



The 1951 Convention relating to the Status of Refugees: Its Relevance in the Contemporary Context

The significance of the Convention

1. The 1951 Convention relating to the Status of Refugees, as complemented by its 1967 Protocol, has justly been termed the “Magna Carta” of refugees. The Convention and Protocol are, indeed, the culmination of an uninterrupted effort by the international community, started under the League of Nations in 1921, to ensure the international recognition of some basic rights and of certain minimum standards of treatment for persons forced to flee their country in order to escape persecution on account of their race, religion, nationality, political opinion or membership of a particular social group.

2. The fundamental importance of the 1951 Convention and 1967 Protocol was stressed by the World Conference on Human Rights held in Vienna in 1993, and has been repeatedly affirmed by the General Assembly of the United Nations, which has hailed the Convention and Protocol as “the cornerstone of the international system for the protection of refugees”.¹

3. The Executive Committee of UNHCR has also emphasised the primacy of these instruments, and confirmed that they form the international legal basis for the protection of refugees.²

4. The letter and spirit of the 1951 Convention indicate that the foundation concepts of the refugee Protection regime include the following: (i) that refugees should not be returned to face persecution or the threat of persecution (principle of *non-refoulement*); (ii) that protection must be extended to all refugees without discrimination; (iii) that the problem of refugees is social and humanitarian in nature and, therefore, should not become a cause of tension between States; (iv) 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 co-operation; (v) 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

¹ The most recent resolution to this effect is No. 52/103 of 12 December 1997.

² See Conclusions Nos. 4 (XXVIII) of 1977, 8 (XXVIII) of 1977, 11 (XXIX) of 1978, 14 (XXX) of 1979, 16 (XXXI) of 1980, 19 (XXXI) of 1980, 21 (XXXII) of 1981, 25 (XXXIII) of 1982, 28 (XXXIII) of 1982, 29 (XXXIV) of 1983, 33 (XXXV) of 1984, 36 (XXXVI) of 1985, 41 (XXXVII) of 1986, 42 (XXXVII) of 1986, 43 (XXXVII) of 1986, 46 (XXXVIII) of 1987, 51 (XXXIX) of 1988, 55 (XL) of 1989, 57 (XL) of 1989, 61 (XLI) of 1990, 65 (XLII) of 1991, 68 (XLIII) of 1992, 71 (XLIV) of 1993, 74 (XLV) of 1994, 77 (XLVI) of 1995, 79 (XLVII) of 1996, 81 (XLVIII) of 1997, 11 (XXIX) of 1978, and 82 (XLVIII) of 1997.

country where they seek asylum; (vi) that given the very serious consequences that the expulsion of refugees may have, such measures should only be adopted in exceptional circumstances directly impacting on national security or public order; (vii) that co-operation of States with the High Commissioner for Refugees is essential if the effective co-ordination of measures taken to deal with the problem of refugees is to be ensured.

5. The importance of the Convention lies not only in the fact that it is a landmark in the setting of standards for the treatment of refugees. The Convention is also important because it constitutes one of the most remarkable achievements in the long battle for the realisation of the ideal proclaimed in the Charter of the United Nations, of ensuring universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. It is highly significant in this connection that the most fundamental of the principles embodied in this instrument, the principle of *non-refoulement*, has been reflected in a number of universal and regional human rights instruments, and is now recognised to have become a general principle of customary international law, binding on all States.

The Convention and new refugee situations

6. It is sometimes argued that the 1951 Convention does not provide a suitable legal frame for addressing present-day refugee problems, as these are often caused by war and conflicts. This argument is fallacious. Even in war or conflict situations persons may be forced to flee on account of a well-founded fear of persecution for Convention reasons. This fact has been acknowledged by the Executive Committee of UNHCR.³

7. Moreover, it is nowadays widely recognised that war and violence may be used as instruments of persecution - they may be the means chosen by the persecutors to repress or eliminate specific groups, targeted on account of their ethnicity or other affiliations. The Executive Committee reaffirmed this most recently during its 1998 session, when it adopted the following Conclusion by consensus:

“The Executive Committee,

(...)

Expresses deep concern about the increasing use of war and violence as a means to carry out persecutory policies against groups targeted on account of their race, religion, nationality, membership of a particular social group, or political opinion”.

8. The recent conflicts in former Yugoslavia, in the Great Lakes region of Africa, and in Kosovo are striking examples of situations where violence has been used as a means to persecute specific communities, and where ethnic or religious “cleansing” has been the ultimate purpose of war. These conflicts provide a clear illustration of the fact that persecution is still very much a reality, and that, whether occurring in time of peace or in

³ See, for instance, paragraph (I) of Conclusion No. 74 (XLV) of 1994.

the context of war or conflict, it remains one of the most important causes of forced displacements of populations.

Responses to situations of large-scale influx

9. There is no doubt that actual or potential victims of persecution in the context of war or conflict should, in principle, be considered as refugees under the 1951 Convention and 1967 Protocol. Individual determination of asylum requests under screening regimes set up to implement the Convention and Protocol may however prove impractical in the case of large-scale influxes. It is therefore generally accepted that, in situations of large-scale influx occurring under circumstances that indicate that members of the group could be considered individually as refugees, recourse may be had to the so-called “*prima facie*” or “group” status determination.

10. Group determination is, though, neither incompatible with nor a substitute for the protection regime under the Convention and Protocol. The Convention and Protocol remain the firm and universally accepted basis for the protection of those who have been forced to leave their country owing to serious threats to their fundamental human rights to life, security, freedoms and dignity. Group determination is a device to ensure an acceptable measure of protection, based on fundamental rights and guarantees, without the prior examination of claims on an individual basis in the first instance. It serves as the guarantee of essential and needed sanctuary to victims of war, conflict or violence (including victims of persecution carried out in the context of war, conflict or violence) who have entered a country as part of a mass influx.

11. As regards the standards of treatment applicable to asylum-seekers who arrive as part of a mass influx, the Executive Committee of UNHCR has recommended certain minimum standards that States should observe.⁴ The standards in question require that the principle of *non-refoulement*, including non-rejection at frontiers, be respected under all circumstances; that the displaced receive admission to safety; that their essential human rights be enumerated and guaranteed; and that UNHCR be given unrestricted access to persons of its concern.⁵

⁴ See Conclusion No. 22 of 1981, concerning Protection of Asylum-seekers in Situations of Large-scale Influx.

⁵ Also relevant to the treatment of refugees in situations of large-scale influx is the extended definition of the notion of refugee contained in the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa. According to Article 1(2) of that Convention, the term “refugee” applies, in addition to the categories of persons specified in the 1951 Convention and 1967 Protocol, to persons uprooted from their country owing to external aggression, occupation, foreign domination or events seriously disturbing public order. In Latin-America, the 1984 Cartagena Declaration contains a similarly extended definition of the notion of refugee. Even though these definitions do not point directly at the massive nature of the influx of refugees, but rather refer to its causes, the two issues are closely linked, since persons leaving their country in the context of war or conflict usually form part of large-scale movements and are recognised on a *prima facie* basis.

12. There has been a gradual evolution in thinking since the Executive Committee first turned its attention to protection standards in mass influx situations. This evolution is reflected not least in the development of the concept of temporary protection, which has found expression in the legislation of a number of States. Temporary protection is a practical device allowing for a principled response by States to large numbers of asylum-seekers displaced by war and generalised violence. Where individual status determination is too cumbersome or even impossible, protection is nevertheless ensured with basic rights guaranteed albeit on the basis of temporary stay in the country of asylum. Temporary protection is not a solution in itself, but an interim protection measure and an essential component of a comprehensive approach based on burden-sharing and international solidarity. It is not a new principle as such, but a measure which complements protection under the Convention by ensuring that its fundamental purposes are respected even while its application is temporarily suspended for a particular group of arrivals. The ending of temporary protection does not, however, entail that all those who benefited from it can safely return to their countries of origin. Persons who have a well-founded fear of being persecuted for Convention reasons may not be able to return, and should be entitled to access refugee status determination procedures, with the Convention becoming again fully applicable.

13. As is clear from the above, the 1951 Convention remains the starting point for protection-based responses to mass arrivals of asylum-seekers. It may, however, need to be supplemented by complementary mechanisms, notably as regards persons fleeing indiscriminate violence which is not persecution-based. The need to accord protection to this category of individuals has been recognised in a number of national legislations in the form of “humanitarian status”, “de facto status”, “exceptional leave to remain”, “B status”, etc. These complementary mechanisms for protection are based on the fundamental universal principles enshrined in the Convention and developed in EXCOM Conclusions and through State practice.

Concluding observations

14. An analysis of contemporary refugee movements shows that persecution, whether occurring in time of peace or in the context of war or conflict, remains one of their principal causes. As such, there can be no doubt that the protection regime established under the 1951 Convention and 1967 Protocol remains the most relevant universal basis for addressing refugee problems.

15. A proper application of the 1951 Convention would cover many of the current categories of victims of conflict. Suggestions for new instruments to fill supposed gaps confuse the failure to apply properly the existing basic treaty obligations in this area with perceived defects in the instruments themselves. Such suggestions are a dangerous encouragement to States to move from the only agreed legal basis for refugee protection to less binding and more popular political options.

16. In fact, the major problems in protection of refugees today come from non-compliance with, or unduly narrow application of the existing refugee treaties. Contrary to the objects of the 1951 Convention regime, current policies and practices in some regions are aimed more at restricting access to safety than at facilitating such access. The prime need today is for the uniform, liberal and positive application of existing refugee instruments.

17. The protection needs of persons in situations of mass influx and of persons leaving their countries to escape indiscriminate violence arising in the context of war and conflicts can and should be filled through complementary forms of protection. These complementary forms of protection should be based on, and should be fully in keeping with the letter and spirit of the 1951 Convention.