who have moved in an irregular manner, to a country of first asylum offering effective protection”.<sup>1</sup> The UK proposals do not refer explicitly to a concept of ‘effective protection’, but they also suggest transfers of refugees and asylum-seekers to third states where ‘effective protection’ will be provided to them.<sup>2</sup> Discussions are also taking place at the EU level.<sup>3</sup> The so-called new approaches to refugee protection are based entirely on the premise that ‘effective protection’ can be provided in regions of origin. Unfortunately, neither the UK, nor UNHCR provide any detail about their understanding of the concept of ‘effective protection’. UNHCR simply stated that “there has to be a shared understanding on the types of situations guaranteeing effective protection, leading to timely and genuine solutions.”<sup>4</sup>

These days, everybody seems to talk about ‘effective protection’, but without ever defining its precise meaning. It is absolutely astounding that both the UK and UNHCR made their proposals without attempting to provide any clear and detailed definition of the concept of ‘effective protection’. UNHCR has merely convened a roundtable and commissioned a research paper on the topic.<sup>5</sup> More recently, Erika Feller, the director of UNHCR’s Department of International Protection, was prompted to make a statement on ‘effective protection’ at the last meeting of the Executive Committee.<sup>6</sup> She rightly observed that “there is danger in allowing the debate about who is responsible for an asylum-seeker to determine the meaning of this term ‘effective protection’”.<sup>7</sup> There is clearly an urgent need for further discussion over the legal content of this concept.

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<sup>1</sup> See UNHCR, “UNHCR’s three-pronged proposal”, Working Paper, June 2003, 1. See also UNHCR, “A revised “EU prong” proposal”, Working Paper, 22 December 2003.

<sup>2</sup> See UK paper, *New international approaches to asylum processing and protection*, 10 March 2003. For a detailed analysis, see G. Noll, “Visions of the exceptional: legal and theoretical issues raised by transit processing centers and protection zones” (2003) 5 *European Journal of Migration and Law* 303; and G. Loescher and J. Milner, “The missing link: the need for comprehensive engagement in regions of refugee origin” (2003) 79 *International Affairs* 583.

<sup>3</sup> See *Towards more accessible, equitable and managed asylum systems*, COM(2003) 315, 3 June 2003; and *On the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin – “Improving access to durable solutions”*, COM(2004) 410, 4 June 2004.

<sup>4</sup> See UNHCR, “UNHCR’s three-pronged proposal”, 5.

<sup>5</sup> See *Summary Conclusions on the concept of “effective protection” in the context of secondary movements of refugees and asylum-seekers*, Lisbon Expert Roundtable, 9 and 10 December 2002 and S.H. Legomsky, *Secondary refugee movements and the return of asylum-seekers to third countries: the meaning of effective protection*, Legal and Protection Policy Research Series, PPLA/2003/01, February 2003 or (2003) 15 *International Journal of Refugee Law* 567.

<sup>6</sup> See *Statement by Ms. Erika Feller, Director, Department of International Protection, at the fifty-fifth session of the Executive Committee of the High Commissioner’s Programme*, 7 October 2004.

<sup>7</sup> *Ibid.*

This paper does not contain a detailed analysis of the current debate on irregular secondary movements or protection in regions of origin. Nevertheless, one needs to understand the context in which the concept of ‘effective protection’ is referred to. Firstly, some states have become increasingly interested in addressing irregular secondary movements. These movements involve refugees who have already found protection in a first asylum country and seek to move on to a third country in an irregular manner, i.e. using a smuggler. The issue of irregular secondary movements has become of such importance to states that it now constitutes one of the strands of the Convention Plus process. The difficulty is that some destination states may like to return those refugees who have already found protection to their first asylum country. Such returns could be justified only where ‘effective protection’ is available in the first asylum country. However, during the discussions over irregular secondary movements, UNHCR cautioned that “while Convention Plus will provide input into this process, it would not be the forum for defining the legal basis of “effective protection”, as this is a debate much broader than the reduction of irregular, secondary movements.”<sup>8</sup>

Secondly, the concept of ‘effective protection’ has also been referred to in debates over protection in regions of origin. EU Member States, for instance, have been increasingly interested in ‘investing’ resources in improving protection in regions of origin. It goes without saying that better protection should be provided to refugees closer to their homes. Nevertheless, some EU Member States probably also hope that the improvement of protection in regions of origin will contribute to a significant decrease in the movements of refugees and asylum-seekers to the EU.<sup>9</sup> Doubts have already been expressed as to the potential benefits of the ‘protection in regions of origin’ approach.<sup>10</sup> In any case, the provision of ‘effective protection’ would constitute the central objective of the new involvement in regions of origin.

Instead of discussing the merits of these approaches, the analysis is focused on the legal content of the concept of ‘effective protection’, which should form the starting-point of any serious discussion of the recent proposals on refugee protection. As a preliminary comment, one must note that the word ‘effective’ should be redundant to the extent that protection should always be effective. Protection that is not effective is simply not protection.

### **Defining the concept of protection.**

It may be useful to start with UNHCR’s definition of ‘effective protection’. According to the refugee agency, protection can only be regarded as sufficient if:

- there is no likelihood of persecution, of refoulement or of torture or other cruel and degrading treatment;

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<sup>8</sup> See *Open Meeting of States and interested parties on secondary, irregular movements of refugees and asylum-seekers*, FORUM/CG/SM/01, 21 December 2003, 6.

<sup>9</sup> See *Conference summary of the Presidency Conference on future European Union co-operation in the field of asylum, migration and frontiers*, 31 August- 4 September 2004, Amsterdam, 8, [http://www.migrationpolicy.org/pubs/EUpresidency\\_conf\\_summary.pdf](http://www.migrationpolicy.org/pubs/EUpresidency_conf_summary.pdf).

<sup>10</sup> See J. Crisp, *Refugee protection in regions of origin: potential and challenges*, 1 December 2003, <http://www.migrationinformation.org/Feature/display.cfm?id=182>.

- there is no other real risk to the life of the person[s] concerned;
- there is a genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable timeframe;
- pending a durable solution, stay is permitted under conditions which protect against arbitrary expulsion and deprivation of liberty and which provide for adequate and dignified means of subsistence;
- the unity and integrity of the family is ensured; and
- the specific protection needs of the affected persons, including those deriving from age and gender, are able to be identified and respected.<sup>11</sup>

This constitutes a reasonably comprehensive definition of protection which puts the emphasis not only on immediate physical safety (as most states usually do), but also on access to durable solutions, family unity and the specific vulnerabilities of the refugees. UNHCR's definition is clearly meant to be used as a benchmark in decisions to transfer/return refugees to a country of first asylum, or even a safe third country in the region of origin. Considering the tone of the current debate on irregular secondary movements, it may be justified to adopt such a defensive approach towards 'effective protection'. UNHCR's definition identifies the legal constraints which are binding upon states wishing to return refugees and asylum seekers who have travelled in an irregular manner from a country of first asylum. These legal constraints must be identified in more detail.

The most fundamental obligation contained in the 1951 Refugee Convention<sup>12</sup> is the prohibition of refoulement. It follows that where transfers to a country of first asylum are envisaged, one must first establish that the person's life or freedom is not threatened by reasons of his race, religion, nationality, membership of a particular social group or political opinion. One has to concede that it is unlikely that a person has a well-founded fear of persecution both in the country of origin and the country of first asylum. Nevertheless, states should always envisage this possibility in order to avoid a breach of their fundamental obligation under article 33. There has never been any doubt that article 33 also prohibits indirect refoulement: states cannot transfer a refugee to a state which, in turn, would return him/her to a place where s/he has a well-founded fear of persecution or begin a chain deportation.

One could suggest that the receiving state should always be a party to the 1951 Refugee Convention.<sup>13</sup> However, this is not a necessary, nor as a sufficient condition. What should be scrutinised is the actual practice of the state. Nonetheless, where the state is a party to the 1951 Refugee Convention, UNHCR can exercise its supervising role under article 35 of the Convention. The other advantage of requiring the receiving state to be a party to the Convention is that, in the event of a dispute between the sending state and the receiving state, the International Court of Justice (ICJ) would have jurisdiction over the matter under article 38. However, it is highly unlikely that any of the two states would refer the matter to the ICJ. Similar arguments can be made with regard to other provisions of the 1951 Refugee Convention and relevant human rights instruments which are mentioned below: while accession to these treaties is preferable, what is crucial is the actual practice of states.

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<sup>11</sup> See *supra* note 6.

<sup>12</sup> *Convention Relating to the Status of Refugees* (hereinafter the 1951 Refugee Convention) 189 UNTS 137, amended by Protocol Relating to the Status of Refugees, 1967, 606 U.N.T.S. 267.

<sup>13</sup> See Lisbon Conclusions, para.15(e), *supra* note 5.

Whereas some states may wish to argue that protection encompasses only protection from refoulement, it is by no means sufficient that states do not return a refugee to another state where his life or freedom would be threatened on one of the Convention grounds. Nor is it sufficient to ensure that the receiving state does not in turn return the refugee to yet another country which would breach the duty of non-refoulement. Indeed, one should refer to UNHCR's Executive Committee's Conclusion No.58 which deals with refugees who have moved in an irregular manner from a first asylum state where they have already found protection.<sup>14</sup> The Conclusion states that refugees could be returned provided that they be "permitted to remain [in the third country] and to be treated in accordance with recognised basic human rights standards until a durable solution is found for them" (emphasis added).

In order to identify these basic human rights standards, one can refer to what is commonly known as the International Bill of Rights, which is composed of the Universal Declaration of Human Rights and the two International Covenants.<sup>15</sup> The notion of *basic* human rights standards implies that these standards should be applied in all circumstances and can never be derogated from. State parties to the above treaties should not be able to evade their obligations not to breach non-derogable rights by simply transferring the person to another jurisdiction. The list of non-derogable rights contained in the International Bill of Rights is fairly limited. The Universal Declaration is not a legally binding treaty. As for the International Covenant on Economic, Social and Cultural Rights (ICESCR), it does not contain any provision dealing with derogations.

Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR) lists the provisions from which no derogation is permissible: these are articles 6 (right to life), 7 (torture and cruel, inhuman, or degrading treatment), 8(1) and (2) (slavery and servitude), 11 (imprisonment for failure to fulfil a contractual obligation), 15 (retroactive criminal punishment), 16 (recognition as a person before the law) and 18 (freedom of thought, conscience and religion). However, one could also distinguish the notion of basic human rights from the concept of non-derogable rights which are not necessarily the most fundamental human rights.

The concept of protection should clearly include, at a minimum, protection of basic economic and social rights. These are not explicitly mentioned in the UNHCR definition, although it refers to "adequate and dignified means of subsistence".<sup>16</sup> Similarly, the Lisbon Conclusions had mentioned that "the person has access to means of subsistence sufficient to maintain an adequate standard of living."<sup>17</sup> The ICESCR imposes on state parties a number of core obligations "to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party".<sup>18</sup> Protection should therefore include access to

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<sup>14</sup> EXCOM Conclusion No.58 (XL) on the problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection (1989).

<sup>15</sup> *Universal Declaration of Human Rights*, GA Res. 217 A (III), 10 December 1948, hereinafter *Universal Declaration*; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 *U.N.T.S.* 171, hereinafter *ICCPR*; and *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 *U.N.T.S.* 3, hereinafter *ICESCR*.

<sup>16</sup> See *supra* note 6.

<sup>17</sup> See Lisbon Conclusions, para.15(g), *supra* note 5.

<sup>18</sup> See *The nature of state parties' obligations (art.2, para.1) – General Comment No.3*, 14 December 1990, E/1991/23.

essential foodstuffs, essential primary health care, basic shelter and housing, and basic primary education. Nevertheless, developing countries may choose to what extent such access is granted to non-nationals (art. 2(3)). Such limitation is partly offset by the fact that the 1951 Refugee Convention provides a stronger basis for protection of certain economic rights.<sup>19</sup>

If a state which is party to the ICCPR and/or the ICESCR returns a person to a territory where his basic human rights are breached, it would be in violation of its obligations under the Covenants. The Human Rights Committee has unequivocally stated that “if a State party extradites a person within its jurisdiction [in such circumstances], and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”<sup>20</sup> This argument was made with regard to article 7 of the ICCPR, but could apply to other articles of the Covenant. Where the sending state has accepted the competence of the Human Rights Committee to receive and examine individual communications,<sup>21</sup> a refugee who is transferred to another state in breach of his fundamental human rights as protected under the ICCPR could lodge a communication against the sending state.

One should also refer to the Convention against Torture, as the UNHCR definition implicitly does.<sup>22</sup> Article 3 of that Convention states that no one should be returned to a state “where there are substantial grounds for believing that he would be in danger of being subjected to torture”. A Committee was established under the Convention and state parties can choose to accept its competence to receive and examine individual communications under article 22. A refugee who is being transferred to a country in breach of article 3 of the Convention could thus send a communication to the Committee. It must be noted that the Committee has clearly established that with regard to return to torture, for a claim to succeed under article 3, it is not sufficient, nor required, to submit evidence that there is a consistent pattern of gross violations of human rights in a country: what must be examined is “whether the individuals concerned would be personally at risk of being subjected to torture in the country to which they would return.”<sup>23</sup>

States which are parties to the European Convention on Human Rights<sup>24</sup> may be subject to further legal constraints. The most important provision to be considered is article 3 which prohibits torture and inhuman or degrading treatment or punishment. In the landmark case of *Soering*, the European Court of Human Rights established that no one should be extradited to a state where he would be faced with a real risk of serious ill-treatment by that state.<sup>25</sup> It was subsequently found that article 3 would also apply to removal cases where the risk of ill-treatment emanates from non-state agents

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<sup>19</sup> See J.C. Hathaway, “The international refugee rights regime”, (2000), 8(2) *Collected Courses of the Academy of European Law*, 135.

<sup>20</sup> See *Ng v Canada*, CCPR/C/49/D/469/1991, 7 January 1994, para.14.2.

<sup>21</sup> See *First Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 *U.N.T.S.* 302.

<sup>22</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 23 *I.L.M.* 1027 and 24 *I.L.M.* 535.

<sup>23</sup> See *S.M.R. & M.M.R. v Sweden*, CAT/C/22/D/103/1998, 11 June 1999, para.9.3.

<sup>24</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter *the European Convention on Human Rights*), 4 November 1950, 213 *U.N.T.S.* 221.

<sup>25</sup> See *Soering v. United Kingdom et al.* (1989) 11 *E.H.R.R.* 439.

and where state authorities are unable to afford protection.<sup>26</sup> Nevertheless, the European Court of Human Rights has also stated that “given the fundamental importance of article 3 in the Convention system, the Court must reserve to itself sufficient flexibility to address the application of that article in other contexts which might arise.”<sup>27</sup> Accordingly, the Court has established that, in very exceptional circumstances, article 3 may also be engaged where a person is returned to a situation, rather than specific acts, exposing him to serious ill-treatment.<sup>28</sup>

There is some uncertainty as what constitutes inhuman and degrading treatment for the purposes of article 3. Nonetheless, the Court has recently given some guidance as to the type of treatment which may fall within the definition of ill-treatment prohibited by the Convention: it has stated that

As regards the types of “treatment” which fall within the scope of Article 3 of the Convention, the Court's case-law refers to “ill-treatment” that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible. (emphasis added)<sup>29</sup>

The threshold set by article 3 is high and few returns of refugees to a third country would amount to a breach of this provision. Nonetheless, it is worth noting that the Court has not foreclosed any further development of its jurisprudence on article 3 in the context of removals. States should therefore carefully scrutinise all the circumstances surrounding each transfer of refugee to a third state, in order to avoid breaching their obligations under article 3.

Other articles of the Convention should be considered when examining the legality of returns of refugees to third countries. Article 2 (right to life) has been invoked on several occasions to challenge removal decisions, but the Court has not found it necessary to rule on whether this provision could be engaged in such cases.<sup>30</sup> In contrast, the Court has explicitly considered that article 8 could be breached in removal cases. In earlier cases, article 8 was successfully invoked only where the removal decision would impact on the enjoyment of family life of those already established within the territory of a state party to the Convention. Indeed, the Court focused on whether the refusal to permit entry or the expulsion of the spouse/child/parent of a settled person amounted to an “interference” with that

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<sup>26</sup> See *H.L.R. v France* (1998) 27 E.H.R.R. 29.

<sup>27</sup> See *D. v United Kingdom* (1997) 24 E.H.R.R. 423, para.49.

<sup>28</sup> *Ibid.*

<sup>29</sup> See *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1, para.52.

<sup>30</sup> See for instance *D. v United Kingdom*, para.59.

person's right to respect for family life.<sup>31</sup> For such an interference to exist, the applicant has to demonstrate that he cannot follow his spouse and establish his family life elsewhere.<sup>32</sup> In the context of transfers of refugees to a third country, states must thus ensure that the refugee does not have close family ties with a person who is settled in their territory and if he does, that the family can relocate to the third country.

More recently, the Court has shifted its attention to the rights to private life of the person to be removed. In *Bensaid*, it has declared that a decision to remove a person to a situation in which he would face treatment which does not reach the severity of article 3 "may nonetheless breach article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity."<sup>33</sup> It is worth noting that article 8 was broadly interpreted to include elements such as gender identification, name, sexual orientation, sexual life, mental health and so on.<sup>34</sup> This case should be seen as an important development since there is no longer a requirement to establish close family ties with a person who is settled in the territory of a contracting state. So far, the Court has not found that a removal decision constituted a violation of article 8 on the sole ground that the person will face a severe interference with his private life, but states should be aware that it is clearly open to the suggestion that some removal decisions may breach this provision.

Article 6 (right to fair trial) has been invoked mainly in extradition cases. Although the Court had once made clear that an extradition decision could breach article 6 where there is a risk of a "flagrant denial of a fair trial" in the requesting country,<sup>35</sup> it has so far refused to examine any issue arising under article 6 in extradition cases.<sup>36</sup> Transfers of refugees to a third country would rarely be challenged under article 6, unless the refugee would face trial in the third country and there is evidence that he will be denied a fair trial. Article 9 (freedom of thought, conscience and religion) has never been successfully invoked to challenge a removal decision. However, while discussing the applicability of article 9 to removal decisions, the British House of Lords has recently stated that articles other than article 3 could be engaged where there is "a real risk of a flagrant violation of the very essence of the right".<sup>37</sup>

There is no doubt that state parties to the European Convention of Human Rights should always consider the foreseeable consequences of their acts of removal. It is now widely accepted that where there is a real risk that the person will face ill-treatment amounting to torture or inhuman or degrading treatment within the meaning of article 3, the state deciding his removal is in breach of its Convention obligations. However, it must be noted that other articles of the Convention can also be engaged when envisaging transfers of refugees to third countries, even in situations where they would face treatment falling short of article 3 ill-treatment. Transfers of refugees to a

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<sup>31</sup> See *Abdulaziz, Cabales and Balkandi v United Kingdom* (1985) 7 E.H.R.R. 471.

<sup>32</sup> For more detail, see N. Rogers, "Immigration and the European Convention on Human Rights: are new principles emerging?" (2003) *European Human Rights Law Review* 1:53.

<sup>33</sup> See *Bensaid v United Kingdom* (2001) 33 E.H.R.R. 10, para.46.

<sup>34</sup> *Ibid*, para.47.

<sup>35</sup> See *Soering v United Kingdom*, para.113. See also the admissibility decision in *MAR v United Kingdom* (1997) 23 E.H.R.R. CD120 Eur Comm HR. This case was subsequently settled.

<sup>36</sup> See *Mamatkulov and Abdurasulovic v Turkey* (application nos. 46827/99 and 46951/99, judgement of 17 March 2004).

<sup>37</sup> See *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, para.50.

third country may amount to a breach of article 8 for instance. Future developments on articles 6 and 9 should also be scrutinised. I would argue that decisions to transfer a refugee to a third state would be in contravention of the Convention where the refugee faces a serious risk of a gross violation of any of his Convention rights and that the severity of the violation should not be assessed solely with reference to article 3, as evidenced by the Court's recent decision in *Bensaid*.

### **Protection of 'acquired rights'.**

The concept of protection has so far been defined within the framework of international and regional human rights law. Since we are specifically concerned with the returns of refugees who have moved in an irregular manner from a first asylum country, one should also define the concept of protection with reference to the 1951 Refugee Convention. State parties to the Convention are bound by certain duties to the refugees who come under their jurisdiction.

These duties go beyond the basic duty not to return a refugee to a country where his life or freedom would be at risk. Indeed, state parties to the Convention have undertaken to grant a range of rights to refugees (articles 2 to 34). It would surely defeat the purpose of the Convention if a state avoided its duties by merely transferring a refugee to another jurisdiction without ensuring that the receiving state protects the rights acquired by the refugee in the sending state.<sup>38</sup> Refugees ought not to be deprived of the protection of their rights as defined in the 1951 Refugee Convention by virtue of the fact that another state has assumed responsibility for their protection.

The principle that an individual cannot be unlawfully deprived of his acquired rights is a general principle of law. The doctrine of acquired rights has been initially applied to property rights: where a person has acquired rights in a property and has been unlawfully deprived of these rights, he should be entitled to restitution or compensation. The doctrine is now well-established in domestic law, but also in international law. Firstly, the doctrine has been applied in the context of state succession. Consequently, rights previously acquired can be validly invoked against the successor state.<sup>39</sup> Secondly, the doctrine has more recently been applied in the context of property restitution to returning refugees and internally displaced persons.<sup>40</sup>

In the context of state succession, the doctrine of acquired rights has traditionally focused on property rights, but this can be explained by the fact that "when international law began to address the protection of acquired rights, there were no international human rights treaties."<sup>41</sup> It is now argued that the doctrine should be and has been

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<sup>38</sup> I would like to thank James Hathaway for this thought.

<sup>39</sup> See *German settlers in Poland* (Advisory Opinion) (1923) PCIJ Series B, No.6, at 36. For a detailed discussion of the doctrine of acquired rights, see D.P. O'Connell, *State succession in municipal law and international law* (Cambridge: Cambridge University Press, 1967), vol. I, 237ff.

<sup>40</sup> See COHRE, *Housing and property restitution for refugees and internally displaced persons: international, regional and national legal resources* (Geneva: COHRE, 2001).

<sup>41</sup> See R. Mullerson, "The continuity and succession of states, by reference to the former USSR and Yugoslavia" (1993) 42 *International and Comparative Law Quarterly* 473, at 491.

extended to include human rights.<sup>42</sup> Indeed, one would have thought that human rights are no less important than property rights. Judge Weeramantry of the International Court of Justice has argued:

Another possible line of enquiry [...] is the analogy between a treaty vesting human rights, and a dispositive treaty vesting property rights. From the time of Vattel, such a dispositive treaty, as for example a treaty recognising a servitude, has been looked upon as vesting rights irrevocably in the party to whom they were granted; and those rights, once vested, could not be taken away. Perhaps in comparable fashion, human rights, once granted, become vested in the persons enjoying them in a manner comparable, in their irrevocable character, to vested rights in a dispositive treaty.<sup>43</sup>

The doctrine of acquired rights can thus be reformulated more broadly. In sum, it provides that rights, including human rights, which were previously acquired by an individual and protected by state A, should be protected by state B, in situations where state A has 'transferred' its responsibility to protect these rights to state B (either through the process of state succession, or by removing the individual to state B). To some extent, the developing jurisprudence of the European Court of Human Rights as analysed above (and to a lesser extent that of the Human Rights Committee) confirms this analysis.<sup>44</sup>

If the doctrine of acquired rights is applicable to human rights, it should a fortiori be applicable to refugee rights. The 1951 Refugee Convention itself makes a reference to some principle of acquired rights. Article 12(2) states that "rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a contracting state".<sup>45</sup> If the refugee is entitled to the protection of the rights he has acquired prior to becoming a refugee, one would expect that he should also be entitled to the protection of the rights he has acquired upon becoming a refugee on the territory of a state party to the Convention. By sending the refugee to a state where his rights are not protected, the sending state would be depriving him of his acquired rights.

Any attempt to define the meaning of protection in the refugee law context should consider the principle of acquired rights as applied to the 1951 Refugee Convention. As a preliminary point, one should first determine which rights are acquired by a

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<sup>42</sup> See M.T. Kamminga, "State succession in respect of human rights treaties" (1996) 7 *European Journal of International Law* 469; but see also A. Rasulov, "Revisiting state succession to humanitarian treaties: is there a case for automaticity?" (2003) 14 *European Journal of International Law* 141.

<sup>43</sup> See *Bosnia and Herzegovina v Yugoslavia* (1993) *ICJ Reports* 225 (Separate Opinion of Judge Weeramantry).

<sup>44</sup> For an application of the doctrine of acquired rights in a completely different area of law, see *EC directive 98/50 of 29 June 1998 amending directive 77/187 on the approximation of the laws of the Member States to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses*, OJ 1998 L 201/88.

<sup>45</sup> See also *EXCOM Conclusion No.69 (XLIII) on cessation of status* (1992), para.(e), which recommends that "states seriously consider an appropriate status, *preserving previously acquired rights*, for persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country" (emphasis added). See G.S. Goodwin-Gill, *The refugee in international law* (Oxford: Clarendon Press, 1983), 210-211.

refugee at which stage. Not every right set out in the Convention is immediately bestowed upon a refugee. The rights guaranteed under articles 2 to 34 can usefully be divided into several categories of rights: rights acquired as soon as the refugee enters a state party's territory, rights acquired when the refugee is lawfully within the territory, rights acquired when the refugee is lawfully staying there and some remaining rights which are granted to him only upon durable residence.<sup>46</sup>

It is the first two categories of rights which are of interest for our purpose. A refugee who is on a state party's territory is entitled to protection against refoulement, but also to a range of rights including protection against discrimination (art.3), religious freedom (art.4), non-penalisation for illegal entry or presence (art.31), and so on.<sup>47</sup> In addition, a refugee who is "lawfully in" is granted additional rights.<sup>48</sup> These rights include the right to engage in self-employment (art.18), freedom of movement (art.26) and protection against expulsion (art.32). Consequently, a refugee cannot be transferred to a state where he would remain in closed camps and not be allowed to support himself by taking up self-employment. Where a refugee is lawfully within the territory of a state party and has thus acquired a range of rights attached to that status, the state should not transfer him to a third state where these acquired rights would not be protected.

The crux of the matter is how to determine whether the third state protects the rights acquired by the refugee in the sending state. Once again, I would argue that it is not crucial that the receiving state be a state party to the Convention, although it would be desirable for reasons explained above. What is important is the *de facto* delivery of protection by the state concerned. When looking at the list of rights which the refugee may have already acquired in the sending state, one realises that many of these rights are purely administrative (e.g. administrative assistance, identity papers, etc). It should thus be fairly straightforward to determine whether the receiving state will respect them. As far as other rights are concerned, it may be more difficult to assess whether the receiving state fully respects these rights. If one takes the example of freedom of religion, the sending state should examine whether such freedom is guaranteed in the receiving state, and in particular whether the practice of minority religions is allowed.

It is submitted here that, where appropriate, the rights granted to refugees by the 1951 Refugee Convention should be protected by domestic legislation in the receiving state. For instance, with regard to article 33 or 31, one could examine whether the principles enshrined in these provisions have for instance been incorporated in national law. One could also identify whether a refugee has access to remedies where his rights under the Convention are breached. UNHCR should assist states in

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<sup>46</sup> See J.C. Hathaway, "What's in a label?" (2003) 5 *European Journal of Migration and Law* 1, at 3.

<sup>47</sup> Other rights include arts.12 (personal status), 13 (movable and immovable property), 16(1) (access to courts), 20 (rationing), 22 (education), 25 (administrative assistance), 27 (identity papers), and 29 (fiscal charges).

<sup>48</sup> Lawful presence is broadly defined. The refugee who has entered the country in an irregular manner, is "lawfully within" the territory as soon as he is admitted to the asylum process. See J.C. Hathaway and A.K. Cusick, "Refugee rights are not negotiable" (2000) 14 *Georgetown Immigration Law Journal* 481, at 494-496. Since the recognition of refugee status is merely declarative, the asylum-seeker should be considered as a "presumptive refugee" until determined otherwise. A state party must grant to the refugee who is "lawfully in" the rights to which he is entitled until he has been determined not to be a refugee under the Convention.

assessing a potential receiving state's record of protecting refugee rights under the Convention. The agency could usefully identify specific areas where protection capacities fall short of the Convention standards and should be strengthened (with the assistance of potential sending states). This leads us to another approach to 'effective protection' in which the emphasis is not only on legal constraints, but on objectives.

### **Providing protection in regions of origin**

As exemplified by Professor Legomsky's study on 'effective protection',<sup>49</sup> much of the discussion has focused on the legal constraints binding upon states wishing to return refugees who have moved in an irregular manner from a country of first asylum. As shown above, some legal constraints can be clearly identified. Others less so. UNHCR stated that "there [should be] a genuine prospect of an accessible durable solution in or from the asylum country, within a reasonable timeframe".<sup>50</sup> Durable solutions are traditionally divided into three categories which are voluntary return, local integration and resettlement. However, it may be not always be possible to assess whether the refugee will be able to return home, integrate locally or be resettled to a third country.

Protection in the sense of access to durable solutions may be more usefully understood as an 'objective' of international efforts in regions of origin. Indeed, instead of assessing what protection *is* available to the refugee in the country of first asylum, one may also determine what protection *should be* provided in that country. Of course, efforts should be focused on the defence of the rights enumerated above. Where possible, the refugee should be given a specific legal status which guarantees that he or she can remain as long as protection is needed, but also that they have access to the full range of rights afforded by the 1951 Refugee Convention. This is desirable even where the state grants refugee status on a group basis.

Some may argue that the granting of a legal status should be a requirement, rather than an aspiration. This goes back to the fundamental issue of whether the concept of protection can bear two separate meanings according to the context in which it is used. One could suggest that in the context of irregular secondary movements, returns to the country of first asylum should only be envisaged where protection, in the sense of legal protection of the rights enumerated above, is guaranteed in that country. In this context, the concept of protection serves to assess the legality of returns to countries of first asylum.

In the context of protection in regions of origin, protection should take on a broader meaning and refer also to access to durable solutions. It would serve to determine what practical actions are required from donor countries to improve both the enforcement of refugees' rights and access to durable solutions in regions of origin. In other words, it would help to define an agenda for action. This distinction between a 'legal' definition and an 'operational' definition of protection may appear problematic to those who are concerned about states using a narrow definition of protection in order to justify returns of refugees to first asylum countries. Nonetheless, in the light

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<sup>49</sup> See *supra* note 5.

<sup>50</sup> See Erika Feller's statement, *supra* note 6.

of the above analysis, one should remember that the ‘legal’ concept of protection can and should be given a comprehensive meaning in accordance with international human rights and refugee standards.

Whereas the concept of protection in the context of irregular secondary movements can be defined in precise legal terms, identifying what protection means in the context of protection in regions of origin depends on a range of political and socio-economic factors. To determine what actions are required in a particular situation requires a thorough understanding of refugee realities in the area concerned. It will require a greater dialogue between donor countries and first asylum countries as to how the former can assist the latter in improving access to durable solutions. This may involve the more strategic use of development aid, capacity-building, the development of resettlement programmes and so on. The choice of strategies will obviously depend on the countries and the refugees concerned.

In some cases, it may appear that a package of measures adopted to improve access to durable solutions can be adopted for a specific caseload of refugees. This may be the case for Somali refugees for which a Comprehensive Plan of Action is currently being envisaged.<sup>51</sup> In most cases, measures will be negotiated at the country level. Under the Convention Plus framework, states are discussing ways to target development assistance to achieve durable solutions for refugees<sup>52</sup> and attempting to develop a multilateral agreement on the strategic use of resettlement.<sup>53</sup> The expectation is that these discussions will facilitate multilateral cooperation to improve refugee protection in specific country situations.

## Conclusion

In the debate over ‘effective protection’, there has been considerable confusion as to the very purpose of that debate. Whereas states have been most interested in this ‘new’ concept, most academics and NGOs have shown very little enthusiasm in defining it with more precision. This lack of interest probably stems from a suspicion that states are interested in ‘effective protection’ as a way of restricting their legal obligations towards refugees moving in an irregular manner from a first asylum country. For instance, Australia claims that “protection obligations may also not be owed to a person who already has effective protection in another country, through citizenship or some other right to enter and remain safe in that country” (emphasis added).<sup>54</sup> There is clearly a risk in leaving the discussion on ‘effective protection’ to states and a pressing need for other stakeholders, lawyers in particular, to engage in this debate. A clear understanding of the meaning of protection is essential in informing the debate over state responsibilities for providing such protection.

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<sup>51</sup> See also High Commissioner’s Forum, *Initiatives that could benefit from Convention Plus, Background document*, FORUM/2003/03, 18 June 2003. This document identifies several caseloads of refugees for whom a comprehensive plan may be also be envisaged.

<sup>52</sup> See for instance High Commissioner’s Forum, *Convention Plus: target development assistance to achieve durable solutions for refugees*, FORUM/2004/3, 17 February 2004.

<sup>53</sup> See High Commissioner’s Forum, *Multilateral framework of understandings on resettlement*, FORUM/2004/6, 16 September 2004.

<sup>54</sup> See DIMIA, *Fact sheet No.61 – Seeking asylum in Australia* (2003), <http://www.dimia.gov.au/facts/pdf/61asylum.pdf>.

Protection is obviously not a new concept, but what is novel is the context in which it is discussed. The recent emphasis is not so much on the sole content of the concept. We are becoming familiar with what refugee protection should entail under the 1951 Convention. It may be that the debate over refugee protection is becoming more elaborate in the sense that we are now discussing in more detail what protection should be provided to which refugees, where and by which state(s). Instead of discussing what protection duties states owe to the refugees who are on their own territory, the analysis has become more global in scope to the extent that states are now also talking about protection in regions of origin and their respective roles in promoting such protection.

This paper has tried to suggest that the current debate on 'effective protection' should be reformulated in more positive terms. In order to respond to some states' attempts to adopt a restrictive definition of protection, a more rigorous and comprehensive definition can be proposed. This should serve to assess more seriously the legality of any returns of refugees to first asylum countries. In terms of protection in regions of origin, one also needs to adopt a broad definition of protection. This time, the emphasis is less on the legal elements of protection and more on the very practical details of protection in the field.