

# International refugee protection 50 years on: The protection challenges of the past, present and future

by

**ERIKA FELLER**

**H**eadlines repeatedly proclaim: “Experts meet in Dublin to discuss child asylum seekers”; “More refugees flee to the Gambia from Senegal’s Casamance province”; “73 illegal immigrants detained in Austria at weekend”; “UNHCR to repatriate more Tanzanian refugees in Kenya”; “Afghanistan: Taliban impose Islamic law on aid workers”; “East Timorese refugees in West Timor to vote on repatriation”; “Residents, army fear rebel assault on Burundi capital”; “1,600 Sudanese refugees enter Uganda”; “Scotland: asylum hate ‘shames city’”; “Immigrants are seeking asylum in out-dated law”. These are just some of the press headlines featuring refugee issues in May/June 2001.

To begin to appreciate the scale of humanitarian need underlying the work of international refugee protection, it is enough to look at refugee statistics showing that UNHCR has responsibility for some 22 million persons in 160 countries, of which the majority are women, children and the elderly. While there is little cause for celebration of the 50th anniversary of UNHCR and the 1951 Convention relating to the Status of Refugees, it provides an opportunity to reflect seriously on the point now reached in refugee protection and where it could or should go from here.

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ERIKA FELLER is Director of the Department of International Protection, Office of the United Nations High Commissioner for Refugees (UNHCR).

This article first outlines the refugee protection regime and its key components, then it portrays past developments in the refugee field, looks into the question as to whether the 1951 Convention is outdated and takes stock of current protection challenges. Finally, it illustrates the current dialogue on how these challenges could be met.

### **Refugee protection regime**

The refugee protection regime, within which the United Nations High Commissioner for Refugees discharges his mandated functions, has its origins in general principles of human rights. At the same time, it is firmly founded on treaty and customary law obligations, particularly those flowing from the 1951 Convention and its 1967 Protocol, 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.

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 141 States Parties of their commitment to uphold and protect the rights of some of the world’s most vulnerable and disadvantaged people.

The 1951 Convention is a landmark in the setting of standards for the treatment of refugees. It incorporates, either directly or as an inevitable interpretation, the fundamental concepts of the refugee protection regime, which are as relevant in the contemporary context as they were in 1951. These include the following:

- that refugees should not be returned to persecution or the threat of persecution (the principle of *non-refoulement*);

- that protection must be extended to all refugees without discrimination;
- 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 be achieved only through international cooperation;
- that persons escaping persecution cannot be expected always to leave their country and enter another country in a regular manner and, accordingly, should not be penalized for having entered into or being illegally in the country where they seek asylum;
- that given the very serious consequences that the expulsion of refugees may have, this should only be resorted to in exceptional circumstances to protect national security or public order; and
- that cooperation by 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.

In addition, refugee protection also embraces the safeguarding of basic human rights placed in particular jeopardy in refugee situations —the right to life, liberty and security of person, the right to be free from torture and other cruel or degrading treatment, the right not be discriminated against, 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).

These fundamental concepts remain intrinsically sound as the framework for refugee protection fifty years after the adoption, on 28 July 1951, of the Convention relating to the Status of Refugees, although it is true that contemporary realities on the ground demand some adjustment. There are gaps in protection which need to be bridged through complementary mechanisms and some necessary evolution of the principles, as outlined in the next chapters. How innovative one really needs to be, however, and to what end, are both the subject of heated debate.

### **Past developments in the refugee field**

Refugees have been around for as long as history, but an awareness of the responsibility of the international community to provide protection and find solutions for them dates only from the time of the League of Nations and the appointment of Dr Fridtjof Nansen as the first High Commissioner for Russian refugees in 1921. For the League of Nations, refugees were defined by categories specifically in relation to their country of origin. Dr Nansen's mandate was subsequently extended to other groups of refugees, to include Armenians (1924), as well as Assyrian, Assyro-Chaldean and Turkish refugees (1928). First, the League of Nations and later the United Nations established and dismantled several international institutions devoted to refugees in Europe. The International Refugee Organization (IRO) was the last to precede UNHCR. The IRO was created in mid-1947 to deal with the problem of refugees in Europe in the aftermath of the Second World War and was to complete its work by mid-1950. It was soon apparent, however, that the comprehensive nature of the task it had been assigned — to address every aspect of the refugee problem (from registration and determination of status, to repatriation, resettlement, and “legal and political protection”) — precluded its winding up.

In December 1949, the General Assembly therefore decided to replace the IRO with UNHCR, which was established, for an initial period of three years, as a subsidiary organ of the General Assembly under Article 22 of the United Nations Charter. On 14 December 1950, the General Assembly adopted the UNHCR Statute. The organization's tasks were to provide international protection for refugees and to seek permanent solutions to their problems by assisting governments in facilitating their voluntary repatriation or their assimilation within new national communities. On 1 January 1951, UNHCR began its work with a staff of 33 and a budget of US\$ 300,000.

### **The 1950s: development of the international refugee protection regime**

When UNHCR was established, the problem was essentially concerned with the remaining million individuals who had fled Nazism and later Communism in Europe. UNHCR's work was mainly of a legal nature to ensure entry and ease integration in accordance with the 1951 Convention. That Convention was the first (and indeed remains) the only binding refugee protection instrument of a universal character. It was actually an instrument of rather limited intent, addressing in particular the question of refugee status, not solutions or causes. While it traced its origins broadly to human rights principles, it was more about States' responsibilities than individuals' rights. A principal contribution it did, however, make, was to put in place a global definition of refugee. In 1967, the main caveat attached to the universal character of this definition — a geographical and time limitation — was lifted by the coming into effect of a protocol (at present the only one) to the 1951 Convention.

### **The 1960s and 1970s: expansion of the international refugee protection regime**

If the 1951 Convention was the baseline, to some extent it also contained the basics only. This became clear as UNHCR's protection activities began to extend well beyond Europe into countries, particularly on the African continent, experiencing the painful process of decolonization. The persecution-based approach confined to the five reasons outlined in the 1951 Convention was perceived to limit its applicability. The large numbers of refugees and the generalized conflicts which precipitated their displacement ensured a growing mismatch. From the late 1950s, the General Assembly felt it necessary on occasion to extend UNHCR's mandate to protect and assist groups of refugees falling outside the definition and geographic ambit of the 1951 Convention, while UNHCR began the process which was to lead effectively to the Convention's 1967 Protocol.

Simultaneously, developments in Africa promoted the conclusion of a regional instrument, which in effect updated the 1951 Convention definition by expanding it to include a broader category

of persons. The result was the 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa. While incorporating the existing 1951 Convention's refugee definition, the OAU Convention 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". In other words the notion 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.

The 1970s proved to be important in terms of fostering the concepts of international solidarity and burden-sharing in the difficult search for solutions. One of the more important milestones in this regard was the International Conference on Refugees and Displaced Persons in South-East Asia, held in 1979 in Geneva. It came at a time when the world was observing with grave concern the plight of Vietnamese fleeing their country in flimsy boats, confronting the perils of the sea and pirates, only to be pushed back as they reached the shores of neighbouring countries. A three-way agreement emerged from the Conference: South-East Asian countries promised to provide temporary asylum; Viet Nam undertook to promote orderly departures in place of illegal exits; and third countries outside the region agreed to accelerate the rate of resettlement. Important burden-sharing schemes were subsequently put in place to ensure the continuing rescue at sea of the Vietnamese "boat people". This Comprehensive Plan of Action (CPA) for Indo-Chinese refugees was the first attempt to involve all concerned parties (countries of asylum, of origin and of resettlement), as well as the donor community in a coordinated, solutions-oriented set of arrangements for sharing responsibilities as regards a refugee population.

### The 1980s, 1990s and the 21st century: restrictions on the international refugee protection regime

During the 1980s and 1990s, substantial changes came about in the environment in which international refugee protection had to be realized. These changes not only placed basic concepts in question, they 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 numbers 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. The conflicts were fuelled by superpower rivalry and aggravated by socio-economic problems in developing countries. Solutions to refugee problems became even more elusive – whether in Afghanistan, with 2.5 million Afghan refugees remaining in exile today, in the Horn of Africa or southern Africa. 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 characteristics became even more pronounced, 2.5 million people were displaced or fled to Iran from northern Iraq in 1991; in the 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.

With the prospects 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. In 1995, the number of persons needing assistance rocketed to around 25 million. Asylum countries 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,

physical attack and rape of refugees. Providing effective protection has become exceedingly difficult where the exodus results from conflict which remains unresolved, 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 some situations such as in the Great Lakes region and the Horn of Africa, the conflicts have spilled across frontiers and affected areas where refugees, returnees and displaced persons have been living, seriously threatening their safety and that of the local population. Governments have resorted to closing borders or pushing refugees back to danger, even death, as a result of their concerns for national security and the safety of the local population. Guinea's closure of its borders in December 1998/January 1999 to the Sierra Leonean refugees, many of whom were women and children who had had limbs amputated by rebel forces, was a graphically horrible example. The civilian character of refugee camps and settlements continued to be compromised, not least by the unwillingness of some governments to site refugee camps away from borders or the lack of commitment of others to address the issue of armed elements resolutely.

When it comes to such situations, the "voluntariness" of returns has become a key issue as refugees return to countries emerging from many years of war, where peace is fragile, the infrastructure weak, the human rights situation not yet stabilized, and the basic necessities of life are in uncertain supply. In such situations, the factor precipitating return is often not durable change at home but inhospitable, even hostile, conditions in the host country, making return the lesser evil. In some cases, rapid outflows have been followed by equally sudden and large-scale returns of people to their country, from which they have been compelled to flee again after only a short period.

In the developed world 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, particularly in recent years, a major reshaping of asylum policies, provoked



by a shared concern in the industrialized 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. Increasingly, being smuggled to sanctuary has become an important option for asylum-seekers, but one which carries a price tag. An asylum-seeker who has resorted to a trafficker has seriously compromised his or her claim in the eyes of many States, and has consequently had to face a sort of double criminality: not only has he or she flouted national borders, but also has consorted with criminal trafficking gangs to do so, to the point where the claim in question has become tainted and measures which restrict fundamental privileges have been seen as more than justified.

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). This has been accompanied by an inappropriate use of otherwise useful asylum-related notions such as “safe country”, “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.

There has furthermore 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 discretionary forms of protection provide lesser safeguards to people of concern. In response, there has been even more resort — by failed asylum-seekers, by lawyers seeking protection solutions, and by judges considering protection needs — to human rights instruments as an alternative source of protection. While the 1984 Convention against Torture and the 1950 European Human Rights Convention do provide an absolute prohibition on removal, the rights of people allowed to remain are usually inferior to those of recognized refugees.

Overall, the climate for the admission, processing and treatment of asylum-seekers is less benevolent today. Refugee issues are often heavily politicized, even sensationalized, for a variety of domestic or political purposes, some quite self-serving. Attitudes, too, are inflamed by opportunistic or ill-informed media. It is a sad fact also that, 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.

To confront these manifold challenges, there is an urgent need to revitalize the legal principles and ethical values that underpin asylum and refugee protection.

### **1951 Convention outdated?**

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 factor in today's migration environment. In particular, the 1951 Convention has been criticized 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. 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. 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.

This being said, I recognize that the 1951 Convention is being challenged in a number of important ways today, which put to the test its resilience and the scope of its application. Any listing of such challenges would have to include the following:

- The changed displacement environment in which the 1951 Convention must operate, which certainly demands some flexibility in its application. There is the need to put an end to debate around such issues as to whether the victims of violence and persecution by non-State agents (e.g. police, military, militia, paramilitary groups, separatist rebels or bandits) are entitled to protection as refugees in another State? Whether the notion of "persecution" and the ground of "membership of a particular social group" in the 1951 Convention can be reasonably extended to protect women from gender-related violence, not least rape, in the context of conflict but also, perhaps, harmful traditional practices or even domestic violence? If only part of the State of origin is affected by conflict, then how far are the victims of violence and persecution required to seek protection inside the State before a claim for refugee protection will be entertained in an asylum State? In addition, what bearing have other Conventions such as the Convention on the Rights of the Child on the status determination and treatment of refugee children?
- The growth of irregular migration and smuggling of people for profit has led to a crowding of the space in which the 1951 Convention has to operate.
- The discrepancies between, variously, Convention refugees, the broader class of persons in need of international protection to whom UNHCR's competence has been extended, and persons for whom States have explicitly accepted responsibilities under the 1951 Convention; at this point some rationalization of

responsibilities is required to introduce greater certainty of a protection outcome for those in need.

- The related issue of the growing number of subsidiary forms of protection which States, not least in Europe, develop often as less onerous alternatives to the 1951 Convention-based protections. Again, these limit the room allowed to the 1951 Convention to operate as it could or should.
- Currently, aside from subsidiary protection at the national level, there are also complementary protections starting to appear at the international level, including in particular those in place through the human rights instruments. Many States which now offer complementary forms of protection currently have several different, parallel proceedings for determining protection needs. When determining those needs, there is the challenge of how to tailor proceedings which are less expensive and require fewer resources from appellate or participating governmental bodies.
- Efforts to develop regionally specific legal frameworks for handling refugee and asylum demands, which carry with them the real, if unintended, threat of a degree of redundancy for the Convention in some parts of the world, and the concomitant problem that its international applicability is put into question.
- While accepting that new or refined notions, such as the internal flight alternative or the safe third country notion, as well as the safe country of origin notion, have a place in the developing repertoire of responses to complex displacement situations, there is a need to establish how best to prevent their misuse and to apply them in protection-sensitive procedures.
- The creation of actual conditions to allow return in safety and dignity remains fundamentally a political process going well beyond the capabilities of UNHCR. The question here is how to enhance the preparedness of the international community to commit itself to a substantive and prolonged engagement in the reinforcement of local efforts. Otherwise, there is no sustainable solution with adequate guarantees of protection.
- Self-sufficiency is just one tool to increase available asylum space. Provided that the absorption of refugees into the host community

does not economically, socially or politically destabilize the country, the challenge is how to enhance the preparedness of host countries to allow local integration.

- A further challenge is how best to realize the full potential of resettlement as a tool of international protection, as a durable solution, and also as a means of burden- and responsibility-sharing.
- While there is a general understanding that more equitable burden- and responsibility-sharing would quantitatively improve the political climate and the asylum possibilities for refugees, in practice, the challenge is how best to spread the share of responsibilities so as to ease the asylum burden on any one State unable to shoulder it entirely; how to put in place burden-sharing and not burden-shifting mechanisms; and how to trigger timely responsibility-sharing in any one situation.
- Finally, and significant amongst those challenges on this list, there is the “integrationist” approach taken to the Convention’s application over the fifty years of its existence, which has given birth to systems to implement the Convention which are not well enough attuned to mass arrivals or even to large numbers of individual asylum-seekers. Applying the Convention in mass arrival situations poses problems in many parts of the world. The challenge here is how to realize solutions for individuals, as well as for refugee groups, which are both lasting and protection-based.
- In short, 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. All stakeholders in the regime do, though, need to try. The 1951 Convention is the one truly universal instrument setting out the baseline principles on which the international protection of refugees has to be built. As indicated above, it has a legal, political and ethical significance that goes well beyond its specific terms. If this instrument is lost, the likelihood of it being replaced by anything approaching its value is remote.

### Revitalizing refugee protection

In the face of these challenges, UNHCR has invested quite some effort recently in strengthening the application of the Convention through targeted strategies to address, variously:

- the deteriorating quality of asylum;
- the current gaps in the protection framework; and
- the inconsistencies between regional approaches and international standards.

These strategies go hand in hand with 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”. The preamble to a treaty is one source for determining its purposes. The Preamble to the 1951 Convention states its aim *inter alia* as being to ensure that human beings shall enjoy fundamental rights and freedoms 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, which in turn requires, consistent with the 1995 judgment in the European Court of Human Rights case of *Loizidou v. Turkey*, that it be treated as a living instrument and understood in the light of present-day conditions, not solely in accordance with such intentions as the authors may have expressly set out at the time of drafting.

This means that the 1951 Convention should not be seen as a static instrument but should be interpreted in more “evolutionary” terms, taking into consideration the changes that have occurred in the period since its conclusion. That this interpretation is in the spirit of the intentions of the 1951 Convention drafters fifty years ago was also accepted by the UK House of Lords in the Aden case of December 2000, according to which “the signatory States intended

that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world”.

When dealing with the various protection challenges in today's context, it is of paramount importance that there be a common understanding of principles and objectives. The following are just some issues to be kept in mind by all stakeholders involved:

- *Mass influx/maintaining civilian character of asylum*

There is nothing inherent in the provisions of the 1951 Convention and 1967 Protocol to preclude these instruments from being applied in mass influx situations. Host States have the primary responsibility for ensuring security in refugee camps and refugee-populated areas, including the identification and separation of armed elements.

- *Interface between refugee protection and migration control*

While fully supporting the efforts of States in combating the criminal and organized smuggling of persons across international borders, there is a need to strike a balance between the repression of criminal smuggling and the protection of humanitarian interests and values.

- *Barriers to entry*

Measures such as interdiction, interception, visas, immigration officers in countries of departure and carriers' liability restrict access to asylum. If such measures are taken, they should be implemented in a manner consistent with international human rights and refugee protection principles. If States apply carrier sanctions, for instance, they should exempt carriers from penalties in the case of asylum-seekers.

- *Illegal entry*

Similarly, and in accordance with Article 31 of the 1951 Convention, States should not penalize refugees for illegal entry or unnecessarily restrict the freedom of movement of such persons.

- *Detention of asylum-seekers*

Detention of asylum-seekers and refugees should take place only after full consideration of all possible alternatives. It should be resorted to only in cases of necessity, and therefore should not be automatic or unduly prolonged.

- *Access to asylum procedures/written decision*

As a rule, all asylum-seekers, without distinction, must be given access to refugee status determination procedures. The examination of applications for refugee status should at first instance allow for a personal interview, if possible before the decision-makers of the competent body, and should be based on a thorough assessment of the circumstances of each case. All applicants should receive a written decision automatically, whether on admissibility or the claim itself. If the claim is rejected or declared inadmissible, the decision should be a reasoned one.

- *Single procedure*

A single procedure to assess the claims of all those seeking refugee status or other complementary protection may in many cases represent the clearest, swiftest means of identifying those in need of international protection. 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 in keeping with the provisions of the 1951 Convention and carrying with it all rights and responsibilities deriving from this status.

- *Guidance to asylum-seekers/access to interpreters and UNHCR/NGOs*

At all stages of the asylum procedure, including the admissibility stage, asylum-seekers should receive guidance and advice on the procedure in a language and in terms they are able to understand and have access to legal counsel in need. They should also have access to qualified and impartial interpreters and the right to contact UNHCR and recognized non-governmental organizations (NGOs).

- *Confidentiality*

The asylum procedure should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request. No information on the asylum application should be shared with the country of origin.



- *Groups with special protection needs*

There should be special procedures for refugee women and children:

- Where female asylum-seekers are accompanied by male relatives they should be informed in private and in terms they understand of their right to make an independent individual asylum application at any stage, and be afforded the opportunity to seek legal advice before making such an application. Female asylum-seekers should preferably be given the opportunity to be interviewed by skilled female interviewers and interpreters and should in any case be interviewed in a gender-sensitive environment.
- For unaccompanied or separated children, the best interests of the child are paramount. They should never be refused entry or returned at the point of entry, or subjected to detailed interviews by immigration authorities at the point of entry. As soon as a separated child is identified, a suitably qualified guardian or adviser should be appointed to assist them at all stages. Interviews should be carried out by specially trained personnel and separated children should never be detained for immigration reasons.

Other groups such as torture victims or the elderly could benefit from the establishment of common understandings and greater sensitivity towards their special protection needs.

- *Review of negative decision*

All applicants shall have the right to an independent appeal against or review of a negative decision, including a negative admissibility decision, although this may be more simplified in the case of admissibility decisions made under accelerated procedures. The letter of rejection should contain information on the asylum-seeker's right to appeal, provisions of the appeal procedure and any applicable time limits.

- *Return of asylum-seekers to third countries*

An asylum-seeker should only be returned to a third State if responsibility for assessing the particular asylum application in substance is assumed by the third country, and if the asylum-seeker will

be protected from *refoulement* and will be able to seek and, if recognized, enjoy asylum in accordance with accepted international standards. Any mechanisms under which responsibility for assessing the asylum claim is transferred should be clearly defined in law.

- *Right to remain until decision has been taken*

An asylum-seeker should in principle have the right to remain on the territory of the asylum country and should not be removed, excluded or deported until a final decision has been made on the case or on the responsibility for assessing the case.

- *Family reunification*

From the recognition of a need for international protection of the beneficiaries stems a “package” of rights and benefits, including the reunification of scattered families, that enables beneficiaries to live in dignity and to support themselves and their families.

- *Durable solutions*

Neither the Statute of UNHCR nor any other international instrument relating to refugees indicates that durable solutions have an inherent hierarchy. The use of the various durable solutions – voluntary repatriation, local integration, resettlement – over the past decades shows that views about which solution is preferable or in some cases realistic can vary greatly, depending on the most appropriate durable solution for a refugee population or for groups and individuals within it.

- *Voluntary repatriation*

To ensure the sustainability of returns, it is important that conditions in the country of origin allow for a voluntary return in safety (i.e. availability of physical, legal and material safety) and dignity.

- *Local integration*

Refugees can offer host societies potentially strong benefits. In order to become part of the community, refugees should be able to exercise the rights as set out in the 1951 Convention, including the option for their naturalization. To facilitate their integration, public, private and community sectors should work alongside refugees as facilitators to create an environment in which people can be empowered.

- *Resettlement*

Resettlement serves as a protection tool, as an instrument of responsibility-sharing and as a durable solution in specific circumstances. Resettlement policies and criteria are to be applied in a consistent and transparent fashion throughout every region of the world, always being careful to strike a balance in resettlement planning between meeting needs and addressing quota-related issues.

- *Burden- and responsibility-sharing*

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.

These are just some of the principles on which it is useful to establish common understandings. As one highly respected refugee lawyer and academic aptly observed, “A great, indeed damaging disservice is done to the protection of refugees by pretending rules exist where there are none, or by imagining that the persistent objector can be overcome by persistent rhetoric alone.”<sup>1</sup> The next section of this paper outlines the process of Global Consultations on International Protection which is, among other purposes, intended to enhance common understandings.

### **Process of ensuring continued refugee protection**

Mindful of all the various developments outlined above, UNHCR decided in 2000 to take the opportunity of the forthcoming 50th anniversary of the 1951 Convention to initiate a process of open,

<sup>1</sup> G. S. Goodwin-Gill, “The international protection of refugees: What future?”, *International Journal for Refugee Law*, Vol. 12, No. 1, 2000, p. 6.

frank and constructive dialogue with governments, NGOs, refugee experts and refugees themselves. These Global Consultations were endorsed by the United Nations General Assembly and UNHCR's Executive Committee (ExCom) and welcomed by the United Nations Secretary-General. The purpose of this process, on the one hand, is to seek to promote the full and effective implementation of the 1951 Convention and, on the other, to develop complementary new approaches, tools and standards to ensure the availability of international protection where the 1951 Convention needs to be buttressed. The challenge for UNHCR is now how best to revitalize the existing protection regime, how to restore its credibility while ensuring its flexibility to absorb new protection notions in order to provide protection for refugees in mass influx situations, in the context of individual asylum systems and in the search for protection-based solutions.

To best match topics, participants and outcomes, the Global Consultations process has been designed along three tracks: the first track involves the Ministerial Meeting of States Parties; the second track comprises a series of Expert Roundtables; the third track will focus on policy formulation within the Executive Committee framework.

### **First track: Ministerial Meetings of State Parties**

The Ministerial Meeting of States Parties to be held on 12 December 2001 will hopefully achieve one of the central purposes of the Global Consultations, namely to reconsolidate support around the foundations of refugee protection and to reconfirm the collective commitment of States Parties to implement the 1951 Convention and its 1967 Protocol fully and effectively, in accordance with the object, purposes and intent of those instruments. In addition, it is hoped by all involved that new accessions or the withdrawal of reservations to the 1951 Convention and 1967 Protocol will accompany the meeting. This meeting should also provide the opportunity for States to reflect more broadly on the governance system for international refugee protection of which the 1951 Convention is a part and within which it remains central. This will be the first ever meeting of the States Parties to the 1951 Convention and its 1967 Protocol and will be hosted jointly by the Government of Switzerland and UNHCR.

### **Second track: Expert Roundtables**

The second track, the legal one, deals with certain open interpretative questions regarding the 1951 Convention and 1967 Protocol. The idea here is to examine how and in what directions the law has developed over recent years so as to allow decision-makers to be better informed about how the 1951 Convention is being understood and applied globally today. This examination is being made through a series of discussions in Expert Roundtables, with participants drawn from governments of States Parties, NGOs, academia, the judiciary, and the legal profession. Following informal consultations with a wide range of States, NGOs and other interested parties, UNHCR identified issues for consideration by experts and on which background papers have been commissioned from scholars. Issues for discussion comprise: interpretation of the cessation (Article 1C) and exclusion (Article 1F) clauses; principle of *non-refoulement* (Article 33); supervisory responsibility (Article 35); membership of a particular social group (Article 1A(2)); gender-related persecution (Article 1A(2)); internal protection/relocation/flight alternative; illegal entry (Article 31); family unity (Final Act of the 1951 UN Conference). The background papers and reports of the Roundtables will be published by UNHCR as a contribution to the 50th anniversary of the Convention. Furthermore, they enable UNHCR to refine its own guidelines on related questions, including in the area of refugee status determination.

### **Third track: policy formulation within the Executive Committee framework**

The third track of the Consultations is structured around a number of protection policy matters, including issues not adequately covered by the 1951 Convention. Through a protection-driven set of discussions within the Executive Committee framework during 2001 and 2002, the following objectives should be achieved: first, to foster a common understanding of the protection challenges and enhance cooperation to address them; second, to identify and promote practical responses to protection problems; and third, to lead to the development of new approaches, tools, and standards to strengthen protection.

The third track is not only about new standard setting, it is also about improving the overall capacity to manage refugee or asylum situations within a proper framework using the existing instruments (e.g. 1951 Convention, 1967 Protocol, OAU Convention). Practical guidance and agreement on what additional tools are required (e.g. Executive Committee conclusions; cooperative arrangements) are only two of the possible outcomes.

The third-track discussions centre on four broad themes as agreed at an organizational meeting in December 2000:<sup>2</sup> protection of refugees in mass influx situations; protection of refugees in the context of individual asylum systems, including the problems inherent in the migration/asylum interface; search for protection-based solutions; and protection of refugee women and refugee children. Responsibility- or burden-sharing, as well as aspects of protection of refugee women and refugee children, are crosscutting themes which are being considered throughout the discussions on the various topics as well as having their own specialized focus. To ensure that the Consultations have a truly global reach, UNHCR is organizing a number of regional meetings in order to broaden participation on issues on the agenda of particular interest to one or other of the regions.

### **Agenda for protection**

The Global Consultations process will help to shape the Agenda for Protection for the coming years. It will be a sort of road map informed by the discussions and conclusions stemming from the various meetings, setting out shared strategic goals, while identifying some key actions needed to attain those goals. A provisional agenda will be submitted to the Ministerial Meeting of States Parties in December 2001 and will provide an opportunity for States to exchange views on how best to build upon the Convention system so as to ensure that aspects of the global refugee situation which are not adequately addressed by the 1951 Convention also benefit from an effective response.

<sup>2</sup> See the revised Work Programme for Executive Committee Framework (Working Document), EC/GC/01/1/Rev.2, 9 May 2001.

But today's and tomorrow's refugee problems cannot be addressed in isolation. There is a need for a strengthened partnership between all stakeholders and a clearer understanding of their roles. While it is correct to say that it is a State's sovereign duty to protect the interests of its own population and its borders from abuse, a State also has humanitarian responsibilities towards refugees and other victims of forced displacement. It is important that States commit themselves to establishing asylum systems which responsibly identify who is a refugee, who is otherwise in need of protection, and who is not deserving of protection and should be rejected and returned home in a safe and dignified manner.

Other important stakeholders in achieving durable solutions for refugees are international and national NGOs. They have a potentially important role to play in providing international protection and assistance. Indeed, refugees need the support of NGOs, given the fact that States and UNHCR alone are incapable of protecting and assisting the millions of refugees throughout the world today.

Another important protection partner is the judiciary. Creative judicial interventions by national courts restore the real meaning to the notion of "protection" for refugees by ensuring that all administrative action meets the basic principles of fairness and due process and that refugees and asylum-seekers are treated in a fair, dignified and humane way throughout their time of refuge. Refugees themselves have very often been a neglected group. To make any process dealing with the protection of refugees credible, they themselves need to be involved in the process, including in fora such as the Executive Committee framework.

### **Outlook for the future**

Refugee protection has undergone considerable change over the last fifty years, since the basic global framework came into existence with the conclusion of the 1951 Convention. There is certainly an irony in the fact that protection is both the most promoted in rhetoric and the most disliked in practice of the functions entrusted to UNHCR. Against this backdrop, the Global Consultations process provides a forum to:

- mark the 50th anniversary of the 1951 Convention;
- reaffirm, in a declaration to be adopted at the 12 December 2001 Ministerial Meeting of States Parties, the collective commitment to the 1951 Convention and 1967 Protocol and the values they embody;
- encourage States Parties to withdraw any reservations that they may have made at the time of their accession and encourage States that are not yet Parties to the 1951 Convention/1967 Protocol to accede to these treaties;
- take stock of developments in refugee law and develop guidance on current open interpretative questions of the 1951 Convention;
- foster a common understanding of the protection challenges and enhance cooperation to address them;
- identify and promote practical responses to current protection gaps;
- develop new approaches, tools and standards to strengthen protection;
- enable governments to present their view of how to improve the international governance of the refugee problem and the directions to be pursued for refugee protection in the future.

Clearly, this process is not an exercise without dangers. Some refugee advocates fear that if UNHCR puts the 1951 Convention in any way up for discussion, the organization may end up provoking a consensus around a protection regime of much more limited rights. While acknowledging the dangers, UNHCR does not see things quite this way. Refugee protection is confronted by a number of major challenges which could well overtake existing protection principles unless action is taken to secure an enduring place for them. UNHCR has to contend with a worrying level of disillusionment about aspects of the 1951 Convention; with a deteriorating quality of asylum worldwide; with hundreds of thousands of refugees without access to timely or safe solutions; with less reliable partners for our traditional protection activities; with more concerted efforts now than in the past to regionalize responsibilities and give them a particular understanding not always consistent with international approaches; and in general with a protection system with gaps and strains now



starting to materialize. It is vital to maintain and revitalize a depoliticized and law-based framework for dealing with all refugee situations.

Refugee protection is at a crossroads with some clear pointers as to the desirable road to go down. With a degree of courage, a good dose of imagination, a measure of goodwill and commitment to positive change, coupled with an unwavering focus on better protection for refugees as the goal to be reached, the chances for a revitalized and enduring refugee protection system being in place for the next fifty years are pretty good.



## Résumé

### **La protection internationale des réfugiés depuis 50 ans — Les enjeux de la protection dans le passé, aujourd' hui et dans l' avenir**

par ERIKA FELLER

*Directeur pour la protection à l'Office du Haut Commissaire des Nations Unies pour les réfugiés, l'auteur brosse un large tableau des activités dévolues au HCR, que résume la notion de « protection » des réfugiés. Après avoir brièvement rappelé l'histoire de la protection internationale des réfugiés, elle examine la question de savoir si la Convention de 1951 relative au statut des réfugiés est toujours à la hauteur pour résoudre les problèmes liés aux migrations de masse qui caractérisent notre époque. Même si la Convention de 1951 n'est pas idéale, elle reste le seul traité international reconnu par la quasi-totalité des États pour légitimer le régime de protection des réfugiés. Afin de renforcer cette protection, le HCR a récemment engagé une vaste consultation des États, des organisations non gouvernementales et des réfugiés eux-mêmes pour mieux définir les problèmes et y trouver des solutions dans le contexte actuel. L'auteur est convaincu que cette consultation renforcera la détermination de la communauté internationale à mieux protéger les réfugiés.*