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The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees

PILAR VILLANUEVA SAINZ-PARDO

This article aims to establish, through an analysis of both the status of refugees and its importance, and the principle of non-refoulement and its reach, the contemporary relevance of the 1951 Refugee Convention and its suitability in dealing with refugee problems. It concludes that a broadening of the definition should be seriously considered in order to make the law adequate to the necessities of this new era. Special attention should be paid to refugee groups such as children, women, and IDPs to make refugee law a complete and effective law.

The refugee is perceived as an involuntary migrant, as a victim of circumstances which force him to seek sanctuary in a foreign country. The concept of 'refugee' has adopted different determinations that range from group consideration¹ to an individualistic approach these days.²

World War II demonstrated the failure of voluntary, humanitarian resettlement refugee policies and the need for refugee norms and obligations. Modern refugee law appeared with the creation of both the Office of the UN High Commissioner for Refugees (UNHCR) in 1950, and the 1951 Convention Relating to the Status of Refugees. The definition of the Status of Refugee has also suffered in modern law, an evolution going from a restrictive character in the 1951 Convention to a revolutionary approach in the 1969 OAU Convention on the Specific Aspects of Refugee problems in Africa³ or 1984 Cartagena Declaration on Refugees⁴ for Central America, Mexico and Panama.

This evolution shows that new times and situations are calling for another reconceptualisation of the term 'refugee' in International Law. New necessities have arisen since the first international definition of

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refugee was outlined in the 1950s; the UNHCR has extended its mandate as these needs appeared, but these changes have not included changes to the written universal law.

The aim of this article is to establish the contemporary relevance of the 1951 Refugee Convention and its suitability in facing today's refugee problems.

THE 1951 CONVENTION AND ITS 1967 PROTOCOL

The Original Definition of 'Refugee' and Its Limitations

The 1951 Convention on the Status of Refugees,⁵ opened for signature on 28 July 1951, originally limited temporally and geographically the definition of refugee in its Art.1. The term 'refugee' shall apply to:

- any person considered a refugee under earlier international agreements;
- any person who is outside their home country owing to a well-founded fear of persecution, for reasons of race, religion, nationality, membership of a particular social group or political opinion, and is unable or unwilling to avail themselves of the protection of that country, as a result of events occurring before 1 January 1951.⁶

The temporal limitation shows that the participating governments were not prepared to take on open-ended obligations for the indefinite future. The geographical limitation was established through an additional option to States of limiting their obligations to refugees resulting from 'events occurring in Europe' before 1 January 1951.⁷

The dramatic increase in the number of refugees during Third World decolonialisation needed the removal of the 'time' (1 January 1951) and 'geographic' (Europe) limitation clauses, which was effected by the 1967 New York Protocol⁸ relating to the Status of Refugees.⁹ The geographical restriction was applied by only few States.¹⁰

The Civil and Political Limitation

The definition of Convention Refugee has been criticised because of, among other things, its limitation on the grounds of civil and political rights, excluding any reference to economic, social and cultural rights. Since the 1993 Vienna Convention human rights have been recognised as being indivisible, and an interpretation of Art.1 in conjunction with Art.33.1 of the 1951 Convention is exiged as to include the latter rights

on the grounds of persecution. The threat to 'life' and 'freedom' must be interpreted in a broad manner so as to involve all human rights.

CONTEMPORARY PROTECTION OF THE 1951 CONVENTION AND ITS PROTOCOL

The Status of Refugee: Its Importance

Who is a refugee? The Status of Refugee is granted today to the persons combining the requirements of:¹²

- being outside their country of origin;
- having a well-founded fear of being persecuted;
- on the grounds of either race, religion, nationality, membership of a particular social group or political opinion;
- and being unable or unwilling to avail themselves of the protection of that country.

The recognition of the Status of Refugee by States is not constitutive, but declaratory: States recognise existing rights already protected by the 1951 Convention and other international instruments.¹³ Its importance resides not only in its determination and recognition by States – difficult in many cases as the Convention does not contain any reference to the procedure to be followed by States¹⁴ – but above all, in its legal consequences on which we are going to focus.

A person whose status as a refugee has been recognised has the right to obtain effective asylum in the country they are in, as a permanent or temporary solution.

While the asylum-seeker is in the procedure of status determination, they must be treated on the assumption that they might be a refugee. Consequently, every asylum-seeker should have access to status determination procedures and be assisted in presenting their claim. In case of a negative decision, an opportunity should exist for an appeal during which time the asylum-seeker must be allowed to remain in the country.¹⁵

Legal consequences of Refugee Status: Articles 3 to 30 of the 1951 Convention identify the civil, social, and economic rights, which must be granted to the refugee within the country of asylum:

These rights concern matters as the recognition of previously acquired rights (Art.12.2), especially in questions of marriage, free access to the courts of law in the territory of all contracting States

(Art.16), administrative assistance by the authorities of the State of residence or international authorities (Art.25), issuing of identity papers and travel documents (Arts.27 and 28), and transfer of assets (Art.30).

The contracting States shall apply the provisions of the Convention to refugees without non-discrimination as to race, religion or country of origin (Art.3).

Other rights recognised include: freedom of religion (Art.4), right of association (Art.15), right to public education (Art.22), right to labour legislation and social security (Art.24), and freedom of movement (Art.26).

The notion of family reunification does not appear in the 1951 Convention, but the respect by the State of asylum of rights attaching to marriage required by Article 12, implicitly acknowledges it.¹⁶

Refugees should have a right to compensation from the country they flee as the UN General Assembly has established in several Resolutions within the context of the Palestinian Question.¹⁷

There is no right to asylum if the country does not recognise refugee status, and no duty on a State to grant asylum or to admit a refugee to its territory, but there is a strict duty not to 'refouler' [return] a refugee to a country of persecution. The Convention protects those who meet the definition of refugees, and recognition under article 1 is both the passport to the civil, social and economic rights, and the necessary precondition of non-refoulement.¹⁸

The importance of the determination of the Status of refugee is clear as to the rights it involves; but a different question is the issue of refugee problems and its 'lack of protection' by a law created 50 years ago. This will be discussed below after the analysis of the reach of the principle of non-refoulement.

The Reach of Non-refoulement

Within the Convention: The principle of non-refoulement, established in article 33 of the 1951 Convention, implies that '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'.

The principle initially applies to refugees under Article 1 of the Convention, and to asylum seekers during an initial period while they are dealing with the process of refugee status determination, at the border and within the territory of a State. In this way, the UNHCR Executive Committee has stressed in Conclusion No.6 about Non-refoulement:

The Executive Committee ... (c) Reaffirms the fundamental importance of the observance of the principle of non-refoulement – both at the border and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been recognised formally as refugees.¹⁹

In contrast to the 1969 OAU Convention that declares the principle of non-refoulement without exception, the 1951 Convention establishes in article 33.2 that ‘the benefit ... *may not be claimed by a refugee* whom there are reasonable grounds for regarding as *a danger to the security* of the country ... or who having *been convicted by a final judgement of a particularly serious crime, constitutes a danger* to the community....’ The principle is not even absolute for convention refugees.

The importance of this rule of law is its current extension to different situations in which persons are not granted the status of refugee defined by article 1 of the 1951 Convention.

As customary law: Today, the principle of non-refoulement has become part of customary law applying to humanitarian refugees. This idea has its followers and its opponents: Goodwin-Gill²⁰ is of this opinion, while Hailbronner²¹ is totally contrary to the idea of non-refoulement being customary law. He only accepts this position when the fear of persecution relies on torture.

The broader application of the principle applies to persons whose lives or freedom may be endangered in their country of origin by reasons of violence, conflict, violations of human rights or other serious disturbances of public order: its scope is then the prohibition of return in any manner whatsoever of refugees including displaced persons to countries where they may face persecution.²²

This development is supported by legal instruments subsequent to the 1951 Convention,²³ declarations²⁴ and treaties,²⁵ by the will of states expressed in successive resolutions of the UN GA Executive Committee of the UNHCR Programme²⁶ – not binding but formulating *opinio juris*, and in the laws and practices of States.

Important issues related with the principle of non refoulement as customary law are the concepts of third country²⁷ and temporary protection:²⁸

1. *Third country:* A de facto limitation on the expulsion of asylum seekers, refugees and aliens to third countries is derived from the principle that third countries are not obliged to allow aliens to enter their territory if

these persons do not have the necessary papers (travel documents and visas). With regard to refugees who are in the country's territory, this means that they may not be turned back or expelled if no other State in which they are safe from persecution is obliged or willing to take them.²⁹

2. *Temporary protection*: The UNHCR began to speak of 'temporary refuge' as a component included within the customary principle of non-refoulement in 1985.³⁰ Temporary refuge means a prohibition on forced repatriation so long as conditions in the country of origin remain unsafe in situations of mass influx triggered by fears of generalised violence stemming from internal armed conflict. The norm of temporary refuge has crystallised as a customary norm through state practice.³¹ UNHCR has defined temporary protection with these basic elements:³²

- admission to the country of refuge;
- respect for the principle of non-refoulement and basic human rights, with treatment in accordance with internationally recognised humanitarian standards such as those outlined in Conclusion 22 (XXXII) of the Executive Committee; and
- repatriation when conditions in the country of origin so allow.

The Mandate of the UNHCR

The original mandate and its evolution: UNHCR was established in 1950 by the General Assembly with the duties of providing 'international protection' and seeking 'permanent solutions for the problem of refugees'. Its work 'shall be of an entirely non-political character', 'humanitarian' and 'social', and shall relate 'to groups and categories of refugees'.³³

Originally, the competence of UNHCR was restricted by its Statute to refugees as defined by the 1951 Convention. However its competence has been gradually extended to cover all refugees, including 'persons who have fled their home country due to armed conflicts, internal turmoil and situations involving gross and systematic violations of human rights'.

In 1957, the General Assembly first authorised the High Commissioner to assist refugees not coming fully within the statutory definition.³⁴ In 1959, the GA called for special attention to be given to the problems of refugees coming within the competence of the UN.³⁵ The notion of the High Commissioner's 'good offices' was developed by the GA in 1960.³⁶ From the mid-1970s the GA spoke of 'refugees and displaced persons of concern' to the Office, and in 1974 acknowledged

an additional category of 'special humanitarian tasks' undertaken by the UNHCR.³⁷ In 1976, ECOSOC recognised the importance of UNHCR's activities in the context of 'man-made disasters in addition to its original functions'.³⁸ The protection and assistance of UNHCR has continued to grow to this day.

The mandate today: The competencies and responsibilities of the UNHCR have broadened considerably since its first establishment. Today, they reach the labours of 'good offices', assistance, protection and solutions; while the class of beneficiaries includes those defined in the Statute, those not of concern but assisted on a good offices basis, and those defined in resolutions and directives of the GA and the Executive Committee, to the generic class of refugees, displaced and other persons of concern of the UNHCR.³⁹

The UNHCR, under its extended mandate protects the interests of Convention and *de facto* refugees, at the same time improving their legal status. They include:

- large groups of persons that have crossed an international frontier, unable or unwilling to avail themselves of the protection of their country of origin, and fleeing for reasons of conflict, radical political, social or economic changes in their own country;
- persons displaced within their own country; and
- returning refugees or 'externally' displaced persons that need reintegration and rehabilitation.

UNHCR and Internally Displaced Persons: Special attention should be paid to the concept of internally displaced persons as the scope of the problem is huge: in 1994, the Representative of the Secretary General on IDPs, Francis Deng, determined that the global population of internally displaced persons was in the range of 25 million people, compared with a refugee population of around 18 million world wide.⁴⁰

The most common and formidable causes of internal displacement are civil conflicts, communal violence, forced relocation and other gross violations of human rights. The difference between IDPs and refugees is the fact that they do not cross an international border when fleeing. The Secretary General defined the term IDPs:⁴¹

persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or

man-made disasters; and who are within the territory of their own country.

The situation in Yugoslavia caused the United Nations to examine and seek to define the functions to be exercised in relation to IDPs by the UNHCR. The first explicit reference to IDPs was made in 1992 by the UN General Assembly commending 'efforts of the UNHCR to undertake activities in favour of the internally displaced persons'.⁴² Subsequently, the Executive Committee decided to extend, on a case by case basis and under specific circumstances, protection and assistance to the internally displaced. In 1993, the UNHCR published guidelines governing the competence of the Office in respect of IDPs.

To conclude this point, it should be clarified that the Office of the High Commissioner does not have an established jurisdiction to take action for the relief of internally displaced persons, other than by means of good offices in response to specific request.⁴³

THE RELEVANCE OF THE CONVENTION TODAY

Its Virtues

The 1951 Refugee Convention is important today in order to assure an effective protection through the legal status and the legal consequences recognised to refugees defined in its text. Despite all its deficiencies, the Convention is the written law: States are compelled to obey its dispositions and have the responsibility to protect refugees entitled by the Convention. The principal legal consequence of the Status of refugee is the obligation of States to respect the principle of non-refoulement that has acquired such strength today that is said to be part of customary law.

Even if the protection of the Convention has not been extended to new circumstances, we can affirm that its existence is legally relevant today for the effective protection of the Convention refugees.

Its Limitations

The 1951 Convention suffers unfortunately from more limitations than virtues today. This does not mean that its still legal relevance is less important. The law, contrary to the mandate of the UNHCR, has not been adapted to the needs of each period of time, while the latter has been extended gradually to embrace these needs. The problem is that the UNHCR does not create binding obligations on States' practice: UNHCR has the statutory function of supervising the application of

international conventions for the protection of refugees, and States formally undertake to facilitate this duty⁴⁴. This is why an adaptation in the law is required.

These are what I consider the important deficiencies of the Convention:

- the restriction in article 1 of the grounds of persecution only to civil and political rights, excluding any reference to economic and social rights;
- the limitations of the term 'refugee' in article 1, excluding humanitarian or de facto refugees. The 'Convention refugee' definition should be broadened as the OAS 1969 Convention definition, and include those fleeing their country of origin 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order': a special Status should be given to refugees in exceptional situations. The 1951 Convention should be adapted to the today extended mandate of the UNHCR; and
- the danger of the extension of the principle of non-refoulement to de facto refugees *only* as customary law: the convention should include it as written law in order to avoid discussions about the nature of the norm and to settle an effective protection by making it compulsory to States parties.⁴⁵

CONCLUSION

Beginning in the immediate post-war era, International treaties providing refugees significant guarantees were drafted and promoted and an important international institution, the UNHCR, came into being solely to watch out for their welfare. Today, the concept of 'refugee' has become a call for action and a challenge to humanitarian response.⁴⁶

The importance of the 1951 Convention as a statement of the minimum rights of 'Convention refugees' is a reality, but its inadequacy to deal with today's refugee problems is obvious. Refugee law remains incomplete so far as refugees and asylum seekers may still be denied temporary refuge or protection, safe return to their home countries or compensation. Besides, the principle of non-refoulement is evolving on account of the new necessities and has reached currently the range of customary law for humanitarian refugees unprotected by the 1951 Convention.

The Convention suffers from a number of deficiencies that stem from a narrow and restrictive definition of the term 'refugee'. The

international community has not managed to reach a consensus to modify the definition, especially with regard to broadening the scope of causes of flight that entitle protection seekers to obtain a Convention refugee status. This means that millions of fleeing people lack clearly and explicitly conceptualised rights – in addition, no international body exists specifically to provide protection to Non-Convention refugees – and that the international community does not have sufficiently strong legal obligations to provide protection.⁴⁷

The broadening of the definition should be seriously considered in order to make the law adequate to the necessities of this new era, and special attention should be paid to refugee groups such as children, women, and IDPs, to make refugee law complete and effective: it is time for a change.

ACKNOWLEDGEMENTS

To my parents

NOTES

1. Russian or Armenian refugees, Report by the High Commissioner, League of Nations Doc.1926.XIII.2 (1926), p.11.
2. Art.1, 1951 Convention Relating to the Status of Refugees.
3. Art.1., par.2 extends broadly the 1951 definition of refugee to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order ... is compelled to leave the country.
4. In its Conclusions and Recommendations (III.3), it adopts the OAU definition of refugee.
5. As at 31 December 1995, 126 States were parties to the Convention and 122 both to the Convention and its Protocol.
6. Art.1. A.2.
7. Art.1. B. The Convention is frequently criticised by its 'European bias' but the present majority of States in the Conference on Plenipotentiaries is European. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Oxford University Press, 1996), p.19.
8. As at 31 December 1995, 126 States were parties to the Protocol.
9. Dacyl, 'Europe Needs a New Protection System for Non-Convention Refugees', *IJRL*, Vol.7 (1995), p.579.
10. As at 31 December 1995, Congo, Madagascar, Monaco, Hungary, Malta and Turkey maintained the geographical limitation.
11. Principle of Non Refoulement.
12. Article 1. A. (2) 1951 Convention.

13. The right to seek and enjoy asylum from persecution in other countries is recognised in Art.14 (1) of the Universal Declaration of Human Rights.
14. A UNHCR Handbook on Procedures and Criteria for Determining Refugee Status was prepared at request of States members of the Executive Committee of the High Commissioner's Programme, for the guidance of governments in 1979. It has received wide approval through governments and courts in refugee status proceedings.
15. Fair and Expeditious Asylum Procedures, UNHCR notes.
16. Igor Khokhlov, *The Rights of Refugees under International Law*.
17. GA Res. 194 (III) of 11 December 1948, para.11.
18. See Art.33 1951 Convention.
19. Goodwin-Gill (note 7), pp.137 and ff.
20. Ibid.
21. Kay Hailbronner, 'Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?', in Martin (ed.), *The New Asylum Seekers* (Dordrecht: Nijhoff, 1988). He is of the opinion that a customary norm of non-refoulement for humanitarian refugees is not supported by the requirements of broad and consistent state practice and opinio juris.
22. Goodwin-Gill (note 7) and Martin (ibid.).
23. 1969 OAU Convention on the Specific Aspects of Refugee problems in Africa.
24. 1984 Cartagena Declaration on Refugees.
25. 1984 Convention against Torture.
26. Executive Committee Conclusions No.19, 1980, on Temporary Refuge reaffirming 'the essential need for the humanitarian legal principle of non refoulement to be scrupulously observed in all situations of large-scale influx'; and No.65 emphasising 'the primary importance of non-refoulement and asylum as cardinal principles of refugee protection'.
27. Executive Committee Conclusion No.15 (XXX) 1979, concerning refugees without an asylum country and calling for an effort to 'resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria'; and Conclusion No.58 (XL) 1989, on irregular movements of refugees and asylum seekers from a country in which they have already found protection.
28. See note 26: 'in the case of large-scale influx, persons seeking asylum should always receive at least temporary protection' and 'should be admitted to the State in which they first seek refuge'.
29. Achermann and Gattiker, 'Safe Third Countries: European Developments', *IJRL*, Vol.7 (1995), pp.119-27.
30. Report of the UNHCR, para.22, UN Doc. E/1985/62.
31. Joan Fitzpatrick, 'The Principle and Practice of Temporary Refuge', Martin (ed.), *The New Asylum Seekers* (note 21).
32. Note by UNHCR: Temporary Protection in a Broader Context.
33. 1950 Statute of the Office of the United Nations High Commissioner for Refugees.
34. UNGA Res. 1167 (XVI), 26 Nov. 1957.
35. UNGA Res. 1389 (XIV), 20 Nov.1959.
36. UNGA Res. 1499 (XV), 5 Dec.1960.
37. UNGA Res. 3271(XXIX), 10 Dec.1974; and 3454 (XXX), 9 Dec. 1975.
38. ECOSOC Res. 2011 (LXI), 2 Aug. 1976.
39. Googwin-Gill (note 7) pp.9-15.

40. Richard Plender, 'The Legal Basis of International Jurisdiction', *IJRL* (1994), p.345.
41. ECOSOC res. 78/ 1990.
42. UNGA res. 47/105, 1992.
43. Googwin-Gill (note 7) pp.9-15.
44. Art.35 1951 Conv; Art.II Protocol.
45. Conclusion No.6 (XVIII) of the Executive Committee, he expressed 'deep concern at the information given by the High Commissioner that, while the principle of non-refoulement is in practice widely observed, this principle has in certain cases been disregarded'.
46. Martin, 'Introduction', *The New Asylum Seekers* (note 21) pp.1-20.
47. Dacyl (note 9).