Teresa Cierco
Universidade Lusíada do Porto/CEPESE
tgomes@por.ulusiada.pt

The 1951 Convention on the status of refugees: Up-to-date or in need of reformulation?

Abstract

Refugees are symptoms of war, persecution and intolerance, all themes of human drama. World War II had long since ended, but hundreds of thousands of refugees still wandered aimlessly across the European continent or squatted in makeshift camps.

In 1951 the United Nations adopted the Convention on the Status of Refugees, which contains a definition of the term refugee and accords them a broad range of rights.

It was hoped that with this institutional setting the refugee crisis could be cleared up quickly. The United Nations High Commissioner for Refugees (UNHCR), the guardian of the Convention, was given a three-year mandate to solve the situation, but refugee issues were a major international problem and have remained so.

More than fifty years later, the treaty remains a cornerstone of refugee protection. With the treaty's help, the UNHCR has assisted an estimated 50 million people in restarting their lives. But much has changed over the past half century. There are still millions of refugees, economic migrants and others that are on the move: the world and the refugee's problem became more complex than they were back in 1951.

In fact, the context in which the Convention was created differs much from the one we have now, both in quantitative and qualitative terms.

Can the 1951 Convention respond to every situation where refugees urgently need protection? The events in Bosnia and in Kosovo during the 1990s demonstrate that it cannot, as analysed in the paper.

So, is the Convention outdated like some of its critics claim? Or is it just a problem of interpretation?

These are some of the questions that this paper addresses in order to shed light on the complexity of refugee-related matters, both in human, legal and political terms.

Introduction

2001 marked the 50th anniversary of the 1951 United Nations Convention relating to the Status of Refugees, the first international agreement covering the most fundamental aspects of the life of a refugee. On that same year, many states and regional organisations reaffirmed their commitment to the Convention and to its 1967 Protocol, describing them as unique instruments and as the foundation of the international regime for the protection of refugees.

Nevertheless, states face considerable challenges as they try to reconcile their obligations under the Convention with problems raised by the mixed nature of migratory movements, misuse of the asylum system, increasing costs, the growth in smuggling and trafficking of people, and the moral feeling to contribute to resolving refugee situations. Countries are also concerned about the failure to resolve certain long-standing refugee problems and irregular migration, along with a perceived imbalance in burden-sharing. With increased awareness of the protection needs of certain groups in society, the Convention has been the mechanism allowing protection to such groups who are forced to flee. This is not to say that the Convention can be tailored-made in order to address all contemporary situations of forced displacement. International human rights and humanitarian law instruments, as well as national legislation and jurisprudence, have increasingly become an important complement in this regard.

Practically since the elaboration of the Convention the urgency to enlarge the mandate of the United Nations High Commissioner for Refugees (UNHCR) was felt, in order to allow assistance and protection to all those falling outside the definition of the Convention. Although the main focus of work continues to be on refugees in the conventional sense of the word, i.e. people embraced by the 1951 Convention, this now constitutes little more

than half of the people who are effectively protected and assisted by UNHCR. The organisation's other beneficiaries include a variety of different groups: internally displaced and war-affected populations; asylum-seekers; stateless people and others whose nationality is disputed; as well as 'returnees' – refugees and displaced people who have been able to go back to their homes, but who still require support from the international community. While such groups of people may differ considerably with regard to their specific circumstances and legal status, they have one thing in common: a high level of human insecurity, arising in most instances from the inability or unwillingness of a state to protect its citizens.

This paper argues that the main global treaty for the protection of refugees and its key provisions are being questioned and even openly flouted by a growing number of states. Are the concepts, instruments and approaches over the past decades able to endure and adapt in the face of the new dimensions of the refugee problem?

Trying to answer this question, in the first part we make reference to the evolution and principal changes of the context in which the Convention was elaborated. In the second part we examine the major problems of the document, and the challenges imposed by those changes, especially the increasing number of people that need international protection, but do not fall within the scope of the Convention, designated *de facto* refugees. Unlike Africa and Latin America, which have enlarged the concept of refugee to embrace other situations according to their specific reality, European states and other regions of the world continued to apply the Convention ever more in a restrictive way, adding difficulties to the entry of refugees in the European continent and putting into question basic rights to which these states have committed in the past. The lack of uniformity and harmonisation on asylum issues and the gaps in international refugee law were clear in the civil war in former Yugoslavia and later in the events that occurred in Kosovo. These obliged the European states to find other forms to protect people who, although fleeing war and generalised violence, were not consider *de jure* refugees (i.e. according to the Convention terms).

In the third part we highlight the importance of revitalising refugees' protection, suggesting ways to strengthen and promote the implementation of the 1951 Convention and its Protocol.

This study concludes arguing that the Convention is still important to safeguard the basic rights of refugees, but it is urgent to proceed to its enlargement, covering *de facto* refugees.

The 1951 Convention: setting the context of its elaboration

Second World War ended in 1945 and hundreds of thousands of refugees were still wandering aimlessly across the European continent. The international community had, from the beginning of the 20th century, established refugee organisations, such as the League of Nations High Commissioner for Refugees (1921), the UN Relief and Rehabilitation Administration (1944) and the International Refugee Organisation (1946), and approved refugee conventions, such as the 1933 and the 1938 Refugee Conventions, but legal protection and assistance remained rudimentary. The need was felt for a new international instrument to define the legal status of refugees.

As such, on 28 July 1951, the Convention relating to the Status of Refugees, known as the Magna Charta of International Refugee Law, was adopted in Geneva.[i] Influenced by the 1933 Refugee Convention and the 1948 Universal Declaration of Human Rights, the 1951 Convention provides a universal definition of who exactly qualifies as a refugee.

Usually, the word "refugee" is used to describe anyone who has been obliged to abandon the usual place of residence. But under international law, however, the concept of refugee has a much more specific meaning. As established in the 1951 Convention (Article 1), the word 'refugee' refers to a person who, "[A]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".[ii]

In elaborating one of the Convention's core definitions – who could be considered a refugee – some countries favoured a general description covering all future refugees. Others wanted to limit the definition to the existing categories of refugees. In the end, inevitably, there was a compromise. A general definition emerged, based on a "well-founded fear of persecution" and limited to those who had become refugees as a "result of events occurring before 1 January 1951". This temporal limitation – and the option to impose a geographical limitation by interpreting the word "events" to mean either events occurring in Europe or "events occurring in Europe or elsewhere"[iii] – was incorporated because the drafters felt "it would be difficult for governments to sign a blank check and to undertake obligations towards future refugees, the origin and number of which would be unknown" (Achiron, 2001: 10).

The concept of refugee had its origin in the political experience of the time and it was elaborated as an answer to the difficult conditions of the victims of European totalitarian regimes (communism, social-nationalism). As Goodwin argues, the Convention definition is "a child of its time, reflecting the displacements of the 1920s, the flight from fascism, the persecution of the Jews and other religious and ethnic minorities under Nazism, and the civic re-engineering then in full flow across Eastern Europe" (Goodwin-Gill, 2003: 6).

The Convention also establishes a framework of basic refugees' rights, which are as relevant in the contemporary context as they were in 1951. The refugee protection regime has its origins in general principles of human rights. The fundamentally humanitarian, human rights and people-oriented rationale of the 1951 Convention is evident in its preamble. It draws attention amongst other things to the profound concern of the United Nations for Refugees and underlines its endeavours to assure them the widest possible exercise of their fundamental rights and freedoms. The preamble also recognizes very specifically the social and humanitarian nature of the problems of refugees.

The refugee protection regime is, by this way, firmly rooted on treaty and customary law obligations, particularly those flowing from the 1951 Convention and its 1967 Protocol,[iv] and also draws on principles and

standards articulated in other international instruments or through court processes in a variety of jurisdictions. Finally, this regime is guided by so-called "soft law" pronouncements and directives of authoritative international and regional bodies, including the conclusions of UNHCR's Executive Committee.[v]

Fundamental rights stated in the document include the principle of non-forcible return of people to territories where they could face persecution *(non-refoulement*).[vi] Refugee protection also embraces the safeguarding of basic human rights which are usually placed in particular jeopardy in refugee crisis – the right to life, liberty and security of the person, the right to be free from torture and other cruel or degrading treatment, the right not to be discriminated, and the right of access to the basics necessary for survival (food, shelter, medical assistance), as well as, at a later point, for self-sufficiency (a livelihood, education, health care). The range of economic, social and cultural rights contained in Articles 17 to 24 of the Convention are essential to establishing refugees' self-sufficiency and allowing them to contribute to, rather than depend upon, the country of asylum. Nevertheless, these provisions were object of reservations from a number of states parties, often for resource-related reasons. In this sense, they have been approached by these states as recommendations rather than obligations.

This international legal system designed to protect people who have to flee their countries also contains obligations for refugees towards the host countries, stipulating who is not covered by its provisions in its "exclusion clauses",[vii] and when the Convention ceases to apply.[viii]

The major achievement was the creation of a formal link between the treaty and the UNHCR, the international agency which has the authority to supervise the application of the Refugee Convention.[ix] UNHCR's functions are to assist and protect refugees, searching durable solutions to their problems either through local integration, voluntary return to their homeland or, if that is not possible, through resettlement in third countries.[x]

The 1951 Convention has a "liberal universalist" approach to asylum (Boswell, 2000: 539). It is liberal in that it is grounded in a commitment to individual freedom from persecution or threats to "life and liberty". It is

universal in the sense that it is impartially applicable to all refugees, regardless of nationality, race or other characteristics. This is reflected in the Convention's wide ratification and the frequent incorporation of the principles it contains into regional instruments, national legislation and judicial decisions. Several regional conventions, such as the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problem in Africa (OAU Convention) and the 1984 Cartagena Declaration in Latin America, were created in its image, demonstrating the ample reach and significance of the document.

So, we can argue that the 1951 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 based; political in that it provides a truly universal framework within which states can cooperate and share the responsibility resulting from forced displacement; and ethical in that it is a unique declaration by the 142 states parties[xi] of their commitment to uphold and protect the rights of some of the world's most vulnerable and disadvantaged people.

Refugees: its status and statute before and after the Cold War

When the UNHCR's protection activities began to extend well beyond Europe into other countries, particularly on the African continent, experiencing the painful process of decolonisation, the persecution-based approach confined to the five reasons outlined in the 1951 Convention (race, religion, nationality, membership of a particular social group or political opinion) was perceived as a limit to its applicability. The large numbers of refugees and the generalised conflicts which precipitated their displacement ensured a growing mismatch.

From the late 1950s, and realising this increasing disconnection between the wording of documents and the conflicting real world, the UN General Assembly felt it necessary to extend UNHCR's mandate to assist and protect groups of refugees falling outside the definition and geographic ambit of the 1951 Convention, confined to Europe. Also, rather than waiting for refugees to cross a border and seek shelter in a country of asylum, there has been a

growing recognition of the need to take action within countries of origin providing there humanitarian assistance (and if possible, protection) to displaced and vulnerable populations (Cierco, 2002: 120).

In 1967 the UN General Assembly adopted the Protocol Relating to the Status of Refugees,[xii] which effectively removed the temporal and geographical restrictions under which only Europeans involved in events occurring before 1 January 1951 could apply for refugee status. Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to states parties to the Convention.[xiii]

Simultaneously, developments in Africa promoted the conclusion of a regional instrument, which in effect updated the 1951 Convention by expanding it to include a broader category of persons. The result was the OAU Convention which incorporates the existing 1951 Convention's refugee definition, but added a paragraph specifying that "[t]he term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".[xiv] In other words, the concept of refugee was broadened beyond victims of persecution to include the increasingly prevalent "new" category of victims of generalized conflict and violence. The OAU Convention was also a significant advance on the 1951 Convention in its recognition of the security implications of refugee flows, in its more specific focus on solutions — particularly on voluntary repatriation — and through its promotion of a burden-sharing approach to refugee assistance and protection.[xv]

On the same line, the 1984 Cartagena Declaration places less emphasis on the fear of persecution and more on objective conditions of violence and disorder in the country of origin. In this Declaration, refugees are those "persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances"[xvi]. For the first time an international instrument about refugees has an explicit

reference to the violation of human rights. These two regional conventions carry with them two main consequences. On the one hand, they gave international protection to a greater number of people than the 1951 Convention, covering persons that were forced to move by a complex set of motives, including violation of human rights, armed conflicts and generalised violence. On the other hand, these documents imply differences in the treatment of refugees depending on the Continent where the request for asylum is sought. In Europe and in the rest of the world, the concept of refugees continues to be that contained in Article 1 of the Convention, which is more limited in the definition than the other two. As a result, someone might be recognised as a refugee in a part of the world and not in another, creating discrepancies in the attribution of the statute and in the treatment that is conferred to someone in need of international protection.

The refugee policies only began to be seriously questioned in the 1970s. The post-1973 recession caused high unemployment rates and raised concerns about race relations being used as a further argument for tightening provisions. States introduced legislation that largely halted immigration flows, so many people tried to enter developed states, especially in Europe, on the grounds of family reunification, through illegal means or asking for asylum.

Faced with large numbers of asylum-seekers, these sates had little obvious economic or political incentive to accept them. Two rather different but inter-related problems emerged. One was the administrative and legal difficulty of sorting through large numbers of cases to sift out those who could be admitted to the status of refugees, and those that could not. This problem and the perceived costs of assisting asylum-seekers for the duration of the process triggered a series of policy measures to reduce access of "economic migrants" to the asylum system, streamline the procedures for determining status, and enforce the return of asylum-seekers whose claims were rejected. The second problem was the high number of *bona fide* refugees, the number of those genuinely in need of international protection was higher than public opinion in European states seemed willing to tolerate at that time.

After the cold war, substantial changes came about in the environment in which international refugee protection had to operate. These changes not only placed basic concepts in question, but also impacted on both political will and readiness of local host communities to continue to offer asylum on the generous terms of the past. The number of refugees grew exponentially, no longer as a product of struggles for independence but due to the steep rise in internal inter-ethnic conflicts in now independent states, such as in former Yugoslavia and former Soviet area**.** The conflicts were aggravated by socioeconomic problems. Human rights abuses and breaches of humanitarian law were no longer by-products of war, but often a conscious objective of military strategy, so that even low levels of conflict generated a disproportionately high degree of suffering among civilians and massive displacement. To give some examples from the post-cold war period when these traits became more pronounced, 2.5 million people were displaced or fled to Iran from northern Iraq in 1991; in former Yugoslavia, the number of refugees, internally displaced and others assisted by UNHCR exceeded four million; and the 1994 crisis in the Great Lakes region of Africa forced more than three million people to flee their countries (UNHCR, 1997: 119).

With the prospect of lasting political solutions to refugee producing conflicts ever more distant, UNHCR had little option but to embark on prolonged aid programmes for millions of refugees in overcrowded camps. And the refugee population steadily rose from a few million in the mid-1970s to some 10 million by the late 1980s, and in 1995, the number of persons in need of assistance was around 25 million. At the start of 2005, the number estimated by the UNHCR totalled about 19.2 million.[xvii]

Asylum countries, especially the poor ones, became ever more worried about receiving large numbers of refugees for whom there was no possibility of early repatriation. Large-scale refugee flows were increasingly perceived as a threat to political, economic and social stability. Even in traditionally hospitable asylum countries, there was hostility, violence and physical attack of refugees. Providing effective protection has become exceedingly difficult where the exodus results from conflicts which remain unsolved, where warring parties lack authority or legitimacy, and where

there is no sense of accountability as regards compliance with basic human rights or humanitarian norms of behaviour.

In the Western European countries where there are sophisticated asylum systems and a long tradition of active political support for refugee protection, the changes were no less significant. There has been, since the 1990s, a major reshaping of asylum policies, provoked by a shared concern in industrialised countries about the overburdening of the structures they have in place to handle claims, about rising costs associated with running their systems and about problems stemming from difficulties in applying refugee concepts to mixed groups of arrivals, and by a substantial misuse of asylum systems. Trafficking and human smuggling have been a compounding feature, to the extent that they represent a great threat to the security of these countries.

There has been a slow but steady growth in processes, laws and concepts whose compatibility with the prevailing protection framework is ever more tenuous. Some states have reverted to an overly restrictive application of the 1951 Convention and its 1967 Protocol, coupled with the erection of a formidable range of obstacles to prevent legal and physical access to territory (i.e. interdiction and interception), especially in the European Union.[xviii] This has been accompanied by an inappropriate use of otherwise useful asylum-related notions such as "safe country",[xix] "internal flight alternative" or "manifestly unfounded claims" and the emergence of a bewildering myriad of alternative protection regimes of more limited duration and guaranteeing lesser rights when compared to those of the 1951 Convention. Increased detention, reduced welfare benefits and severe curtailment of self-sufficiency possibilities, coupled with restricted family reunification rights, have all been manifestations of this trend.

Furthermore, there has been the tendency in some states to move away from an objective and law-based system altogether. Instead of a process which is protected by the rule of law and overseen by an independent judiciary, some national asylum systems are resting increasingly on *ad hoc* and subjective procedures built around the exercise of executive discretion, such as "temporary protection".[xx] Such discretionary forms of protection provide lesser safeguards to people of concern. In response, there has been

even more resort to human rights instruments as an alternative source of protection. While the 1984 Convention Against Torture and the 1950 European Human Rights Convention[xxi] do provide an absolute prohibition on removal, the rights of people allowed to remain are usually inferior to those of recognised refugees.

Overall, the climate for the admission, processing and treatment of asylum-seekers is less benevolent today. Refugee issues are often heavily politicised, even sensationalised, for a variety of domestic or political purposes, some quite self-serving. Attitudes, too, are inflamed by opportunistic or ill-informed media, especially in negative economic and social contexts. Also, in many cases, racist and xenophobic attacks against refugees are being politically instigated, and refugees are being made the scapegoat for other inadequacies and exploited for party-political ends (Boswell, 2000: 537). There is a growing awareness that refugee movements can constitute a serious threat to national, regional and even international security.

With no doubt, this international community's declining commitment to asylum and growing interest in policies of containment is a retrograde development which flies in the face of international refugee law, human rights principles and humanitarian norms. To confront these manifold challenges, there is an urgent need to revitalise the legal principles and ethical values that underpin asylum and refugee protection.

The problems raised by the 1951 Convention

As the number of people seeking asylum increased dramatically, the relevance of the 1951 Convention has been called into question, especially in Europe, ironically its very birthplace.

There are, in fact, gaps in protection which need to be bridged through complementary mechanisms and some necessary evolution of principles. How innovative one really needs to be, however, and to what end, are both subject of heated debate. Some have felt compelled to argue that the complexities of modern population movements have rendered the 1951 Convention outdated, unworkable or irrelevant, or even an unacceptably

complicating element in today's migration environment. In particular, the 1951 Convention has been criticised as being over-rigid in the face of important migration challenges.

There are, however, many more voices to the contrary, including that of UNHCR itself. As the UNHCR has argued, the 1951 Convention cannot be held accountable for what it has not achieved in relation to problems for which it was never intended as a response. Its terms impact, it is true, on immigration-related issues including the sovereign right to regulate entry across borders, but only with a view to introducing the compelling exception for a clear category of individuals in need of protection. The 1951 Convention was never drafted to be an instrument for permanent migration settlement, much less for migration control. So, it is unacceptable, in UNHCR's view, that proper implementation of a refugee protection instrument should lose its priority in the face of migration challenges which have no formal or direct relationship to its intended purposes (Feller, 2001b: 2).

Modern migratory patterns can be extremely complex and contain a mix of economic migrants, genuine refugees and others. It is states responsibility to find ways to separate the individuals who leave the country voluntarily from those who flee because of the threat of persecution and cannot return safely to their homes in the circumstances then prevailing. Like Crisp refers, "it has become increasingly difficult to make a sharp distinction between refugees and other international migrants (…) For in many cases, people move from one country to another in response to a complex set of threats, hardships and opportunities" (Crisp, 2003: 7). Today the nature of the refugee's movements in the world is quite different. The flee reasons are much more complex, resulting from the decomposition of the power structures, artificial hereditary from colonialism and the failure of ideological systems that have presided to the construction of post-colonialism state, from endemic poverty and the rise of social differences.

One major problem of the 1951 Convention is its silence on a number of issues, including asylum, gender and burden-sharing, has ignited heated debate in last years among governments, legal scholars and UNHCR.

Although the Universal Declaration of Human Rights asserts the right of persons to seek and enjoy asylum,[xxii] the Convention makes no mention to such a right, neither to any obligation of countries to admit asylum seekers.[xxiii] So, it does not provide for automatic or permanent protection. There will be the situation where refugees will integrate permanently in their country of asylum, but alternatively a person may cease to be a refugee when the basis for the refugee status ceases to exist. The only reference to states' responsibilities in admitting refugees appears in the drafters' Final Act. They recommended "that governments continue to receive refugees in their territories and… act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement".[xxiv]

Gender based violence is another behaviour which, when reaching the level of persecution, must be addressed by the Convention. However, this view has not always won acceptance from decision-makers given the lack of an explicit reference to "gender" in the Convention's wording. Like Kumin argues, "[T]he Convention drafters did not deliberately omit persecution based on gender – it was not even considered" (Kumin, 2001: 12). So, it might be argued that persons who suffer gender-related persecution can never be covered by the Convention terms, or that the only possible ground for recognition must always be on the basis of belonging to a "particular social group". Neither of these assertions is correct. Persecution may be gender-related in the sense that the method for persecution is related to sex or to gender roles. For example, women of a certain ethnic group may be subjected to rape as a form of persecution, not for reasons related to sex or gender, but to nationality or religion.

We think that this is also a question of interpretation which has unfortunately become rooted in cultural and social perceptions, even prejudices, rather than good law. Certain offences have traditionally been held to fall outside the proper application of the 1951 Convention, because they were classified, at worst, as regrettable acts of human excess, or failures in personal judgement, rather than as what they actually are, that is, violations of fundamental rights. There is an ever growing need to interpret the refugee definition in a gender sensitive way. UNHCR's position

is that violence with a basis in gender is as persecutory in Convention terms as any other violence when the harm inflicted is sufficiently serious. Where it can be linked to a Convention ground, the definition applies and it does not matter whether the Convention is silent on gender as a ground for persecution, just as it does not matter whether the crime is gender-specific, with women as its victims.

While the Convention is predicated on international cooperation and recognises the need to share equitably the burdens and responsibilities of protecting refugees, it gives no prescription on how to do so. Burden-sharing has become one of the most contentious issues among receiving countries, with these trying to avoid great fluxes of asylum seekers. Left unresolved the issue could threaten the very existence of the international refugee protection regime, because in this dispute, these countries are pursuing a restrictive interpretation of the refugee definition, limiting refugee rights and adopting domestic legislation and measures to render difficult the access of asylum seekers to their territory.

Other major criticism of the Convention is based on the fact that it does not cover Internally Displaced Persons (IDPs). Refugees are persons who have crossed an international border into a second country seeking refuge. IDP may have fled for similar reasons, but remain within their own territory and thus are still subject to the laws of that state. We do not agree with the idea of expanding the refugee definition to include IDPs, because the term refugee addresses a particular situation that is characterised by being a foreigner in a host country. The framework of refugee protection exists to safeguard the well-being of people who are outside of their own country and who are unable to avail themselves of the protection which a state should provide to its citizens. The situation is more complex in the case of IDPs. They remain under the jurisdiction of their own state, even if they do not benefit from its effective protection, given the state's unwillingness or inability to guarantee the security of its citizens. There is not one specific right found in the 1951 Convention that could logically be applied to displaced persons who have not escaped their own country. But, although these persons are not eligible for refugee status, they are also object of

assistance and protection by the UNHCR, because their security, like that of refugees, is at risk.

The Convention's provisions present a complex legal challenge. While some articles are absolute, like article 33 (principle of *non-refoulement*), many are flexible enough to allow the treaty to live and evolve, through interpretation, as times and circumstances change. In fact, this lack of precision has allowed the Convention to be applicable and compatible with later developments to its adoption, while, at the same time, giving states the liberty to interpret it on a restrictive or liberal way, depending on their own interests, translating a realistic vision of the Convention.

This variety of interpretations allowed by the 1951 Convention, concretely the expressions "persecution", "fear with reason" and "agents of persecution", words highly subjective, constitutes one of its major problems. Trying to resolve this, the UNHCR published its "Handbook on Procedures and Criteria for Determining Refugee Status" that provided the basic guidance of the Office on the interpretation of the refugee definition.[xxv] More recently, in April 2001, the UNHCR published a note, "Interpreting Article 1 of the 1951 Convention", whose aim was to highlight key points of the Convention, especially the inclusion, cessation and exclusion clauses. But, despite the importance of these two documents as a guide to states and organisations, they are seen by states only as a set of recommendations, without force of law. Besides, as Hathaway as argued, there is the need to substitute the UNHCR as a supervision organ of the Convention mainly because being financially dependent on states, this organisation's activity is highly conditioned and influenced by them (Hathaway, 1990: 129-183).

The 1951 Convention does not define the term "persecution"; so it has been subject to wildly differing – and increasingly restrictive – interpretations. For Hathaway, persecution is the result of the failure of a state to protect its citizens (1998: 105). Further, that "persecution may also consist of either the failure or inability of a government effectively to protect the basic human rights of its populace" (ibid: 127). Regarding this issue, there are two leading schools: one that defends a severe and restrictive interpretation of the term persecution applying it only when there are serious violations of

human rights; and other more liberal, which considers that persecution implies any attempt against human dignity. In the UNHCR Handbook, persecution comprises human rights abuses or other serious harm, often but not always with a systematic or repetitive element, a consistent discrimination (UNHCR, 1992: paragraphs 51-53). Unfortunately, the interpretation of this term by the majority of the states is a restrictive one.

The Convention is only applicable on individual grounds;[xxvi] this results from the historical, political and social context that existed at the time of the elaboration of the Convention. But the nature of persecution has changed over time, and people, who flee civil war, generalised violence or a range of human rights abuses in their home countries, usually do so in large numbers, making individual status determination impracticable. At the same time, they are not fleeing persecution *per se*. So, they are not recognised as refugees according to the Convention definition of refugee. War and violence are not criteria for receiving refugee status. This was particularly acute in former Yugoslavia in the beginning of the 1990s and later in Kosovo, where war and violence have been used increasingly as instruments of persecution of specific communities, and where ethnic or religious "cleansing" was the ultimate goal of those conflicts, but even though, people who flew from these wars were not recognised refugees in the terms of the Convention.[xxvii]

The notion "well found fear of being persecuted" to define a refugee does not also apply to actual circumstances. The person in question must effectively prove that it is a victim of persecution and justify the objective and subjective reasons of his departure. However, fear is a subjective emotion and for purposes of refugee's status determination, it must be well-founded; that is, it must have an objective basis. The victims of war and generalised violence do not fit in this definition. Besides, many times political persecution coincides with economic oppression: the populations run from bad economic conditions and from politics that do not safeguard basic conditions of life. The victims of political events or civil wars are, generally, racial, national or religious minorities. One aspect of the well-founded fear element which has given rise to particular problems in recent years is that of determining when a person ought reasonably to move to

another part of the country and live safely there, rather than exercising the right to seek asylum from persecution outside his own country. In some jurisdictions, this notion, the so-called "internal flight alternative" or "relocation principle", has been used, incorrectly, to deny refugee status to persons who are in fact entitled to it. This occurs particularly when the concept is used to bar access to asylum procedures for whole groups of individuals.

The 1951 Convention also does not define who "agents of persecution" are; it is, once more, a question of interpretation. These were usually assumed to be states. Now, refugees more often flee areas where there is no functioning government, where they are victims of rebel movements, paramilitary groups or local militias. Some countries insist that actions by these "non state agents" cannot be considered "persecution" under the Convention. Given the Convention's silence on the issue, UNHCR defends that the source of the persecution is less a factor in determining refugee status that whether mistreatment stems from one of the grounds stipulated in the Convention. The European Court of Human Rights reaffirmed that persecution by non-state agents is still persecution by ruling that returning asylum seekers to situations in which they could face persecution violates the European Convention of Human Rights, whatever the origin of persecution. This constitutes a great problem in the European Union, because some states distinguish the cases where legal authorities do not want to protect their citizens (in these cases people are embraced by the Convention) from the ones where the state cannot offer protection by lack of power (and in these cases are not considered refugees). This has two main consequences. On the one hand, it creates differences in the way that states address similar situations, with obvious consequences of inequality and injustice. On the other hand, adopting this restrictive interpretation put them in breach with the document to which they are committed.

The mismatch of the 1951 Convention: Bosnia and Kosovo

There are people who need international protection even though, after examination of their claims, they are not found to meet the definition

contained in the 1951 Convention. These are, generally speaking persons fleeing from armed conflicts (war refugees), serious internal disorder or other mass violations of human rights, with no link to a specific Convention ground, as happened during the conflict in the former Yugoslavia in the beginning of the 1990s and latter on in Kosovo.

The former Yugoslavia was theatre of four wars: Slovenia (1991); Croatia (1991-1995); Bosnia-Herzegovina (1992-1995); and between NATO and the Federal Republic of Yugoslavia (FRY) (1999). These were interethnic wars in ethnically mixed territories. In fact, the FRY was an ethnically mixed country, construed in a way that its various parts (republics and autonomous provinces) contain the bulk of individual nations and national minorities. Each of these conflicts produced its contingent of refugees and IDPs, sharing one fundamental thing: these people had to leave their homes because of war. The same happened in Kosovo, where according to UNHCR, since the beginning of the conflict in 1998 until the intervention of NATO in March 1999, more than 450,000 people (one fifth of the population in Kosovo) flew from their homes completely destroyed by Serbian forces.[xxviii] The violence affected and still affects all segments of the population; the displacement is not only of Kosovo Albanians but also of many Kosovo Serbs, Montenegrins, Roma and Muslim Slavs (all minorities leaving in this province).

The people that escaped from the escalating war in the Balkans into neighbouring countries, especially European ones, found that they were not able to apply for refugee status for several reasons. The first one is the fact that, as we have seen, war and generalised violence are not criteria to obtain refugee status according to the 1951 Convention definition of refugee. At the same time, these people had to demonstrate that they have been singled out for persecution, what was not the case. Some states contend that if warring parties terrorise a whole community – even as part of ethnic, religious, racial, social or nationality-based violence – none of the victims is a refugee unless he or she has been singled out for special treatment. We have to note here that the spirit and object of the Convention is seriously undermined when people with a well-founded fear of persecution are not afforded international protection just because the

persecution is not individually targeted. Finally, in Europe as in many parts of the world, persecution can only be conducted by a government or governmental organisations and these people fleeing from a civil war, were fleeing essentially from non-governmental actors, like local militia and rebel groups.

This mismatch of the 1951 Convention to situations of sudden mass influx of people fleeing from civil war and generalised violence, obliged states to find other forms to give them some form of protection. In practice, although not considered *de jure* refugees, host countries recognise that these people cannot return to their home countries. So, they generally grant them some type of permission, known as Temporary Protection arrangements (TP), to enter and remain in their territory until the situation in the country of origin returns to normality.

In Europe, this concept emerged in 1992, in the early days of the war in Yugoslavia, as a way for EU member states to deal with the "situation of mass influx". Being impossible to process their applications individually, the idea was to afford practical assistance to war refugees, fleeing from ethnic cleansing, without giving them any expectation of permanent settlement in the EU.

TP has relieved states of the need to examine many thousands of individual asylum applications and has enabled them to adopt a more generous asylum policy than might otherwise have been the case. Publicly and politically, the admission of former Yugoslavia citizens became more acceptable because of the understanding that they would be repatriated once conditions had improved at home. The TP principle has also had some broader benefits in terms of defending the principles of international protection in a situation of mass influx, acknowledging a humanitarian obligation to provide a place of safety to people who have fled from a war-torn state.

It is important to note, however, that TP is a necessary complement to the 1951 Convention and the 1967 Protocol, but cannot substitute the protection system established by the Geneva Convention. TP is an immediate, short-term response that is used to respond to an emergency when there are clear protection needs but little or no possibility to

determine such needs quickly on an individual basis. It allows people immediate access to safety and protects their basic human rights, but it lasts only until there is a fundamental change in the circumstances that prompted people to flee.

In the world, the granting of TP to people forced to flee countries beset by war, civil strife, widespread violence or natural disasters is not governed by any international legal instrument and is a matter for the receiving countries to decide. It is up to the state to determine which rights and benefits these people would have in its territory during the TP, noticing that there are often fewer in number and less generous in scope than those provided for under the Convention.

It was possible to verify many divergences in the interpretation of TP between states and not always the basic rights were protected in relation to the civilians under this form of protection.

The movements arising from the crisis in the former Yugoslavia have highlighted deficiencies and gaps in the current international refugee law. European states have not agreed how to handle an emergency situation involving the sudden large-scale arrival of displaced persons on their territory. So, they acted independently to adopt special measures to speed up decision-making on temporary admission, in some cases shelving the lengthy procedures for examining asylum applications. Several arrangements were made for dealing with these non-conventional refugees and granting them TP of one form or another where appropriate, be it called "temporary admission" as in France, "exceptional leave to remain" as in the United Kingdom, "collective protection" as in Norway, etc.. These arrangements are based on specific legislation or on various combinations of existing laws and administrative decisions. As a result, conditions regulating access and the granting of TP differ substantially from one country to another, resulting in the fact that people fleeing war zones may tend to choose their destination according to the TP conditions offered by individual states.

A number of important lessons can be learnt from the international community's experience with asylum seekers from former Yugoslavia. Although TP is intended to be provisional and essentially short-term, people

who benefit from this arrangement should evidently be granted a formal legal status and a set of basic rights, including the principle of *non-refoulement*. Repatriation should initially proceed on a voluntary basis. Unfortunately, we have assisted to many involuntary returns of people to places where their lives or liberties were still at risk, where violence and human rights violations were still occurring. This happened particularly in Kosovo where, in spite of many reports from Non-Governmental Organisations underlining that the region was still unsafe, host states, mainly European countries, refused to grant any status to Kosovars and started to deport them.[xxix] Cases of forced conscription, forced repatriation and restrictions on free movement were also denounced. Approximately 16.000 refugees have been relocated in Kosovo, very often against their will.[xxx] In fact, despite the establishment of a civil administration in the province, Kosovo remains politically unstable. One major concern since 1999 is that many people are not fleeing political persecution *per se*, but seeking work and more favourable economic circumstances in the west.[xxxi]

TP can be seen as part of an overall strategy in developed states to contain refugees either in their country of origin or within their home region. Furthermore, TP provides a way for states to avoid their legal obligations under the 1951 Convention and implement a less defined and less enforceable humanitarian agenda (Fitzpatrick, 2000). Such moves have resulted in an erosion of core rights and principles of the 1951 Convention, in particular the right to *non-refoulement* and an increasingly heavy emphasis on repatriation over resettlement (Chimni, 2000).

The lack of a framework in this area leads to a situation where *de facto* refugees might benefit from TP in some country and in similar conditions be denied that protection in other states. So, it is urgent to give protection to those who do not qualify for refugee status under the terms of the 1951 Convention, respecting their fundamental socio-economic and relevant civil and political rights while in exile, and to establish a common reference framework relating to TP to serve as a basis for the legislation and practices of the states in this field.

At regional level, concretely in the EU, this has been already done with the approval of a Directive setting norms for TP in case of mass influx of

displaced persons in 28 May 2001, which came to harmonized the procedures in every country member overcoming the previous existing discrepancies between European countries regarding the application of TP. The EU has been making some efforts in devising a common asylum policy, and this was considered the first step to reach that policy. This directive enables the EU to act with uniformity in situations of sudden and massive flows of people, such as those from Kosovo and Bosnia. It establishes some standards for returning people to their country of origin, the maximum duration of stay and ensures that the persons under TP will benefit from the same minimum conditions and enjoy the same rights in all member states of the Union. But, the problem continues to exist at international level, beyond Europe, where still does not exist anything that can regulate the concession of this type of protection and people who need it are subject to different sets of rights and measures in the event of extension or termination of this protection, which put its safe at risk.

The 1951 Convention: the main challenges

The configuration of socio-economic and political conditions is challenging the prevalent liberal universalist model and renders the future direction of asylum policy highly uncertain. Now, the combination of high numbers of refugees, unemployment in receiving countries, and the impact of globalization on notions of both identity and state legitimacy, render the correct implementation of the 1951 Convention more difficult. As Erika Feeler argued, "the Convention is being challenged in a number of important ways today, which put to the test its resilience and the scope of its application" (2001a: 591).

The changed displacement environment in which the 1951 Convention must operate; the irregular migration; the different interpretations of its provisions; and the growing number of subsidiary forms of protection, are some of the challenges that the UNHCR, as the supervisory organ of the Convention, must dealt with.

The efforts to develop regionally specific legal frameworks for handling refugee and asylum demands, as it happened in Africa and Latin America,

carries with them the threat of a degree of redundancy for the Convention, and the concomitant problem that its international applicability might be questioned.

Another challenge consists of the "integrationist" approach taken to the Convention's application over the fifty four years of its existence, which has given birth to systems of implementation of the Convention which are not well enough attuned to mass arrivals or even to large numbers of individual asylum-seekers.

But, the greatest challenge is to promote a dynamic interpretation of the 1951 Convention. There are already well-established international law rules for interpreting treaties, which have been codified quite comprehensively in the 1969 Vienna Convention on the Law of Treaties. This latter Convention can be said to place a premium on the principle of effectiveness by requiring interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[xxxii] According to the basic rules of treaty interpretation, the Convention is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in light of its object and purpose. In this case, the object and purpose is to protect refugees and to assure them the widest possible exercise of their rights in the absence of effective national protection. The preamble to a treaty is one source for determining its purposes. The Preamble to the 1951 Convention states its aim as being to ensure that human beings shall enjoy fundamental rights and freedoms, such as those set out in the Universal Declaration of Human Rights without discrimination, as well as to assure refugees the widest possible exercise of these fundamental rights and freedoms. The Convention is thus quite a specific rights protection instrument. This being so, it is of fundamental importance that its provisions be interpreted in such a way as to make its safeguards practical and effective.

This means that the 1951 Convention should not be seen as a static instrument, but instead should be interpreted, as Erika Feller argued, in more "evolutionary" terms, taking into consideration the changes that have occurred since its conclusion (Feller, 2001a: 593). The 1951 Convention

must accordingly be construed to cover situations which, whether or not so mentioned by its drafters 50 years ago, clearly come within the spirit of its terms.

Nevertheless, we have been assisting to the growing tendency among some governments to interpret the Convention's provisions restrictively as a reaction to the strains imposed on asylum systems by the uncontrolled rise of migration and both real and perceived abuse of those systems. In this sense, its supervision is important, not only for many of the guarantees related to the status of refugees, but also for such key provisions as Article 33 of the 1951 Convention on *non-refoulement* or the refugee definition as provided for by Article 1A of the 1951 Convention. The full and inclusive application of the Convention is crucial to the Convention being able to serve in practice as the frame for harmonisation and as a single procedure. This notion has, perhaps, two critical dimensions. At the conceptual level, full and inclusive application requires a flexible and shared interpretation of the terms of the Convention, in particular its definition. This interpretation has, moreover, to be consistent with the objects and purposes of the instrument, not only its letter. At other level, side by side with a proper interpretation of the Convention, there has to be genuine commitment to implement it. This has, unfortunately, not always been the case with states assessing that the obstacles confronting implementation are too strong an impediment.

The obstacles to implementation of the 1951 Convention have traditionally been and remain of three kinds: socio-economic, legal and political, and practical. There are inevitable tensions between international obligations and national responsibilities where countries called upon to host large refugee populations, even on a temporary basis, are suffering from their own severe economic difficulties, high unemployment, declining living standards and/or man-made and natural disasters. Legal obstacles to proper implementation include the clash or, inconsistencies between, existing national laws and certain Convention obligations; failure to incorporate the Convention into national law through specific implementing legislation; and restrictive interpretations of the Convention. Finally, the maintenance of the geographic limitation by some countries, such as

Madagascar, Congo, Monaco and Turkey, is a serious obstacle to effective implementation.

At other level, there are bureaucratic obstacles, including unwieldy, inefficient or inappropriate structures for dealing with refugees, and the non-availability of expert assistance for asylum-seekers and refugees, especially in poor countries. Finally, there are certain problems of perception at the governmental level, including the granting of asylum as a political statement which might be an irritant in inter-state relations.

An additional obstacle includes the limitation of the state's capacity and resources. Public opinion does not always understand or support efforts undertaken on behalf of asylum-seekers or refugees, particularly where they arrive in large numbers or where they come by illegal or irregular channels. Proper fulfilment of responsibilities can be a function of political will and government policy, which in turn can be influenced by perceptions of the national interest and problems of a geopolitical nature. The imprecision of the language of a number of the Convention's provisions as indeed with any international law instrument – can facilitate, as we have seen in the previous section, selective interpretation of application, particularly where new displacement dilemmas are not well addressed through the Convention's framework, or where there is divergence between the profiles of groups of asylum-seekers and the classical concept of refugee.

While the Convention remains, and has to remain, the foundation of refugee protection, it is being chipped away from all sides at the moment. How to reinforce it, reinvigorate it and ensure its full and inclusive application for the decades to come is a common concern.

In the search for permanent solutions for refugees, UNHCR is dependent on states offering asylum to refugees in a spirit of burden- and responsibility-sharing. This reformulation of burden-sharing to responsibility-sharing arises from the fact that refugees are not only a problem but also part of the solution, and also from the recognition that often countries of refuge are the least equipped financially and logistically to assist refugees in situations of mass influx, as well as those of a protracted nature. This happened in Kosovo when the violence inflicted upon ethnic Albanians led to an exodus

of refugees onto his poor neighbouring countries.[xxxiii] So, it is important to develop specific burden-sharing agreements that would be applied in response to mass influxes and to resolve protracted refugee situations. To be efficient, international protection must be based on cooperation between states, principles of solidarity and international burden-sharing.

Revitalising refugee protection should imply complementary forms of protection. This is a positive way of responding pragmatically to certain protection needs, as long as the criteria for refugee status in the 1951 Convention retain their proper sway. This means that refugees who would fulfil the Convention criteria should be recognised and protected under that instrument, rather than being relegated to complementary protection schemes, like TP. There should be appropriate measures in place to allow the provision of complementary protection in a manner that strengthens, rather than undermines, the existing global refugee protection regime.[xxxiv] The various complementary protections must contain guarantees for the protection of basic civil, political, social and economic rights, and be harmonised to the extent possible in terms of the treatment provided.

Aside from subsidiary protection at the national level, there are also complementary protections starting to appear at the international level, including notably those in place through the human rights instruments. The possibility to resort to human rights instruments is an important complement to the 1951 Convention protection principles, where the Convention is not being properly applied or, for whatever reason, is not directly applicable. However, this has its own complications, particularly in the absence of guarantees of a comparable security of stay and access to basic rights. The reality is that adjudicators have not taken human rights law sufficiently in this direction. European Court of Human Rights (ECHR) jurisprudence, for example, is silent both about the status of those whom it protects and the social rights which must be attached. Often, states are left simply to adapt their immigration regulations to accommodate duties under the *non-refoulement* clauses of human rights instruments. Resort to human rights instead of refugee protection concepts as the basis for stay, in the absence of any consequential obligations, could become the politically more popular alternative. Yet it would be the notably less beneficial one for

refugees. From this perspective, human rights protections could, without further development, start to pose a threat to the vibrant survival of the Convention's refugee status in the modern world. The challenge here is for the Convention to co-exist and be complemented by these new forms of protection, and not be substituted by them.

Assessment

Fifty-four years after its adoption the Convention is on discussion. Some governments have been questioning its continuing relevance. But others, like British Prime Minister Tony Blair argue, the "treaty's values are timeless", though adding that "with vastly increasing economic migration around the world and most especially in Europe, there is an obvious need to set proper rules and procedures. The United Kingdom is taking the lead in arguing for reform, not of the Convention's values, but of how it operates".[xxxv]

This debate was taken within the context of a series of meetings in 2001, known as the Global Consultations on International Protection, which UNCHR held with countries parties of the Convention and the Protocol and other interested parties, like law scholars, non-governmental organisations and refugees. The main themes of these Consultations were the protection of refugees in mass influx situations,[xxxvi] protection of refugees in the context of individual asylum systems, including difficulties arising from migration.[xxxvii] This process ended with the adoption of an Agenda for Protection,[xxxviii] and the reaffirmation of the commitment of the countries to the Convention, which can lead us to two main conclusions. On the one hand, it is explicit that there is no international consensus in strengthening the Convention through the adoption of a set of adjustments that are needed. The international harmonisation of asylum issues continues to be difficult to achieve. On the other hand, it is a way of maintaining the status quo; states will continue to have liberty in the interpretation and application of the Convention, according to their national interests. It must be acknowledged that every time that an up-to-date of the Convention was

sought, the political and economic context and the hesitation of the states were decisive in blocking it.

It is argued that the 1951 Convention does not provide a suitable legal framework for addressing present-day refugee problems, as these often occur in the context of war and armed conflicts. In a similar vein, national jurisprudence in some countries has developed criteria arguing that in order for it to be said that an asylum-seeker is persecuted, it must be "singled out" or in some way "individually targeted". It should be recalled that the Convention was drafted in the aftermath of World War Second, at least in part as a means for protecting victims of persecution in that war. Where conflicts are rooted in ethnic, religious or political differences, which specifically victimise those fleeing, as is so often the case today, persons fleeing such conflicts would qualify as 1951 Convention refugees. The Executive Committee has reaffirmed this on a number of occasions.[xxxix] Likewise, on a proper interpretation of Article 1, it is not relevant how large or indeed how small the affected group may be. Whole communities may risk or suffer persecution for Convention reasons, and the fact that all members of the community are equally affected does not in any way undermine the legitimacy of any particular individual claim. On the contrary, such facts should facilitate recognition, as the sociological process of marginalisation that such stigmatisation engenders is a powerful archetype of persecution. This approach, counselled by the UNHCR Handbook and in various Executive Committee Conclusions,[xl] has also been adopted by refugee scholars and in well-reasoned jurisprudence. This being said, however, it is equally recognised that there are persons who flee the indiscriminate effects of violence associated with conflict with no element of persecution. Such persons might not meet the Convention definition, but may still require international protection on other grounds.

The single procedure approach must, though, avoid any tendency to redefine protection down to the most basic of obligations – that of *non-refoulement* alone. At the same time, the status of refugee must be one which continues to be conferred, consistent with the provisions of the 1951 Convention and carrying with it all rights and responsibilities deriving from this status. It should not be forgotten, in this regard, that refugee status

entails certain rights which are also extra-territorial and, for these to be acceded, status must formally have granted them.

We argue that the scope of the 1951 Convention refugee definition is a matter of international law and its interpretation should not be subject to variations deriving from idiosyncratic, legal, cultural or political determinants in any state. Similarly, the true meaning of the refugee concept must be determined independently from the financial or other costs attached to the granting of asylum, from the difficulties besetting management of asylum procedures, or from any other limitations on a state's capability or willingness to meet obligations as regards treatment of refugees. Employing a restrictive interpretation of the refugee definition will not help reduce the numbers of non-refugee migrants claiming asylum, it only leads to the increase of the number of persons in need of international protection falling outside its scope.

Questioning the Convention is an exercise with dangers. Some refugee advocates that put the 1951 Convention up for discussion may end up provoking a consensus around a protection regime of much more limited rights. Refugee protection is confronted by a number of challenges which could well overtake existing protection principles unless action is taken to secure an enduring place for them. In fact, the worrying level of disillusionment about aspects of the 1951 Convention; the increasingly restrictive application of the Convention, including diverging interpretations of its provisions; the deterioration of the quality of asylum worldwide; the existence of refugees without access to timely or safe solutions; and a protection system with gaps and strains oblige ever more the international community to think in a solution to strengthen the Convention and help to resolve this negative trend in asylum issues. Also the UNHCR has been making efforts in this sense, concretely with the "Convention Plus" process launched in mid-2003.[xli] Although upholding the rights and obligations set out in the Convention is at the centre of all UNHCR's protection efforts, it seeks new ways to address contemporary protection problems.

We think there are several options to resolve the main problems of the Convention. The first one, based on an ideological enlargement of the Convention, based on its ample interpretation, according with what is stated

in its E Recommendation[xlii] in the Final Act. The idea is to acknowledge other threats to human rights that are already expressed in humanitarian law, and are not in the Convention, as those contain in the Universal Declaration of Human Rights.[xliii] The major problem of this solution will be to obtain the support and the political will of participating states.

The other option could be a technical enlargement through the adoption of a new protocol annexed to the Convention as has already happened in 1967. This would ensure an extension of the refugee regime protection at the international level to people who fall outside the scope of the 1951 Convention, but that genuinely need international protection. At the same time, the protocol could establish a link between *de jure* and *de facto* refugees, establishing international standards to address the current gaps in the protection framework. This would be of particular relevance to complex emergencies, as it was the situation in the Balkans. This option is stronger than the previous, because states would have to commit themselves through the ratification of the document.

To write a new Convention or revue its provisions are not an option. This would risk undermining the principal position in international refugee law which is, and still should be, held by the 1951 Convention. Supporting this position, the EU countries, at their Council meeting in Tampere, in October 1999, reaffirmed "the importance the Union and member states attach to absolute respect of the right to seek asylum"[xliv] and "agreed to work towards establishing a Common European Asylum system based on the full and inclusive application of the Geneva Convention".[xlv] This strengthens the position of the Convention and its ongoing relevance in the complicated process that European countries have embarked upon of developing common policies on asylum and migration which respect both the dictates of border control, while respecting also the principles guaranteeing protection to those who may need it within the European space. The Convention was thereby accepted as the starting point for harmonisation of European asylum standards and procedures, or as the instrument which should set the framing limits for what will be legislated within the EU.

Conclusion

Much has changed over the last decades. The world is more complex than it was in 1951; people are more mobile; humanitarianism has seemingly been replaced by pragmatism; empathy by suspicion. But although these changes, people still flee persecution, war and human rights violations and have to seek refuge in other countries. Even if the Convention is not ideal it is the only international treaty recognised by almost all states to legitimise the refugee's protection regime.

For refugees, now as half a century ago, the 1951 Convention is the one truly universal, humanitarian treaty that offers some guarantee that their rights will be safeguarded. It is also in the interests of states themselves to respect the Convention and other refugee instruments, which were established with the specific intention of ensuring that the refugee's problem is dealt with in a consistent and predictable manner.

By defining the principles and standards which states are expected to observe, international and regional refugee law provides an essential foundation for the protection of exiled populations. But legislation alone does not provide protection, particularly at a time when there is growing hostility towards refugees. Unfortunately, some of the states that have adhered to the principal legal instruments have nevertheless been responsible for serious breaches in international refugee law. As we have seen, this was the case when several European countries forced the return of people that were under TP to Kosovo when the situation still represented danger, violating in this way the main principle of the 1951 Convention, *non-refoulement*.

There has been a tendency over recent times for decision-makers to focus more on the letter of the Convention than on its purposes, much less its spirit. It has become as such, for those so inclined, an instrument to restrict responsibility to the minimum, rather than to ensure protection to legitimate beneficiaries. Persons victimised by persecution in on-going conflict situations are often treated as "victims of indiscriminate violence", not refugees, regardless of whether the conflict they flee is rooted in ethnic, religious or political differences which specifically force flight, as it happened

in former Yugoslavia and Kosovo. This restrictive approach in applying the definition is of concern to UNHCR, even where states provide an alternative form of protection, to meet the demonstrated need.

While some governments are reading the Convention evermore restrictively, and jeopardizing the safety of genuine refugees in the process, the quality of asylum has been steadily deteriorating, especially after the September 11 terrorist attacks in the United States, when many countries have pushed through emergency anti-terrorism legislation that curtails the rights of refugees.

Implementation of the Convention in a principle way is a challenge for states seeking to respond effectively to contemporary displacement situations. Recurring cycles of violence and systematic human rights violations in many parts of the world, the changing nature of armed conflict and of patterns of displacement, as well as serious apprehensions about "uncontrolled" migration in an era of globalisation, are increasingly part of the environment in which refugee protection has to be realised.

As highlighted by the situation of refugees and displaced people in former Yugoslavia there is now a growing awareness of the need to adopt a comprehensive approach to refugee's problems, providing different solutions to different groups of people, according to their specific needs and circumstances. This can be addressed, as we argued through two main options: an ideological or a technical enlargement of the 1951 Convention.

What we must not forget is that the refugee definition in Article 1 of the 1951 Convention has been the principal tool for providing effective protection to millions of refugees since it was crafted. It has proven its adaptability over those years, demonstrating that a proper interpretation of Article 1 respects and furthers the objects and purposes of the 1951 Convention. So, a balanced application of the definition, incorporating human rights law principles, has the best chance of yielding the best result.

Being the one truly universal instrument setting out the baseline principles on which the international protection of refugees has to be built, its definition is still important as a way of connecting the rights of refugees with human rights. As indicated above, it has a legal, political and ethical significance that goes well beyond its specific terms. As such it is necessary

to proceed to adjustments without shaking the base of a structure raised with international efforts and consecrated in national legislation and practices. If this instrument is lost, the likelihood of it being replaced by anything approaching its value is remote.

NOTES

[i] This Convention entered into force on 21 April 1954. In the paper we refer to it as the 1951 Convention.
[ii] Article 1ºA, Convention Relating to the Status of Refugees, Geneva, 28 July 1951.
[iii] Article 1º B Convention Relating to the Status of Refugees, Geneva, 28 July 1951.
[iv] See *infra*.
[v] Consisting of some 68 member states the Executive Committee includes representatives from all parts of the world and from almost every political, religious and cultural tradition. It advises the High Commissioner on the exercise of his functions, and its annual conclusions form part of the framework of the international refugee protection regime. It is available www.unhcr.ch/cgi-bin/textis/utx/execom
[vi] See Article 33, Convention Relating to the Status of Refugees, Geneva, 28 July 1951. No reservations are permitted to this principle.
[vii] The sections D, E and F of Article 1º of 1951 Convention contains provisions where by persons otherwise having the characteristics of refugees are excluded from refugee status.
[viii] The Cessation Clauses (Article 1ºC (1) to (6) of the 1951 Convention) spell out the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified.
[ix] The statute of the Office is annexed to Resolution 428 (V), adopted by the General Assembly on 14 December 1950. The UNHCR supervisory role of the Convention is expressed in Article 35 of the 1951 Convention.
[x] UNHCR Statute, Chapter I, paragraph 1.
[xi] On 1 May 2005, there were 142 states parties to the Convention and the same number of states parties to the Protocol; 139 states adhered to both the Convention and the Protocol. UNHCR (2005) *States Parties to the 1951 Convention and the 1967 Protocol* (Geneva: UNHCR).
[xii] *Protocol Relating to the Status of Refugees*, New York, 31 January 1967.
[xiii] See note 9.
[xiv] *OAU Convention*, article 1, paragraph 2.
[xv] Three fundamental characteristics differentiate it from the definition found in the 1951 Convention: first the OAU definition is objective rather than subjective, is not based in the fear; second, it does not require a specific type of harm or cause of flight, it converts generalize violence; and third, it was primarily designed and intended to be applied to the context of group displacements, not only to individuals.
[xvi] *Cartagena Declaration*, third conclusion.
[xvii] They included 9.2 million refugees (48%), 839.200 asylum seekers (41%), 1.5 returned refugees (8%), 5.6 IDP (29%) and 2 million others of concern (11%). It is available at www.unhcr.ch/cgi-bin/texis
[xviii] Some of these obstacles are: extended visa requirements; carrier sanctions; pre-boarding documentation checks at airports; readmission agreements with transit countries, the interdiction and mandatory detention of asylum and the withdrawal of social welfare benefits, among others.
[xix] Countries were generally there is no serious risk of persecution.
[xx] See *infra.*
[xxi] See *Convention Against Torture*, 1984, article 3º; European Human Rights Convention, 1950, article 2º.
[xxii] See *Universal Declaration of Human Rights*, 1948, article 14.

[xxiii] The right to grant asylum remains the exclusive prerogative of states and has not been incorporated into any binding international instrument.
[xxiv] *United Nations Convention Relating to the Status of Refugees*, Geneva, 1951, Final Act.
[xxv] The Handbook was produced in 1979 by the (then) Division of International Protection at the request of the Executive Committee for the guidance of governments. It is a valuable aid in determining refugee status. It was re-edited in 1992.
[xxvi] Jurists argue that nothing in the definition implies that it refers only to individuals and underline that when the Convention was drafted, its intended beneficiaries were, in fact, large groups of people displaced by World War II (Weis, 1994, p. 335).
[xxvii] See *Infra*.
[xxviii] Available at www.monde-diplomatique.fr/cahier/Kosovo/repression
[xxix] This happen special in Austria, Netherlands and Britain. See "Position on returns to Kosovo", available at www.ecre.org/positions/Kosovo00.shtml
[xxx] Available at www.hrw.org/reports/1996/Serbia.htm
[xxxi] Kosovo has the highest rate of unemployment and the youngest population of the European Continent. See "The post-Kosovo European Refugee Crisis".
Available at www.bhhrg.org/countryReport.asp?countryID=1
[xxxii] 1969 *Vienna Convention on the Law of Treaties*, Articles 31º and 32º. See also Executive Committee Conclusion n. 77 (XLVI), 1995, paragraph (e), stressing the importance of interpreting and applying international refugee instruments "in a manner consistent with their spirit and purpose".
[xxxiii] In May 1999, over 230,000 refugees had arrived in the Former Yugoslav Republic of Macedonia, over 430,000 in Albania and some 64,000 in Montenegro. Macedonia and Albania carried 98% of the burden. Available at www.nato.int/Kosovo/history.htm
[xxxiv] About this issue, see Vedsted-Hansen, Jens (2002).
[xxxv] www.unhcr.ch/1951convention/timeless.html
[xxxvi] See *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, Global Consultations (EC/GC/01/4), March 2001.
[xxxvii] Among the objectives were the promotion of progressive development of international law for the protection of refugees; universalize standards and avoid compartmentalization; ensure greater consistency and complementarily between human rights instruments and the Convention, and to implement the international refugee protection regime more effectively through better review, monitoring and technical assistance.
[xxxviii] It is a UNHCR program of action to improve the protection of refugees. The Agenda consisted of two sections: the Declaration of States Parties, adopted at the conclusion of the December 2001 Ministerial Meeting of states Parties to the 1951 Convention, and a Program of Action that identifies specific objectives and activities grouped according to six inter-related goals: strengthening the implementation of the 1951 Convention and its 1967 Protocol; protecting refugees within broader migration movements; sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees; addressing security-related concerns more effectively; redoubling the search for durable solutions for refugees; and meeting the protection needs of refugee women and children. See UNHCR, *Agenda for Protection*, Third Edition, October 2003, p. 10.
[xxxix] *Executive Committee Conclusions* n. 85 (1998) paragraph (c).
[xl] See *Executive Committee Conclusions* n. 22 (1981) paragraph l. 1; n. 74 (1994) paragraph (l); n. 85 (1998) paragraph (c).
[xli] The objective of this process is "to improve refugee protection and to facilitate the resolution of refugee problems through multilateral special agreements to tackle three priority challenges: the strategic use of resettlement as a tool of protection; more effective targeting of development assistance to support durable solutions of refugees; and the clarification of the responsibilities of state in the event of irregular secondary movements of refugees and asylum seekers".
Available at UNHCR's website http://www.unhcr.ch/convention-plus.
[xlii] E Recommendation of the Final Act of the 1951 Convention states that "the conference expresses the hope that the Convention relating to the Status of Refugees with have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides".
[xliii] See for example, Universal Declaration of Human Rights, articles 2º, 9º, 11º to 17º.
[xliv] "Towards a Union of Freedom, Security and Justice: The Tampere Milestones", Presidency Conclusions, *Tampere European Council*, 15 and 16 October 1999, paragraph 13.

[xlv] Ibid., paragraph 4.

References

ACHIRON, Marilyn (2001) The Geneva Convention has been the cornerstone of protection for 50 years, but there is a lively debate about its relevance today, *Refugees*, vol. 2 (123), pp. 6-29.

BOSWELL, Christina (2000) European Values and the Asylum Crisis, *International Affairs*, 76 (3), pp. 537-557.

CELS, J. (1990) *Responses of European States to de facto Refugees.* Loescher, G. & Monahan L. (ed.) *Refugees and International Relations* (Oxford: Clarendon Press).

CHIMNI, B.S. (February 2000) *Globalisation, Humanitarism and the Erosion of Refugee Protection.* University of Oxford, Working Paper n. 3.

CIERCO, Teresa (2002) *O Conceito de Refugiado e o asilo na perspectiva das Relações Internacionais* (Braga: Universidade do Minho).

CRISP, Jeff (2003) *A new asylum paradigm? Globalization, migration and the uncertain future of the international refugee regime*. UNHCR, Evaluation and Policy Analysis Unit, Working Paper Series n. 100.

CUNLIFFE, S. Alex & Pugh, Michael (20 June 2005) The UNHCR as Lead Agency in the Former Yugoslavia, *The Journal of Humanitarian Assistance*.

FELLER, Erika (2001a) International Refugee Protection 50 years on: The protection challenges of the past, present and future, *RICR*, vol. 83 (843), pp. 581- 606.

FELLER, Erika (2001b) *Challenges to the 1951 Convention in its 50th Anniversary Year,* Seminar on "International Protection within one single asylum procedure", Sweden, 23-24 April.

FELLER, Erika (2001c) The wall behind which refugees can shelter. The 1951 Geneva Convention*, Refugees,* vol. 2 (123), p. 6.

FITZPATRICK, J. (2000) Temporary Protection of Refugees: Elements of a Formalized Regime, *America Journal of International Law,* 94 (2) www.asil.org/ajil002.htm

GOODWIN-GILL, Guy S. (2003) *Refugees and their human rights*. University of Oxford, Working Paper Series n. 17.

GOODWIN-GILL, Guy S. (1996) *The Refugee in International Law* (Oxford: Clarendon Press).

GRAHL-MADSEN, Atle (1996) *The Status of Refugees in International Law*. Vol. I. (Leyden: A.W. Sijthoff).

HATHAWAY, J.C. (1997) *Reconceiving International Refugee Law*. (Haia: Martinus Nijhoff).

HATHAWAY, J.C. (1991) *The Law of Refugee Status*. (Toronto: Butterworths).

HATHAWAY, J.C. (1990) A Reconsideration of the Underlying of Refugee Law, *Harvard International Law Journal*, vol. 31 (1), pp. 129-183.

HOLZGREFE, J.L. & Keohane, Robert O. (2003) *Humanitarian Intervention* (Cambridge: Cambridge University Press).

LOESCHER, Gil (2001) *The UNHCR and world politics: a perilous path* (Oxford: OUP).

KUMIN, Judith (2001) Gender-based persecution leaves the shadows, *Refugees*, vol. 2 (123), pp. 12- 13.

MCNAMARA, Dennis & Goodwin-Gill, Guy (June 1999) *UNHCR and International Refugee Protection.* Working Paper n. 2, University of Oxford.

RAMCHARAN, B.G., *The Concept and Present Status of the International Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1989).

RANKIN, Micah Bond (April 2005) *Extending the limits of narrowing the scope? Deconstructing the OAU Refugee definition thirty years on.* UNHCR, Working Paper n. 115.

SELM, Joanne van (May 2005) *European Refugee Policy: is there such a thing?* UNHCR, Working Paper n. 115.

SELM, Joanne van (2000) *Temporary Protection: Some Preliminary lessons of the Balkans Crises (1992-1999)* (Bergen: International Society for the Study of European Ideas).

STEDMAN, Stephen John & Tanner, Fred (ed.) (2003) *Refugee Manipulation* (Washington: Brookings Institution Press).

STRAW, Jack (2001) The Convention: Britain's view, *Refugees*, vol. 2 (123), p. 9.

Tampere European Council *Towards a Union of Freedom, Security and Justice: The Tampere Milestones,* Presidency Conclusions, 15-16 October 1999.

UNHCR (2005*) States Parties to the 1951 Convention and the 1967 Protocol* (Geneva: UNHCR).

UNHCR (October 2003) *Agenda for Protection*, Third Edition.

UNHCR (2001) 50th Anniversary The 1951 Geneva Convention, The Wall behind which Refugees can Shelter, *Refugees*, vol. 2 (123).

UNHCR (13 September 2001) *Note on International Protection,* UN doc. A/AC.96/951.

UNHCR (7 July 2000) *Note on International Protection*, UN doc. A/AC.96/930.

UNHCR (7 September 1994) *Note on International Protection*, UN doc.A/AC.96/830.

UNHCR (1992) *Handbook on Procedures and Criteria for Determining Refugee Status*.

UNHCR (1997) *State of the World's Refugees* (Oxford: Oxford University Press)

UNHCR (1967) *Protocol relating to the Status of Refugees of 31 January 1967*.

UNHCR (1951) *Convention relating to the Status of Refugees of 28 July 1951*.

VEDSTED-HANSEN, Jens (February 2002) Complementary or subsidiary protection? Offering an appropriate status without undermining refugee protection. UNHCR, Working Paper n. 52.

VEDSTED-HANSEN, Jens (May 1999) Europe's response to the arrival of asylum seekers: refugee protection and immigration control, *Journal of Humanitarian Assistance*, Working Paper n. 6.

WAHLBECK, Osten (2002) The concept of diaspora as an analytical tool in the study of refugee communities, *Journal of Ethnic and Migration Studies*, vol. 28 (2), pp. 221-238.

WALDMAN, Lorne (2001) *The definition of Convention Refugee* (Toronto: Butterworth).

WEIS, Paul (1994) *The Refugee Convention, 1951: the travaux preparatoires analysed* (Cambridge: Cambridge University Press).

WEISS, Thomas G. & Pasic, Amir (1998) Dealing with the Displacement and Suffering caused by Yugoslavia's wars. Cohen, Roberta & Deng, Francis M (ed.) *The Forsaken People: Case Studies of the Internally Displaced* (Washington: Brookings Institution Press).