Introduction

Sixty years ago the international community agreed a framework for the protection of refugees, when a diplomatic conference in Geneva adopted the 1951 Convention Relating to the Status of Refugees. Today, the protection of those compelled to leave their own state, and seek asylum in another, continues to present formidable challenges. The scale of those challenges, and the perceived inadequacies of the Refugee Convention’s response to them, have led some critics to argue that the Convention is now outdated, unworkable and irrelevant.1

At the end of 2010, there were 16.2 million people throughout the world seeking refuge from conflict and persecution who had been forced to leave their homes and homeland.2 The nature and complexity of displacement is continually changing, with new forms of conflict and the enforced movement of people as a result of extreme weather events, natural disasters, and environmental degradation. International crises increasingly result in the mass movement of peoples across borders – most recently seen in response to the Arab Spring uprisings.

A growing business in human trafficking has also contributed to an increase in the number of irregular immigrants. Modern migratory patterns are extremely complex and contain a mixture of economic migrants, refugees and others. Consequently, distinguishing those who have a valid claim to protection from those who do not, through the implementation of fair asylum procedures in accordance with the 1951 Convention, places an exacting demand on governments.

This article looks at the achievements of the Convention over the past sixty years, outlines the contemporary challenges facing it, and considers the capacity of the Convention to meet these challenges and to continue to have an enduring and effective role in the protection of refugees.

Need for Refugee Convention

Why does a person seek the international protection of another state? A properly functioning state recognises the civil, political, economic, social and cultural rights of its citizens, and respects and protects these rights through appropriate legislation, policies and services. If that system of ‘national protection’ breaks down – either because the country is at war or is suffering from serious unrest, or because the government itself is persecuting certain categories of citizens – then people may flee to another state.3

In recent decades, we have been confronted by stark and shocking images of refugees in many different parts of the world: in Africa, as a result of the bloody genocide in Rwanda and the ‘blood diamond’ conflicts in Sierra Leone and the Democratic Republic of Congo; in the heart of Europe, following the violent disintegration of Yugoslavia, and the subsequent war in Kosovo; and more recently, in the wars in Afghanistan and Iraq. Relay across the world are vivid images of people fleeing terror, persecution and conflict – men, women and children, carrying whatever possessions they can, and using whatever transport is available, seeking safety in neighbouring countries.

Sixty years ago, the international community faced similar wanton destruction and human tragedy in the period leading up to, during, and after the Second World War, when millions of peoples were uprooted and forced to flee their homeland in fear of their lives. This was the context in which the Convention was framed:

In a spirit of empathy and humanitarianism, and with a hope that such widespread suffering might be averted in the future, nations came together in the stately Swiss city of Geneva and codified binding, international standards for the treatment of refugees and the obligations of countries towards them.4

Initially, just 26 states were signatories to the 1951 Refugee Convention; now, over 140 have ratified both the Convention and the 1967 Protocol Relating to the Status of Refugees (which extended the scope of protection afforded by the Convention...
by removing geographic and time limits). Three states have ratified the 1951 Convention only and three (Cape Verde, USA, and Venezuela) have ratified the Protocol only.

UNHCR (United Nations High Commissioner for Refugees) argues that, although the nature of conflict and patterns of migration have changed over the last sixty years, the Convention has proved remarkably effective in helping to protect more than 50 million people in a wide variety of situations.  

**Challenges to the Convention**

**Scope and Definition**

One of the major criticisms of the 1951 Convention relates to its definition of who is a refugee. Under the Convention, a refugee is a person who is unable or unwilling to return to his or her country of nationality, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

The Convention’s definition reflected the experience of the preceding thirty years and especially the Second World War. Despite improvements represented by the 1967 Protocol, the definition remains relatively narrow.

Other refugee definitions have since emerged – for example, those incorporated within the *Convention Governing the Specific Aspects of Refugee Problems in Africa*, adopted by the Organisation of African Unity (1969) and the *Cartagena Declaration on Refugees* (1984). These are wider in scope and reflect the more complex reality of the conditions that force people to flee their homes than was captured by the Refugee Convention.

The Commission of the European Community, noting that in EU Member States an increasing percentage of applicants for refugee status are given instead some other form of protection, suggests: ‘This is probably due to the fact that an increasing share of today’s conflicts and persecutions are not covered by the Convention’.  

In addition, in recent years, more and more people are displaced, and forced to move either within or outside their country, because of drought or other extreme weather conditions; land degradation, and natural disasters. Such persons fall outside the scope of the Refugee Convention.

Amaya Valcarcel of Jesuit Refugee Service (JRS) International has highlighted a broader category of forcibly displaced people, which he terms ‘survival migrants’: people fleeing an existential threat to which they have no domestic remedy. The exodus of around two million Zimbabweans to countries in the Southern African region between 2005 and 2009 exemplified this concept; they fled for a combination of interrelated reasons – mass livelihood collapse, state failure, repression and environmental catastrophe.

In its 1992 document, *Refugees: A Challenge to Solidarity*, the Pontifical Council for the Pastoral Care of Migrants and Itinerant People called for asylum systems to take account of the needs of people who fall outside the strict definition of ‘refugee’ under the 1951 Convention but whose circumstances are such that they are *de facto* refugees. The Pontifical Council mentioned specifically those who are the victims of armed conflict, natural disasters, and ‘economic conditions that threaten [people’s] lives and physical safety’. This is the definition adopted by JRS in its work of ‘accompanying, advocating and serving’ refugees and forcibly displaced persons.

**Mass Movements**

Mass movements of people across borders as a result of wars and conflicts present particular challenges to the Convention. Where there is a large-scale influx, the individual determination of claims places a significant burden and pressure on receiving states’ asylum determination systems.

In a refugee camp environment, the situation can become acute. In the face of the sheer weight of numbers arriving, the individualised identification of refugee status and attendant Convention rights may be impractical. Human and physical security in the camp environs will, of necessity, become the over-riding protection objective. The Convention does not exclude a *prima facie* or group determination in the case of large numbers of applicants but this is not without its problems:

*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 to be built between prima facie recognition of refugee status and the Convention regime.*

Three quarters of the world’s refugees reside in countries neighbouring their country of origin. The
countries receiving asylum seekers are themselves often very poor, with inadequate infrastructure and underlying political and social tensions. Erika Feller, UNHCR Assistant High Commissioner for Protection, has noted: ‘The Convention’s absence of burden-sharing provisions is a clear liability when it comes to mass influx’.11

Mixed Migration Flows
While refugees and asylum seekers account for a relatively small proportion of the estimated 214 million people living outside their country of origin, they increasingly move from one country to another alongside people whose reasons for moving are different and are not protection-related.

‘Mixed movements’, in which persons with different objectives move alongside each other using the same routes and means of transport, or engaging the services of the same smugglers, may create particular challenges for states. Moreover, there are considerable risks involved for the individuals travelling as part of such movements. Women and unaccompanied children may be especially vulnerable to exploitation en-route and at their place of destination.

The identification of people requiring protection within mixed irregular migrant flows is a significant challenge. Once identified, those in need of protection need both the safeguard of the Convention’s principle of non-refoulement (that is, that they will not be returned, directly, or indirectly, to a place where they would face serious harm for a Convention reason), and access to durable solutions.12

Credibility
Guy Goodwin Gill argues that the drafters of the 1951 Convention did not anticipate that the process of refugee determination would become institutional. It was not foreseen that there would be a requirement of due process by virtue of which the claimant would have a right to advice and legal representation. Furthermore, it was not anticipated that it would be required of decision-makers to understand the situation in the claimant’s country of origin and make a reasoned and fair determination on the credibility of an individual’s claim.13

Determining credibility is extremely complex and places a huge burden of responsibility on decision-makers: getting it wrong may result in returning an individual applicant to a situation of persecution or worse. For example, there are asylum seekers without documents who are refugees, and there are asylum seekers with valid travel documents who are definitely not. There are people who tell a false story well, and people who tell a true story badly.

There is a grey zone: people who are leaving a country where persecution and discrimination are unquestionably occurring, and the economy is also dire. Are people leaving such countries for refugee reasons, or economic ones – or do both sets of reasons fuse into one that is, in many cases, almost impossible to unravel? And what about the people who leave their country for refugee reasons, and then keep on moving for economic ones (so-called secondary movers)?14

Where there is no possibility to legally migrate to a country, then economic migrants, either forced or voluntary, may resort to submitting a Convention claim for asylum ‘in the hope of gaining the privileges associated with refugee status’.15 It is the job of asylum decision-makers to distinguish those who have a credible claim for protection from those who do not.

Access in Order to Claim Protection
Article 14.1 of the Universal Declaration of Human Rights proclaims: ‘Everyone has the right to seek and enjoy asylum from persecution in other countries’. Access to the territory is essential for persons seeking the protection of a state in order to vindicate this right.

In recent years, across the world, states have been putting in place increasingly restrictive measures to prevent people gaining access to their territory in order to lodge a claim for asylum. Restrictions in access are being initiated in many instances in response to heightened concerns about national security, especially in relation to terrorism. Such restrictions are intended to be balanced against refugee rights – but, in reality, they often outweigh these rights.

In the EU, over the past decade, there have been increasing border controls (visas, interceptions on the high seas, carrier sanctions, pre-embarkation controls and specialist liaison officers abroad carriers), harsher detention policies and efforts to outsource asylum determination to states outside the Union. The net result of these policies is that entry is being denied to not only those who are not entitled to enter, but to many who would be entitled to asylum.
Within the context of stricter controls, migrants are using increasingly irregular and extremely dangerous routes to get to countries and regions of destination. The operation of border controls without complementary measures for identifying persons in need of protection creates the danger of turning away people fleeing persecution and victims of human rights violations.

For example, a Colonel Ghadaffi-led Libya did not have any asylum system or offer any sort of protection, having never signed the 1951 Convention. On 6 May 2009, three boats carrying 227 migrants were rescued by a merchant vessel; the migrants were transferred onto Italian coastguard boats in waters belonging to the Maltese Search and Rescue Region. These migrants did not have an opportunity to make a claim for asylum. Within twenty-four hours, a decision to remove them to Libya was taken by the Italian Government. This case is currently under review by the European Court of Human Rights.16

Return
While few of the significant numbers of asylum seekers who arrive in industrialised countries are given refugee status, fewer still are forced to leave.17 Deportation remains a relatively rare occurrence. The Annual Report for 2010 of the Department of Justice and Law Reform shows that, in the five-year period 2006 to 2010, the number of deportation orders issued in Ireland was 4,859 and the number of deportation orders effected was 1,235.

Enforcing return is expensive. Tracking down individuals who may have gone underground is time-consuming and resource-intensive. Normal airline carriers will often not take deportees, so additional chartered flights have to be arranged. Special teams of security guards have to be drafted in to pick up and accompany the deportee to the country of origin.

A further constraint on return is the need to have the agreement and co-operation of the country of origin. Many countries are unwilling to accept the return of their nationals and do not readily issue the required travel documents.

Finally, while the public may support removal conceptually, it tends to be ambivalent in practice in relation to individual cases where there are no concerns about public safety and the only issue is a violation of immigration laws.

What are the implications of non-return for the system? ‘If rejections have little impact on whether or not asylum seekers remain in the country, then there is a serious question about the point of it all.’18 In effect, if it is perceived that people will not be removed despite the failure of their claim, then public support for the institution of asylum may be undermined.

The response of states has been to try to speed up the determination process for claims which appear to be without foundation and to implement tighter border controls to restrict or deny access to the territory.

Continuing Relevance of the Convention?
The fact that the Refugee Convention faces significant challenges does not mean it is irrelevant or unworkable. Even the strongest advocates for the Convention would not argue that it is, or was ever intended to be, a panacea for the complex reality and constantly evolving protection needs arising from forced displacement.

The enduring value and relevance of the 1951 Refugee Convention is, first and foremost, that it is there. It is the foundation for refugee protection. Notwithstanding any actual or perceived limitations in the scope of the Convention, crucially for the first time it provided a formal legal framework and recognition that, where states are unable or unwilling to provide de jure or de facto protection for their citizens, the international community has an obligation to offer protection.

The Convention tells us who is a refugee. It also states who is not a refugee: its provisions do not apply to people who have committed war crimes or crimes against humanity, serious non-political crimes, or who are guilty of acts contrary to the purposes and principles of the United Nations.
The Convention articulates a number of fundamental principles underpinning refugee protection, namely, non-discrimination, non-penalisation and non-refoulement:

**Article 3** states that the Convention provisions are to be applied without discrimination as to race, religion or country of origin.

**Article 31** stipulates that refugees should not be penalised for their illegal entry or stay. This recognises that those trying to escape persecution cannot be expected to leave their country or enter another state in a regular manner, and, accordingly, should not be penalised or arbitrarily detained purely on the basis of having resorted to such means in order to apply for asylum.

**Article 33** requires that refugees should not be returned to face persecution or the threat of persecution. The principle of non-refoulement is so fundamental that no reservations or derogations in relation to it may be sought by a state wishing to sign up to the Convention.

Since the Convention is a rights-based instrument, it also lays down basic minimum standards for the treatment of refugees. Such rights include access to the courts, to primary education, to work, and the provision of documentation, including a refugee travel document. Erika Feller expresses well this fundamental feature of the Convention:

*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.*

It remains a significant achievement that the Convention is so widely endorsed and adhered to, even though there is not yet universal sign-up to it.

**Addressing the Challenges**

UNHCR contends that the Convention remains the cornerstone for the protection of individual refugees from persecution and targeted violence, even if the language of certain provisions has allowed for overly-restricted and 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 [narrow interpretation].*

*Attention could more constructively turn to better methods of implementing the Convention ...*  

The 1951 Convention was designed to protect refugees from persecution. The emergence of complementary and subsidiary forms of protection in response to the evolving needs of people who are displaced is a welcome development. The international protection framework needs to adapt to the dynamic and complex reality of global movements of people, the changing nature of conflict and causal factors of forced displacement.

Asylum systems now are required to take account of multiple protection considerations in assessing claims for protection: whether someone is entitled to protection on the grounds that they are eligible for refugee status; whether they are eligible for subsidiary protection; whether the principle of non-refoulement requires that they should not be returned; and whether there are other compelling or humanitarian reasons for which they should be granted protection.

The practical difficulties of applying the Convention to a mass influx of people have been noted. In these situations, the Convention serves more as an ‘aspirational basis for extending protection’ than a blueprint for what is needed. Guy Goodwin Gill has highlighted that states complain about the burden of individual case-by-case determination but would not consider alternatives for fear they would be perceived as a ‘soft touch’.

Furthermore, the Convention provides a model for the development of supplementary protection mechanisms to address the needs of the increasing numbers of people who are being forcibly displaced, both within their own countries and across borders, for reasons other than persecution and violence, and in particular for environmental reasons. These displaced people are likely to share many of the protection needs of Convention refugees but will also have different needs.

Burden-sharing is needed but is absent from the Convention. Currently, developing nations host around 80 per cent of the world’s refugees. There is need for a ‘new deal’, geared towards ensuring that countries in the frontline of providing asylum are not left alone in dealing with displacement from neighbouring states.

Clearly, it is not the fault of the Convention that
economic and other migrants seek to regularise their status through the asylum system. A significant factor in the phenomenon of ‘mixed flows’ is the reality that a legal immigration route into industrialised countries does not exist for the majority of people who wish to become economic migrants. Consequently, some will seek access via the asylum process — and, inevitably, states will seek to implement policies to prevent this. Perversely, one of the reasons that economic migrants may choose to apply for asylum is ‘the potential to exploit high standards which have been established to ensure the determination system is fair’.24

Appeal and procedural safeguards of due process ensure that status determination is a lengthy process, often lasting several years. The fact that very few unsuccessful claimants are returned at the end of the process undoubtedly encourages some people who do not have protection needs to apply for asylum. However, it should be noted that the Convention itself is not a barrier to the return of non-refugees.

Credibility is at the heart of any asylum determination procedure. The presence of significant numbers of economic migrants who make an unfounded asylum claim undermines the credibility of the process for all. The low recognition rates in many states cannot be attributed solely to the reality that some applications come from economic migrants – but such applications are nevertheless a significant factor. Ultimately, low recognition rates may serve to undermine public confidence in the system and create a more hostile environment for asylum seekers.

I believe these issues have given rise to a more fundamental threat to refugee protection. The response of governments, especially in more industrialised countries, has been to institute increasingly tough and restrictive border controls and immigration practices, which make it harder for asylum seekers to reach these states. The move towards a more restrictive response finds expression also in the conditions imposed while asylum claims are being processed (through, for example, harsher reception conditions, increased recourse to detention and fewer economic and social rights during status determination). The closing of borders undoubtedly denies access not only to those who are not entitled to enter, but to many who have a genuine right to protection.

UNHCR believes that it is imperative for the international community to address the ‘mixed migration’ phenomenon in a more coherent and comprehensive manner. It has developed a 10-Point Plan as a tool to assist governments and other stakeholders to incorporate refugee protection considerations into migration policies. The focus of this Plan is on activities in countries of transit and destination, incorporating both traditional protection activities as well as specific proposals to protect refugees and asylum-seekers travelling as part of mixed movements.

In particular, the 10-Point Plan recommends establishing entry systems that contain mechanisms to identify new arrivals with protection needs and to meet the needs of other categories of persons involved in mixed movements.25

Conclusion

The 1951 Convention has a continuing relevance in protecting refugees. Nevertheless, its role needs to be subject to regular review, ‘to recognise and reaffirm its enduring strengths but also to 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’.26

António Guterres, United Nations High Commissioner for Refugees, has prioritised addressing ‘protection gaps’ in the international system and balancing the disproportionate burden of responsibility for refugees which falls on poor countries. The High Commissioner has also highlighted the need for action on an expanding list of displacement problems for which no agreed international solutions currently exist, including natural disasters, climate change, economic and other man-made calamities, gang violence, and
vulnerability arising from the uncertainty of post-conflict situations.27

The 1951 Convention was never intended to address migration issues. Its sole aim was, and is, to protect refugees. The challenge is to find other efficient mechanisms to manage economic migration and maintain border security. These are legitimate concerns but they need to be carefully balanced with the responsibility of states to protect people fleeing persecution.

After sixty years, and in the face of all the modern challenges of forced displacement, the 1951 Convention remains the cornerstone of refugee protection. It provides a sound foundation on which to build supplementary systems of protection for those in need who fall outside its remit.

The Convention has enabled millions of people fleeing persecution to find safety and refuge over the last six decades. It is ‘the wall behind which refugees can shelter ... the best we have, at the international level, to temper the behavior of states.’28

Notes


2. At the end of 2010, there were, in total, 43.7 million forcibly displaced persons throughout the world, including 15.4 million refugees; 27.5 million internally displaced persons, and more than 840,000 individuals whose application for asylum had not yet been adjudicated. See UNHCR, 60 Years and Still Counting: UNHCR Global Trends 2010, Geneva: UNHCR, 2011, p. 5.


9. The Jesuit Refugee Service (JRS) is present in more than fifty countries worldwide, providing assistance to refugees in camps, to people displaced within their own country, to asylum seekers in reception centres and those held in detention.


11. Ibid., p. 7.


16. Hirsi and Others vs Italy, application no. 27765/09.


18. Ibid., p. 7.


20. Ibid., p. 6.


22. Chatham House, op. cit.


27. Luise Druke, op. cit., p. 4.


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