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**“Review of Asylum Policies and Procedures in The Bahamas:  
Are Current Policies and Procedures Consistent with  
International Instruments for the Protection of Refugees?”**

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**"Let us protect our country for this  
present generation and for generations  
yet unborn"**

The Hon. Vincent Peet, Minister of Labour and Immigration

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# Summary

Volatile conflicts, poverty and suppression of basic human rights stemming from one's political or religious affiliations, gender and race, are some of the various reasons why thousands flee home in the hopes of finding some kind of security. As the world observes the appalling deterioration of conflicts in Western Sudan, Iraq and Haiti, we simultaneously observe neighbouring or developed countries securing their borders in an effort to prevent an influx of refugees on to their territories.

We have seen wealthy nations invest in costly technology to detect illegal immigrants and impede all efforts to access their territory. Such deterrent strategies are crystallized through *non-entrée* or protective entry policies, which may take several forms including; i) off-shore processing, ii) visa requirements and iii) interception at sea. From Europe to the Americas, governments are working diligently to keep "illegal immigrants" out. James Hathaway has argued that such 'restrictionist practice' by Western States effectively threaten the viability of international refugee protection<sup>1</sup>. This point is especially valid when one considers the usual trend of smaller, less developed states, which emulate such measures.

*Non-entrée* policies have not emerged *sans* controversy. Such policies can easily be construed as contrary to the spirit and purpose of the 1951 Convention Relating to the Status of Refugees<sup>2</sup> (hereinafter called "the Refugee Convention" or "the Convention") which prohibits the penalisation of immigrants on account of their illegal entry<sup>3</sup>. The refugee convention further prohibits the return of immigrants to a territory where their life or freedom may be endangered<sup>4</sup>. The underlying rationale of *non-entrée*

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<sup>1</sup> Virag Katalin; *Towards a Progressive Reading of International Refugee Law: James Hathaway Revisited*. Available at:

<[www.csu.edu.au/student/forcedmigration/refugee/Vol1/Vol1\\_a6.htm](http://www.csu.edu.au/student/forcedmigration/refugee/Vol1/Vol1_a6.htm)>

<sup>2</sup> 189 U.N.T.S. 150, *entered into force* April 22, 1954.

<sup>3</sup> See article 31 of the Refugee Convention.

<sup>4</sup> *Ibid.* article 33 (on non-refoulement).

policies is to prevent would-be asylum seekers from accessing the jurisdiction of the potential country of protection. Successful *non-entrée* policies greatly reduce the obligations of a country to offer protection to asylum seekers.

Like many countries, the Bahamas has adopted rather restrictive policies towards asylum seekers. The archipelago of 700 islands and cays is located approximately 50 miles off the east coast of Florida. Due to its proximity to the United States of America (USA), illegal immigration is a significant aspect of its geopolitical relationship with this country. Indeed many of the illegal immigrants apprehended in Bahamian waters have dreams of landing in the USA. However, with just 23 inhabited islands and an approximate population of 310,000, many undocumented immigrants end up in the Bahamas – a trend that is disturbing to both the Bahamian Government and the electorate alike. It has been estimated that there are approximately 60,000 illegal immigrants living in the Bahamas<sup>5</sup>, predominantly from Haiti or of Haitian parentage.

In addition to its geographical location, economic and political stability are other ‘pull factors’ which have made the Bahamas an attractive destination for immigrants in the region. However, in recent times, the country has seen illegal immigrants come from all over the world - even as far away as China, Nigeria and Nepal. Though many of the illegal immigrants landing on Bahamian shores are ‘economic migrants’, it is extremely important to distinguish between those ‘in search of a better life’ and those seeking asylum. It is particularly difficult to make this distinction, which in the writer’s opinion, is one of the main problems plaguing the asylum policy of the Bahamas.

In summary, this thesis will provide a comprehensive overview of asylum policy and procedure in the Bahamas, highlighting the inadequacies of the

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<sup>5</sup> BBC ‘Country Profile: Bahamas’. Available at:  
<[www.bbc.co.uk/1/hi/world/americas/country\\_profiles/115642.stm](http://www.bbc.co.uk/1/hi/world/americas/country_profiles/115642.stm)>

system and its inconsistency with international law. The writer will critically analyse Constitutional provisions and the 1967 Immigration Act, which fail to consider asylum seekers, in addition to discussing the failure of the Government to enact appropriate legislation to implement the provisions of the refugee convention.

# Aknowedgements

After months of research and interviews, my study of International Refugee Law and in particular the obligations of The Bahamas with regards to International Instruments for the Protection of Refugees has come to an end. I would be remiss if I failed to mention how exciting I found this topic and I am overjoyed to state that after writing on the same, I intend to pursue a professional career in Refugee Law.

Anyone who has written a Master Thesis (or PHD for the matter) will be all too familiar with the colossal amount of research and dedication such a feat requires. The determination acquired when writing this thesis, is a valuable quality I shall always cling to, and recall in all my future endeavours.

This thesis could not have been completed without the love and support of many, and I would like to dedicate this section of my work to those who have been extremely instrumental in making this paper possible.

First and foremost, I would like to thank the professors and staff at The Raoul Wallenberg Institute for Human Rights and Humanitarian Law at Lund University in Sweden, and in particular my thesis supervisor, Professor. Brian Burdekin.

I would also like to thank the staff of the Resettlement Unit at the UNHCR Cairo, who played an important role in putting much of refugee law into perspective for me. Writing a thesis on refugee law was greatly simplified by having the opportunity to complete an internship with the UNHCR.

A special thanks to my family and friends who enthusiastically encouraged me throughout my study, even when it seemed nearly impossible to ascertain the necessary information from the appropriate authorities.



Additionally, I would like to thank the Bahamas Ministry of Labour and Immigration, which provided vital insight into the country's refugee determination procedure. This study could not have been properly completed without their assistance.

Lastly, I would like to express my gratitude to the host of Bahamian lawyers who offered their insight into the situation and of course, the interviewees who captured my attention, when I began to lose focus. Such 'interaction' introduced me to the reality of a refugee's plight and this exposure, in my view, brought 'life' to my work.

Many thanks,

Deneisha E. Moss

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# Abbreviations

ACHR	American Convention on Human Rights
ADHR	American Declaration on Human Rights
AI	Amnesty International
CERD	Committee on the Elimination Racial Discrimination
EXCOM	Executive Committee (of the High Commissioner's Programme) (UNHCR)
IACHR	Inter-American Commission on Human Rights
IRO	International Refugee Organisation
HCR	Human Rights Committee
NGO	Non-Governmental Organisation
OAS	Organisation of American States
RBDF	Royal Bahamas Defence Force
UNHCR	Office of the United Nations High Commissioner for Refugees
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
USCR	United States Committee for Refugees

## **INTERNATIONAL TREATIES & INSTRUMENTS**

- 1926 Arrangement with Regard to the Issue of Identity Certificates to Russian and Armenian Refugees
- 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees
- 1933 League of Nations Convention Relating to the International Status of Refugees
- 1938 Convention Concerning the Status of Refugees
- 1948 Universal Declaration of Human Rights
- 1948 American Declaration on the Rights and Duties of Man
- 1950 European Convention on Human Rights
- 1950 Statute of the Office of the High Commissioner for Refugees
- 1951 Convention Relating to the Status of Refugees
- 1954 Caracas Convention on Diplomatic Asylum
- 1954 Caracas Convention on Territorial Asylum
- 1966 UN Convention on Civil and Political Rights
- 1967 Protocol Relating to the Status of Refugees
- 1969 American Convention on Human Rights
- 1969 UN Convention on the Elimination of All Forms of Racial Discrimination
- 1969 OAU Convention Relating to the Specific Aspects of Refugee Problems in Africa
- 1984 Cartagena Declaration on Refugees
- 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- 1989 UN Convention on the Rights of the Child

# Introduction

## *i) The Development of International Refugee Law/Historical Perspective*

In the wake of the early twentieth century, the international community began voicing valid concerns over the mass movement of people in Europe and Asia<sup>6</sup>. The Russian Revolution in 1917 and the backlash of World War I further substantiated the need for refugee protection as tens of thousands fled their homes in search of safety.

It was necessary for the League of Nations to conclude a series of agreements to assist those affected during this tumultuous period<sup>7</sup>. Initially, the absence of internationally recognised documents meant that many falling within the ambit of the agreements found themselves in a precarious situation. Although these people were considered refugees by definition and had acquired some level of protection, travel was difficult (if not impossible) since in most cases, those concerned were stateless people with no valid identification. In 1922, the League of Nations organised the “Nansen Passport”<sup>8</sup> which became a de facto travel document used to facilitate the return or resettlement of thousands of people to different countries<sup>9</sup>.

In hindsight, it is arguable that the system may have been blemished due to its restrictive nature and failure to take a holistic approach to then current and future refugee crises. The agreements concluded by the League of

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<sup>6</sup> In the nineteenth century, political domination by the Ottoman and Hapsburg Empires led to the persecution of Armenians and Romanians, many of whom then emigrated to Chicago. Available at <<http://www.encyclopedia.chicagohistory.org/pages/1053.html>>

<sup>7</sup> During this period, the League concluded the 1926 Arrangement with Regard to the Issue of Identity Certificates to Russian and Armenian Refugees, the 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees, the 1933 League of Nations Convention Relating to the International Status of Refugees, the 1938 Convention concerning the Status of Refugees coming from Germany.

<sup>8</sup> Named after the First High Commissioner for Refugees - Fridtjop Nansen

<sup>9</sup> The Nansen passport was initially issued to Russian refugees, but later became available to other refugees who were unable to secure valid travel documents. By 1942, the travel document was accepted by 52 countries.

Nations dealt only with specific groups of people: i.e., the German Jews, Turks, Greeks, Assyrians, Armenians, Spaniards and Austrians. The contents of the agreements reflected the world's predicament at the time. However, had there been foresight (on the part of the League) of the refugee crises to come, perhaps a more permanent framework would have been established.

Nonetheless, the League of Nations did eventually embark upon a 'permanent' legal structure for the protection of refugees. Refugee law as we know it today began to develop with the adoption of the 1933 *League of Nations Convention Relating to the International Status of Refugees*, which has been described as a "milestone" in international refugee law<sup>10</sup>. The convention was followed by the 1938 *Convention Concerning the Status of Refugees*. However, lack of political will in the international community is arguably responsible for the demise of both conventions<sup>11</sup>.

The outbreak of the Second World War compelled the international community to acknowledge the importance of a more permanent and well-defined solution for the masses of people who were being made homeless by the horrors of war.

The establishment of the International Refugee Organisation ("IRO")<sup>12</sup>, which emerged following the expiration of the United Nations Relief and Rehabilitation Agency ("UNRRA")<sup>13</sup>, created a more comprehensive system of helping refugees and further developed the founding principles of various treaties and agreements concluded under the League of Nations. The

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<sup>10</sup> Jaegar, Gilbert: *On the History of the International Protection of Refugees*, available at: <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JREE/\\$File/727\\_738\\_Jaeger.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JREE/$File/727_738_Jaeger.pdf)>

<sup>11</sup> Dr. Luise Druke (Representative of the UNHCR) has described both the 1933 and the 1938 conventions as an "abysmal failure, merely confirming the general lack of willingness of countries around the world to offer a lifeline to the Jews". Dr. Druke supports this assertion by pointing out that the 1933 convention only had 8 signatories. Available at: <[http://www.unhcr.bg/events\\_records/2002/2002\\_12\\_10\\_ld\\_en.pdf](http://www.unhcr.bg/events_records/2002/2002_12_10_ld_en.pdf)>

<sup>12</sup> The IRO was established by the United Nations in 1946 and actually began its work in July 1947.

<sup>13</sup> The United Nations Relief and Rehabilitation Agency was established in 1943 to provide assistance to refugee camps. The mandate of the UNRRA was limited to member states of the United Nations.

mandate of the IRO extended to assist the massive number of refugees incapacitated as a result of World War II, and subsequently helped more than 1,000,000 people in refugee camps across Europe<sup>14</sup>.

### ***ii) International Refugee Law in a ‘Contemporary’ Sense***

This study is divided into two parts; the first part outlines various international instruments relevant in refugee law. Chapter one concentrates on conventions and declarations that *specifically* relate to asylum seekers and refugees. Chapter two is dedicated to other human rights instruments that are of relevance in the protection of refugees.

The second part of the thesis takes a less ‘legalistic’ view. Chapter three examines the current asylum policy of the Bahamas in light of its obligations under international law. Chapter four takes a procedural approach, discussing how refugee status is determined by authorities, and shortcomings of the system.

In the fifth Chapter, the writer discusses the importance of the UNHCR: its mandate and its supervisory role emanating from article 35 of the refugee convention.

The final section of this paper, offers recommendations on how Bahamian asylum policy can be reconciled with international refugee law.

### ***iii) Research Methodology***

The first part of this paper was completed using the work of authorities in international refugee law, such as Hathaway and Goodwin-Gill. A detailed analysis of the instruments was also necessary for completion of part one.

The Second Part of the study required more ‘field work’. Interviews with refugees and an immigration official were necessary to obtain vital

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<sup>14</sup> The IRO resettled 1,038,750 refugees overseas and repatriated 72,834 to their countries of origin. Available at: <<http://www.mhsc.ca>>

information. Additionally, the lack of literature relating specifically to Bahamian asylum policy meant the bulk of the second part of the study required internet based research.

# Chapter 1

## 1. Refugee Law Instruments

### 1.1 1951 Refugee Convention Relating to the Status of Refugees (“The Refugee Convention”)

The emergence of the United Nations High Commissioner for Refugees (“UNHCR”) helped to pave the way for the establishment of the Refugee Convention. The principle role of the non-political body was to develop and promote refugee protection. Shortly after establishment of the agency<sup>15</sup> (which is discussed in detail in Chapter five), the refugee convention was drafted and adopted, providing a permanent legal framework for refugees.

To date there are 142 countries party to the convention<sup>16</sup>, which is legally binding on State parties. The refugee convention offers a detailed definition pertaining to *who* qualifies as refugee<sup>17</sup> and elaborates on the rights and duties attached to those acquiring status. The Convention also gives detailed guidance on those excludable from international protection<sup>18</sup> and circumstances when refugee status will cease to exist<sup>19</sup>. Before we can discuss exclusion and cessation however, we must firstly consider inclusion.

Five key elements comprise the concept of ‘inclusion’. Those seeking protection must be able to demonstrate the following;

- (i) that they are outside of their country of nationality/habitual residence;
- (ii) that they have a *well-founded fear*
- (iii) of persecution
- (iv) based on particular grounds, and
- (v) that they do not benefit from effective state protection.

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<sup>16</sup> As of 1 May 2005. Available at <[www.unhcr.ch](http://www.unhcr.ch)>

<sup>17</sup> Article 1 of the Refugee Convention.

<sup>18</sup> Ibid. (Exclusion clauses Article 1 (F)).

<sup>19</sup> Ibid. (Cessation clauses Article (C)).



Where these elements are satisfied, a person will be considered to have fulfilled the criteria for inclusion. Once inclusion has been determined, a person must meet the definition of a refugee as stipulated by article 1A of the refugee convention.

***Definition of a 'Refugee' according to the Refugee Convention***

Article 1(A) clearly defines a refugee as one who was recognised under either the;

- a) 12 May 1926 and 30 June 1928 Agreements;
- b) 28 October 1933, 10 February 1939 and Protocol of 14 September 1939 or;
- c) Constitution of the IRO.

Additionally, the article embraces those people who may have been ineligible for refugee status under the IRO, provided they fulfil the grounds for recognition listed in article 1(A) (2).

***Grounds for Recognition - Article 1 (A)(2)***

'Convention refugees'<sup>20</sup> are those who able to demonstrate a *well-founded fear* of persecution based on either their; race, religion, nationality, political opinion or, membership of a particular social group<sup>21</sup>. According to international law, because refugee status is declaratory<sup>22</sup>, a person is a refugee as soon as he fulfils the criteria stipulated in article 1(A) of the refugee convention.

The era in which the refugee convention was drafted coincided with repercussions of the second world and this is reflected in the wording of article 1 (A) (2). The requisite '*well founded fear of persecution*' emanating from certain grounds, must be 'owing to events occurring in Europe *before*

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<sup>20</sup> Term used to refer to a refugee recognised under the Refugee Convention.

<sup>21</sup> Article 1 (A) (ii) of the Refugee Convention.

<sup>22</sup> Meaning a person is recognized *because* he/she is a refugee, and *not a refugee because of recognition*.

1 January 1951'. These temporal and geographical aspects of the 1951 convention were later removed with the adoption of the 1967 Protocol.<sup>23</sup>

*Cessation Clauses – Article 1(C)*

Article 1 (C) of the refugee convention lists the circumstances when refugee protection will cease to exist. The conditions for cessation are based on various elements that render continued international protection unnecessary.

Refugee status will cease, in accordance with article 1(C) where,

- a) a person avails himself to the protection of his country/nationality;
- b) a person has lost his nationality, but has voluntarily re-acquired it;
- c) a person has acquired new nationality and enjoys the protection of that country;
- d) a person voluntarily returns or re-establishes himself in the country which he/she left or outside which he/she remained owing to a well-founded fear;
- e) a person can no longer refuse to avail himself to the protection of his country because the circumstances which previously existed, no longer exist. This provision is **not** however, absolute. Where a refugee can show *compelling reasons* why he cannot avail him/herself to the protection of his government then his/her status will continue to exist<sup>24</sup>.
- f) a person has been recognised as one having no nationality, and the circumstances giving rise to that predicament have ceased to exist and he/she is able to return to his country of habitual residence. As above, where the refugee can provide *compelling reasons* to the contrary, then he/she will not be subjected to this article.

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<sup>23</sup> The 1967 Protocol is discussed in detail infra. pp. 22

<sup>24</sup> Such '*compelling reasons*' must arise out of previous persecution.

The conditions for cessation are exhaustive and where they do become relevant, the country of asylum should have procedures in place to examine an individual's situation to determine whether an alternative status should be found to allow continued residence in the country. The refugee should have recourse to make representations to an appropriate body explaining why he/she should be allowed to retain his/her status. Ideally, the said body should be the same that originally determined refugee status. Additionally, when cessation of status becomes a real possibility, UNHCR should be involved in the process, offering its expertise and opinion regarding the changed circumstances in the individual's home country.

*Exclusion Clauses – Articles 1 (D-F)*

Article 1 (D) of the refugee convention stipulates that those people receiving assistance from any other UN agency (apart from the UNHCR) will not be covered by the provisions of the convention. Additionally, the provisions of the convention do not extend to those who have taken up residence in a country where they have been recognized by a competent authority and where they have acquired the rights and obligations which are attached to a national of that country<sup>25</sup>.

Once inclusion has been determined, a State party can then consider whether any circumstances exist which may render an asylum seeker excludable from international protection. The decision to exclude is a serious one, and should not be taken lightly by State parties. A person will be excluded from protection where there are serious reasons to consider:

- a) he/she has committed a crime of aggression, i.e. a crime against peace, war crime or a crime against humanity;
- b) he/she has committed a *serious* non-political crime outside his country of refuge prior to being recognised as a refugee or;
- c) he/she has been guilty of acts contrary to the purposes or principles of the United Nations.

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<sup>25</sup> Article 1(E) of the Refugee Convention.

In essence, this article refers not only to former combatants and to those who continue to take part in military activities, but it includes those state agents who may not have *actively* participated in certain crimes, but would have sanctioned or encouraged them. Crimes of aggression and acts contrary to the purposes or principles of the UN include genocide, war crimes and terrorism. Such activities are incompatible with the humanitarian character of the refugee convention. Additionally, those suspected of serious crimes, which are not politically motivated (e.g. murder, rape, etc.) will also be excluded from acquiring refugee status.

### ***Fundamental Principles Emerging from the Refugee Convention***

*Non-refoulement* is one of the most fundamental aspects of refugee law and is often described as “the cornerstone of refugee law”. Article 33 of the refugee convention provides:

*“No contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion ”.*

Throughout this paper, the principle of *non-refoulement* is referred to, but it is appropriate to flag up its importance even at this early stage. The notion has found its place in customary international law having “...*acquired traits of a pre-emptory norm...*”<sup>26</sup>, an important characteristic, which makes it irrelevant whether or not a country has become a party to the refugee convention – it is a principle that must be respected.

International Humanitarian Law also alludes to the principle of *non-refoulement*. The 1949 Geneva Convention on the Protection of Civilians in the Time of War, provides:

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<sup>26</sup> Report of 33<sup>rd</sup> Session UN Doc. A/AC.96/614, para. 70

*“...In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs”<sup>27</sup>.*

Additionally, various international agreements and conventions either explicitly, or through interpretation, prohibit *refoulement*<sup>28</sup>. While most States have acknowledged the quintessence of the principle, what States *say* and *do*, unfortunately, is another matter. Additionally, how States construe legal provisions to suit their policy is even more disturbing.

At a meeting of the UNHCR Executive Committee (“Excom”) in 1987, the American delegate, Ambassador Jonathan Moore made a statement, one which Goodwin-Gill has described as “one of the clearest general statements in support of the principle of *non-refoulement*...”<sup>29</sup> The Ambassador stated:

*“Forced repatriation had occurred in almost every region of the world during the past year, resulting in death, serious injury and imprisonment. Considering the most important element of a refugee’s protection was the obligation of non-refoulement, it was tragic that refugees had been forced to return to their countries against their will, especially when such violations were committed by...states parties to international instruments prohibiting such acts. **The threat to a country posed by influxes of economic migrants should not serve as an excuse for refusing asylum**”.*<sup>30</sup>

This statement is indeed a powerful one, as states are often quick to label immigrants as ‘economic migrants’, in order to justify hasty repatriations or

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<sup>27</sup> Article 45 of the 4th Geneva Convention.

<sup>28</sup> Article 3 of the Convention Against Torture, article 13 of the International Covenant for Civil and Political Rights, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 22 of the American Convention on Human Rights, article II of the OAU Convention Relating to Specific Problems of Refugees and Displaced Persons in the Arab World, article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance, principle 5 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

<sup>29</sup> Goodwin-Gill, Guy S., *The Refugee in International Law*, 2<sup>nd</sup> ed; p.129

<sup>30</sup> Ibid. p.129. Also found in UN Doc. A/AC.96/SR.415, para. 16 (1987)

deportations. Often, such practices are in the absence of proper procedures to determine whether any of the immigrants might have refugee claims.

During the time when this statement was made, The United States had been practicing their policy of interdiction-at-sea, which was authorised by virtue of the 1981 Presidential Proclamation and Executive Order. An important feature of the Order was to prevent an influx of refugees on to American soil, so instead, the undocumented migrants were regularly apprehended on the high seas and forcibly returned to their countries (in most cases Cuba and Haiti). Under the terms of the Order, the United States ensured that no one found to have a valid refugee claim would be returned, but at the same time, ran an extremely superficial screening procedure to determine whether individuals might require asylum.

Throughout the mid-90s, the number of refugees fleeing the unstable situation in Haiti fluctuated, but remained high. The situation climaxed in May 1992, when the US base at Guantánamo Bay (where refugees were housed) exceeded its limit of 12,000 individuals. The US then began summary repatriations of all Haitians interdicted thereafter, without screening them for refugee claims<sup>31</sup>. The situation deteriorated even further, when the US and Jamaica signed a bi-lateral agreement authorising Haitian immigrants to be ‘processed’ on a US navy ship docked in Kingston Harbour. The underlying benefit of this was the US was able to argue these refugees were not actually on their territory and thus not subject to US or international refugee law.

This argument was used in the landmark case of *Sale v. Haitian Centres*<sup>32</sup>, where a group claim was brought against the Immigration and Naturalization Services (INS) on behalf of Haitians being forcibly returned home. Attorneys for the State contended that summary return of illegal

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<sup>31</sup> Savage, David, G., *Haitian Intercept Policy Backed by High Court Immigration*: Los Angeles Times: June 22, 1993

<sup>32</sup> *Sale v. Haitian Centres Council*, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993)

Haitian immigrants did not breach their obligations under international law because the principle of *non-refoulement* only applied to refugees within a state's territory. The rationale was that the principle (of *non-refoulement*) was inapplicable to those interdicted on the high seas. The US Supreme Court in an overwhelming majority (8-1) agreed with the argument presented by the lawyers for the INS. Only the dissent of one Supreme Court Justice reiterated the importance of the principle, taking the position that the overall purpose of it implied extra-territorial application. The UNHCR referred to the decision as "a setback to modern international refugee law which has been developing for more than forty years."

The Inter-American Commission of Human Rights ("IACHR"), one of the main organs of the Organisation of American States ("OAS"), revisited the matter in 1997, and rejected the argument raised by the United States in the case, finding *refoulement* applied equally on the high seas and in a State's territory<sup>33</sup>.

### ***Exceptions to the principle of non-refoulement***

The prohibition of *non-refoulement* in the refugee convention, though a compelling notion in international refugee law, is by no means an absolute prohibition. Article 33 (2) of the refugee convention states:

*"...the present provision may not...be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country".*<sup>34</sup>

Again, should article 33(2) be invoked as an exception to the rule, a State must be able to provide compelling evidence to substantiate its claim. In the wake of the September 11<sup>th</sup> attacks on the United States, there is the potential danger that article 33(2) could be abused by states aiming to

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<sup>33</sup> *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am. C.H.R., OEA/SER.L/V/II.95 Doc.7 rev. at 550 (1997).

<sup>34</sup> Article 33(2) of the Refugee Convention.

restrict their asylum policy even further<sup>35</sup>. In the context of this paper, the Government of the Bahamas often resorts to the ‘security argument’ when justifying its stringent asylum policy, an issue which will be discussed in Part II of this paper.

Other obligations of State parties emanating from the refugee convention include ensuring access to national asylum procedures and guaranteeing recognised refugees identical rights to other foreigners living legally on the State’s territory.

Chapter three of the refugee convention, concerns employment and specifies the right of recognised refugees to gainful employment. Article 17 (2) emphasizes that refugees recognised before the convention entered into force, will not be subjected to national provisions which are in place to protect the labour market of a State party. Otherwise, for the conditions in article 17 (1) to apply, a recognised refugee must fall under one of the following categories:

- (a) he must have resided in the country for more than three years or,
- (b) have a spouse possessing the nationality of the country of residence, or
- (c) have one or more children possessing the nationality of the county of residence.

In essence, this provision offers a form of ‘preferential treatment’ to those granted status (over other foreigners), which has the effect of limiting discrimination. Unfortunately, the Bahamas entered a reservation upon acceding to the refugee convention, requiring refugees to acquire “status in the Commonwealth” in order to have employment rights superior to non-

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<sup>35</sup> The recent case of Ahmed Agiza and Mohammed El-Zari provides a perfect example of this potential risk. Both men were found to have a *well founded fear* of persecution, but both claims for asylum were rejected by the Swedish government for ‘security reasons’, based on ‘secret information’ linking the men to terrorist organizations. The pair were forcibly returned to Egypt in December 2001 after a guarantee by Egyptian authorities that they would not face torture. The UN Committee Against Torture ruled in May 2005, that Swedish government violated the ban on torture, by returning the men to a situation, where they were likely to be tortured, given the documented incidences of torture by Egyptian officials, particularly when dealing with terrorist suspects.



Bahamians<sup>36</sup>. This reservation has the effect of canceling the preferential treatment prescribed in article 17, and instead places an additional requirement of attaining commonwealth status before any such treatment can be afforded. Consequently, this reservation may substantially limit the quality of work refugees are able to secure, and indeed, there have been cases where refugees have encountered difficulty when trying to practice liberal professions, such as law.

An interview with a Nigerian refugee in the Bahamas further illustrated the problems refugees can face due to domestic laws. The refugee, who was a qualified lawyer in his country, arrived to the Bahamas in 1996 and immediately requested asylum from the authorities. Following recognition approximately one year later, the interviewee completed the requisite legal courses in Bahamian Law at the local Bar school. However, after successful completion of the course, the interviewee was informed that he was not eligible for Call to the Bahamian Bar on account of him not being a Bahamian citizen, and could not therefore practice his profession in the country.<sup>37</sup> Article 19 of the refugee convention which relates to liberal professions and refugees, provides those refugees legally on the territory of a State party, holding diplomas by competent authorities, should be accorded treatment as favourable as possible (and not less favourable than other aliens in the same circumstances). Should one construe the provisions of the 1992 Legal Profession Act as existing to protect the Bahamian labour market, there may be an arguable case, that the piece of legislation is incompatible with the refugee convention.

Chapter four of the convention relates to the welfare of refugees, outlining their rights to education, housing and welfare. The convention states that

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<sup>36</sup> The Bahamas made a reservation to the Refugee Convention: “Refugees and their dependants would normally be subjected to the same laws and regulations relating generally to the employment of non-Bahamians within the Commonwealth of the Bahamas, so long as they have not acquired status in the Commonwealth of the Bahamas” The United States Refugee Committee 2002-3 World Report on The Bahamas. Available at <[www.refugees.org](http://www.refugees.org)> or see: <[www.unhchr.ch/html/menu3/treaty2ref.>](http://www.unhchr.ch/html/menu3/treaty2ref.>)

<sup>37</sup> The 1992 Legal Profession Act stipulates only citizens of the Bahamas can be Called to the Bahamian Bar.

these rights must be equivalent to those rights afforded to other aliens on the territory. In some cases (for instance primary education), refugee children should be afforded identical rights to nationals of the State party. The point on primary education of refugee children raises concern when considering whether the Bahamas is living up to its obligations under the refugee convention. In August 2002, a delegation from Amnesty International (AI) claimed that refugee children detained at the Carmichael Road Detention Centre did not go to school.<sup>38</sup> Moreover, the author was unable to ascertain information with respect to refugee minors being educated in the public system.

## **1.2 The 1967 Protocol Relating to the Status of Refugees (“The Protocol”)**

The 1967 Protocol widened the scope of the 1951 convention. As previously mentioned, it removed the temporal and geographical limitations present in the 1951 convention, making it less of an instrument applicable mostly to those in Europe.

The Protocol is not as widely ratified as the 1951 convention, and indeed there are a few countries, like Turkey for example, that have chosen to retain the geographical and temporal limitations. It can be said however, that the terms of the Protocol have given the refugee convention a truly international character.

Whether or not conclusion of the refugee convention served as an impetus for regional cooperation on refugee matters is debatable. However, in the years following conclusion of the convention, numerous regional provisions ensuring legal protection for refugees materialised.

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<sup>38</sup> Additionally, article 28 of the Convention on the Rights of the Child provides that primary education should be compulsory and free for all. The Bahamas ratified the Convention agreement in February 1991, with a reservation to article 2 stating the government would not apply the provisions of article 2 “...insofar as those provisions relate to the conferment of citizenship upon a child having regard to the Provisions of the Constitution of the Commonwealth of the Bahamas”.

### **1.3 1969 OAU Convention relating to the Specific Aspects of Refugee Problems in Africa (“The OAU Convention”)**

The OAU Convention, adopted in 1969 by African States, significantly extends the definition of a refugee within (African) states. The treaty incorporates Article 1 of the refugee convention, but also expands that definition of a refugee by virtue of article 1 (2), which provides a refugee is also one who is;

*“...compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his county of origin or nationality.”*

The international community has commended the OAU for broadening the definition of a refugee, but it is easy to comprehend the rationale behind the widening of the parameters. Few conflicts in Africa remain within the borders of the country where they are being fought, and the problem of displaced persons crossing borders is common. This definition encapsulates and recognises the repercussions of the civil wars and tribal conflicts many African countries face. The convention was drafted during a period when numerous problems plagued the continent, including colonial domination, apartheid, armed conflicts and racial tension. Member states had a general feeling of sympathy for asylum seekers. Although the OAU convention has been recognised for its progressive qualities, the regional agreement is not binding on non-member States.

Another impressive feature of the OAU convention is that it contains no exception to the rule of *non-refoulement*. The OAU convention further acknowledges the notion of burden-sharing. Article II (4) provides that an OAU Member State should be able to appeal to a fellow Member State for assistance should it ever find itself in an overwhelming position. This article is meant to reflect a spirit of “African solidarity”.

The remainder of the convention discusses rights and obligations of refugees with respect to non-discrimination, voluntary repatriation, travel documents, etc.

#### **1.4 1954 Caracas Convention on Territorial Asylum (“The Caracas Convention” or “The Convention on Territorial Asylum”)**

The 1954 Convention on Territorial Asylum concluded the same year by Latin American States, protects persons coming from countries where they are persecuted for their beliefs, opinions, personal affiliations or acts which can be considered political offences.

This convention on territorial asylum, which is binding on State parties, stipulates that persons clandestinely or even irregularly entering the territorial jurisdiction of a State, should not be penalized for the way in which they entered (Article 5). This provision closely mirrors that of the Article 31 of the refugee convention, which asserts that States should not impose penalties on those who enter their territories illegally, if they are coming directly from a country where their life or freedom is endangered.

The Caracas Convention further declares that any right to freedom of association/assembly cannot be restricted for refugees or asylum seekers if the State’s internal legislation grants that particular right to other aliens on its territory- unless the outcome of the association/assembly could result in violence against the Government of the soliciting state (Article 7).

The agreement further requires and encourages State parties, which accept asylum seekers or refugees onto their territory, to be proactive in taking appropriate measures to ‘keep watch’ over those asylum seekers who are notorious leaders, of for example, a subversive movement and ensure that they are housed a reasonable distance from borders (Article 9).

Although the convention on territorial asylum is far less extensive than the refugee convention, its rudimentary qualities are nonetheless significant.

### **1.5 1954 Caracas Convention on Diplomatic Asylum (“The Convention on Diplomatic Asylum”)**

The 1954 Caracas Convention on Diplomatic Asylum was concluded during the same year as the convention on territorial asylum. Its purpose was to provide a legal framework protecting diplomats serving on overseas missions who could potentially find themselves in need of diplomatic asylum.

The convention on diplomatic asylum extends to personnel on war vessels, aircraft or military camps who may have been granted asylum in the country where they are posted. Where any of these people are being sought by the territorial State for political reasons or political offences, the State in which they are posted has a duty to respect their asylum status in accordance with the convention.

Article 2 of the convention, provides every State has the right and competence to grant asylum, but does not have an obligation to do so. Additionally, where a State fails to grant asylum, there is no duty on that State to delve into any explanation as to why it chooses not to.

Article 3 of the convention prohibits the grant of asylum to any person who, at the time of requesting it, has either an indictment issued against him, or is on trial for a common offence, or has been convicted in a competent court and has not served his sentence.

### **1.6 1984 Cartagena Declaration on Refugees (“the Cartagena Declaration”)**

The 1984 Cartagena Declaration, concluded by a group of Latin American experts and jurists in Columbia, provides similar extensions to the 1951 convention, as does the 1969 OAU Convention. The parameters of who qualifies as a refugee are considerably wider than those of the refugee convention and include individuals who have fled their country;

*“...because their lives, safety or freedom have been threatened by generalised violence, foreign aggression , internal conflicts, mass violation of human rights or other circumstances which have seriously disturbed public order.”*

Again, this broad definition is a reflection of the political crises in many Latin American countries at the time of drafting and adopting the Cartagena Declaration. The conclusions and recommendations resulting from the Colloquium importantly included provisions for all contracting states to adopt measures for constitutional reform to incorporate the 1951 convention and its 1967 protocol into national legislation.

The round table discussions also recommended that all contracting States implement any ‘internal machinery necessary’ upon accession to the 1984 convention, to bring about the provisions of the 1951 convention and the Protocol.

The 1984 Cartagena Declaration is clear on *non-refoulement* and repatriation, reiterating that the former is prohibited (including rejection at the frontier), and the latter must be nothing short of *voluntary*. The 1984 Cartagena Convention also advises that repatriation should be carried out with the cooperation of the UNHCR.

Although non-binding, the Cartagena Declaration lays down fundamental principles of refugee law that must be respected. The agreement also encourages contracting States to offer refugees assistance in terms of educational, safety, labour and social activities.

An interesting component of the Declaration can be found in paragraph (m), which places a duty on contracting States to ensure that they participate in the necessary efforts to eradicate the causes of the refugee problem. This provision is commendable since it indirectly puts a moral obligation on

State parties to co-operate to achieve a common goal – to bring to an end the reasons why citizens might have to flee their country in the first place.

# Chapter 2

## 2.1 Human Rights Instruments Relevant to the Protection of Refugees

In addition to the instruments discussed in the previous chapter, which explicitly provide a legal framework in which asylum seekers and refugees are protected, there exists another stratum which implicitly offers a level of protection for these vulnerable people. Not all of these human rights instruments are binding in nature, but those which are, also offer monitoring mechanisms to ensure correct application of the conventions.

### *Binding Instruments*

#### 2.1.1 1966 International Covenant on Civil and Political Rights (“ICCPR”)

The 1966 International Covenant on Civil and Political Rights (“ICCPR”) is one of the more significant human rights instruments. The widely ratified convention establishes international minimum standards (of human rights) and the same has gained ‘universal acceptance’<sup>39</sup>. It incorporates, by virtue of article 28, a monitoring mechanism in the form of the Human Rights Committee (“HRC”)<sup>40</sup>. The monitoring aspect of the convention is discussed further in Chapter five.

The primary aim of this convention is to guarantee civil and political rights to citizens of those states party to the agreement. The rights guaranteed therein also extend to non-citizens who may find themselves within the territory of a State party<sup>41</sup>. The ICCPR also contains important safeguards applicable to those who may be in need of asylum.

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<sup>39</sup> According to the Office of the United Nations High Commissioner for Human Rights, 170 States have ratified the ICCPR, and 30 have ratified its First Optional Protocol.

<sup>40</sup> For individual complaints to be lodged, a Member State must have ratified the First Optional Protocol to the ICCPR.

<sup>41</sup> Article 2(1) of the ICCPR states, "Each State Party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color,



Article 7 of the ICCPR prohibits cruel, inhuman or degrading treatment or punishment. Though the article *itself* does not explicitly refer to *refoulement*, a general comment by the HRC pertaining to the article reiterated that State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.<sup>42</sup> Moreover, article 9 (1) prohibits arbitrary arrest or detention. Both articles extend to illegal aliens on the territory of a State party.

### 2.1.2 The 1969 Convention on the Elimination of All Forms of Racial Discrimination (“CERD”)

The purpose of the 1969 CERD is to minimise and eventually eliminate racial discrimination, in all forms, on all levels. The Bahamas succeeded to the convention in 1975, with a reservation to article 4, pertaining to the adoption of (national) measures condemning racist propaganda and feelings of racial superiority over a group of people.

In its 64<sup>th</sup> session<sup>43</sup>, the Committee on the Elimination of Racial Discrimination<sup>44</sup>, noted with concern, the failure of the Bahamas to take steps to bring into effect the provisions of article 4 of the convention. The Committee expressed further concern over the position of the government that it had no plans to modify its legislation to give effect to this particular article. Although this convention does not deal specifically with asylum or refugee law, it serves, as its name states, to eliminate racial discrimination – an element that ties in neatly with refugee issues.

While hostility fuelled by racial discrimination is not rampant in the Bahamas, the presence of illegal immigrants in the country does

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sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>42</sup> General Comment 20 at para 9. Available at: <[www.unhchr.ch](http://www.unhchr.ch)>

<sup>43</sup> 64<sup>th</sup> Session; Committee on the Elimination of All Forms of Racial Discrimination March 2004.

<sup>44</sup> The monitoring body for the 1969 Convention on the Elimination of All Forms of Racial Discrimination (CERD). The Bahamas became a party to this convention in 1975.

occasionally give rise to tension. It is common for political parties to campaign heavily on the ‘immigration card’, as it is an easy way to ‘gain points’. However, such tactics, in the writer’s view encourage a xenophobic atmosphere, which is usually latent until a discussion on the issue develops.

The largest group of illegal immigrants in the Bahamas come from Haiti and the ‘*Haitianisation*<sup>45</sup>’ of Bahamian society and culture is frowned upon by natives. These sentiments are sometimes reflected in openly racist remarks. An editorial in a local newspaper provided a good example of the fear that exists in the tiny country when it comes to sharing a home with immigrants. One person remarked in a local editorial:

*“ Fred was right about the danger of Haitians!...Foreign Minister Fred Mitchell hit the nail on the head when he warned of the dangers of ‘Haitianisation’ of our society...Get these [Haitian] misfits off our streets... Otherwise we will all eat grass like Haitian goats ”*<sup>46</sup>.

Remarks on this level are not rare and supports the writer’s views that there needs to be some initiative on behalf of the Government to educate the general population on discrimination against immigrants. In effect, removing the reservation relating to article 4 of the CERD, could assist in reducing racist tendencies, making it completely unacceptable to display such superior behaviour.

### 2.1.3 1984 Convention Against Torture (“CAT”)

The 1984 Convention against Torture (“CAT”), which came into force the same year, has been ratified by 139 countries. The treaty is of fundamental importance as its main purpose is to prohibit torture on all levels, by State agents and Non-State agents alike. The CAT is also important because it provides a legal definition of torture. Additionally, the CAT contains an

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<sup>45</sup> A common term used when describing the ‘heavy’ influence Haitian culture and values have on Bahamian society.

<sup>46</sup> *The Punch* Editorial, 12 August 2002

important provision with respect to *non-refoulement*. Article 3 of the CAT states:

*“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

*For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”*

The Bahamas is not a signatory to the CAT and is therefore not bound by the provisions contained therein, however, the country has an obligation to respect article 3 of the convention, by virtue of the nature of its contents.

The monitoring bodies established by the preceding conventions constitute important features. If States have ratified the relevant Optional Protocols, they enable individuals to bring formal complaints (or communications) against State parties, should a member State fail to properly implement the terms contained in the instruments or breach the legal obligations stipulated therein<sup>47</sup>. The importance of monitoring mechanisms should not be underestimated and the writer will elaborate on this topic in Chapter five. Monitoring mechanisms are crucial for proper implementation and functioning of human rights treaties, although one can raise convincing arguments that the international mechanisms are rarely effective<sup>48</sup>.

It is conceivable that the Bahamas does not consider ratification of the ICCPR and the CAT necessary since many of the rights contained therein are incorporated in the country’s constitution. However, pressure is slowly mounting on the country from lobby groups and non-governmental

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<sup>47</sup> The Convention Against Torture is monitored by the Committee Against Torture. Individual complaints under both the CAT and the ICCPR are only possible where State parties have ratified relevant Optional Protocols.

<sup>48</sup> In fact, these committees (a) only meet once every 4 or 5 years to consider the report of each individual State and (b) have no ‘enforcement’ powers.

organizations (NGOs) to accede to these and other basic international human rights conventions<sup>49</sup>.

### ***Regional Convention***

#### 2.1.4 1969 American Convention on Human Rights (“ACHR”)

The 1969 American Convention is not exactly a convention which would be classified as an *international* human rights instrument, however because it is a binding instrument, it will be discussed under this heading.

The ACHR is a regional pact, which was concluded in San José in 1969. It reiterates the intention of State parties to respect basic human rights. Additionally, it covers the right of individuals to claim asylum, and the obligation of States to respect the principle of *non-refoulement*.

Article 22 (7) of the ACHR clearly states:

*“Every person has the right to seek and be granted asylum in a foreign territory...in the event that he is being pursued for political offences or related common crimes”.*

Article 22 (8) refers to *non-refoulement* and provides that in no situation, is a State to return or deport an alien whose life or personal freedom may be in danger because of his race, nationality, religion, social status or political opinion.

The Bahamas, (along with Canada) has not signed or acceded to the ACHR. The United States has signed, but failed to ratify the agreement.

### ***Non-Binding Instruments (Declarations/Conventions)***

#### 2.2.1 1948 Universal Declaration of Human Rights (“The Universal Declaration”)

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<sup>49</sup> Amnesty International in particular has called on the Bahamas to ratify the American Convention on Human Rights (“ACHR”) and other regional and international human rights instruments. The NGO has also suggested that the government invite the UN Working Group on Arbitrary Detention to visit and report on the conditions at the Carmichael Road Detention Centre.

The 1948 Universal Declaration of Human Rights (“The Universal Declaration”) carries considerable influence since it comprises general principles of international law and elementary considerations of humanity. Provisos contained in the Universal Declaration also appear in the United Nations Charter<sup>50</sup>. As the Universal Declaration relates to this paper, article 14 (1) acknowledges, “Everyone has the right to seek and to enjoy in other countries asylum from persecution”<sup>51</sup>.

### 2.2.2 1948 American Declaration on the Rights and Duties of Man (“The American Declaration”)

Although the American Declaration is a non-binding agreement, it carries the equivalent legal status of a binding treaty<sup>52</sup>. The Bahamas, a member state of the Organisation of American States (“OAS”), is obliged to respect the contents of the Declaration, by virtue of its membership. The Declaration reiterates the right of everyone to claim and receive asylum in a foreign territory, in accordance with the laws of each country and with international agreements<sup>53</sup>.

It is arguable whether the current asylum procedure of the Bahamas is consistent with the article XXVII of the ADHR. This assertion stems from the belief that the current *ad hoc* procedures fall short of internationally accepted minimum standards on asylum procedure. As will be discussed in Chapter four of this paper, Bahamian officials do not inform illegal immigrants of their right to claim asylum, and although the Declaration does not place a direct obligation on states to *inform* asylum seekers of this right, it is the writer’s view that failure to do so, *potentially* violates the provision.

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<sup>50</sup> See Preamble of the United Nations Charter and Articles 1, 55, 56, 62, 68 and 76

<sup>51</sup> Article 14 (1) of the 1948 Universal Declaration on Human Rights.

<sup>52</sup> Opinión Consultativa OC-10/89. (Amnesty Report 2002; Note No. 7)

<sup>53</sup> Article XXVII of the American Declaration on Human Rights.

# Chapter 3

## Review of Asylum Policy in the Bahamas

Part II of the paper will divert from the legalistic approach of the previous section. Chapter three will provide a detailed information about refugee and asylum issues in the Bahamas, analysing the country's current policy as well as its legal obligations under various agreements and/or treaties. Chapter four will then scrutinise status determination procedures and discuss shortcomings of the system. Overall, the purpose of Part II is to demonstrate how Bahamian policy on refugee issues is inconsistent with its legal obligations under international law and how the current policy could put the country at serious risk of violating the fundamental principle of *non-refoulement*.

Chapter five will discuss the importance and the role of the UNHCR and the last section of this paper will make recommendations regarding how the current system can be enhanced to align Bahamian asylum policy with its legal commitments under international law. The writer's recommendations will also reflect the need for the country to join other international human rights agreements, which would undoubtedly offer additional protection for those seeking asylum and consequently put the government in the position that it continually purports to endorse – respect for human rights.

The Bahamas gained her independence from Britain and became a sovereign nation within the Commonwealth system in 1973. Since then, the tiny politically stable nation has been slow in ratifying and/or acceding to various international human rights treaties<sup>54</sup>, despite the official stance of the country, which continues to affirm its commitment to the protection and promotion of human rights. Successive governments have asserted, but failed to take the necessary steps to prove their convictions. Whether this

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<sup>54</sup> The Bahamas has failed to sign the ICCPR, ICESR, CAT, ACHR.

failure is attributable to indolence or lack of political will is debatable, but what is of ultimate importance, is the fact that even after more than 30 years of independence, the Bahamas is still failing to fully respect its obligations under international law and in particular, international refugee law.

### 3.1 Bi-Lateral Agreements

The repatriation of both Haitians and Cubans has been a controversial topic over the last few years and even more so since the Governments of Haiti and Cuba signed bi-lateral agreements with the Bahamas permitting the return of illegal immigrants and failed asylum-seekers to their home countries.

These agreements have effectively established a framework in which the potential for *refoulement* is greatly increased - should one critically examine the unreliable nature of the refugee screening process, used by the Bahamas Department of Labour and Immigration. The Bahamas has in fact been accused, on more than one occasion, of forcibly returning illegal immigrants, in contravention of this fundamental principle<sup>55</sup>. Moreover, the Minister for Foreign Affairs, Hon. Fred Mitchell, admitted to an Amnesty International (AI) delegation in 2002, that he was conscious that the current agreements with Cuba and Haiti are inconsistent with the Bahamas' legal obligations under the refugee convention<sup>56</sup>. He went so far as to assure the team that the government was in the process of renegotiating the agreements. Unfortunately, however, as of September 2003, the agreements remained in force<sup>57</sup>.

The annual World Refugee Survey, compiled by the United States Committee for Refugees (USCR) has, for eight consecutive years<sup>58</sup> condemned the 1996 Memorandum of Understanding ("the Cuban MOU")

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<sup>55</sup> Editorial by the United States Committee for Refugees in the *Washington Post*, January 1998.

<sup>56</sup> Amnesty International; *Forgotten Detainees? Human Rights Detention in the Bahamas*; AI 14/005/2003 p. 12 Available at: <[www.amnesty.org](http://www.amnesty.org)> ("Amnesty Report 2002")

<sup>57</sup> *Ibid* p 12.

<sup>58</sup> The Cuban MOU between the Bahamas and Cuba was signed in 1996. Each consecutive year thereafter (between 1997-2004), the USCR condemned the Bahamas for returning potential asylum seekers to Cuba.

and its 1998 Protocol ('the Cuban Protocol') between the Bahamas and Cuba. The bi-lateral agreements provide for the *immediate deportation* of Cuban immigrants falling into two categories – those that have arrived in the Bahamas *subsequent to* the signing of the agreement and those Cuban immigrants already in the Bahamas.

The agreement states that within 15 days of notification to Cuban authorities (acknowledging the illegal immigrant) the Bahamas will return the immigrant to Cuba. One of the most striking aspects of the Cuban MOU, is the absence of any safeguards or assurances that those immigrants sent home will not be punished by the Government. Given the political climate in Cuba, this omission is of grave importance, since there is a real and serious risk of retribution. Additionally, according to the terms of the Cuban MOU, Bahamian authorities have an obligation to furnish Cuban officials with the full name, address and date of birth of those apprehended (within a 72-hour period).

A similar agreement between the Bahamas and Haiti existed until 1995. Unfortunately, at the time of writing this paper, there was no available information on whether the agreement was renewed after this date. However, it has been reported, that repatriations to Haiti are still being carried out according to the terms of the agreement<sup>59</sup>. The 1993 Memorandum of Understanding ('Haitian MOU') allowed for the immediate repatriation of illegal immigrants to Haiti. Unlike other illegal immigrants that arrive in the Bahamas, Haitians are typically returned home within a few days. In the writer's view, the Haitian MOU has a serious potential to breach article 33 of the refugee convention on *non-refoulement*. 'Immediate repatriation' often means immigrants are deported within a 72-hour period, which in the writers view, leaves insufficient time to thoroughly investigate those with asylum claims. According to Haiti's National Office of Migration, in 2004 more than 2,000 Haitian immigrants

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<sup>59</sup> Amnesty Report 2002, p.12 Available at: <[www.amnesty.org](http://www.amnesty.org)>



were returned to Haiti from the Bahamas<sup>60</sup>, in spite of the highly publicised three-week rebellion that ousted President Jean-Bertrand Aristide in February of that year<sup>61</sup>. With such large numbers of Haitian immigrants arriving in the Bahamas annually, it is difficult to realise how proper evaluation of each individual case is completed in such a short amount of time.

The government of the Bahamas, like all others in the region, is fully aware of the ongoing instability of Haiti. It continually expresses its concern for the people of Haiti, confirming its dedication to participate in solving the crisis. In 2003, the governments of Haiti and the Bahamas held roundtable discussions in an effort to generate ideas on how best to reduce the flow of illegal immigrants from Haiti. One of the suggestions was to embark upon an initiative informing Haitians of the perils of illegal immigration. What is undoubtedly of concern however, is the seemingly constant negotiation(s) of the Bahamian government to return these immigrants - even though aware of the on-going threat of human rights violations they may face at home. Occasionally, the government will grant secondary protection, on humanitarian grounds, but this is indeed rare.

### *Need for Constitutional Reform?*

The Constitution of the Bahamas is silent on the rights and duties of refugees, as it is on refugee status determination. Moreover, the current social climate in the Bahamas is in no way conducive to introducing any kind of reform on the matter. The consensus in the country is that illegal immigrants are unwelcome and should be 'kept out'. This mentality, in the writer's opinion, stems from lack of education on refugee issues and more specifically, grave misconceptions regarding why refugees find it necessary to flee their country in search of safety in 'another man's land'.

Religious leaders (as well as Government officials) echo the same mantra: 'the Bahamas is for Bahamians'. Sympathising with the plight of refugees

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<sup>60</sup> *The Bahama Journal* claims in 2004, 2,500 Haitians were repatriated.

<sup>61</sup> In addition to the flooding which killed hundreds of people in May and September 2004.

in any country can bring the demise of even the most charismatic politician's career. Thus, the introduction of drastic measures, such as constitutional reform, to address the issue of asylum, is not in the foreseeable future for this country.

### **3.2 Interdiction at Sea & Article 33 on *Non-Refoulement***

As discussed in Part I of this study, various international human rights instruments, as well as the refugee convention itself, prohibit the practice of returning asylum seekers or illegal immigrants to the frontiers of territories where their life or freedom may be threatened. It then follows, in order to avoid breaching this elementary principle of international law, where immigrants may be apprehended at sea, all proper precautions must be taken to ensure that each individual not fulfilling the requirements for refugee status is not sent home to face threatening conditions. In the writer's view, this obligation cannot be properly met if illegal immigrants are not given a fair chance to explain the reasons for fleeing their country. Consequently, the protective entry procedure of 'interdiction', which entails (depending on the country) either, preventing access to the territory, thus minimising the chance to claim asylum or preventing access to the territory and criminalising (illegal) entry, present another hurdle for asylum seekers to surmount in their quest for protection.

As already noted, in the 1980s, the Reagan Administration established an interdiction-at-sea program with the hope of deterring illegal immigrants from flocking to America. According to the US immigration service, between 1981 and 1991, the interdiction program 'succeeded' in returning 25,551 Haitians to Port-au-Prince under the interdiction program<sup>62</sup>. Unfortunately, when Jean-Claude 'Baby Doc' Duvalier's regime fell in Haiti, and he was compelled to leave the country in 1986, successive military governments and rising political instability produced even more

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<sup>62</sup> Gavigan, Patrick; *Migration Emergencies and Human Rights in Haiti*- Paper prepared for the Conference on Regional Responses to Forced Migration in Central America and the Caribbean; October 1997

[Haitian] immigrants. The election of President Jean-Bertrand Aristide in February 1991 decreased the migration flow from Haiti, but a coup d'état seven months later produced some of the largest flows ever seen from Haiti<sup>63</sup>.

Countries in the region responded differently to this serious influx. The United States screened interdicted immigrants at the US naval base at Guantánamo Bay, but after more than 10,000 refugees had accumulated there, the Bush Administration ordered the summary return of all immigrants picked up in the sea. The Bahamas took an impervious position, refusing to open her borders. Instead, in the middle of the Haitian refugee crisis (1991-1994), that country signed the 1993 MOU with Haiti, calling for the immediate repatriation of all illegal immigrants apprehended in Bahamian waters.

More recently, in 2004, a Bahamian newspaper discussed an initiative between the Royal Bahamas Defence Force (“RBDF”) and the U.S. Coast Guard to combat the flow of illegal immigrants to the Bahamas<sup>64</sup>. The primary idea behind the joint effort is to prevent those boats, travelling from the southern Bahamas, from evading Bahamas Immigration and Customs. The ‘solution’ for this problem, is to participate in ‘information-sharing’, whereby data on all northbound vessels is shared between both American and Bahamian law enforcement authorities.

Undoubtedly, the United States has high stakes in assisting the Bahamas with immigration control, in order to protect her own borders. After all, the great majority of illegal immigrants inadvertently end up in the Bahamas, as they are en route to America. Unfortunately, the geographical location of the tiny archipelago prevents easy access.

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<sup>63</sup> Helton, Arthur C., *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. Sch. J. Hum. Rts., 325, 329 (Spring 1993). Shortly following the coup, the US Coast Guard intercepted 38,000 Haitian refugees in 1991.

<sup>64</sup> *Bahamas, US in Special Interdiction Campaign*, ZNS Bahamas, 14 January 2004

Three months into this joint endeavour, 45 vessels had already been boarded and searched by authorities. More than 400 travel documents of were inspected and it was not long before authorities concluded that the majority of the travel documents were forged. Many voyages were “terminated...and in cases where undocumented migrants were discovered, they were repatriated”<sup>65</sup>.

At the 64<sup>th</sup> session of the Committee on Racial Discrimination, the committee acknowledged with concern, reports received concerning the current asylum system of the Bahamas, with respect to its policy and procedure on recognition of refugees. The Committee found the system was inefficient primarily because of its inability to guarantee that deportees would not face cruel, inhuman or degrading treatment upon their return<sup>66</sup>. In essence, the country was unable to say, with any certainty, that it had not ‘*refouled*’ any immigrants because the current system lacks any legal ‘safety net’, which would impose such terms. The committee recommended the country swiftly adopt measures allowing individuals the right to appeal orders of detention imposed on those entering the country without proper documentation. The Committee also recommended the country prioritize adoption of national legislation that would give effect to the provisions of the refugee convention.

One of the safeguards against violating article 33 should be a comprehensive *and* efficient preliminary system, which is capable of protecting those fleeing persecution at home. As long as a country fails to provide an adequate system, which allows refugees to fully present their claims to the authorities, the country will risk breaching article 33.

### **3.3 Immediate Repatriation and A.31 of the Refugee Convention**

Article 31 of the refugee convention states:

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<sup>65</sup> Ibid.

<sup>66</sup> The committee considered the current system “incapable of guaranteeing that no one will be sent back to a country where his life or liberty might be in danger”. U.N. Doc. CERD/C/64/CO/1 (2004). Evidently, the Committee had concerns that the current practice could result in *refoulement*.

“...contracting states shall not impose penalties on account of their illegal entry or presence, on refugees who, coming **directly** from a territory where their life or freedom was threatened...enter or are present on their territory without authorisation...”.

As Goodwin Guy points out in his paper, submitted during the UNHCR Global Consultations, the refugee convention stipulates certain rights and duties guaranteed to refugees. In most cases, only where a State examines the individual’s claim *prior to* penalizing him/her for illegal entry and hence, subsequently determines he/she is not entitled to international protection, can it claim that it has fully observed and respected the provisions of the refugee convention<sup>67</sup>.

The refugee convention fails to define what it meant by ‘penalties’, but it has been suggested that fines, imprisonment and/or detention would suffice<sup>68</sup>.

### ***1967 Bahamas Immigration Act (“The Immigration Act”)***

This archaic piece of legislation is the sole provision that even *remotely*, refers to asylum-seekers - and paradoxically, it only criminalises their entry. Section 37 (1) of the Immigration Act conclusively states that anyone arriving in the Bahamas without a document evidencing permission to enter commits a criminal offence<sup>69</sup>. Section 18 of the Act imposes a prison sentence of up to 12 months (and/or a fine of B\$300) on any a person who has either arrived in the country without leave of an immigration officer, or entered the territory without having arrived at an official port of entry. The piece of legislation directly conflicts with article 31 of the refugee convention, which prohibits the penalization of illegal immigrants who come from a place where their life or freedom may have been threatened.

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<sup>67</sup> Guy, Goodwin, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non- Penalization, Prevention and Protection* (at the request of the Department for International Protection UNHCR) for the Global Consultations 2002, Oct. 2001, p.4

<sup>68</sup> *Ibid.* p. 11

<sup>69</sup> 1967 Bahamas Immigration Act, s. 37(1).

The Bahamas contends that it is “sensitive to large amounts of undocumented persons within its territorial waters” and indeed, the Immigration Act permits broad search powers for authorities, should they come across vessels suspected of carrying illegal immigrants. Section 47 of the Act states:

*“Where any officer of the Defence Force or any customs officer or police officer has reasonable grounds for believing that any person on board any vessel which is in the territorial waters of The Bahamas is landing or preparing to land in The Bahamas in contravention of the provisions of this Act, he may board such vessel and exercise the powers conferred on an immigration Officer under Section 8<sup>70</sup>.”*

The state maintains that the geographical location of the archipelago makes illegal immigration/asylum issues a matter of “national security as well as having an impact on relations with neighbouring countries”<sup>71</sup>. It further argues that it lacks the necessary resources to deal with the number of illegal immigrants it receives on an annual basis. This reasoning is not illogical, though it is problematic.

Firstly, it is vital to distinguish between undocumented migrants who may be seeking asylum and those who are economic migrants. This is precisely where the country fails to make an efficient distinction. It is a basic principle of refugee law that those fleeing persecution ought not to be automatically penalised because they have entered a State’s territory illegally. Not only is it unreasonable, but it is unrealistic to expect a person fleeing persecution to acquire requisite documentation before escaping to a country in search of refuge. This principle does not apply to economic migrants, but when apprehending *any* illegal immigrants, a state must be

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<sup>70</sup> Section 8 of the Immigration Act allows for immigration officers to board any ship in territorial waters without a search warrant and search the vessel. The officers have the power to interrogate anyone reasonably suspected of not being a citizen of the Bahamas or permanent resident for example, those suspected of being an illegal immigrants. Additionally, the officer has the power to demand persons produce documents upon which he/she may be interrogated.

<sup>71</sup> Letter to Amnesty International in response to AI’s 2002 Report on the Bahamas, 20<sup>th</sup> October 2003.

careful not to categorically conclude that they are all in search of a ‘better way of life’. In support of this view, the writer quotes the words of Jonathan Moore that, “...*The threat to a country posed by influxes of economic migrants should not serve as an excuse for refusing asylum*”.<sup>72</sup> Moreover, as is often the case with Haitian immigrants, poverty does serve as an impetus to risk one’s life and take to the high seas, but it is important to take into consideration that poverty in Haiti originates from the ongoing political instability that afflicts the country.

In considering the foregoing, and in particular the absence of any provision relating to asylum seekers, the writer asserts the Immigration Act is outdated in this regard, and should be amended to include specific provisions on asylum seekers.

Perhaps at the time of drafting the Act, there was no need to include a proviso on asylum seekers. However, the arrival of immigrants to Bahamian shores did not start in the 1990s. The history of migration between Haiti and the Bahamas, for example, dates back to the late 1700s when the first free blacks, were forced to leave their homeland because of the ongoing slave rebellions. Like the current situation, many of them were destined for the United States, but ended up in the Bahamas instead.

In modern times, the leadership of President Francis Duvalier (‘Papa Doc’) brought economic hardship to Haiti when he began leading the country in 1957. It was in that year the Bahamas received its first wave of (economic) migrants. Political turmoil which emerged from Duvalier’s dictatorship resulted in more natives fleeing the country.

The Bahamas government policy on immediate repatriation has intensified in recent years, as the reality of the actual number of illegal immigrants residing in the country has lead to public outcry. Recent statistics reveal

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<sup>72</sup> U.N. Doc A/AC.96/SR.415, para. 16 (1987).

that 60,000 persons (or more) live in the Bahamas illegally, most of whom are Haitian or of Haitian descent<sup>73</sup>.

In February 2003, Minister for Immigration, Hon. Vincent Peet, announced plans to establish a Rapid Response Unit to curtail the rising numbers of illegal immigrants entering the country. In support of his plan, Mr. Peet claimed it is time to “*protect our country for this present generation and for generations yet unborn*”<sup>74</sup>. As of the end of February 2005, the RBDF had already interdicted 293 illegal migrants<sup>75</sup>.

In the last few months, the government has resumed its efforts to ‘voluntarily repatriate’ illegal immigrants. During the months of March and April, official raids were conducted in different parts of the capital island of New Providence, arresting those who were unable to present valid permits to reside in the country.

Normally, round-ups of this nature also apply to people born in the Bahamas to parents who have not acquired legal status. Since the Bahamas does not apply the principle of *jus solis*<sup>76</sup>, even children born in the country do not benefit from citizenship, unless they make a formal application on their 18th birthday. Unfortunately, this right is not very well known in many immigrant communities, so many people lose their right to citizenship. However, in some cases, immigrants are aware of their entitlement to citizenship, but a notoriously slow immigration system often means the time period in which one must apply, often expires and the right is lost.

Following round-ups, immigrants are detained at the Carmichael Road Detention Centre, until they are repatriated. The government often refers to this deportation as ‘voluntary repatriation’, but to what extent the activity is actually ‘voluntary’ is extremely contentious. Like any other country, the

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<sup>73</sup> Available at: <[www.bbc.co.uk/1/hi/world/americas/country\\_profiles/115642.stm](http://www.bbc.co.uk/1/hi/world/americas/country_profiles/115642.stm)>

<sup>74</sup> *Unit in place to halt illegal immigration*, The Nassau Guardian, 14 February 2003.

<sup>75</sup> Symonette, Bianca, Bahamas News, 2 March 2005.

<sup>76</sup> The principle prescribes that a person is granted citizenship through place of birth. (Source: United States Immigration and Naturalization Service).



Bahamas firmly denies that it practices forced repatriation. Human rights reports and other evidence points to the contrary.

A fact-finding delegation organized by the Yale Law School Lowenstein International Human Rights Clinic visited the Bahamas in 1994 and highlighted serious concerns over the Government's repatriation scheme at the time. The group found that hundreds of recently arrived Haitian nationals had been repatriated from the Detention Centre, without proper checks to ensure they would not suffer any kind of retribution upon return.

Moreover, the report by the group revealed concerns about the 'voluntary' aspect of the government's repatriation programme. The delegation reported that during a repatriation exercise, the Haitian Ambassador Joseph Etienne, had the opportunity to board a flight bound for Haiti, filled with newly arrived immigrants. He requested a show of hands to demonstrate who had actually volunteered to return home, and only 14 of the 94 passengers raised their hands. When detainees at the Detention Centre were questioned about voluntarily returning home, it was discovered that the Haitian immigrants were given the choice between repatriation or incarceration. Whilst it is true that Bahamian law prescribes for a fine and/or prison sentence for illegal entry onto the territory, the writer has already explored and opined that the same is inconsistent with the refugee convention.

The year prior to publication of the report (1993), the illegal immigration situation in the country was particularly bad. Twenty-five consecutive years of one-party rule encouraged a change of Government in 1992, and one of the main campaigning issues of the opposition was illegal immigration. The new government, the Free National Movement (FNM), had promised the electorate that if elected, the immigration situation would be "top

priority...instituting a programme of detention and early repatriation of all illegal immigrants”<sup>77</sup>.

In May 1993, massive ‘round-ups’, described as ‘brutal’, were conducted on numerous islands. Hundreds of Haitian nationals were brought to the capital (New Providence) for ‘processing’. During the latter half 1993, however, the coup d’état against Aristide produced a wave of instability upon Haiti, which consequently brought more immigrants to the Bahamas. Nonetheless, throughout the 1990s, the Government continued its ‘voluntary repatriation scheme’ during which time thousands of so-called ‘economic migrants’ were repatriated. Between February-December 1995 alone, the Bahamas returned approximately 8,000 Haitian immigrants<sup>78</sup>.

In 2002, the Centre for Justice and International Law presented a petition to the IACHR claiming the Bahamas was in breach of its international obligations under the 1948 American Declaration on the Rights and Duties of Man and had violated provisions of the refugee convention<sup>79</sup>.

Specifically, the petitioners argued that by repatriating Cuban and Haitian immigrants in the absence of a well-structured asylum process, the country was in breach of articles I, II, V, VI, XVII, XVIII, XXV and XXVII<sup>80</sup> of the 1948 American Declaration. They further claimed that the Bahamas had failed to respect the provisions of article 33 of the refugee convention, all based on the argument that illegal immigrants were not granted the right to present their claim to the state. The petitioners further contended that the potential refugees were not afforded due process, because the domestic legal system of the Bahamas denied the illegal immigrants access to domestic remedies.

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<sup>77</sup> Project Diana: Human Rights Delegation Report on Haitians in the Bahamas: 1994.

<sup>78</sup> Gavigan, Patrick: *Migration Emergencies and Human Rights in Haiti*, Oct. 1997.

<sup>79</sup> Report N° 6/02 Admissibility Petition 12.071, 27 February 2002 (IACHR).

<sup>80</sup> On the rights to life, liberty, security, equality, protection, juridical personality, civil rights, fair trial, arbitrary arrest and the right to asylum.

The country responded to these allegations by admitting that there were not yet any formal procedures to implement the provisions of the refugee convention, but that there was an administrative system to deal with asylum claims. It denied that it was in breach of its legal obligations under the convention. The country assured the commission that refugees were afforded an opportunity to present their claims to the state, as prescribed by international law and supported this assertion by enlightening the commission that it took decisions on refugee issues with the advice and assistance of the UNHCR, in conformity with stipulations enshrined in article 35 of the refugee convention. The State explained the procedure of recognising refugees, and seemingly attempted to display its ‘generosity’ to asylum seekers by stating that on “*on no occasion has the Executive not acted favourably to a recommendation*”, insinuating that every case recommended for protection, had in the past been approved. What the state conveniently failed to point out however, was that at the time of the case, the Bahamas had only granted status to 78 Cuban nationals since its accession to the refugee convention five years earlier. This is a very small figure, considering the hundreds of Cubans that flee to the Bahamas annually.

Although the *efficiency* of a country’s asylum policy is not measured by the number of individuals it recognised annually, numbers may give a clear indication on how *liberal* a country’s asylum policy may be. Should one consider the number of illegal immigrants that arrive in the Bahamas and the countries from where they originate, there is cause for concern, especially when in the last ten consecutive years, the number of recognised refugees has often remained in single digits.

### **3.4 Arbitrary Detention**

Although the refugee convention makes no mention of detention of refugees, other international instruments and provisions set standards for how asylum seekers are to be treated in the event that it is deemed necessary to detain them.

ExCom Conclusion No. 44 (XXVIII) of 1986 pertaining to detention of asylum seekers is clear on treatment of those who are awaiting a decision of their status. Paragraph (b) of the conclusion states that “detention should be avoided” whenever possible. It additionally provides that detention should be a last resort and only used where the identity of an asylum seeker is questionable, or his/her detention is necessary to examine elements of the asylum claim, or where fraudulent documents have been produced in order to mislead authorities or on national security grounds. The conclusion also points out that asylum decisions should be expeditious, so as to avoid prolonged detention. The conclusion stresses the importance of humane conditions in detention and states that detention should be subject to judicial or administrative review.

Moreover, the UN Working Group on Arbitrary Detention provides the holding of asylum seekers or immigrants in prolonged administrative custody without the possibility of administrative or judicial remedy may amount to arbitrary detention.

The Revised UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (1999) stipulate in which cases asylum seekers may be detained. These provisions are very similar to ExCom conclusions mentioned above, but more explicitly state that detention “*may exceptionally be resorted to as long as this is **clearly prescribed by a national law** which is **in conformity** with the general norms and **principles of international human rights law**”<sup>81</sup>. The guidelines also assert that detention of asylum seekers will be legal and not amount to arbitrary detention where it complies with article 31 of the refugee convention and international law. “*It [detention] must be exercised in a non-discriminatory manner and must be subject to judicial or administrative**

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<sup>81</sup> UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (1999).

*review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist”<sup>82</sup>*

Whether Bahamian domestic law conforms to general norms and international human rights law on this matter is highly questionable. National law does provide for the mandatory detention of asylum seekers, which the Government deems as necessary to “deter and control onshore arrivals and to ensure that immigrants can be found should the need for deportation arise”<sup>83</sup>. However, this stance contradicts UNHCR Guidelines which state:

*“...the detention of asylum-seekers which is applied for purposes...for example, as a part of a policy to deter future asylum seekers, or to dissuade those who have commenced claims from pursuing them, is contrary to the norms of refugee law”<sup>84</sup>*

The Director of Immigration has acknowledged that one of the purposes of detention in the Bahamas is to serve as a deterrent<sup>85</sup>. In June 2002, the Government announced plans to construct another detention centre on the island of Inagua, which the Minister of National Security stated in June 2003, would not only monitor illegal activities, but would “...in the case of illegal migration, would allow for early repatriation”<sup>86</sup>.

It is submitted that the way in which detention is being used by the Government directly conflicts with international law. Detaining asylum seekers for any purposes other than those listed in the ExCom conclusions or UNHCR Guidelines can amount to ‘*constructive refoulement*’ particularly where detention is used to persuade asylum seekers to withdraw their claims, or discourage fellow asylum seekers from claiming asylum.

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<sup>82</sup> Ibid. para. 5

<sup>83</sup> Amnesty Report 2002

<sup>84</sup> Ibid (note no. 20), p.11

<sup>85</sup> Amnesty Report 2002 p.10

<sup>86</sup> Ibid note 18, p.10

AI was permitted to conduct interviews with detainees at the Bahamas Detention Centre, some of whom had been detained for more than one year. One detainee in particular told the delegation that he had been detained for more than three years since the Bahamas did not have a diplomatic relationship with his country and could not therefore, arrange his repatriation. Moreover, he could not afford to purchase himself a return ticket home, so he was simply left in detention. Another detainee from Ghana claimed he was detained after he presented himself to the authorities a few days prior to the expiration of his student visa. He had remained in detention for more than two years.

These cases arguably amount to arbitrary detention since they concern persons who have been found to have no grounds for refugee status, but at the same time cannot leave the country because they have no funds to do so. Further, they are not allowed into society because they are deemed illegal immigrants and must therefore be held until they can be returned home. Not only is this an expensive predicament for the Government (to financially support detainees), but from a legal perspective, such detention can easily appear as cruel, inhuman or degrading treatment or punishment.

The situation for Haitians is somewhat different. Whereas immigrants from other nationalities may stay in detention from one month to several years, immigrants from Haiti, because they are immediately deemed 'economic migrants' are repatriated at the earliest possible opportunity. AI's interview with the Director of Immigration revealed that Haitian immigrants are usually repatriated within five days of their arrival and very often are not expected to pay for their own plane ticket.

This speedy process that exists with respect to Haitian refugees is worrying in that it raises a question about the level of 'risk assessment' used when determining their claims - particularly when one focuses on the political instability in the country.

### *Conditions in Detention*

The 2002 Report compiled by AI, revealed the distressing conditions in which asylum seekers and immigrants are forced to live at the Carmichael Road Detention Centre. The Centre has the capacity to hold a little more than 500 detainees. The facility is comprised of four identical ‘huts’, three male huts and one hut for women and children. According to the report, two of the three male huts are especially for Haitian immigrants – one for newly arrived Haitian immigrants and one for other Haitian immigrants. The third male hut holds males of other nationalities. This segregation is strikingly bizarre, and leads one to speculate a variety of reasons for why it is considered necessary. The female hut holds women and children (of all nationalities).

Reports of inadequate food and drinking water were received by AI, as well as complaints of insufficient bed mattresses, meaning many detainees are compelled to sleep on the floor. Additionally, the female lavatory was found to have no doors, therefore providing no privacy for female detainees. There were several reports of ill-treatment including one allegation of rape<sup>87</sup>, two allegations of male staff watching women naked and one allegation of ‘consensual’ sexual conduct between a female detainee and a guard. In an interview conducted by the writer, one refugee told described his year at the Detention Centre as “too painful to relive”.

In its Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, the UNHCR reiterates the general rule of international law, asylum seekers are not to be detained. Where detention is found to be necessary, the guidelines clearly stipulate minimum standards (of detention) which must be respected. Those standards include, having the right to interact with people on the outside (i.e., friends, family, legal representatives), the opportunity to further education or vocational activities, access to basic necessities such as bedding, shower facilities, toilets, etc.

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<sup>87</sup> The incident occurred in 1995, and the officer accused of the crime has since been relieved of his duties in connection with the incident. *Haitian claims she was raped by policeman in holding camp*, The Tribune, 16 October 1995.

With regards to the foregoing, numerous reports received by AI and other NGOs suggest that the basic minimum requirements are not fully respected at the Detention Centre. Although on site visits from NGOs confirm that many detainees have visitors from the outside, there have been reports of children not having adequate space to play, and adult detainees not being able to exercise. The latter has been explained by the Department of Labour and Immigration, a necessary precautionary measure in response to various incidents where detainees have allegedly tried to escape<sup>88</sup>.

Additionally, as a signatory to the UN Convention on the Rights of the Child (“CRC”), the Bahamas has undertaken to abide by the terms of the convention, which provides that children are to be detained only as a last resort and for the shortest period of time. The convention also states that State parties must ensure that all children are treated fairly, with no regard to their nationality, and have the ability to exercise (their right) to education and to play. In brief, AI’s visit to the Detention Centre revealed that children were placed in huts with adults, and in those cases where families were separated, there were instances of children not being able to communicate with either their mother or father, depending on which hut they child was placed in. Even more disturbing, were claims from detainees that children did not have the opportunity go to school.

It is the opinion of the writer, that the conditions at the Detention Centre are arguably tantamount to inhuman and degrading treatment. It is also believed that the conditions in which detainees are housed, more likely than not, amount to arbitrary detention. The Ministry of National Security oversees the Department of Labour and Immigration and the writer takes the view that the government must rectify and improve the standards at the Detention Centre, so that asylum seekers and illegal immigrants alike, are able to live temporarily in conditions that do not violate their fundamental human rights.

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<sup>88</sup> Bain, Robert; *Immigrants tell their story*; The Tribune July 2004.



# Chapter 4

## CURRENT ASYLUM PROCEDURES TO DETERMINE REFUGEE STATUS

The majority of illegal immigrants and would-be asylum seekers/refugees enter the Bahamas by boat. ‘Undocumented migrants’ and are usually apprehended by the Royal Bahamas Defence Force (“RBDF”), the body responsible for patrolling Bahamian waters and defending Bahamian territory from illegal activities. RBDF officers lack any jurisdiction in immigration matters, and are in no way involved in the refugee determination process. Their main duty when apprehending immigrants at sea is to transport them inland for ‘processing’.

Once immigrants have been apprehended and brought inland, they are taken to the Coral Harbour Base, where immigration officials record their personal details. Questionnaires ascertaining basic bio-data are distributed in an effort to document the immigrant’s name, address, country of nationality, etc. The Department of Immigration claims to have trained officials who assist with ‘form-filling’ for those immigrants who may be illiterate or unable to read/write/converse in English. Additionally, the Department of Immigration claims it provides forms in various languages for those non-English speaking immigrants. There was no evidence of this assertion however, when the AI fact-finding mission visited the base in 2002<sup>89</sup>.

### 4.1 Screening

Once the undocumented immigrants have completed their questionnaires, the forms are reviewed by immigration officials, who then decide (based on the questionnaire), whether any of the illegal entrants might meet the requirements for refugee status according to the definition stipulated in the refugee convention. An immigrant will be considered as having a potential

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<sup>89</sup> Amnesty Report 2002, p. 8

claim if he/she explicitly expresses a fear of returning to his/her country of nationality when filling out the questionnaire. Where an immigrant fails to make such a declaration, his chances of securing an individual interview with an immigration official for status determination, literally disappear. Illegal immigrants are not informed of their right to claim asylum and indeed, it would not be far-fetched to conclude that many of them are usually unaware of this basic right enshrined in so many international agreements. When interviewing a senior immigration official at the Bahamas Immigration Department, the writer was assured that “the right to asylum is *not* something the Bahamas advertises, just as no other country would”.

It then follows, that serious issues can emerge with this process of ‘screening’. It is a practice we have seen exhibited by the United States in recent years, although it takes place in a different context. In 1994, the US under the Clinton Administration, adopted measures that allowed apprehended immigrants to be ‘processed offshore’<sup>90</sup>. This policy, in addition to creating concerns regarding the efficiency of status determination, subsequently raised concerns regarding its potential breach of the principle of *non-refoulement*. As previously discussed in the first chapter, the US ‘skilfully’ argued that this process was not subject to the same strict minimum standards required in status determination, since screening was being conducted ‘offshore’ and the immigrants were therefore not actually *on their* territory. They argued that because of this technicality, ‘offshore screening’ did not contravene international law and did not therefore, put them in breach of their international obligations<sup>91</sup>.

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<sup>90</sup> In May 1994, the Kennebunkport Order, which allowed the return of Haitians without a prior interview was reversed to allow Haitian immigrants be interviewed and ‘processed offshore’ in Jamaica and the Turks and Caicos Islands. *Refugee Policy Adrift: The United States and Dominican Republic Deny Haitians Protection*; Women’s Commission for Refugee Women and Children, January 2003

<sup>91</sup> This argument was raised in the case of *Sale v. Haitian Centres Council*. The US Supreme Court ruled in favour of the Presidential Decree, essentially stating that the policy of interdiction on the high seas and forcible return did not in breach of obligations of the US since the asylum seekers were not on the territory.

In the case of the Bahamas however, since screening *does* take place on the territory, additional situational elements come into play. Firstly, the majority of the illegal immigrants that arrive in the Bahamas are of Haitian or Cuban nationality and are therefore Creole or Spanish speaking. Many of the (Haitian) immigrants come from destitute backgrounds and are often illiterate. Thus, one must also put into context the level of education most of these people have attained. Many of the illegal immigrants that find themselves in the Bahamas, who may have a valid refugee claim, are uneducated and certainly *not* cognisant of their legal rights. It is illogical to expect people with this background to make a declaration on a bio-data questionnaire stating they have a well-founded fear of persecution, particularly when the said questionnaire *omits to ask* reasons for leaving country of nationality.

An absence of a regulatory framework for the 1951 refugee convention allows each state to use its 'discretion' to give effect to the provisions of the convention. Incorporation of the refugee convention into domestic law is not mandatory and it is accepted that a state may use *ad hoc* measures for its asylum system. However, where such measures will be utilised, a state should ensure that even at a preliminary stage, an immigrant is aware and informed of his right to claim asylum. Otherwise, those that may face a real threat to their life or liberty could be returned to their country without having been given a real opportunity to have their claim properly examined as prescribed by international law. In this regard, screening an illegal immigrant with the dual purpose of a) ascertaining personal details and b) determining the need for a status interview, cannot be considered an adequate (preliminary) mechanism of separating economic migrants from those who may actually have a refugee claim.

Another concern emerges when considering whether the screening process is a satisfactory pre-determinative tool for conducting refugee status determination – its consistency with Excom recommendations. ExCom conclusion No.8 (XXVIII) of 1977 lays down minimum standards that

should be respected in the status determination process. The language of the conclusion presumes the applicant is conscious of his/her right to asylum. What the recommendation does not mention however, is any obligation of the contracting State to inform the applicant of his/her right to actually claim asylum. Excom conclusions, which are not legally binding in nature, serve to guide States on their refugee policy. However, even the refugee convention, which places legal duties on State parties, fails to place any burden on a State to inform potential refugees of this right.

The third problem arising with the current screening process is the actual questionnaire itself. In an interview with a senior immigration official, the writer was refused permission to view a copy of the questionnaire. Instead, the official insisted that the questionnaire contained ‘relevant questions’ although she neglected to elaborate on what the questions were actually *relevant to*. However, the AI delegation, in its fact-finding mission in 2002, were allowed to view the questionnaire and concluded the same was very basic. In fact, the delegation was of the opinion that the current administrative system was remarkably inadequate for the purposes of refugee status determination. The questionnaire was considered exceedingly superficial, failing to ask even the most basic of questions, which might indicate a person’s need for international protection. Moreover, the right to legal aid is unavailable for undocumented immigrants under Bahamian law, thus there is no recourse to legal advice, unless an immigrant is able to hire a private lawyer. In essence, this means, those illegal immigrants that may have a claim to asylum, but fail to state so at a very early stage, do not even have a chance to seek legal advice before they are deported.

Based on the forgoing, the extent to which these screening questionnaires actually serve a purpose is debatable. In terms of obtaining details so as to record logistics and document illegal arrivals in the country, the form could be said to be useful. However, if the questionnaire is going to be the sole means of determining who is entitled to refugee status interview, it is the writer’s view that the current system should be completely revamped.

A good example of how this screening procedure can be detrimental to a potential refugee was demonstrated in 2002 when the AI delegation visited the Carmichael Road Detention Centre. On the day of the visit, the group was told that 80 illegal immigrants from Haiti had been brought to the centre to await deportation. All 80 immigrants were screened that morning and immigration officials were satisfied (by midday) that not one of the 80 had a valid refugee claim – based on the questionnaires. They were all therefore, considered economic migrants to be kept in detention until arrangements could be made for them to be sent home. The writer finds this situation remarkable for two reasons. Firstly, it is difficult to imagine that 80 people could be properly ‘processed’ in such a short period of time and determined to have no claim for asylum. Secondly, whilst it is true that many of the illegal Haitians entering the Bahamas are indeed economic migrants, that is not to say that everyone fleeing this politically unstable country is in search of economic freedom, particularly when there is voluminous documentation of the human rights abuses which occur in Haiti on a daily basis.

The writer, in accordance with AI’s conclusion, finds the current practice highly inadequate. The process of screening greatly undermines the importance of having an interview, since it appears to be a system, which serves to ‘weed out’ those with ‘no claim’. Instead, what it does, is provide a blanket approach to the problem, almost conclusively labelling all illegal immigrants (particularly those from Haiti) as economic migrants, thus withdrawing their chances of receiving protection.

The screening process is followed by relocation of the immigrants to the Detention Centre, to await either recognition or deportation.

## **4.2 Individual Interviews**

Where an immigrant has been convincing enough to convey the need for international protection, he/she is granted a personal interview with one of

the immigration officials. Immigration officials have been trained according to UNHCR standards, and when conducting one-on-one interviews, take a number of considerations into account including the current political climate and the human rights situation in the applicant's country at the time.

The approximate time spent interviewing an applicant is generally one hour. Occasionally an interview will last longer, but interviews rarely exceed two hours. It is important to highlight that this individual interview, is the sole opportunity that a refugee has to 'make his case'. It is of fundamental importance and yet no legal representatives are provided. It is only in the *minority* of cases that a refugee is granted a follow-up interview. In some instances, interpreters are available, but in most cases, the immigration officials claim that they are capable of conducting the interviews without an interpreter.

Refugee status determination is covered by UNHCR Guidelines as well as Excom Conclusion No 8 (XXXIII) 1978 which provide, when considering status determination, minimum standards should be respected. The Handbook for Parliamentarians (published by the UNHCR) also clearly lays out a procedural checklist entailing the duties of state parties to ensure asylum seekers have fair access to the system. Additionally, domestic legislation should provide a legal framework enacting the provisions of the convention (and the guidelines). Where a state has failed to enact domestic legislation (as is the case with the Bahamas), and the UNHCR has no formal presence in the country, *ad hoc* determination procedures can be used. There are various methods of processing of asylum seekers, depending on the country. This is one of the major challenges which arises when discussing international refugee protection - the disparity in national refugee status determination processes. A uniform approach to dealing with refugees and asylum seekers would limit the discrepancies between countries, and might subsequently circumvent some of the problems that come with the determination process.

### **4.3 Decision Making Body – The Ministerial Cabinet**

After the asylum seeker has conducted his interview with the immigration official, his/her case is submitted to the Director of Immigration, who in turn reviews the case on its merits. If the Director is of the opinion that an asylum seeker may have a valid claim, he submits case to the Ministerial Cabinet for review and final determination. Review of cases by Cabinet is purely administrative and there is no legal obligation on the [Cabinet] to revisit its decision. This is remarkable considering that domestic law provides that all administrative decisions should be ‘transparent and reviewable with proper disclosure granted and the opportunity to review the decisions made recourse for appeal’<sup>92</sup>. The decision of Cabinet at this stage is effectively a ‘de facto’ first instance decision, and asylum seekers are not afforded the opportunity to have their cases reviewed, or appeal negative decisions (discussed below).

The current administrative process creates a problem, not least because those responsible for reviewing the asylum claims are neither experts in the field of international, nor refugee law, but because international provisions provide that refugees should have the right to appeal a negative decision, as well the right to know why their claim has been rejected<sup>93</sup>. At present, asylum-seekers have no right to be present when their cases are being reviewed and do not benefit from independent legal counsel.

### **4.4 Right to Appeal**

ExCom Conclusion No. 8 (XXVIII) on minimum requirements for refugee status determination calls for each State party to create a coherent appeal system allowing the applicant to appeal against a negative decision. Additionally, the conclusion provides, where an applicant receives a

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<sup>92</sup> AI Report 2002; Note No. 15. p. 9

<sup>93</sup> ExCom Conclusion No. 8 (XXVIII) of 1977

negative decision, he/she should be given a reasonable time to appeal for a formal reconsideration of the decision according to the prevailing system.

When the writer conducted interviews with The Department of Immigration, it was confirmed that there was no right to appeal. The Immigration Act, further confirms this, stating, those entering the country illegally have no right to appeal deportation orders<sup>94</sup>. Despite the foregoing, the Government insists that an appeal process exists for rejected asylum seekers, although no rejected asylum seeker seems to have been informed of it, and no evidence has come to light to support the government's assertion.

It is the view of the writer that vital components are missing in the Bahamian asylum system. The current procedure lacks the proper standards called for in various provisions and guidelines. A legal framework on asylum and refugee law needs to be created, which would no doubt, be more effective than the current *ad hoc* procedures.

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<sup>94</sup> Immigration Act 1967 s.40-45



# Chapter 5

## 5.1 The Office of the United Nations High Commissioner for Refugees (“UNHCR”)

The Office of the United Nations High Commissioner for Refugees (“UNHCR”), successor to the IRO, was established in 1951 by a resolution of the United Nations General Assembly<sup>95</sup>. Created in the aftermath of the Second World War, its *raison d’être* was to create a body under the auspices of the UN which offered ‘international protection’ and ‘permanent solutions for the problems of refugees’<sup>96</sup>.

Initially, it was anticipated that the agency would function for a three-year period, but was voted successive five-year extensions in 1958, 1963, 1968, and 1973. During this period, it was also becoming more apparent that there was the need for a legal framework, which defined the status of refugees. The mandate of the UNHCR (discussed below), encompasses legal standards stipulated in the 1948 Universal Declaration of Human Rights (“UDHR”) and the 1949 Geneva Conventions pertaining to International Humanitarian Law. The agency has succeeded in creating a generally accepted definition for ‘refugee’ based on the concept of ‘*well-founded fear*’.

The statute of the UNHCR governs the agency and encapsulates a clear definition of a refugee. It considers as falling within its ambit, those people who were covered by previous treaties and agreements<sup>97</sup>, as well as those persons who are outside their country of nationality or habitual residence, who have a *well-founded fear* of persecution owing to their race, religion, nationality or political opinion. Additionally, such a person must be able to

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<sup>95</sup> United Nations General Assembly res. 428(V).

<sup>96</sup> *Ibid.* p.7

<sup>97</sup> Arrangements of 12 May 1926 and 30 June 1928, Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939. Chapter II, 6 (A) (i) Statute of the UNHCR.

show that he/she is unable or unwilling to avail his/herself to the protection of the government of his/her country of nationality, or (if he/she has no nationality), unable or unwilling to return to the country of his/her former habitual residence.”<sup>98</sup>

Refugees falling into one of the above-mentioned groups are categorised as ‘mandate refugees’, which are slightly different from those recognised under the 1951 refugee convention<sup>99</sup>. It should be noted however, that a person *can* be recognised under both the UNHCR statute and the refugee convention.

## **5.2 Mandate of the UNHCR**

A more detailed analysis of UNHCR’s mandate demonstrates its far-reaching impact. Initially, the agency was responsible for refugees falling into one of the previously discussed categories, or those considered refugees under the IRO. With time, its competence eventually evolved and extended well beyond its statutory boundaries and came to include certain ‘persons of concern’ such as internally displaced persons, stateless persons and those who may have faced traumatic natural disasters, leading to a dire need of humanitarian assistance.

Although this new category of persons was not envisaged at the time of drafting the UNHCR statute, their vulnerable position made them of ‘concern to the international community’, and the agency, in conjunction with the UN General Assembly, deemed it necessary to find a solution to alleviate their problems. In 1957, the High Commissioner, acting under the request of the General Assembly, extended a humanitarian practice known as ‘*good offices*’ to assist millions of Chinese refugees in Hong Kong by securing and encouraging contributions for them. The High Commissioner used his good offices again, between 1957-1958, when Algerian nationals

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<sup>98</sup> Statute of the United Nations High Commissioner for Refugees 1950, Chapter II, 6B

<sup>99</sup> Mandate refugees are distinguished from convention refugees in that the former does not recognize those who have a *well founded fear* based on their ‘membership in a particular social group’.

were forced to flee to Tunisia and Morocco. In 1962, the UNHCR assisted with the voluntary repatriation of the Algerians.

### **5.3 Executive Committee of the High Commissioner’s Programme (“ExCom”)**

The Executive Committee of the High Commissioner’s Programme (“ExCom”) was established in 1957.<sup>100</sup> Its function is to assist in setting protection standards through producing conclusions and recommendations, which although non-binding, carry substantial weight, since it is the only UN body which addresses refugee issues in such an explicit manner<sup>101</sup>. The body has the competence to advise the High Commissioner on matters pertaining to his statutory functions and take decisions on whether international assistance through UNHCR may be appropriate in some situations. ExCom is currently comprised of 68 member States<sup>102</sup> and meets annually in Geneva to discuss the financial affairs of the UNHCR and approve its programmes for refugee protection. In 1995, ExCom created a ‘standing committee’ for the purpose of discussing various aspects of UNHCR’s work. The standing committee meets quarterly in Geneva.

In 1977, ExCom took a series of decisions on protection issues relating to fair access to asylum procedures<sup>103</sup>, *non-refoulement*<sup>104</sup>, expulsion<sup>105</sup>, and refugee status determination<sup>106</sup>.

Conclusion No.8 (XXVIII) on refugee status determination importantly noted that many of the contracting parties to the 1951 refugee convention and the 1967 protocol had not yet established formal procedures for refugee status determination. In highlighting this fact, ExCom recommended that

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<sup>100</sup> UNGA res. 1166 (XII), 26 Nov. 1957

<sup>101</sup> In comparison to many other intergovernmental (human rights) bodies, ExCom and the Standing Committee meet more regularly to discuss refugee protection in detail.

<sup>102</sup> Available at: [www.unhcr.ch](http://www.unhcr.ch)

<sup>103</sup> ExCom Conclusion No. 5 (XXVIII) of 1977

<sup>104</sup> ExCom Conclusion No. 6 (XXVIII) of 1977

<sup>105</sup> ExCom Conclusion No. 7 (XXVIII) of 1977

<sup>106</sup> ExCom Conclusion No. 8 (XXVIII) of 1977

States meet certain minimum standards in their determination procedures.

These minimum standards, according to the conclusions, should include:

- (i) having a competent official to determine refugee claims;
- (ii) proper guidance for the applicant regarding the asylum procedure;
- (iii) an identified body responsible for dealing with asylum claims;
- (iv) recourse to a competent interpreter and the opportunity to contact a UNHCR representative;
- (v) issuing successful applicants with proper documents certifying his/her status;
- (vi) a proper appeal system for unsuccessful applicants which allows them a reasonable amount of time to appeal and;
- (vii) provisions for unsuccessful applicants to remain in the country awaiting the outcome of appeal procedures.

At the same session, ExCom noted with concern (Conclusion No. 6) that many States were still practising measures that could amount to *non-refoulement* contrary to international law. It reiterated the commonly accepted position that rejection of asylum seekers at the border or returning them to a territory where their lives or freedom may be endangered can contravene a State's legal obligations and reaffirmed observance of the principle.

#### **5.4 The UNHCR and Article 35 of the Refugee Convention**

Unlike many human rights treaties, the refugee convention does not have a treaty-monitoring body to ensure its proper application and implementation by State Parties. This responsibility has been delegated to the UNHCR by virtue of article 35 of the refugee convention, which states:

*“The Contracting States undertake to co-operate with the UNHCR...in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.*

*In order to enable the UNHCR...to make reports to the competent organs of the United Nations, the Contracting States undertake to provide...information and statistical data...concerning:*

- (a) The condition of refugees,*
- (b) The implementation of this Convention, and*
- (c) Laws, regulations and decrees which are...in force relating to refugees’.*

Article II of the 1967 Protocol places the same responsibility on the agency.

This provision is the closest ‘enforcement mechanism’ relating to the 1951 convention and it only calls for basic cooperation and supervision. The UNHCR goes about fulfilling its duties under article 35 by promoting and encouraging ratification of the refugee convention as it simultaneously publicly scrutinises State practice. Additionally, the UNHCR regularly intervenes with authorities, assists in ensuring physical safety of refugees and promotes national legislation and asylum procedures. The agency also monitors the entry and removal of asylum seekers.

Article 35 also places a duty on member States to provide the UNHCR with information regarding the condition of refugees on its territories and details on implementation of the convention. However, the extent to which the UNHCR is involved in a country’s asylum process depends largely on the administrative and judicial systems of each State party, as well as the amount of assistance each State party requests from the UNHCR.

Article 36 obliges member States to communicate with the United Nations informing the agency of the measures taken to “ensure application” of the provisions stipulated in the convention.

Like many countries, the government of the Bahamas has not formally invited the UNHCR to handle its refugee applications, although the agency works in conjunction with the government, to review the few applications

which are received. Moreover, Bahamas immigration officials are trained according to UNHCR guidelines, thus rendering the presence of the agency unnecessary. Additionally, the number of illegal immigrants that enter the Bahamas on an annual basis, although high, is arguably not sufficiently high to make UNHCR's permanent presence vital.

As already stated, one of the main problems plaguing the refugee convention, is the absence of a uniform approach regarding refugee determination. In its Global Consultations (UNHCR), the High Commissioner remarked that, had there been a requirement for each State party to have an identical (determination) procedure, then perhaps the system would have far less inconsistencies. One must consider the reality of the problem however – trying to harmonize the status determination procedures of nearly 140 governments is a colossal feat. Each State wishes to have control over who is allowed to enter its borders. Moreover, it is unlikely that governments will gather the political will necessary to become serious about codification of asylum procedure.

## **5.5 Utilizing Other UN Human Rights Mechanisms for Refugee Protection**

The absence of a uniform approach in applying the refugee convention is indeed problematic for both States and the UNHCR alike, in terms of recognising and defining refugees. Moreover, utilization of the UNHCR as a supervisory body brings further difficulties. The agency can aptly be described as a 'toothless watchdog' since its supervisory role is easily compromised by its significant dependency on member States for funding. This brings the writer to the importance of utilizing other human rights treaties for the protection of refugees.

As was briefly touched upon in Chapter two, the ICCPR, CAT and CERD all contain provisions creating specially commissioned bodies to monitor and ensure proper and effective functioning of the treaties. Each committee is comprised of independent experts, and although none of the conventions

relate specifically to refugee protection, references to *non-refoulement*, arbitrary detention and cruel, inhuman and degrading treatment mean the treaty bodies have the competence to express an opinion on refugee issues.<sup>107</sup>

### 5.5.1 Human Rights Committee (ICCPR)

Article 28 of the ICCPR creates the Human Rights Committee (“HRC”), which attempts to ensure that State parties respect the civil and political rights of individuals. The HRC was established in 1976 and can be described as one of the more comprehensive monitoring bodies, given the universal character of the ICCPR. The First Optional Protocol to the ICCPR gives the HRC competence to examine individual complaints (also known as communications or petitions) against those State parties that allegedly act contrary to the convention<sup>108</sup>. Additionally, the HRC comments on reports<sup>109</sup> which State parties are required to submit periodically.

Despite the fact that the HRC is not concerned primarily with refugee issues, it does allude to State practice pertaining to refugee matters from time to time. For instance, in 1995, the Committee stated with reference to the United States:

*“The Committee is concerned that excludable aliens are dealt with by lower standards of due process than other aliens and, in particular, that those who cannot be deported or extradited may be held in detention indefinitely. The situation of a number of asylum seekers and refugees is also a matter of concern to the Committee”<sup>110</sup>.*

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<sup>107</sup> A country must have ratified the relevant Optional Protocols to the ICCPR and CAT for the complaint mechanisms to be accessed. Accessing the complaint mechanism under the CERD requires a State to declare that it recognizes the competence (of CERD).

<sup>108</sup> Complaints can only be submitted against those countries that have ratified the Additional Protocol. To date 30 States have ratified the First Option Protocol to the ICCPR.

<sup>109</sup> States are under an obligation to submit an initial report one year after becoming a party, and thereafter periodic reports every five years.

<sup>110</sup> International Service for Human Rights and Amnesty International; *The UN and Refugees’ Human Rights: A Manual on how UN Human Rights Mechanisms can Protect the Rights of Refugees*; 1997, (A/50/40), p.55

Where a one believes that a State party has acted in contravention of its obligations stipulated in the ICCPR (which serve to protect asylum seekers), a complaint may be lodged.<sup>111</sup>

### **5.5.2 Committee against Torture (CAT)**

The Committee Against Torture also monitors the conduct of its State parties and requires the submission of periodic report. Additionally, the Committee has a three-tier complaint mechanism system. In addition to reviewing periodic reports, the committee monitors implementation of the CAT through:

- (i) individual complaints
- (ii) inter-state complaints
- (iii) inquiries

The monitoring mechanisms of the Committee Against Torture can be seen as a useful means of protecting refugees and indeed article 3 of the CAT makes this mechanism one of the more relevant mechanisms for refugee matters. Like the two preceding monitoring mechanisms, ratification of the First Optional Protocol is necessary for the activation of the complaint mechanism<sup>112</sup>.

### **5.5.3 Committee on the Elimination of Racial Discrimination (CERD)**

The Committee on the Elimination of Racial Discrimination formed under the CERD, receives petitions from individuals at any time<sup>113</sup>, and also requires state parties to submit periodic reports. For refugee matters, the writer takes the view that recourse to this committee may not be the most useful for refugee protection (as the provisions contained therein are limited with respect to asylum). However, the importance of State reports was demonstrated earlier, when the writer discussed the 64<sup>th</sup> session of the committee, which raised issues with the Bahamas over its failure to enact

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<sup>111</sup> In accordance with the terms of the First Optional Protocol.

<sup>112</sup> To date, the CAT has been widely ratified – 130 State Parties, however, its Optional Protocol has been ratified by only 8 countries. Available on <[www.unhchr.ch](http://www.unhchr.ch)>

<sup>113</sup> Granted the State in question has recognised the competence of the Committee under article 14 of the CERD (The Bahamas has not).



legislation explicitly prohibiting racist propaganda, as stipulated by article 4 of the CERD.

## **FINAL REMARKS / RECOMMENDATIONS**

This study has revealed disconcerting information about the asylum practices of the Bahamas, and it is the view of the writer that certain measures must be taken by the Government of the Bahamas to reconcile its asylum policy with its international obligations. The following points below summarize the writer's recommendations.

### ***(1) Accession to International/Regional Instruments***

The government of the Bahamas should accede to international human rights treaties relevant to refugee protection including the CAT, ICCPR. Furthermore, the government is encouraged recognize the competence of the CERD in accordance with article 14 of the convention and accede to the ACHR, which offers further protection to those in need of international assistance.

### ***(2) Reconciling Domestic Law with International Obligations***

The government of the Bahamas should;

- i. Enact legislation which gives effect to the 1951 refugee convention, by way of either incorporating the convention (in its entirety) into domestic law, or otherwise,
- ii. Ensure that the principle of non-*refoulement* has been properly incorporated into national legislation,
- iii. Adopt legislation which clearly delineates the difference between asylum-seekers and those who may want to enter the country for other reasons (i.e. economic migrants).

### ***(3) Co-operation with UNHCR***

The government of the Bahamas should continue and enhance its cooperation with UNHCR. Ensure data and statistics on refugee applications is submitted on a regular basis.

**(4) *Asylum Policy***

The government of the Bahamas should re-negotiate the terms of the bilateral agreements with Haiti and Cuba so that they include safeguards for all returned immigrants or failed asylum-seekers. The government should also halt its program of immediate repatriation until it finds a suitable means of ensuring minimum standards are met in the refugee determination process. In terms of the government's policy on interdiction-at-sea, the writer calls on those responsible to inform immigrants of their right to asylum. Additionally, the government is advised to either de-criminalize the illegal entry of asylum-seekers and/or enact new legislation dealing exclusively with asylum seekers.

**(5) *Asylum Procedure***

The government of the Bahamas should;

- i. Adopt procedural measures that clearly inform asylum seekers of their right to claim asylum,
- ii. Adopt a clear legal framework for refugee status determinations, which includes access to legal representation and the right to an appeal,
- iii. Set specific guidelines dealing with asylum seekers and illegal immigrants with respect to their detention. Take steps to ensure that no one is subject to arbitrary detention at the Carmichael Road Detention Centre.

**(6) *National Initiative***

The Government of the Bahamas should establishment a learning/awareness program(s) for the general population, which serves to educate people on refugee issues and the obligations of the Bahamas as a signatory to the 1951 refugee convention.



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ExCom, 'Non-Refoulement' No. 6 (XXVIII), 1977

ExCom, 'Expulsion' No. 7 (XXVIII), 1977

Excom, 'Determination of Refugee Status' No. 8 (XXVIII), 1977

ExCom, 'Refugees without an Asylum Country' No. 15 (XXX), 1979

Handbook on Determination and Procedures for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/IP/4/Eng/REV.1; 1992

UNHCR Handbook on Voluntary Repatriation, January 1996

UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers; February 1999

U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the protection of All Persons under Any Form of Detention or Imprisonment Regarding the situation immigrants and asylum seekers, UN Doc. E/CN.4/2000/4/Annex 2;1999

UNHCR Refugee Protection: A Guide to International Refugee Law (Handbook for Parliamentarians); No. 2 2-2001

### ***Other UN Documents***

Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, Bahamas, U.N. Doc. CERD/C/64/CO/1/(2004)

CCPR, General Comment No. 20 (Replaces General Comment No. 7) Concerning Prohibition of Torture and Cruel Treatment or Punishment; 43<sup>rd</sup> session, 1992.

## **3. Other Documents**

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948)

Organisation of American States Convention on Diplomatic Asylum, Mar. 28, 1954, 1438 UN 104, OAS Treaty Series, No. 18

Organisation of American States Convention on Territorial Asylum, Mar. 28, 1954, 1438 UN 129, OAS Treaty Series, No. 19

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S 123 *entered into force* July 18, 1978

Cartagena Declaration on Refugees, Nov.22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev.1

Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U. N.T.S 45, *entered into force* June 20, 1974

#### **4. Studies and Manuals**

The State of the World's Refugees, UNHCR Publications, Oxford University Press, 2000

International Service for Human Rights and Amnesty International; The UN and Refugees Human Rights: A Manual on how UN Human Rights Mechanisms can Protect the Rights of Refugees; 1997

#### **5. Interviews**

Coleby, Veldia, Senior Immigration Officer, The Bahamas Department of Labour and Immigration, August 19 2004

Private Interview (Anonymous), Former Detainee at the Carmichael Road Detention Centre, August 2004

#### **6. Cases**

Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993)

The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Report No. 51/96, Inter-Am. C.H.R., OEA/SER.L/V/II.95 Doc.7 rev. at 550 (1997).

#### **7. Useful Web-Sites**

- [www.acdi-cida.gc.ca](http://www.acdi-cida.gc.ca)
- [www.amnesty.org](http://www.amnesty.org)
- [www.asylumlaw.org](http://www.asylumlaw.org)
- [www.asylumsupport.info](http://www.asylumsupport.info)
- [www.bbc.co.uk](http://www.bbc.co.uk)



- <http://www.cia.gov/cia/publications/factbook/geos/sw.html>
- [www.hrea.org](http://www.hrea.org)
- [www.hrw.org](http://www.hrw.org)
- [www.humanrightsfirst.org](http://www.humanrightsfirst.org)
- [www.irvl.net](http://www.irvl.net)
- [www.icrc.org](http://www.icrc.org)
- [www.jonescommunicationsltd.com](http://www.jonescommunicationsltd.com)
- [www.lchr.org](http://www.lchr.org)
- [www.nationbynation.com](http://www.nationbynation.com)
- [www.nchr.org](http://www.nchr.org)
- [www.oas.org](http://www.oas.org)
- [www.thebahamajournal.com](http://www.thebahamajournal.com)
- [www.thenassauguardian.com](http://www.thenassauguardian.com)
- [www.thirdworldtraveler.org](http://www.thirdworldtraveler.org)
- [www.refugees.org](http://www.refugees.org)
- [www.refugeesinternational.org](http://www.refugeesinternational.org)
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- [www.uwichill.edu.bb](http://www.uwichill.edu.bb)