

THE RELEVANCE OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES

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INTRODUCTION

The theme of the 1995 Refugee Week Summit is the basis for this article.¹ The mere questioning of the relevance of the 1951 Geneva Convention Relating to the Status of Refugees (the Refugee Convention) tends to lead one to the conclusion that as a convention, it has become obsolete in most refugee situations. Or even perhaps that it was never relevant in the first instance. This appears to be the belief in some quarters of the refugee advocacy community.

The problems created by the refugee definition in Article 1A of the Refugee Convention is the main reason the perception has arisen. The definition has been described as out of step with our times. It has been deemed too narrow and disproportionately concerned with the issue of persecution. It does not accord with the plight of the overwhelming majority of contemporary refugees who are the victims of large scale international and, increasingly, communal violence. As a consequence, at least three descriptions have been applied to it. It has been considered obsolete, premature and even outright irrelevant from the start.

IMPLICATION OF RELEVANCE AND RELATED ISSUES

The issues raised by the relevancy of the Refugee Convention have to be dealt with in a historical perspective. In the early days of the international refugee regime, although there were refugee flows which are not dissimilar to those which exist today, the criterion used to define "refugee" then and now are different. In the past, the criterion used to determine the meaning of the term was objective in nature. It referred to groups of persons in

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¹ This article is based on a paper presented by the writer during the Refugee Week Summit held in Parliament House, Canberra on 21 June 1995. The views expressed here do not represent those of the United Nations system.

certain defined situations rather than to their fear of persecution, which is the criterion used today. The present approach is more subjective in nature because it emphasises the need to protect, especially at the regional level. The evolutionary process that changed the criterion from one of objectivity to one of subjectivity took place over a period spanning three to four decades.

The subjective approach, which is a narrower approach, has unwittingly given credence to the perception that the Convention's refugee definition is indeed a narrow one. This has somehow produced a comforting effect on states as it validates their practice of construing and applying the definition in a narrow and restrictive sense. In this context, it is no wonder the definition has been described as obsolete and insufficient in its scope and application.

Another example in support of the obsolescence argument is the Convention's treatment of events which occurred prior to 1 January 1951. The Convention allows contracting states to limit its geographical application to "events which occurred in Europe" only. This limited application and narrow approach have now been partially addressed in the 1967 Protocol Relating to the Status of Refugees. Under the Protocol, states are permitted to forego the geographical limitation and most of them have done so.

The obsolescence argument may also be applied to other matters which have been excluded from the scope of the Refugee Convention. For instance, there is no mention of women refugees. Under Article 22(2)² the provision of socio-economic rights is inadequate as it *inter alia* excludes a right to secondary and tertiary education, albeit primary education is included.

On the other hand, it may be argued that the proponents of the obsolescence argument are wrong because they fail to view the Refugee Convention in context. For example, they do not take into account the fact that the Convention is part of an overall international regime established for the

² Some have argued that most of the social, economic and settlement rights mentioned in the Refugee Convention are irrelevant to the realities of most refugee situations today.

protection of refugees. The Convention does not act alone but is reinforced and supplemented by other components in the regime. Indeed, it would be unrealistic to treat the Convention in a vacuum since it has to operate within a complex framework of values, principles, norms, structures, institutions and practices. It is this entire framework that has enabled the great majority of refugees around the globe to effectively obtain protection and assistance. The achievement of permanent solutions to problems is often elusive and at this stage it is not clear if changes to the Convention would or could improve the situation.

THE CONVENTION IN CONTEXT

As stated above, the Refugee Convention does not stand alone. The principles, norms and values that apply to asylum seekers also apply to refugees. Since the regulatory framework is found in general principles of law, customary international law and other international instruments and arrangements, it applies to all states irrespective of whether they are party to the Convention.

Specific instruments governing refugees exist at both international and regional levels. They include conventions and declarations. The 1967 Protocol Relating to the Status of Refugees has already been mentioned. Other relevant instruments include the 1977 Universal Declaration on Territorial Asylum, the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa,³ and the 1984 Cartagena Declaration. In addition, the instruments that govern stateless persons are relevant because they may also be refugees. Examples are the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

The Refugee Convention should be viewed in the context of international and regional human rights instruments also. For instance, at the international level, there are the 1948 Universal Declaration of Human Rights, 1965 International Convention on Elimination of All Forms of Discrimination, 1966 International Covenant on Civil and Political Rights, 1966 International Covenant on Economic, Social and Cultural Rights, 1975 Convention against All Forms of Discrimination Against Women, 1984

³ This is an initiative of the Organisation of African Unity.

Convention Against Torture and Other Inhuman and Degrading Treatment or Punishment, and 1987 Convention on the Rights of the Child. At the regional level, there are the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1969 American Convention on Human Rights, and 1983 African Charter of Human and Peoples' Rights.

Related to the human rights instruments are the four 1949 Geneva Conventions on International Humanitarian Law and the two 1977 Additional Protocols (collectively, the Geneva Conventions). They apply to the treatment of civilians and other non-combatants in situations of international and non-international armed conflict. They reflect precisely the contexts within which contemporary refugee situations occur, especially in non-international conflict. Article 3, which is common to the Geneva Conventions, specifically deals with the issue of refugees.

The Statute of the Office of the United Nations High Commissioner for Refugees (the Statute) forms part of the framework of relevant instruments.⁴ It is annexed to United Nations General Assembly Resolution No 248(V) of 14 December 1950 and numerous other resolutions of the General Assembly and the Economic and Social Council. It is found in resolutions which authorise UNHCR to extend its "good offices" to particular groups of persons who do not fall under the mandate of UNHCR, pursuant to its Statute.⁵ For example, the resolutions authorise UNHCR to undertake action with respect to such persons. They also call upon and enable states to cooperate with UNHCR in this regard.

The Conclusions on International Protection of the Executive of UNHCR's Program are also worthy of mention. Although they are not sources of law *per se*, nonetheless they provide valuable and sometimes essential guidelines to governments and even UNHCR in the discharge of their duties. They address the lacunas in refugee law. For example, they address issues that are not mentioned in the Refugee Convention, like armed attacks on refugee camps, refugee women, and children. They identify, clarify, and highlight issues and problems, and call for action in that regard.

⁴ The Office will be referred to as "UNHCR".

⁵ UNHCR's mandate is to provide international protection to refugees and seek permanent solutions to their problems in any state, whether the state is a party to a refugee convention.

Many of the above instruments and texts have been implemented by institutions whose operations directly or indirectly affect asylum seekers and refugees. Under the Statute, UNHCR is charged with the responsibility of supervising the implementation of international instruments on refugees. It has to promote the adoption of relevant instruments and accede to them.⁶ This function is reinforced by the Preamble to the Refugee Convention which recognises UNHCR's responsibility to supervise international conventions relating to refugees. Under Articles 35 and 36, contracting states are required to cooperate with UNHCR in the exercise of its functions. In turn, UNHCR has to provide the United Nations with information like the statistics on refugees in various territories, and the legislative or regulatory framework adopted in the territories to alleviate the plight of refugees. Similarly, the International Committee of the Red Cross has the function of promoting accession to the Geneva Conventions and supervising their implementation.

The United Nations Human Rights Committee hears cases on the application of the 1966 International Covenant on Civil and Political Rights with respect to states that are party to its Optional Protocol. The Committee's various sub-committees deal with matters like the protection of the rights of minorities and indigenous peoples. The United Nations Human Rights Commission debates the performance of states alleged to be in violation of the human rights of their nationals. From time to time, it appoints Human Rights Rapporteurs to report on the situation in named states. Since all these activities apply to refugees, in practice there has been an increasing cooperation between UNHCR and other human rights organs of the United Nations.

At the regional level, the European Commission on Human Rights and the European Court of Human Rights hear cases on the application of the European Convention on Human Rights and Fundamental Freedoms. These European institutions have had a significant impact on the protection of human rights in the member states of the Council of Europe. Of particular relevance is the developing jurisprudence on asylum. Article 3 of the European Convention prevents the involuntary return of asylum seekers to states where they might be subjected to torture or other inhuman or degrading treatment or punishment.

⁶ See para 8 of the Statute.

Other regional bodies are the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. They operate under the auspices of the American Convention on Human Rights. However, their impact has not been as significant as that of their European counterparts. Of lesser impact is the African Commission on Human and Peoples' Rights under the African Charter.

The various efforts described above are in some way related to the Refugee Convention. At the regional level, the Convention of the Organisation of African Unity and the Cartagena Declaration were made possible by regional cooperation. The Organisation of African Unity has actively collaborated with UNHCR to protect refugees and address the refugee problem in Africa even though it has limited means. The Organisation of American States has also collaborated with UNHCR to promote refugee law in Latin America. Further, at the international level, there are plans afoot for the establishment of a Court of Human Rights.

PRACTICE OF STATES AND INTERNATIONAL ORGANISATIONS

An important element in refugee protection is the practice of states and international organisations on asylum seekers and refugees. Although, ideally, the regulatory framework on protection should mainly be at the domestic level, in national Constitutions and Bills of Rights, in practice, the national refugee legislation of several states is becoming more restrictive in nature. Some observers have viewed this direction to be contrary to the spirit of the international instruments that apply to refugees. On the other hand, unless the instruments are actually breached, it appears that no action can be taken against states for acting in a restrictive manner.

Be that as it may, states have compensated for their restrictive approach in other ways, especially in the humanitarian law arena. Generally speaking, refugee law has operated in a quasi-extraterritorial fashion to ensure the implementation of internationally recognised standards in the protection of asylum seekers and refugees. For example, it is doubtful if any state has adopted a clear anti-asylum policy. The absence of domestic legislation on refugees has been compensated by tradition, religious norms and cultural affinities, resulting in domestic policies on the granting of asylum to specific groups of refugees, albeit sometimes in a somewhat discriminatory manner. As a result of these various amalgams, it would be difficult to find a state

which has an empty cupboard when it comes to the protection of refugees. Another example of protection afforded at the international level is the recent Comprehensive Plan of Action on Indochinese Refugees in Southeast Asia.

UNHCR is without doubt the primary international institution responsible for refugees. Its mandate enables it to provide protection for refugees in any state, irrespective of whether it is party to the Refugee Convention or whether a request has been received by it to act. It has authority from the United Nations General Assembly to extend refugee status to deserving persons if the territorial state is unwilling or unable to do so. Although its competence is limited to refugees, the General Assembly and Secretary-General have increasingly called upon UNHCR to provide assistance or protection, or both, to internally displaced persons.

The significant role played by the International Committee of the Red Cross regarding refugees and internally displaced persons cannot be sufficiently emphasised. It supplements the work of UNHCR and in certain conflict situations is a substitute for it. Added to this are the contributions of the Federation of Red Cross and Red Crescent Societies, national Red Cross Societies and non-governmental organisations.

So far, references have been made in this article to a number of other instruments and bodies that deal with refugee issues, besides the Refugee Convention. The fact they exist does not mean that they had been deliberately created to supplement or save the Convention. Nor is their existence meant to belittle or highlight the Convention's deficiencies. On the contrary, not only have they enhanced the relevance of the Refugee Convention, but the Convention may be viewed as an effective springboard for further action and attention in the area.

LIMITATIONS OF THE CONVENTION

As indicated above, one limitation of the Refugee Convention is the purported narrow character of the refugee definition in Article 1A. This definition distinguishes a refugee from a stateless person, namely, a person who does not have a nationality. Although the Convention refers to the stateless person in its clauses, the stateless person is only relevant *vis a vis* the Convention if he or she is also a refugee. Originally, the intention of the

drafters of the Convention was to include the stateless person within its scope. However, it was later decided that the Convention should adopt the more restrictive approach and the status of the stateless persons was subsequently dealt with in two separate instruments, the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

The refugee definition excludes migrants because it was never intended that they be accorded the type of protection envisaged for refugees. This is a matter of regret because the definition does not extend to persons who flee national borders for reasons of poverty or unemployment. Fortunately, the international community has adopted other means for helping such persons. For example, states like Australia, Canada and the United States of America have domestic immigration programs. Since World War 2, Western European states have instituted guest worker programs. At present, the Gulf States and some Asian states like Malaysia and Singapore abate their manpower shortages by instituting labour immigration programs.

The Refugee Convention does not require member states to examine asylum claims and this has led to great debate on the responsibility of states to do so.⁷ Since other international conventions also do not recognise a person's right to asylum, it is this lacuna that has led states to adopt regional initiatives to deal with this matter. The initiatives have resulted in instruments like the Schengen Agreement and the Dublin Convention.

The Refugee Convention does not refer to the so-called "war refugee" and "environmental refugee". However, some commentators believe that war refugees are implicitly covered by the refugee definition and therefore this should not be used as a basis for criticising the Convention. The use of the environmental refugee as a platform for criticising the Convention is even more tenuous since this issue concerns events that have not yet occurred but merely predicted. The prediction warns that if there is global warming and the low-rise islands in the South Pacific are affected, this would result in environmental refugees.

⁷ Fortunately, the Refugee Convention provided for the refugee's right to *non-refoulement* in Article 33. It means a person cannot be returned to the territory of potential persecution involuntarily.

The Convention does not extend to internally displaced persons who are still within their own state of nationality. The principles governing national sovereignty and non-interference in the domestic affairs of another state have prevented the inclusion of such persons within the refugee definition. It is for this reason that all international refugee definitions have required refugees to be persons who are outside their country of origin or nationality. At present, internationally displaced persons are dealt with by UNHCR on an *ad hoc* basis when requested by the United Nations Assembly or Secretary-General to do so. The Special Representative of the Secretary-General for Internally Displaced Persons has systematically compiled international principles and norms governing refugees, human rights and humanitarian law that apply to internationally displaced persons. The aim is to promote the protection and assistance to be given to such persons.

A failing of the Refugee Convention relates to education. The right of access to a secondary or tertiary education is provided as a lesser right than the right to a primary education.⁸ Some observers think there should be no difference between the right to a primary, secondary or tertiary education.

The Convention also fails to identify the rights and particular problems of specific vulnerable groups. It does not deal with refugee women as a distinct category. It does not recognise their special problems. It does not provide separately for children. And it does not make special reference to victims of war, civil violence, ethnic conflict and the like.

As stated above, the Refugee Convention has depended on other sources of law and regulation to deal with matters which it has not addressed. For example, the International Labour Organisation promotes and supervises the implementation of international instruments on the rights of workers, including migrant workers. On 18 December 1990, the General Assembly adopted the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. Part VI is devoted to the international migration of workers and their families.

Another organisation is the International Organisation for Migration as its mandate extends to refugees and migrants. Its charter is distinct from the bilateral arrangements and agreements between states on the supply,

⁸ See Article 22 (1)-(2).

recruitment and employment of migrant labour. The charter is also distinct from the various human rights instruments in existence. Other organisations are the international development aid agencies which exist within and without the United Nations system. They relate to international economic relations and play broad and significant roles in the alleviation of poverty and other economic ills.

More specifically, there are now in existence instruments which target vulnerable groups. The Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child⁹ are two such examples. Included in this list are the two sets of UNHCR Guidelines for Women Refugees and Children respectively. There are several UNHCR Executive Committee Conclusions, including Conclusion No 39 (XXXIX) of 1985 on Refugee Women and International Protection. Under this instrument, the UNHCR Executive Committee endorsed the idea that women in certain circumstances should be considered members of an identifiable group, thus allowing them to fall within the meaning of Article 1A(2) of the Refugee Convention. The Conclusions on children provide the guidelines on their protection and the granting of assistance to them.¹⁰

SCOPE OF THE REFUGEE CONVENTION

The Refugee Convention covers a great deal more than what it is usually credited with. In spite of its limitations, it is arguable that the Convention's refugee definition is really quite wide. The reason is this. The scope of the Convention as defined is not meant to be exhaustive because Article 5 provides that there is nothing to prevent states from being more generous than that provided in the Convention's text. In the 1960s and 1970s, various resolutions and declarations of the Council of Europe have also encouraged a generous application of the Convention.¹¹

An important feature of the Refugee Convention is Article 33 on *non-refoulement*. Although the provision is not as generous as Article II(3) of the Convention of the Organisation of African Unity or Article 22(8) of the

⁹ Article 22 specifically addresses refugee children.

¹⁰ It should be noted that at best, guidelines are a source of "soft law".

¹¹ Examples are Council of Europe Resolution 14 of 1967 and the 1947 European Declaration on Territorial Asylum.

American Convention on Human Rights, nonetheless Article 33 is considered to be the Refugee Convention's greatest strength because it brings the Convention close to recognising the subjective right of asylum.

A positive aspect of the Refugee Convention is that it contains severe restrictions on the expulsion of refugees. The provisions on expulsion are dealt with in great detail, in fact in greater detail than that regarding *non-refoulement*. Article 31 is another significant provision as it deals with the non-penalisation of refugees for illegal entry or stay, albeit in a conditional fashion.

Other clauses worth mentioning include Article 3¹² on the fundamental principle of non-discrimination. Article 26 contains an important clause on the freedom of movement.¹³ And Article 34 contains an obligation to facilitate the naturalisation of refugees so as to enable them to integrate into their new society and find a permanent solution to their problems.

The Refugee Convention emphasises access to the judicial process and provides for a range of economic and social rights. Article 35 obliges contracting states to cooperate with UNHCR and the United Nations, and to inform them on legislation and other measures undertaken to aid the refugee. The Convention laid the foundation for the creation of certain fundamental principles in the sense that some clauses are immune from reservations or declarations. They are the principles of non-discrimination and freedom of religion, and the *non-refoulement* norm.

CONCLUSION

The Refugee Convention is an international treaty and the product of negotiation and compromise by sovereign states. Therefore, by definition, it cannot be an ideal text. Nevertheless, it is a finely tuned instrument reflecting what was possible at the time. When it was signed, it set out to achieve all that it could in the context of 1951. It is submitted that even if the Refugee Convention were to be replaced by a new convention today, there is no guarantee that the latter would have fewer problems or that it would be more generous, in its refugee definition or scope, than the former.

¹² In practice, this provision is often violated in refugee protection cases.

¹³ This provision is limited in scope to refugees lawfully in the territory of contracting states.