

59th Course on International Refugee Law
International Institute of Humanitarian Law
San Remo, Italy, 21 March 2011

Opening lecture

Alice Edwards

Senior Legal Coordinator, Division of International Protection, UNHCR

**“The International Protection Regime and the Right to Asylum:
Development and Challenges”**

Thank you very much for the kind invitation to give the opening lecture to the 59th session of the Institute’s International Refugee Law course. It has been 10 years since I was last here – during the Global Consultations on International Protection to celebrate the 50th anniversary of the *1951 Convention relating to the Status of Refugees*, when we were discussing issues of membership of a particular social group, gender-related persecution and internal flight-relocation alternative. Now, in the 60th anniversary year of the 1951 Convention, it is a particularly apposite time to be studying, and to be reflecting on, the current international protection regime. Moreover, the events of the past few months in both North and West Africa have put the international protection regime and the correlative right to asylum under the spotlight.

The political instability and rising tensions in Côte d’Ivoire have displaced close to half a million people inside and outside the country. Nearly 80,000 Ivorians have now been registered with UNHCR in neighbouring Liberia, while smaller numbers have made their way to other countries in the region. The majority of refugees in Liberia are being hosted in more than 76 border villages, most of which are in remote, inaccessible locations. Many countries in the region, including Liberia, Guinea and Togo, have declared such persons to be refugees on a prima facie basis under the regional OAU Refugee Convention and borders remain open, while several European countries quickly declared moratoriums on returns of rejected asylum-seekers to Côte d’Ivoire. The fighting appears to be escalating and spreading, especially in the west of the country and in Abidjan, where urban forms of warfare are challenging normal protection responses and the operational environment.

Meanwhile, in North Africa, the political instability spreading throughout the region is having an impact on the ability and willingness of governments to respond to the escalating unrest and violence in Libya. Yesterday, in accordance with UN Security Council resolution 1973, the no-fly zone established over Libyan airspace began being enforced. It is not yet clear what the effects of these measures will be. But even before Sunday’s military operations, hundreds of thousands of persons had been trying to enter the land borders of Egypt and Tunisia, countries which themselves are just emerging from their own political revolutions and are unable to deal with the scale of the refugee influx without international support. Many of these persons crossing the border are migrant workers, with massive humanitarian evacuation operations underway to transport them home. To date, close to 500,000 persons have left Libya to neighbouring countries, while 200 evacuation flights have been organized and have transported around 35,000 persons home. Many more are making hazardous sea

journeys to Europe, while there are reports of others heading south towards Niger. Amongst those fleeing are Libyans as well as many third country nationals, including refugees from Eritrea, Somalia, Ethiopia and Palestine. Many are being denied entry to neighbouring countries, while there have also been reports of groups being corralled and held at gunpoint and being prevented from leaving Libya. Other information suggests that sub-Saharan Africans are being singled out by the Gaddafi regime and targeted as alleged “mercenaries” and thus they face particular threats inside the country. UNHCR’s emergency hotline has received many calls from individuals too scared to leave their apartments or homes.

While the focus of international attention falls on North Africa and the Middle East, we should not lose sight of the many protracted displacement situations in other parts of the world, for example, in Afghanistan, the Congo, and in Darfur, Sudan.

So what does the international protection regime provide in such circumstances, and can the 1951 Convention still meet these challenges?

The concept of asylum or sanctuary is as ancient as ancient Greece. Its modern manifestation is located in the *1948 Universal Declaration of Human Rights* (UDHR), in which Article 14(1) provides that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” This right was translated into binding form in the 1951 Convention, in which the definition of a “refugee” was framed as anyone who was outside their country of origin before 1 January 1951 and as a result of events in Europe had a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.” It is thus both a post-World War II and a Cold War instrument. This means that it has both humanitarian as well as political underpinnings. In 1967, the Convention was amended to remove the geographical and temporal limitations and to make it truly universal in scope.

The 1951 Convention rests on three fundamental principles: First, the principle of non-discrimination – that individuals should enjoy the same rights regardless of immigration or other status except where distinctions can be objectively justified. Second, the principle of *non-refoulement* – which provides protection of individuals from return to threats to life or freedom - is fundamental; and the third principle is the guarantee of non-penalization for persons showing “good cause” for having entered or stayed in the territory illegally. Noting that persons in flight are rarely able to satisfy immigration entry requirements,¹ the Conference of Plenipotentiaries noted that “good cause” would include those fleeing persecution, but also that there could be other good causes.² In addition, Articles 3 to 34 of the Convention contain a number of rights, from the right to access courts to the rights to be issued identity and travel documents, freedom of movement and work rights. These rights are to be acquired progressively, that is, the longer one stays in the country of asylum the more rights accumulate.

Despite its purported universality, Africa in 1969 and Latin America in 1984 adopted their own instruments, which expanded considerably the definition of a refugee to include persons fleeing their own countries for reasons of, inter alia, foreign aggression, occupation, conflict, generalized violence, massive human rights violations, or serious disturbances to public order. Both regions were suffering from massive human displacement at the relevant time and sought a broader and more objective approach to refugee status. The 1951 Convention

¹ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records UN doc. A/CONF.2/SR.14 (M. Colemar, France).

² For an overview of the travaux relating to Article 31, see G.S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, detention, and protection” in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003), 186.

however was endorsed in these later instruments as the “basic and universal instrument”³ on which they were to build. The European Union has also expanded its legislative commitments to persons in need of international protection, including those who cannot be returned owing to a real risk of serious harm arising from torture or inhuman or degrading treatment or who face indiscriminate violence in situations of international or internal armed conflict.⁴ Meanwhile most countries in Asia, host to very large populations of refugees, have yet to accede to the 1951 Convention regime, but they do observe many of its central tenets.

There have long been questions raised about the scope and limits on asylum and who qualifies for the status and rights of a “refugee” under the 1951 Convention. Andrew Shacknove in 1985 noted that 1951 Convention refugee status is limited to a privileged class of aliens fleeing life-threatening conditions. However, he questioned the specific form of harm that refugees suffer – persecution – as justifying their special treatment. In arguing that “persecution is a sufficient, but not a necessary, condition for refugeehood”,⁵ he identified a refugee as someone “whose basic needs are unprotected by their country of origin, who have no remaining resources other than to seek international restitution of their needs, and who are so situated that international assistance is possible.”⁶ Shacknove highlighted three basic threats to individuals that deserved international attention – persecution, vital (economic) subsistence and natural calamities. Under the 1951 Convention, only the first normally qualifies for refugee status.⁷

Shacknove further argued that refugeehood is “conceptually ... unrelated to migration”⁸ in the sense that one can be a refugee within the borders of one’s own state. This was one of the first articulations from the perspective of legal ethics that persons who are internally displaced (IDPs) ought to also benefit from international protection. Today this is well accepted in the form of the Guiding Principles on Internal Displacement, which consolidates existing international law, as well as through international community engagement in IDP situations and the provision of humanitarian assistance under the UN’s Emergency Relief Coordinator. UNHCR also plays a lead role in relation to IDPs, specifically in relation to protection issues.

In tracing the historical progression of the concept of asylum and the definition of a “refugee”, Jerzy Sztucki clarified in a 1999 book chapter that: “The [1951] definition has been premised on what may be called peacetime persecution inherent in the ‘normal’ functioning of oppressive regimes”.⁹ Yet, as the groups of persons benefiting from *non-refoulement* protection have grown markedly since 1951 – to include, for example, persons fleeing gender-related forms of persecution and other serious human rights violations – Sztucki

³ OAU Convention governing the Specific Problems of Refugees in Africa, pmbl para. 9; Cartagena Declaration on Refugees, paras. 1-3.

⁴ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal L 304*, 30/09/2004 P. 0012 – 0023, Article 15.

⁵ A. Shacknove, “Who is a Refugee?” (1985) 95 *Ethics* 274, 277.

⁶ *Ibid.*

⁷ UNHCR, Handbook on Procedures and Criteria for Refugee Status, 1992, HCR/IP/4/Eng/REV.1, para. 63-4 (on economic migrants and refugees). See, M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007), for an alternative position.

⁸ Shacknove, p. 283.

⁹ J. Sztucki, “Who is a Refugee? The Convention Definition: Universal or Obsolete?” in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 55, p. 57.

observes that: "It is no longer the quality of 'refugee', however defined, which entitles one to protection. It is the need for protection that entitles one to treatment as a refugee".¹⁰

With many contemporary forms of displacement not matching the historical roots to the 1951 Convention, various scholars and policy-makers have been examining ways to address these modern challenges. For example, Alexander Betts, an international relations scholar, has advanced the need for a broader framework, what he calls "survival migration" and which could encompass persons who are "outside their country of origin because of an existential threat to which they have no access to a domestic remedy or resolution".¹¹ In making his proposal, Betts had in mind in particular the large number of Zimbabweans seeking sanctuary in South Africa, who leave their homes on account of a complex mixture of impetuses including environmental and livelihood factors plus those related to state fragility or collapse. It is arguable however that many within the broader group of Zimbabweans could be subsumed under the "public disorder" ground of the OAU Convention, properly interpreted; while others may meet the 1951 Convention definition.

In the 2010 High Commissioner for Refugees' Dialogue, he indicated that there are many persons who remain unprotected, including those fleeing conflict or the indiscriminate effects of generalized violence, natural disasters, severe socio-economic deprivation, or persons caught in mixed migration movements and who cannot for legal or practical reasons be returned home (or so-called "stranded migrants").¹² While the majority of such movement will likely be internal, it is inevitable that some will also be external. Either way the international community must be ready to respond. The High Commissioner queried whether there was a need for a set of guiding principles or a new instrument to respond to these growing, challenges. A secondary question might be whether the international community of states is ready to accept additional obligations.

A further challenge to the international system rests in the regional disparities in protection instruments, such that protection may be based on geographic location. To put it another way: where one is located or to where one flees can determine the greater or lesser chance of falling within a legal protection framework. Protection in practice is thus often divorced from the need for it, and this too challenges the universality of international protection. Of course, to a considerable extent, the inter-state system has always evidenced diverse state practices; and one might see that the problem lies not in regional instruments that provide higher or more generous protection standards, but rather in regions where there is an absence or lack of protection.

In situations of mass influx, such as Libya and Côte d'Ivoire, the Executive Committee of UNHCR's Programme has confirmed that, at a minimum, refugees and others in need of international protection must be ensured admission to safety, respect for basic human rights, protection against *refoulement*, and safe return when conditions permit to the country of origin.¹³ In fact, it could be argued that the core content of asylum has become entrenched. It is widely accepted, for example, that the principle of *non-refoulement*, as reflected in Article 33(1) of the 1951 Convention at a minimum, has crystallized as a principle of customary international law.¹⁴ Meanwhile, the obligation "to grant" asylum under the 1951

¹⁰ *Ibid.*, p. 67.

¹¹ A. Betts, "Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants" (2010) 22 *Int'l J. Refugee L.* 209, p. 219.

¹² High Commissioner's Dialogue on Protection Gaps, Closing Remarks, 9 December 2010, available at: <http://www.unhcr.org/pages/4ca099226.html>.

¹³ Executive Committee Conclusion No. 22 (XXXII) (1981), Protection of Asylum-Seekers in Situations of Large-Scale Influx.

¹⁴ *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol*

Convention, which has long been disputed by states as falling wholly within their sovereign discretion and framed only as a right “to seek” it, was recently recognized as an obligation to “grant” asylum by the Grand Chamber of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*.¹⁵ Regional human rights treaties also go further than Article 14 of the UDHR in recognizing rights to “obtain” or “be granted” asylum.¹⁶

So, with all this in mind, to what extent is it possible in real terms to advance a new conception of asylum at this juncture in history?

Matthew Gibney reminds us of the particular challenge ahead:

in the midst of scarcity of entrance places and different categories of people in need, which claimants for entry deserve priority in immigration admissions? To what extent, if at all, is it legitimate to curtail the rights of asylum seekers and refugees in order to maximise the number of refugees receiving asylum overall?¹⁷

Mathew Price, too, identifies two contradictory trends in international protection over the last two decades: one trend is in the direction of “liberalization”, which he says is manifest in court decisions granting asylum to “previously excluded applicants”. The other trend is in the direction of “restriction, stimulated by public resistance to rising numbers of applicants.”¹⁸ In other words there is a paradox - while the 1951 Convention is being more broadly interpreted and applied in some jurisdictions, accessing asylum is being made more difficult by various restrictive measures. These measures have included containment in regions or countries of origin through the application of such notions as “safe third country” or “safe country of origin”, resort to accelerated procedures, increasing rates of administrative detention, interception and interdiction measures, visa controls, and carrier sanctions. Despite the existence of a state’s international legal obligations, asylum is a “global public good”¹⁹, whose benefits are non-excludable, and thus there are only so many incentives for international cooperation. Today’s political context makes asylum a limited resource or a limited public good: *that is*, the less persons who are seeking to enter a state’s territory, the more rights tend to be made available to them (which matches the limited reach of the 1951 Convention’s definition and the broad set of rights contained therein), whereas the more persons who seek to enter, the less rights seem to be available.

The unrest in Libya is one such example where this is very clearly being played out, not least in connection with the history and continuing practice of interception in the Mediterranean. Yet, at the same time, we are witness to a massive humanitarian evacuation operation, alongside the international community’s resolve to secure the safety of Libyan nationals and others inside the country, as well as the peoples’ right to political self-determination. Additionally, in West Africa, the continuing generosity of many African states in accepting

Relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09 at para. 4.

¹⁵ *M.S.S. v. Belgium and Greece*, European Court of Human Rights, Application No. 30696/09, 21 January 2011, para. 54: “Belgium and Greece have ratified the 1951 Geneva Convention relating to the Status of Refugees (“the Geneva Convention”), which defines the circumstances in which a State must grant refugee status to those who request it, as well as the rights and duties of such persons.”

¹⁶ See, e.g., Article 12(1), African Charter on Human and Peoples’ Rights 1984; Article 22(7), American Convention on Human Rights; Article 18(1), European Charter on Fundamental Rights and Freedoms.

¹⁷ M. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response of Refugees* (2004), p. 5.

¹⁸ M. Price, *Rethinking Asylum: History, Purpose and Limits* (2009), p. 11.

¹⁹ A. Suhrke, “Burden-Sharing During Refugee Emergencies: The Logic of Collective Action versus National Action” (1998) 11(4) *J. Refugee Studies* 396.

Ivorians as refugees on a group basis is noted, which illustrates that the concept of asylum and regional hospitality is far from a relic of the past and is very much a relevant concept to contemporary crises. Nonetheless, the international protection regime remains fragmented and has yet to cover the entire range of persons fleeing serious threats to their life or freedom, even temporarily.

While there is concern that any re-examination of the 1951 Convention may lead to an inferior system of asylum and rights today and that this must be guarded against, the underlying premises of the 1951 Convention – those of non-discrimination, *non-refoulement*, non-penalization and basic human rights – are alive and well, especially when the stakes are high, the humanitarian needs are great, and the lives of people are at grave risk.

I leave these issues and questions for you to digest over the coming days, and I'd be happy to take questions and comments.

Thank you.