

The Convention at 50: the way ahead for refugee protection

by Erika Feller

In order to explore the way ahead for refugee protection it is important to situate the Convention and the refugee protection regime in its present context. What is the Convention and what is it not, as an instrument of refugee protection today?

It is often said, with justice, that the 1951 Convention is the foundation of refugee protection, the one truly universal instrument setting out the baseline principles on which the international protection of refugees has to be built. These include:

- Refugees should not be returned to face persecution or the threat of persecution (the principle of *non-refoulement*).
- Protection must be extended to all refugees without discrimination.
- As the issue of refugees is social and humanitarian in nature, it should not become a cause of tension between states.
- Since the granting of asylum may place unduly heavy burdens on certain countries, a satisfactory solution can only be achieved through international cooperation.
- As persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner, they should not be penalised for having entered into or for being illegally in the country where they seek asylum.
- Given the serious consequences of expulsion of refugees, such measures should only be adopted in exceptional circumstances directly impacting on national security or public order.
- Cooperation of states with the High Commissioner for Refugees is essential if the effective coordination of measures taken to deal with the issue of refugees is to be ensured.

The Convention has a legal, political and ethical significance that goes well beyond its specific terms: legal in that it provides the basic standards on which principled action can be founded; political in that it provides a truly universal framework within which states can cooperate and share the burden resulting from forced displacement; and ethical in that it is a unique declaration by the 140 States Parties of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged.

Assertions that the Convention is no longer relevant are belied by encouraging recent developments. At the Inter-Parliamentary Union meeting in Amman in May 2000, 648 parliamentarians from 124 countries around the world reaffirmed the centrality of the Convention to asylum systems today; EU leaders meeting in Tampere, Finland, followed suit as have the 56 government members of the UNHCR's Executive Committee. States continue to accede to the Convention and State Parties continue to promote accession.

The Convention is no panacea for all the problems of displacement. Root causes are outside its scope. If the notion of burden sharing is inherent in its terms, there is no practical underpinning of it through specific provisions. Absent, too, are provisions on family reunification, access to procedures or the grant of asylum. There are no measures tailored to the specific needs of women and children, just as there is only very lit-

tle development of the solutions aspect of refugee protection. While the Convention could be applicable to large-scale influxes, just as to individual arrivals of refugees, in practice states have found it too difficult or onerous to adhere to its provisions when faced with sudden mass arrivals.

Clearly the Convention regime has gaps. We have to be able to admit this without blaming the Convention for problems to which it was never designed to respond. Recently critics have alleged that the Convention is outdated, unworkable, irrelevant and inflexible, a complicating factor in today's migration environment. Several states have deemed it an instrument unresponsive both to the interests of states and to the real needs on the ground.

In its defence, we must adamantly state that the Convention was never conceived only as an instrument for permanent settlement, much less for migration control. The Convention, together with its 1967 Protocol, was drafted to become the global, multilateral, standard-setting agreement on how to protect individuals in need of protection. It is true that it impacts on the sovereign right to regulate entry across borders but it does so in order to introduce a needed exception for a specified category of persons. UNHCR can sympathise with the concerns of states that asylum should not be frivolously resorted to and should not be abused. The Convention itself has safeguards against these risks and states have other means to limit this possibility. There is no need to condemn and modify the only global refugee protection framework that exists. The inability of states to control their borders or to deport aliens with no valid claim to continued residence on their territories should not be blamed on the Convention.

Migration and the Convention

Migration trends are central to the environment in which refugee protection has

to be realised. As far as protection is concerned, changes in migration patterns represent a serious complicating factor. Refugee problems are not only closely tied to the spread of inter-ethnic conflicts and the capacity of states to respond to and resolve them but also to globalisation. There is no doubt that states have a serious apprehension about 'uncontrolled' migration in this era of globalisation - globalisation in communications, in economies and indeed in migration. To governments aiming at minimising the effects of globalisation of migration, asylum is an exemption that allows too many people through the door.

One problem is that many refugees, of necessity, come 'uninvited' and more and more via smugglers. Trafficking and human smuggling are a compounding feature of the migration landscape. There are many evils associated with trafficking and smuggling which are criminal activities involving abuses of many individuals. It is also true, though, that being smuggled to sanctuary has become an increasingly important option for asylum seekers, even while it carries a price tag going beyond its financial cost. An asylum seeker who resorts to a human smuggler seriously compromises his or her claim in the eyes of many states. As has already been observed, this leads to an imputation of double criminality; not only do refugees flout national boundaries but they also consort with criminal trafficking gangs to do so. Therefore, it is claimed, their claims must be bogus and measures to restrict elementary privileges are justified.

If migration is a singular feature of the changed environment for refugee protection, another is the increasingly unfavourable cost/benefit equation of asylum as seen from the perspective of states. There was a time when the benefits of offering asylum to refugees, arguably at least for many states, outweighed their costs. Where refugees were culturally similar, easily assimilable, plugged labour shortages, arrived in manageable numbers and, even better, reinforced ideological or strategic objectives, the policy was one of

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generous admission. Today, in the reckoning of states, the costs are to the fore. States seeking to restrict asylum options frequently claim that these options have to be limited because of the economic burden of offering asylum, set against competing national priorities for limited resources. Security concerns, inter-state tensions, backdoor migration, social and political unrest and environmental damage are all cited as 'negative' costs in the asylum ledger. In parallel with more and more asylum arrivals is a growing incidence of racism, xenophobia and intolerance directed against refugees, asylum seekers and foreigners in general. There is also a cost to this at the political level and it is certainly, as a result, a disincentive to enlightened arrival policies.

Changes in states' asylum policies

This combination of factors (the evolving refugee situation, the threat of uncontrolled migration and the costs - real or imagined - of asylum) has led to a reshaping of the asylum policies and practices of many states. Broadly speaking, two parallel trends have emerged, both of which have impacted negatively on the accessibility of asylum and the quality of treatment received by refugees and asylum seekers. The first has been the growth in an overly restrictive application of the 1951 Refugee Convention and its 1967 Protocol, coupled with a formidable range of obstacles erected by states to prevent legal and physical access to their territory. The second is the bewildering proliferation of alternative protection regimes of more limited duration and guaranteeing lesser rights than those contained in the 1951 Convention. There has even been, in some states, a gradual movement away from a rights-based approach to refugee protection altogether, with a growing

preference by their governments for discretionary forms of protection that provide lesser safeguards and fewer rights to people of refugee concern.

There has been the growth of 'notions' or 'approaches' which have substituted, in effect, for the application of the Convention by giving it a rather subsidiary place in a state's response repertoire. The notion of the 'safe country' notion or the concept of the 'internal flight alternative', rather than serving an evidentiary function within a full refugee status determination process, are coming to constitute the rationale for non-resort to the Convention procedures in the first place. From the perspective of UNHCR, refugee protection can only be seriously jeopardised as a result.

Notions such as 'effective protection elsewhere' are increasingly entering asylum systems, in effect substituting for the internationally agreed refugee definition. Whether or not an individual has found, or even could have found, protection in countries through which that person passed is rarely easily or reliably assessed. In any case, the indicators of 'protection' are too imprecise. If the notion is to have any currency, its applicability should be determined on an individual basis, not on a country basis, and certainly not in the case of persons who have passed through countries of 'mere transit'. Any decision to return an asylum seeker to a 'safe third country' should be accompanied by assurances that the person will be readmitted to that country, will enjoy there effective protection against refoulement, will have the possibility to seek and enjoy asylum and will be treated in accordance with accepted international standards.

Similar concerns exist with the notion of 'safe country of origin', which is also coming to serve as an automatic bar to access to asylum procedures. It is impossible to exclude, as a matter of law, the possibility that an individual could have a well-founded fear of persecution in any particular country, however great its attachment to human rights and the rule of law. While a

sophisticated democratic order and an elaborate system of legal safeguards and remedies would allow for a general presumption of safety, history is replete with examples to prove that no system is either infallible or immutable. Where the notion of safe country of origin is used as a procedural tool to assign certain applications to accelerated procedures, or where its use has an evidentiary function (for example giving rise to a presumption of non-validity of claim), UNHCR has far less concern, provided that the presumption of safety is rebuttable in a fair procedure.

In parallel, much ingenuity has been shown in developing new forms of protection. Temporary protection, 'B' status, humanitarian status, exceptional leave to remain, stay of deportation and toleration permits are but a few. The present situation is marked by lack of harmonisation of asylum policies even within regions, with marked differences among countries and within countries as to who gets protection, what kind of support is accessible, and what are the legal and social consequences of different kinds of status.

In response to these various approaches by states there has been even more resort (by failed asylum seekers, lawyers seeking protection solutions and judges considering protection needs) to human rights instruments as, in effect, an alternative source of protection. With all the advantages of this possibility being available, there is also the problem (at least at the present time) that *non-refoulement* under human rights instruments is not yet accompanied, for the beneficiaries, by clearly articulated standards for treatment and stay.

Discussion so far has focused on the developed world, countries where refugee protection traditionally has a strong legislative base. In those countries where protection is not legislated for, accession to the Convention seems an increasingly remote possibility. Tellingly, Southern governments frequently observe at UNHCR's Executive Committee meetings that the Convention seems to be less and less relevant for its main traditional supporters and that therefore any incentive for them to consider accession is fast receding. Restrictive approaches of Northern

governments export well. They are already being replicated in regions where laws and structures are only now being put into place. Consequences are particularly apparent where they are being replicated in regions where their effect is not cushioned or mitigated in any way by a culture, much less a regime, of human rights protection.

There are clear advantages to all concerned (refugees, host states and the international community in general) in having a globally recognised and consistently applied regime of refugee responsibilities. Burden sharing would be enhanced, 'asylum shopping' would be diminished and better predictability of responses would improve asylum management.

The way ahead

The plethora of different forms of protection, coupled with the ever more ingenious systems of people trafficking, is causing increasing frustration. Countries are coming to appreciate the need to rationalise and harmonise approaches, both regionally and, increasingly, inter-regionally. Harmonisation may well run in tandem with a growing acceptance by states that it is no longer feasible, much less demographically sound, to coexist without a considered migration policy. Most population projections for the developed world forecast a greater and greater imbalance between young and old. A truly comprehensive and integrated approach must include a normative framework for managing migratory movements.

In UNHCR's view, constructive and visionary immigration policies could result in an easing, or at least a balancing, of the pressure on asylum systems. There would be a positive switch in approach to managing migration through migration tools and managing the asylum system through asylum tools. Where there are linkages, and trafficking and human smuggling is a case in point, special additional approaches are called for.

What we should be working towards is in fact a revitalisation of the Convention regime, which would preserve its centrality but would buttress it with more enlightened migration policies and

harmonised additional protections. This scenario is built around the recognition that the 1951 Convention is far from obsolete, even if in some respects it is incomplete. Might we envisage somewhere down the line protocols on mass influx and temporary protection? Interstate cooperation, or burden sharing, is another area where the Convention's preambular references could well benefit from being given specific context. Special protection measures for women and children, procedural requirements for refugee status determination, family reunification and voluntary repatriation are other areas where a progressive development of international refugee law would be useful. In the process of revitalising the protection regime, UNHCR also sees a need to foster greater consistency and complementarity between human rights instruments, such as the European Convention on Human Rights or the CAT Convention and the 1951 Convention.

Refugee law is not a static but a dynamic body of principles. As with all branches of law, it has, and must retain, an inherent capacity for adjustment and development in the face of changed international scenarios. UNHCR's approach to promoting this development rests on the understanding that refugee protection is first and foremost about meeting the needs of vulnerable and threatened individuals. These needs of course have to be accommodated and addressed within a framework of sometimes competing interests of other parties directly affected by a refugee-producing situation, which include states, host communities and the international community generally. The refugee protection regime has to balance appropriately all these rights, interests and expectations.

UNHCR regards it as its moral, legal and mandate responsibility to foster this process of developing new approaches, not to lower the international protection paradigm but to strengthen the available protection modalities. For this reason UNHCR has used the build-up to the 50th anniversary to engage in consultations [see end for details] with senior government representatives and experts in the refugee protection area in order to clarify the content and scope of protection, within the framework of comprehensive approaches, necessitated by different refugee-producing situations not fully covered by the 1951

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Convention. The purpose of these Global Consultations is, on the one hand, to re-affirm the fundamental role of the Convention and, on the other, to acknowledge and answer the gaps and failures of the current system from the perspective both of persons seeking and needing protection and of governments confronted by serious dilemmas in this regard.

The initiative has been strongly supported by governments and expectations are high. The Secretary General has given it his endorsement, as has UNHCR's Executive Committee and the UN General Assembly. The Consultations have been designed along three parallel tracks to which issues broadly divided along political, legal and practical lines were consigned. The 'First Track', or political track, centres squarely on the 1951 Convention and support at the highest political levels for it so as to preserve its integrity, relevance and place in the overall protection framework. The 'Second Track', the legal track, focuses on selected interpretative questions regarding the Convention. The 'Third Track', the practical track, is being conducted within the framework of the Executive Committee.

Problems for discussion in the Third Track have been grouped under three

themes: protection of refugees in mass influx situations; protection of refugees in the context of individual asylum systems (including burden sharing); and the search for protection-based solutions. It is hoped that this process will firstly foster a common understanding of the protection challenges and better cooperation to address them. Secondly, it will permit the identification and promotion of practical responses to protection problems. Thirdly, it should lead to new approaches, tools and standards to strengthen protection and buttress the Convention.

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Global Consultations on International Protection

Several articles in this issue have referred to the Global Consultation process initiated by UNHCR to promote more effective implementation of the Refugee Convention in its 50th year. The First Track involves inter-governmental action to reaffirm states' commitment to the Convention and to promote further accessions. The Second Track, looking in detail at refugee law, is to hold a series of expert roundtables in Washington, Cambridge, San Remo and Geneva. The Third Track, linked to the ExCom process, is discussing issues not fully covered by the Convention. To ensure that the Consultations have a global reach and involve governments, legal experts, NGOs and refugees themselves, the Third Track is organising a series of regional meetings.

There are a large number of discussion papers on all three tracks at: www.unhcr.ch/issues/asylum/globalconsult/main.htm

For further information, and to comment or contribute to discussions, contact:

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