



EDITORIAL

The Enduring Relevance of the 1951 Refugee Convention

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1. INTRODUCTION

In 2016, it was 65 years since the Refugee Convention¹ was adopted. That same year, there were 65 million displaced people in the world. The synchronicity of those figures would have caused grave concern to the drafters of the Convention, especially since they envisaged it as an instrument that would resolve the legal status of refugees displaced by the Second World War.

We have all heard the accusation levelled at the 1951 Refugee Convention that it has passed its use-by date. Critics of the Refugee Convention fall into two camps: those who think it is too restrictive and outdated in its application, and those who think it alone is responsible for the displacement crises we see around the world today. We are told that the Convention is too old to respond adequately to the displacement challenges of the 21st century – whether that is because it is too restrictive in its reach, or because it is too generous. We are told that it is at once too narrow and too broad, simultaneously blocking and facilitating access to protection.

The fact is that without the Refugee Convention, the protection regime would lose one of its key regulating components, and would likely result in even larger numbers of disorderly movements. As experience shows, ‘departures from the fundamental principles of international refugee protection have neither reduced nor stalled refugee movements’, but have resulted in ‘ineffective management of large-scale influxes, the diversion of refugee movements, [and] the creation of tensions between states as burdens and costs are shifted from some onto others.’²

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¹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

² Volker Türk, ‘Prospects for Responsibility Sharing in the Refugee Context’ (2016) 4 *Journal on Migration and Human Security* 45, 47.

2. THE SCOPE OF PROTECTION

The Convention was drafted at a time when Europe had seen some of the worst systemic human rights abuses imaginable. The Second World War had displaced over 50 million people in Europe, and there were 100 million internally displaced persons in China. The number of refugees in Germany alone was 14 million.³ The 1951 Convention relating to the Status of Refugees, as its full name suggests, was an attempt to respond to existing displacement in Europe by providing a legal status – and thus some certainty – for the many thousands of refugees still displaced six years after the conflict. It was one of a number of foundational human rights instruments negotiated at the time – including the Universal Declaration of Human Rights, the twin human rights covenants, and the Genocide Convention – when the atrocities of the war still loomed large, and the refrain ‘never again’ was front of mind.

Some of the Convention’s own drafters had been refugees themselves – such as the United Nations’ (UN) first High Commissioner for Refugees, Gerrit van Heuven Goedhart. They acutely understood the need for an instrument that accorded a uniform legal status to refugees already displaced. The ideal of resettlement – a mechanism that had been viewed both as a solution for Jewish refugees, and as a more general population management tool in the face of resource scarcity – had proven impossible,⁴ and the creation of a legal status to be enjoyed within host States was seen as very important. Even though States could have unilaterally created such a status in domestic law, the creation of a formal agreement ‘helped to ensure that the states signing the treaty offered similar levels of protection, and thus helped to prevent further influences to those states that raised their standards.’⁵ Accepting mutual obligations was key to international responsibility sharing.

Although drafted in the 1950s, the Refugee Convention definition of a ‘refugee’ has proven itself to be capable of dynamic interpretation. While the drafters never envisaged gender-based persecution as a ground for refugee status, for instance, the rules of treaty interpretation have allowed the Convention to adapt to evolving conceptions of human rights law. As the High Court of Australia has affirmed, the Refugee Convention’s provisions must be understood in light of the treaty’s context, object, and purpose, and not read purely literally or in a vacuum.⁶

This dynamic approach to protection through ‘the progressive development of international refugee law’⁷ uses existing legal principles and standards within the corpus of

³ Chauncy D Harris and Gabriel Wülker, ‘The Refugee Problem of Germany’ (1953) 29 *Economic Geography* 10, 10.

⁴ Jane McAdam, ‘Relocation and Resettlement from Colonisation to Climate Change: The Perennial Solution to “Danger Zones”’ (2015) 3 *London Review of International Law* 93.

⁵ Hemme Battjes and others, ‘The Crisis of European Refugee Law: Lessons from Lake Success’ (2016) 18 <<http://christenjuristen.nl/wp-content/uploads/2016/05/H.-Battjes-E.-Brouwer-L.-Slingenberg-T.-Spijkerboer-The-Crisis-of-European-Refugee-Law.pdf>> accessed 15 November 2016.

⁶ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 253 (McHugh J).

⁷ Guy S Goodwin-Gill, ‘Editorial: The Dynamic of International Refugee Law’ (2013) 25 *International Journal of Refugee Law* 651, 661. ‘Refugee law, which is a part of the law of human

international law to 'secure the rights, the security and the welfare of refugees', and to find durable solutions to their plight.⁸ Successive Executive Committee Conclusions adopted by States have sought to clarify the content of the Convention, as have guidelines and notes on international protection produced by the UN High Commissioner for Refugees (UNHCR).

The Refugee Convention's scope is not unlimited, of course. It contains strictly defined exclusion clauses to prevent people who have committed very serious crimes, such as genocide, torture, murder, and terrorism, from obtaining refugee status. The rationale was that States should not shelter fugitives from justice by granting them asylum. Furthermore, it was thought that perpetrators of serious crimes, such as former Nazis, should not be protected alongside the people they had persecuted.

The exclusion clauses do not sit comfortably with contemporary human rights law, which precludes sending any person – no matter how abhorrent their behaviour – to a real risk of being arbitrarily deprived of life or subjected to the death penalty, torture, or cruel, inhuman or degrading treatment or punishment. This does not mean that such people must be granted refugee status – that is, all the rights envisaged in the Refugee Convention – but it does mean that they cannot be sent back to danger.

International human rights law is certainly not blind to the importance of safeguarding security, but it recognizes that the rights of individuals also need to be preserved. A careful balance has been struck which acknowledges the importance of certain fundamental rights that must never be compromised, and those with which the State may interfere, provided that the interference is reasonable, necessary, and proportionate, and can thus be justified as a matter of law.

Although the Convention is silent on the procedures for recognizing refugee status, it is obvious that fair and efficient procedures are a necessary component of protection, to ensure that those entitled to it are accurately identified, and those who are not are screened out. When refugee status determination processes operate effectively and transparently, they 'are their own deterrent of misuse'.⁹ This is because decisions that have been made according to such practices are defensible and can withstand public scrutiny and questioning, whereas decisions that have (or appear to have) been made without proper regard to due process and impartiality remain open to criticism.

The principle of *non-refoulement* is the cornerstone of the Refugee Convention. Since 1951, it has developed beyond the confines of article 33 of the Convention as well, such that human rights law now prohibits return not only to persecution based on the refugee definition in article 1A(2), but also to places where someone would face a real risk of being subjected to torture; cruel, inhuman or degrading treatment or punishment; arbitrary deprivation of life; a flagrant denial of the right to a fair trial; or

rights and closely related to international humanitarian law, is a dynamic institution': The Editor in Chief and the Members of the Editorial Board, 'Refugee Law and the Protection of Refugees: Editorial' (1989) 1 *International Journal of Refugee Law* 1, 2.

⁸ See Guy S Goodwin-Gill, 'The Language of Protection' (1989) 1 *International Journal of Refugee Law* 6; 'the absence of specific rules, however, does not imply an absence of principles': 16.

⁹ Guy S Goodwin-Gill, 'Editorial. Asylum 2001: A Convention and A Purpose' (2001) 13 *International Journal of Refugee Law* 1, 8.

a flagrant denial of the right to liberty and security of the person. The principle of *non-refoulement* is also recognized as a principle of customary international law.

So, when returning to the objections levelled at the Refugee Convention, we need to be cautious about misdiagnosis and reaching for ‘the treaty equivalent of euthanasia.’¹⁰ Many of the alleged deficiencies of the Refugee Convention are misplaced. Those who call for an overhaul of the instrument – whether they think it too restrictive, inflexible, or too generous – commonly misapprehend its historical origins and purpose. The Refugee Convention is ‘in many respects a basic statement only’ of States’ protection obligations.¹¹ It was never intended as a comprehensive document: ‘it did not deal with, and was not intended specifically to deal with: large-scale refugee movements, the question of asylum or admission to asylum, the details of international co-operation or the promotion of solutions other than those related to the status of the individual as a refugee.’¹² If this is misunderstood, however, then it is easy to see why it gets the blame.

So, what are some of the factors behind the messiness we see today? A key one is the lack of political will to tackle the challenges head-on and accept responsibilities (especially in view of the fact that we are experiencing the largest displacement crisis since the Second World War, which necessitates larger commitments). As the UN Secretary-General said in April 2016: ‘New lists of recommendations are not necessary. Instead, mobilization of the political will and the resources to implement the decisions of the international community in the General Assembly, the Security Council and other international forums are needed.’¹³

Secondly, there is a failure to take the forecasting seriously and to plan. Syria did not happen overnight: the writing was on the wall for a good five years before refugees began leaving for Europe, and the lessons of history were there to see ... if one only cared to look. Refugees are not setting out on a world tour – most prefer to stay close to home if they can.

Thirdly, there is the woeful lack of funding. The UN’s Syria appeal is its largest ever, but it remains terribly underfunded. Frontline States also need to be resourced to better support and integrate refugees where possible. A quarter of Lebanon’s population is now comprised of refugees, and they need assistance to attend school, to work, to receive proper healthcare, and to live in dignity. Such assistance should be pursued both as a humanitarian and a development strategy, not as a containment strategy.

Fourthly, as a former Assistant High Commissioner for Protection once said: ‘There are many asylum systems which remain ineffective or unresponsive, with some purposefully in decline, perhaps aimed at serving a deterrent function.’¹⁴ Rather than using the Refugee Convention as a blueprint to guide positive action, some States look for

¹⁰ *ibid* 2.

¹¹ Erika Feller, ‘The Refugee Convention at 60: Still Fit for Purpose? Protection Tools for Protection Needs’ in Susan Kneebone, Dallal Stevens, and Loretta Baldassar (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Routledge 2014) 60.

¹² Guy S Goodwin-Gill, ‘Editorial. The International Protection of Refugees: What Future?’ (2000) 12 *International Journal of Refugee Law* 1, 2.

¹³ UN Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, UN doc A/70/59 (21 April 2016) para 52.

¹⁴ Feller (n 11) 57.

the grey areas to confine and restrict their obligations as far as is arguably possible. This brings into question whether some States are implementing their treaty obligations in good faith, which is an autonomous duty under international law.

Fifthly, there has always been a ‘responsibility deficit’ in the refugee protection regime. When the Refugee Convention was drafted in 1950, States rejected a proposal by the then UN Secretary-General to formally cooperate by ‘agreeing to receive a certain number of refugees in their territory’,¹⁵ and for this reason the treaty does not settle the distribution of refugees. The irony, of course, is that this is a policy area that demands collaborative action,¹⁶ and until ‘we are able to move beyond reactive solutions and deal comprehensively with causes, then we are destined to be locked into ever repeating cycles of population displacement and therefore of displacement crisis.’¹⁷ Events in Europe over the past two years have shown the precariousness of protection when States fail to cooperate.

3. WHAT IS TO BE DONE?

If we think of the Refugee Convention as our basic guiding framework, which sets out the minimum standards and conditions within which States must operate, then how can we build upon that in good faith to ensure that refugees can access protection within our own country, region, and the world?

Senior UNHCR officials, Volker Türk and Madeline Garlick, have argued that creating a more predictable response to large-scale refugee flows ‘would ideally be addressed through an additional Protocol to the 1951 Convention in the longer term’, but they recognize that ‘an incremental approach is more realistic’ at the present time.¹⁸ Professor Guy S Goodwin-Gill has suggested that current needs demand a ‘new or very substantially revised Statute’ for UNHCR (and its possible renaming as the UN High Commissioner for Refugees and Displaced Persons); new funding arrangements, including the acquisition of funds for humanitarian assistance from frozen assets of the State responsible for the displacement; reconsideration of the idea of safe or neutral zones; and the creation of truly regional responses to protection, such as a European

¹⁵ Ad Hoc Committee on Statelessness and Related Problems, ‘Status of Refugees and Stateless Persons: Memorandum by the Secretary-General’, UN doc E/AC.32/2 (3 January 1950), Annex, Preliminary Draft Convention relating to the Status of Refugees (and Stateless Persons), art 3(2).

¹⁶ Guy S Goodwin-Gill, ‘The International Protection of Refugees and Asylum Seekers: Between Principle and Pragmatism?’ (Keynote Address, Andrew & Renata Kaldor Centre for International Refugee Law Conference, UNSW Sydney, 3 November 2014) <<http://www.kaldorcentre.unsw.edu.au/publication/2014-annual-conference-keynote-address>> accessed 15 November 2016.

¹⁷ Guy S Goodwin-Gill, ‘Editorial. Asylum: The Law and Politics of Change’ (1995) 7 *International Journal of Refugee Law* 1, 9.

¹⁸ Volker Türk and Madeline Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’ (2016) 28 *International Journal of Refugee Law* 656.

Migration and Protection Agency competent to implement and fulfil the European Union's protection goals.¹⁹

The UN General Assembly's high-level Summit for Refugees and Migrants, held in New York on 19 September 2016, was not quite so ambitious in its aspirations, but was nonetheless a historic gathering which resulted in the important New York Declaration. As Elizabeth Ferris, who was closely engaged in the process, observed, the Declaration's 'reaffirmation of core principles of refugee protection was not a foregone conclusion, especially given the xenophobic climate in which the document was negotiated'.²⁰ At the Summit, States for the first time sought to create a systematic framework to coordinate responses to large influxes of refugees, focusing on the roles and responsibilities of different actors, and the needs of those in flight over time. They 'underline[d] the centrality of international cooperation to the refugee protection regime' and 'recognise[d] the burdens that large movements of refugees place on national resources, especially in the case of developing countries'.²¹ States also agreed to begin a series of consultations over the next two years, resulting in the adoption in 2018 of a Global Compact on Refugees, and a Global Compact on Safe, Orderly, and Regular Migration.

The Summit's outcome document, the non-binding New York Declaration, emphasizes the importance of international law as the guiding framework in finding 'long-term and sustainable solutions'.²² It commits States to protecting fully 'the human rights of all refugees and migrants, regardless of status; all are rights holders'.²³ It notes the importance of tackling the root causes of displacement through preventative diplomacy and the promotion of 'good governance, the rule of law, effective, accountable and inclusive institutions, and sustainable development'.²⁴ In the Declaration, States reaffirm the Refugee Convention and its Protocol 'as the foundation of the international refugee protection regime',²⁵ in conjunction with international human rights law and international humanitarian law.²⁶ In particular, States reaffirm respect for the right to seek asylum and the 'fundamental principle of *non-refoulement*'.²⁷ The Declaration calls for a multi-stakeholder approach to displacement, involving 'national and local authorities, international organizations, international financial institutions, civil society partners (including faith-based organizations, diaspora organizations and academia), the private sector, the media and refugees themselves'.²⁸ The Declaration commits to

¹⁹ Guy S Goodwin-Gill, 'The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change' (2016) 28 *International Journal of Refugee Law* 679.

²⁰ Elizabeth Ferris, *In Search of Commitments: The 2016 Refugee Summits* (Andrew & Renata Kaldor Centre for International Refugee Law Policy Brief No 3, November 2016) <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Policy_Brief_3_A4_final.pdf> accessed 15 November 2016.

²¹ New York Declaration for Refugees and Migrants, UN doc A/RES/71/1 (3 October 2016) para 68.

²² *ibid* para 10.

²³ *ibid* para 5.

²⁴ *ibid* para 64.

²⁵ *ibid* para 65.

²⁶ *ibid* para 66.

²⁷ *ibid* para 67.

²⁸ *ibid* para 69.

ensuring that refugee admission policies align with obligations under international law, and that administrative barriers are eased.²⁹ The Comprehensive Refugee Response Framework, annexed to the Declaration, provides a response blueprint, in that it seeks to set out in detail the steps required by different actors at the outset of a large-scale influx. It draws on lessons learned and practices known to be effective.

The Declaration overall has been criticized by academics and civil society groups as lacking vision.³⁰ However, those closely involved in the process have described it as ‘nothing short of a miracle’ given the ‘xenophobic and anti-refugee rhetoric currently on display in many countries around the world’.³¹ Indeed, States’ reaffirmation in the Declaration of their existing commitments under international law is significant, especially at a time when there is a palpable intransigence among States to respond in a truly coordinated and cooperative manner. It is also important given some politicians’ suggestions that these rules do not matter. From a legal perspective, States’ reiteration of the law in formal declarations forms a vital part of establishing State practice and *opinio juris*. Still, when States flout their obligations with disturbing regularity, restatements of the law can feel like little more than rhetorical flourish.

It is also reassuring to see States indicating that they will increase the ‘number and range of legal pathways’ for refugees to be admitted or resettled, thereby obviating the need for dangerous travel.³² Those mentioned in the Declaration include measures such as expanded humanitarian admission programmes, temporary evacuation schemes, flexible arrangements to assist family reunification, private individual sponsorship, education pathways (including through targeted scholarships, student visas, and apprenticeships, as in Canada, the Czech Republic, and Germany), and labour mobility schemes (including in partnership with the private sector).³³ Increasing global resettlement places, creating alternative pathways to protection, and abolishing carrier sanctions on airlines that transport people without visas would result in a huge reduction in

²⁹ *ibid* para 70.

³⁰ See eg Jeff Crisp, ‘Minor Miracle or Historic Failure? Assessing the UN’s Refugee Summit’, Andrew & Renata Kaldor Centre for International Refugee Law blog (5 August 2016) <<http://www.kaldorcentre.unsw.edu.au/publication/minor-miracle-or-historic-failure-assessing-un%E2%80%99s-refugee-summit>> accessed 15 November 2016; Alexander Betts, ‘UN Summit on Refugees Fails to Offer Solutions’ *The Irish Times* (20 September 2016) <<http://www.irishtimes.com/opinion/un-summit-on-refugees-fails-to-offer-solutions-1.2797049>> accessed 15 November 2016; Fadi Halisso, ‘Another UN Summit and More Nice Words – But No Concrete Action’ *Syria Deeply* (22 September 2016) <<https://www.newsdeeply.com/syria/community/2016/09/22/another-u-n-summit-and-more-nice-words-but-no-concrete-action>> accessed 15 November 2016; ‘UN Refugee Summit Talks End in Abject Failure’ (3 August 2016) <<https://www.amnesty.org/en/latest/news/2016/08/un-refugee-summit-talks-end-in-abject-failure/>> accessed 15 November 2016.

³¹ Volker Türk, ‘The New York Declaration: Once in A Lifetime Opportunity to Enhance Refugee Protection’, Andrew & Renata Kaldor Centre for International Refugee Law blog (11 October 2016) <<http://www.kaldorcentre.unsw.edu.au/news/new-york-declaration-once-lifetime-opportunity-enhance-refugee-protection>> accessed 15 November 2016.

³² New York Declaration (n 21) para 77.

³³ *ibid* para 79.

the numbers of people making unsafe journeys. Where appropriate, protection might be granted to particular cohorts of refugees on a *prima facie* basis given the objective country of origin conditions that they have fled.

All these approaches would not only provide safe and secure outcomes for refugees, but, in turn, could help to incubate post-war economies by training and skilling people who might one day return. There is ample documented evidence of the long-term economic and social contributions refugees make, whether in developed or developing States.³⁴ In Uganda, for instance, refugees have created jobs for locals through innovative businesses. The International Monetary Fund has emphasized that refugee arrivals in Europe will be a source of long-term benefit in the region, addressing skills gaps, labour shortages, and an ageing population.

But this also requires taking the time to listen to people's concerns and address them responsibly and honestly. States have to acknowledge some of the short-term challenges, while emphasizing the longer-term gains. Part of this involves explaining why integration needs to be fostered as quickly as possible, since idleness and isolation are far more likely to breed extremist views than a sense of community and belonging. Canada's experience with private sponsorship of refugees since 1978 has helped the local community to feel directly invested in supporting refugees and more welcoming towards them. This, in turn, can generate more political will to increase government-led resettlement.

Any principled and sustainable response to displacement must be founded on certain basic premises. It must comply with the letter and spirit of international law (both substantive obligations, and the duty to implement treaty obligations in good faith). It should be grounded in a holistic, 360-degree approach to addressing the root causes of displacement, development, and humanitarian needs. It should incorporate effective practices, both past and present, from around the world. It should emphasize protection over deterrence (because people who need protection will seek it, however dangerous the journey might be). It should be founded on respect for human dignity, and the premise that every person should be able to live a safe and dignified life.

Complexity does not have to mean chaos. Indeed, the more multifaceted and thorny a phenomenon, the greater the need for humble, level-headed, and nuanced responses. How we frame what the challenge is will influence the approaches we choose to address it, and will shape how we measure our success. Policy change does not necessarily signal weakness or indecision, but rather can demonstrate responsiveness to new information and greater understanding of the reasons for flight and the drivers of movement.

The drafters of the Refugee Convention were well aware that refugee protection was not a way to short-circuit migration controls – on the contrary, refugee status determination demands the most stringent checks of all. But what the drafters recognized was

³⁴ See eg Graeme Hugo, *A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants: Summary of Findings* (Commonwealth of Australia 2011); International Monetary Fund, *The Refugee Surge in Europe: Economic Challenges* (January 2016); Philippe Legrain, *Refugees Work: A Humanitarian Investment that Yields Economic Dividends* (2016) <http://www.opennetwork.net/wp-content/uploads/2016/05/Tent-Open-Refugees-Work_V13.pdf> accessed 15 November 2016.

that never again should the world bear witness to millions of people fleeing for safety and being turned away.

International law on its own cannot resolve the displacement we see today. But it does offer a principled, ordered framework for protection, which can 'serve both as the essential premise for international involvement, and as the measure of accountability for the assessment of particular actions or policies.'³⁵

4. CONCLUSION

The Refugee Convention remains the most comprehensive statement we have of the rights and obligations of refugees, supplemented by international human rights law more generally. It does not provide a 'blank cheque';³⁶ the needs of refugees and States are carefully balanced. Human rights law bolsters and in some respects offers even more protection than the Refugee Convention, such that renouncing the Convention would not relieve States of its most central requirements.

Yet, if politicians, policymakers, and commentators (including academics) do not understand the history of protection principles and institutions, then flawed assumptions and approaches will inevitably result. This risks not only reinventing the wheel, but misconceiving what the system was designed to do. Nowhere is this more apparent than in States' disavowal of the Refugee Convention as a poor migration management tool, when this was never its function.

While the systems and structures for responding to refugee movements could certainly be improved, the Convention itself remains fit for the purpose for which it was created. Without political action to implement and enforce it, however, it cannot do its job. Forced migration is an intractable, global challenge, and unilateral actions will never be able to 'solve' it. We need a system that is accountable, predictable, universal, and solutions-oriented. Protection must be front and centre for everyone involved.

³⁵ Goodwin-Gill (n 17) 11; see also Guy S Goodwin-Gill, 'Editorial' (1993) 5 *International Journal of Refugee Law* 1, 5–6.

³⁶ Ad Hoc Committee on Statelessness and Related Problems (n 15); Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Third Meeting (17 January 1950), UN doc E/AC.32/SR.3 (26 January 1950) 9 (United States); Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twentieth Meeting (13 July 1951), UN doc A/CONF.2/SR.20 (26 November 1951) 9 (France).