

“The Refugee Convention at 60: Still fit for its Purpose?”

Protection Tools for Protection Needs

Statement by Erika Feller, Assistant High Commissioner (Protection), UNHCR¹

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A recent article in the Daily Telegraph declares, as its title suggests, that “The UN Convention on Refugees is not fit for [its] purpose.”² That is a pretty sweeping observation in a text which singularly fails to try and define what the purpose of the Convention actually is. Nevertheless, it is worth unpacking a little the arguments made by the author, given that this year we are celebrating the 60th anniversary of this instrument and it is more than likely that this will attract – as it should – quite some analysis about its strengths and weaknesses. So, has the Convention seen its day?

If you agree with the author of the article, it has. His central thesis is that the “concept of asylum [is] an outdated and unworkable relic from the mid-20th century.”³ He supports this, slimly, by pointing to world population growth, proliferation of abusive regimes, greatly enhanced movement possibilities and the incentives to move created by badly functioning asylum systems which reward misuse. He asserts that the problems are compounded by reluctance or inability of, in this case the UK Government, to properly distinguish between economic migration and protection-motivated flight and he lays at the feet of the Convention the responsibility for what he calls the people trafficking industry.

In a speech made in November 2010, on the other side of the world, by the Opposition party immigration spokesperson in the Australian Parliament, Scott Morrison, in different language, a rather similar posture was taken. He argued that the Convention is increasingly an inadequate instrument for dealing with “global people movement,” which will become an ever bigger problem, but not for Convention related reasons - climate change, financial collapse, natural disasters or growing societal inequities - which he was concerned about.⁴ Commenting on the Morrison speech, Australian academic Klaus Neumann⁵ notes that “the absence of other instruments dealing with these more general risks forcing people to move are likely to lead to the Refugee Convention being abused as a surrogate – with claims being confected to attract protection.”⁶

¹ An earlier version of this presentation was made as a speech to the Chatham House International Law Discussion Group on 24 March 2011.

² Ed West, “It’s not the Home Office’s fault – the UN Convention on Refugees is not fit for purpose,” *The Telegraph*, January 11, 2011

³ West, “It’s not the Home Office’s fault.”

⁴ Scott Morrison, “A real solution: An international, regional and domestic approach to asylum policy.” (speech to the Lowey Institute, Sydney, November 30, 2010).

⁵ Klaus Neumann, “Whatever happened to the right of asylum.” (address to the Law and History Conference, Melbourne, December 13, 2010).

⁶ Morrison, “A real solution.”

It is important to listen to such concerns, even if they are ill informed (as many will be) because perception can be as important as reality when it comes to understanding and dealing with the problems which today confront refugee protection.

One hears often that the Convention is an increasingly inadequate response to “global people movements.” The main message being disseminated is that there is something not sufficient with what we have and there is a need for something more. We agree. But what, and for whom? This will be the focus of what I want now to develop in this presentation.

THE BACKGROUND SETTING

The world for many millions remains very insecure. An estimated 43.7 million people are forcibly displaced worldwide. More than 25 million people –10.5 million refugees and 14.7 million IDPs – were receiving protection or assistance from UNHCR at the end of 2010.

Of course these bald statistics do not tell a nuanced enough story. Refugees can and do go home: witness the 2009 returns to Southern Sudan of more than 330,000 refugees, i.e. around 75 percent of the UNHCR registered 428,000 refugees in the neighbouring countries at the time the Comprehensive Peace Agreement was signed. When it comes to resettlement, there are now 24 countries offering resettlement places with over 73,000 persons able to benefit from this solution in 2010. And there have been a number of positive initiatives to move refugees away from care and maintenance to self-sufficiency. The naturalization of over 162,000 long-term refugees in Tanzania particularly stands out. That there is a legal instrument for the protection of internally displaced persons in Africa which is a major step forward, and UNHCR has also welcomed the openness with which its overtures on behalf of stateless people are now being received.

Asylum in the industrialized world remains, still, an important durable solution. Sizeable numbers in Europe, North America and Oceania [in 2009, around 150,000 persons] received Convention status or subsidiary protection, with accompanying rights necessary for social inclusion.

This being said, there has been a worrying consistency when it comes to the persistent problems. Insecurity and narrowing protection space are prevalent in many countries, with the deliberate targeting of civilians, to destabilise populations through displacement and terror - including by resorting to brutal sexual violence - as we see for example in the DRC. *Refoulement* incidents of high visibility continue. Refugees are frequently hosted in areas too close to conflicts and in environments which represent diverse threats to their physical safety. Urbanisation of refugee situations is making the delivery of assistance and protection both more complicated and less effective, even if it means, to use a popular phrase, less “warehousing.” Refugee education is everywhere a challenge, and particularly problematic against the fact that the non-availability of solutions has left millions of refugees [and internally displaced persons] locked in exile situations for years on end.

If nationality might seem like a universal birthright, an estimated 12 million people around the world – probably a much underestimated number – are struggling to get along without it. This means, in practice, a daily struggle for legitimacy, to establish a legal residence to move freely, to find work, to access medical assistance and education for their children.

There are many asylum systems which remain ineffective or unresponsive, with some purposefully in decline, perhaps aimed at serving a deterrent function. These are the systems which, variously, receive asylum applicants in remote and isolated reception centres; which provide only limited, if any, access to low quality state legal aid and interpretation services; or which lack procedural guarantees for accelerated procedures or for handling claims from vulnerable groups. Many asylum systems are not “child friendly,” take no account of the special circumstances of child applicants, and legitimate the automatic repatriation of children, without resort to established protection, such as best interests of the child determination. Applications based on sexual orientation have been subject also to discriminatory and unproven testing such as phallometry. Detention of asylum-seekers continues to create great individual hardship in many countries and research shows that it has no impact as a deterrent⁷. The duration can be over-long, the conditions unjustifiably harsh and the possibilities for legal oversight or review very limited. It has reached the point in some countries where there are actually more due process safeguards regulating detention of criminals than of asylum-seekers.

In short, in this the 60th anniversary year of the 1951 Refugee Convention, physical insecurity, legal insecurity, socio-economic insecurity and environmental insecurity are commonplace. Quite predictably as a result, so too is forced displacement and, with it, protection gaps. The Middle East unrest may well just reconfigure global politics, and refugee and asylum situations with it. The power of social media as a tool of protection and game-changer when it comes to refugee and migration situations has enormous potential yet to be realised. This is the context for any analysis of the place of the Convention as a protection tool in today’s world.

THE FRAME FOR THE ANALYSIS – PROTECTION TOOLS FOR PROTECTION NEEDS

There are many ways to approach this analysis. I want to do it by categories of situations, where the persons caught up in them will most likely encounter, at some point, the legislation or the practical arrangements States have put in place to meet their own protection responsibilities. The situations can broadly be broken down as follows;

⁷ A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html> [accessed 25 August 2011] and UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, July 2011, available at: <http://www.unhcr.org/refworld/docid/4e315b882.html> [accessed 25 August 2011].

- the “classical” persecution-driven movement where refugees, individually or in small groups, flee state or non-state persecution, including that comprising deliberately targeted acts of violence;
- the mass-influx situations where large-scale displacement is provoked by danger or violence accompanying conflicts or civil disturbance and which overwhelms receiving State apparatuses;
- cross-border displacement provoked by natural disasters or man-made calamities, such as nuclear disasters;
- mixed flows of persons moving as an integral and often indistinguishable part of an asylum/migration movement.

These situations may not always be so easy to distinguish, one from another. Clearly the applicability and utility of the 1951 Convention will differ markedly, situation by situation. An analysis of where and why is a first step to measuring the alleged outdatedness or irrelevance of the Convention and should provide some indication of what, in addition, may be needed.

THE FIRST SITUATION - INDIVIDUAL REFUGEES FROM PERSECUTION AND TARGETED VIOLENCE

(Convention is directly relevant. Problem lies in lack of committed implementation, admittedly facilitated by some generality of text and some gaps which, however, are quite bridgeable, without amendment, through positive interpretations.)

When it comes to refugees from persecution, the 1951 Convention remains the foundation of protection obligations owed to them. It is the one truly universal instrument setting out the baseline principles. The Convention tells us who is a refugee. It requires that refugees should not be returned to face persecution, or the threat of persecution (principle of *non-refoulement*); that protection must be extended to all refugees without discrimination; that persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner, and accordingly, should not be penalised for having entered into or for being illegally in the country where they seek asylum; that given the very serious consequences the expulsion of refugees may have, such a measure should only be adopted in exceptional circumstances directly impacting on national security or public order; that the problem of refugees is social and humanitarian in nature, and therefore should not become a cause of tension between States; that since the grant of asylum may place unduly heavy burdens on certain countries, a satisfactory solution of the problem of refugees can only be achieved through international cooperation; that cooperation of States with the High Commissioner for Refugees is essential if the effective coordination of measures taken to deal with the problem of refugees is to be ensured. Such prohibitions are not time-bound.

The 1951 Convention was drafted to confer a right to protection on persons made otherwise exceptionally vulnerable through being temporarily outside the normal framework of national state protection. Its object and purpose was to give voice and force to rights for refugees, and to responsibilities for their surrogate protection.

In recognition of the importance of these objectives, the Convention is widely adhered to, even if there is still no universal sign-on to it. To date there are 148 States parties to the 1951 Convention and/or its 1967 Protocol. The problem is less the number of accessions and more the will to implement.

Weakened political will to support the Convention has at its root the growing numbers of asylum seekers, exacerbated both by disenchantment with them within civil societies and heightened government concerns about terrorism and transnational crime. Asylum is seen as a costly burden which is not equally distributed; refugees can become a cause of social tensions and a divisive political issue; they can be difficult to extricate from an illegal migration flow in any reliable manner; and when it is all said and done, generosity to them is not understood to be bringing in internationally the political dividends that it used to.

It is, though, not weak political will alone that accounts for the malaise of the Convention today. Part of the problem lies in the Convention text itself which, if the baseline, is also, in many respects a basic statement only.

The scope of the refugee definition in the Convention has long been identified as a limiting factor. In particular, the grounds of persecution stipulated in it leave too much scope for narrow interpretation, making it easier for those so inclined to deny its applicability when it comes to causes not specifically mentioned, such as gender. Partly to promote more modern interpretations, ten years ago we launched a global consultations process on refugee protection. The result was an Agenda for Protection, which has guided the actions of UNHCR, and in many ways those also of States and other protection partners, intergovernmental and non-governmental, for a decade. We have, as a result, guidelines which have helped to modernise the interpretation and application of the Convention regime in important areas, from gender persecution to family reunification, from non *refoulement* to internal protection, from exclusion to cessation, and others as well. We have serious and implementable commitments from States to address more holistically the protection needs of women and children at risk, refugees with disabilities, or urban refugees. Solutions are more actively embraced and strategically used and we have new tools, from the 10-Point Plan for the asylum/migration nexus, to participatory planning for age, gender and diversity sensitive protection.

What we do not have, however, is any firmer commitment than before that asylum for however long will be made available by receiving States to all refugees who need it. It is particularly important to note that absent from the Convention are provisions which specifically compel access to national procedures and the granting of asylum. Even Article 14 of the Universal Declaration of 1949 went no further than to state that “Everyone has the right to seek and enjoy asylum from persecution.” The original formulation, i.e. the right “to be granted asylum” was dropped. Regional instruments have gone further than the international text in this regard, in reverting to the notion of a responsibility to grant. And the European Court of Human Rights recently accepted that the 1951 Convention imposed obligations on States to grant asylum to those who met its protection terms⁸. The Convention, while providing for a whole range of rights

⁸ Case of *M.S.S. v. Belgium and Greece*: A Catalyst in the Re-thinking of the Dublin II Regulation. *Refugee Survey Quarterly*, 30(3): 107-128, January 2011

enjoyed by refugees, does not impose a legal duty on a State which can be construed to require it to admit any particular refugee on any permanent basis however. The Convention only establishes the right of seriously at-risk persons to cross international borders to seek safety until the threat in their home country is eradicated. The non-*refoulement* principle prevents – or should prevent – return to persecution, but non-return can be achieved in a number of ways short of durable entry and stay.

Paradoxically, this could be seen as one of the Convention's strengths, even through the optic of States. Convention-based asylum is not a solution in itself; rather it is a protection mechanism which creates space for solutions to be worked out. It should be re-assuring that Convention protection in fact does not automatically equate only and absolutely with permanency and integration. It can lead to permanent stay, just as it can lead to voluntary repatriation, or resettlement at the right time. States have allowed fears and pressures to cloud perceptions here, sometimes leading to an "either/or", or rather a "neither/nor", approach to implementing the Convention. Concerns about asylum obligations flowing from Convention adherence need to be accordingly tempered.

In short, when it comes to the persecuted refugees the Convention remains the cornerstone of their protection even if the language of some of its provisions has allowed, unfortunately, for over narrow interpretation. In our assessment, there would be too much to lose in trying to amend the core of the Convention to address this problem. Attention could more constructively turn to better methods of implementing the Convention so that States act affirmatively to ensure every refugee has the right to enjoy asylum somewhere and not act in such a manner that renders the right meaningless.

THE SECOND SITUATION – LARGE SCALE INFLUXES INVOLVING [PRESUMPTIVE] REFUGEES

(Convention often more aspirational than actually implemented. Is scope for reinforcing it.)

Armed conflicts continue to displace large numbers of persons. There were reportedly more than 300 armed conflicts in the second half of the 20th century, involving a proliferation of state and non-state actors, causing around 100 million deaths and countless millions of refugees and displaced persons. At least 300,000 people have been killed in Darfur since the conflict erupted in 2003⁹. In Europe last year, around 20% of asylum applicants came from just three countries in conflict: Afghanistan, Iraq and Somalia¹⁰. The roots of the conflicts vary, with many, albeit not all, stemming from causes [including ethnic and religious divisions] which are refugee-generating according to the 1951 Convention and/or the regional refugee instruments, notably the 1969 OAU Refugee Convention.

9 "Darfur security improving, says UN" (AFP) – Jan 20, 2011

10 United Nations High Commissioner for Refugees: "Asylum Levels and Trends in Industrialised Countries", 2009

While doctrinally the Convention should apply in such contexts, in practice it serves more as an aspirational basis for extending protection than the blueprint for what is needed. It is certainly not a good camp management tool, beyond its non-derogable provisions. What is implementable will be much more a product of exigencies on the ground than the letter of the law. In such situations there is a need to complement the Convention framework with additional approaches better tailored to mass arrivals and the complexities thereof.

The sheer size of the outflow is one. It can make individualised identification of refugee status and the grant of all the rights envisaged in the Convention purely impractical, at least in the first instance. Another is that the daunting task of creating a measure of physical security for refugees, as well as for the humanitarian staff, can in practice become the overriding protection objective, necessarily rendering longer term, if even reachable, other aspects of protection envisaged in the Convention. *Prima facie* recognition has become, in effect, one tool employed to circumvent some of the obvious difficulties in applying the more individual-oriented and integration-focused provisions of the Convention, beyond its fundamental protections. As an approach, it has its limits, particularly when it comes to ensuring the civilian character of camps or when complicated issues of status come to the fore, like exclusion or cessation. A bridge certainly needs, in my view, to be built between *prima facie* recognition of refugee status and the Convention regime. We are looking at this.

The Convention's absence of burden-sharing provisions is a clear liability when it comes to mass influx. A recently released World Bank "World Development Report 2011 Background Note" looks at the burdens and opportunities for host States of significant refugee influxes.¹¹ The report records that the largest percentage of refugees [75.19%] is found in countries neighboring their country of origin, more often than not in fragile or low income countries, or housed in low income and fragile border regions, where the economic, social, political and environmental impacts hit hardest.¹² Some of these host states [like Pakistan, Chad or Yemen] are struggling not only with refugee influxes, but also with sub-national conflicts of their own. Some also have large IDP populations to contend with [Pakistan, Sudan, Kenya, Chad, and Yemen]. Often, lack of accountable and responsive governance and rule of law structures, particularly at the local level, is also a feature.

In such circumstances, competition between refugees and local citizens for scarce resources such as water, food and housing can become fierce. Similarly the competing demands on education, health and infrastructure services such as water supply, sanitation and transportation and, in some cases, natural resources such as firewood or grazing land, can heighten social tensions to a breaking point. This becomes more likely the longer the situation drags on.

These facts are a part of the particular and telling context for refugee protection in large scale influxes. Burdens and responsibilities are not well shared at all. In spite of the fact that the 1951 Convention is predicated on international solidarity and sharing responsibilities to balance the burdens, the absence of clear parameters for

11 Margarita Puerto Gomez and Asger Christensen, "The Impacts of Refugees on Neighboring Countries: A Development Challenge," World Development Report 2011 Background Note, World Bank, July 29, 2010.

12 Gomez and Christensen, 3.

burden-sharing is a serious gap in the Convention architecture. There have been several tentative, but ultimately shelved, attempts to articulate general benchmarks. This does not have to mean new instruments. Practical arrangements which offer some dependability would be a real advance. Certainly the Convention needs buttressing in this regard.

THE THIRD SITUATION – DRIVERS OF FORCED DISPLACEMENT OTHER THAN PERSECUTION AND VIOLENCE.

(Different models of protection are likely warranted, as a complement to 1951 Convention refugee protection.)

There is a high probability that patterns of forced displacement will be increasingly impacted by environmental factors such as population growth, declining resources and inequality of access to them, together also with ecological damage and climate change. Natural disasters are forcing more people into displacement inside and outside their countries. Others will be displaced across borders by a combination of factors which leave them very vulnerable, or exacerbate vulnerabilities to the point where flight becomes more feasible than stay.

The legal implications of displacement driven by forces other than persecution, serious human rights violations and ongoing conflict have not been sufficiently examined. The displaced are likely to have many of the same protection needs as Convention refugees as well as different ones - they may for example, be in a legal limbo situation, having lost identity or land title documents, or worse they may have lost family members and be single women heading households, or unaccompanied children. Vulnerability to sexual or gender based violence may be high, including high risks of trafficking of persons.

In spite of such protection needs, the Convention at least as it currently stands, is unlikely to be applicable or applied. Nor should it necessarily have to be. There are instruments other than the Convention which offer greater potential here. As refugee law academic, Guy Goodwin Gill has recently observed:

If the concept of international protection might once have been perceived as merely another form of consular or diplomatic protection, limited to one closely confined category of border crossers, today its roots are securely locked into an international law framework which is still evolving. This encompasses refugee law, human rights law, aspects of international humanitarian law, and elementary considerations of humanity.¹³

While there is an impressive body of jurisprudence being built up by entities such as the European Court of Human Rights, or the CAT Committee, around for example the non-*refoulement* or non-expulsion provisions of the human rights conventions, it is fair to say coverage is still partial. This increasingly inter-connected web of international law is both complicated and sometimes contradictory. The challenge remains to weave it into a coherent and complementary body of protections.

¹³ Guy Goodwin-Gill, High Commissioner's Dialogue on Protection Challenges, December 2, 2010.

It is, however, far from easy to identify the exact unifying threads. At the risk of causing the international law purists some discomfort, I suggest that one that bears looking at in this connection is the principle of asylum. There is a continuing ambiguity in the relationship between Convention refugee status and asylum. They are not one and the same thing. It is true that within the international law framework of the 1951 Convention, asylum has closely accompanied the granting of refugee status, with the content of asylum tending to be most closely attuned to the circumstances and needs of Convention refugees. However asylum is also one of the responses suitable to situations which do not fit the classical refugee paradigm, and which involve the need for protection of temporary duration. This has been partially recognised, particularly in Europe, through subsidiary protection arrangements, but also through discretionary provisions of various sorts in the immigration laws of a number of countries outside this region.

Big immigration countries like the US, Canada and Australia are in fact at this moment discussing, with their European counterparts, to which “emergent scenarios immigration systems must be prepared to respond.”¹⁴ They are posing for analysis such questions as: should a government open its borders to people fleeing a country devastated by disaster, natural or otherwise? If so, then how should a State identify which group of individuals requires additional aid or protection? What categories of aid or protection should a State provide? The questions continue, embracing such issues as whether the aid and protection can be provided by a State outside its territory? The overall issue for the concerned States is framed in part as “defining the limits of what an immigration system can/should reasonably do in response to crises” or “scenarios where migration is one aspect of more complicated problems.”¹⁵ A priority from the State perspective is stated to be preserving the integrity of immigration services during crisis response, but with a focus on response, not denial.

We see such a discussion as being warranted and very timely. Seriously at-risk persons fleeing devastation and disaster do not, yet at least, have a generally recognised right to cross international borders to seek safety until the threat in their home country has passed. Human rights law may be applicable in some situations, but the fact that such temporary protection has not yet achieved broad international endorsement in legal form - as part of the growing fabric of asylum-based responses to interim needs - is a gap both of law and practice. In our assessment the time has come to work with States to develop an internationally agreed doctrine of temporary protection, which would ensure the availability of interim protection to people in temporary need. The beneficiaries must, in the first instance, be made more precise. They could even include, for example, persons who leave situations which constitute the aftermath, but not the continuation, of refugee-producing situations, where the transitional period is nevertheless still uncertain. For temporary protection for whomever to be meaningful, clearer guidance is certainly needed on how and when a temporary protection situation may be declared, what rights it should entail, how to terminate it, and when to conclude that return should or should not be pursued. The indicators of safety have to be made more precise, and the role of voluntariness as an aspect of return in temporary protection situations needs to be better defined. Such

¹⁴ See overall the Theme Paper for the 2010 IGC Full Round, Miami, May 2010

¹⁵ See overall the Theme Paper for the 2010 IGC Full Round, Miami, May 2010

guidelines might even take binding form, at some point, through an instrument on temporary protection.

THE FOURTH SITUATION – MIXED FLOWS INCLUDING MIGRANTS

(Convention is a relevant tool, but not for the migrant element.)

Asylum seekers with justified claims often move together with persons who make no claims to refugee protection, or where they do, on grounds which do not substantiate the claim.

Turning to the migrant element first, while economic push factors can be compelling in themselves, by and large [cumulative and persecutory deprivations aside], they were never intended to be addressed through refugee protection mechanisms, and certainly not the 1951 Convention. It seems obvious, but is worth stressing nevertheless, that this is not a failing of the Convention, which cannot be held responsible for States' incapacity to effectively manage irregular migration. The Convention does impact on the sovereign right to regulate borders, but only with a view to introducing a needed exception for a defined category of persons. Its purpose was not broader.

It requires no great leap of the imagination to understand why there are so many irregular migrants in today's world. This year's Human Development report, 2010, contains a wealth of interesting statistical data. It concludes that:

People around the world have experienced dramatic improvements in some key aspects of their lives. They are healthier, more educated and wealthier and have greater power to select their leaders than at any other time in history. But the pace of progress is highly variable and people in some countries and regions have experienced far slower improvements. Stark inequalities and vulnerabilities remain and are increasing in many places, giving rise to – and reflecting – acute power imbalances.¹⁶

Events in the Middle East at the moment certainly bear this out.

More specifically the Report draws attention to some telling facts:

-a significant aggregate progress in health, education and income is qualified by high and persistent inequality, unsustainable production patterns and disempowerment of large groups of people around the world¹⁷

-an estimated one third of the population in 104 developing countries, or approx 1.75 billion people, experience multi-dimensional poverty¹⁸

-international, inter-group and interpersonal inequalities remain huge in all dimensions of well being, and income disparities are on the rise¹⁹

¹⁶ United Nations Development Programme, *Human Development Report 2010* (New York: UNDP, 2010), 118.

¹⁷ United Nations Development Programme, 85.

¹⁸ United Nations Development Programme, 86.

¹⁹ United Nations Development Programme, 101.

The plight of migrants in humanitarian need can be particularly dire. This can include the so-called “stranded migrants” we have seen so many of recently, as a result of the unfolding events in Libya - witness the mass exodus of migrant workers from Bangladesh, Egypt, Chad or Ghana for example - and the humanitarian rescue operation still underway. But the turmoil in the region is presenting the international community with quite a mosaic of challenges going beyond returning the stranded migrants. There were at one point close to 5000 Tunisians on the southern Italian island of Lampedusa, in a one-to-one ratio with the local population. Most said that they had come to look for employment. The 25,000 persons, many of them Tunisians, who are known to have come to or through Italy, and who are now comprising a stream of irregular onward movers into France and beyond, could well lead to partial unraveling of hitherto sacrosanct EU innovations, such as free movement under the Schengen arrangements.

The 1951 Convention is obviously not the answer here. In fact, with the Italian authorities having initially designated many of the new arrivals as asylum-seekers, had it continued, this could have served to undermine the integrity of asylum in Italy.

Adam Smith advocated “the ability to go without shame”. UNHCR has promoted for some time now a more imaginative approach to accessible migration channels as an alternative to unduly stretching international instruments to accommodate short or medium term socio-economic stresses. The link between easing the strain on asylum systems and the creation of more accessible temporary migration channels is obvious. Iran has begun to use it to positive effect with Afghan migrant arrivals. Thailand and Malaysia have unmet labour needs which irregular migrants help to satisfy. Whatever ideas are explored, innovative thinking is called for which stimulates development of migration opportunities.

Mixed flows by definition include not only regular migrants, but also others who may have compelling protection needs of various sorts, refugee-related or not. Migration as a so-called “fourth solution” in refugee situations is, incidentally, an approach we are advocating to address some protracted situations of displacement. More generally, and in recognition of the fact that refugees and non-refugees do resort to the same route and means of departure. UNHCR developed and has been actively promoting use of its “10-Point Plan of Action on Refugee Protection and Mixed Migration.” The plan, conceived of as a planning and management tool, has found wide favour globally with governments and intergovernmental and non-governmental entities, and is increasingly resorted to. The goal of the plan, simply put, is to ensure: [1] that people who need protection receive it; [2] that those who do not are assisted to return home; and [3] that all people are treated with dignity while appropriate solutions are found.

The Plan has found a particular use in mixed flow situations which have regional dimensions, impacting several countries. The South East Asian region is one area where regional approaches are starting to be more actively explored, including through the colloquially titled “Bali Process”, led with some resolution by Indonesia and Australia. The countries in the region are now more accepting of the fact that the diversity of national responses to mixed flows has become part of the problem in itself, in that it has distorted the push and pull factors influencing the choices of the people moving and has facilitated their exploitation by people smugglers and human

traffickers. From UNHCR's particular perspective this has also meant instability and unpredictability for protection delivery and in the realisation of longer term solutions for the persons of our concern. Hence we have been prepared to work cooperatively with efforts now underway to complement and embed national and bilateral responses within a regional approach which takes careful cognizance of the 10-Point Plan framework. For example, we are currently looking at how regional protection mechanisms which contribute to capacity building and ensure better burden-sharing for solutions, as well as facilitate returns, might be developed as a complement to national asylum systems. These would relieve some of the pressures or distortions of push and pull factors and secondary movement, which is particularly of interest where people smuggling and human trafficking have compromised the capacity of national systems to fully perform.

CONCLUSIONS

I used to argue that there is no real difference between the refugee problem and the asylum problem which would justify some of the distinctions being made in Europe and elsewhere. The argument went that a refugee is a refugee whether she is present as part of a mass influx into a neighbouring country or whether she presents her claim for recognition after irregular entry into a chosen state further afield. It is only double standards that drive a policy which becomes more generous and sensitive to refugee protection needs the further away these needs are able to be addressed, and that to locate the response to refugee influxes in the foreign affairs portfolio and the response to asylum arrivals in the immigration or interior portfolio was at best ingenious.

Intellectually, this is of course a legitimate way to reason. However I believe there is a strengthening argument to be made that protecting the persecuted and dealing with asylum dilemmas are tasks which, in some important respects, may have to proceed on common foundations but somewhat different tracks.

At the risk of over-simplifying the analysis, when a problem is genuinely one of refugee protection, protection responsibilities are a given and the challenge is not whether but how to deliver upon them, particularly against the backdrop of large-scale displacement situations and unequal distributions of burdens. The asylum problem is becoming a sub-set of more nuanced issues within the refugee problem broadly defined. At essence the challenge is to determine to whom protection is owed, with what content and for how long, in what circumstances.²⁰ This is more complicated than it used to be against the realities of mixed asylum and migration flows, the specter of environmentally driven displacement on the rise, and with the international environment increasingly unpredictable and insecure.

The conclusion I then reach is that it would be irresponsible not to review the role of the 1951 Convention, to recognise and reaffirm its enduring strengths but also to

²⁰ See, e.g., Presentation by Alice Edwards, Senior Legal Coordinator and Chief, Protection Policy and Legal Advice Section, Division of International Protection, UNHCR, to the Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity, Prato, 2 May 2011, entitled: "Rethinking the right to asylum and the notion of temporary protection", which examined the legal basis, if any, for derogating from 1951 Convention obligations in mass influx situations. Publication forthcoming.

buttress it when it comes to the “refugee problem” in all its dimensions, where these are understood to include asylum/migration nexus issues and new drivers of displacement. This is not, at all, to argue against the centrality of the Convention. It is though to suggest it needs to be built upon, even legally.

In a pertinent comment, and in his personal capacity, the former Legal Advisor to the British Foreign Office, Daniel Bethlehem recently observed: “We the international legal community need to have a clear vision of international society [as well as] the role that the law can and should play in shaping that society in ways that will be most conducive to its peaceful and productive development.”²¹ Are we, he asks, “seeing the world in sufficiently non-parochial terms to allow us to take comfort that we are seeing the challenges sufficiently clearly, or indeed at all.”²² Any review of the international legal system and its adequacy to meet new challenges should particularly be shaped by, among other considerations: the international environment with all its now shared spaces and global commons; the movement of people and the economic flows as well as the civic and social integration that goes with this; the challenges to human, animal and plant life and health, and to global food security that comes from a growing interdependent world; and the challenges and opportunities of technological and cyber systems.

Close to 33 years ago the General Assembly was invited to reconsider, when the time would be ripe, the reconvening of the Conference on Territorial Asylum. Perhaps the time has arrived.

²¹ Daniel Bethlehem, “The End of Geography.” (Comments on the Keynote Address at the Biennial Conference of the European Society of International Law, Cambridge, September 2-4, 2010).

²² Bethlehem, “The End of Geography.”

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