

THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES: EVOLUTION AND RELEVANCE FOR TODAY*

PIERRE-MICHEL FONTAINE, PH.D. **

I. Introduction

One may justifiably wonder why the relevance of the 1951 Convention relating to the Status of Refugees, ("Convention"),¹ which has been called alternatively a "Bill of Rights for Refugees" and a "Magna Carta for Refugees," would be made an issue in a discussion on refugee law. The fact is that it became quite fashionable in some circles within the refugee advocacy community in the late 1980's and early 1990's to boldly claim that the 1951 Convention (its Protocol was rarely mentioned in this context) was

* An initial and shorter version of this paper was presented at the Refugee Week Summit in Sydney, Australia, 1995 and published in AUSTCARE/UNHCR, *Refugee Rights : Papers of the Refugee Week Summit 1995 on Refugee Rights : Their promotion and protection in Australia and the region* (Sydney : AUSTCARE, 1996), 13-19. The current version was read at the International Refugee Law Course organized jointly by the Office of the UN High Commissioner for Refugees [hereinafter UNHCR] and European Council on Refugees and Exiles [hereinafter ECRE] at the School of Law, St Petersburg State University, Russian Federation, November 1-4, 2005.

** The author is an Adjunct Professor for the International Relations Department at Florida International University, North Miami, Florida, and an Adjunct Professor for the Africana Studies Program at the University of Miami, Coral Gables, Florida. He has taught the course on "Protection of Refugees" in the LL.M. Program in Intercultural Human Rights at St. Thomas University School of Law since its inception, and he forms part of its J.S.D. program faculty. He also served as the Director of the Office of the UN High Commissioner for Human Rights in the Democratic Republic of Congo and the Principal Advisor for the Division of International Protection at the UNHCR, Geneva. The author notes that the ideas expressed in this paper do not necessarily reflect those of any of the institutions with which he is, or has been, associated.

¹ See generally Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention].

150 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

no longer relevant to most refugee situations. Such a claim continues to be made today, though less vehemently.² In this respect, the lesser vehemence is perhaps due to the evolution of the 1951 Convention and its Protocol (or more precisely the evolution of the international legal regime of which they are an integral part) and to the final realization that it is most unlikely that anything better would come out of any attempt to upgrade or replace these international instruments.³

Yet, some have argued that the Convention was in fact never relevant to certain refugee situations, meaning the situations of large-scale influx that have characterized our world in the past several decades. This claim refers mostly to the fact that these large-scale displacements, which occurred during and between the two World Wars and then later during and after the period of decolonization that followed and well into the twenty-first century are not amenable to the application of the Convention refugee definition⁴ either before or

² “The commitment to refugee protection and the relevance of the 1951 UN Refugee Convention and its 1967 Protocol were reaffirmed in December 2001. . . by the adoption of the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol of the Status of Refugees. The Declaration was an important achievement... because it was issued at a time when some governments had started to ask whether the Convention was relevant to current realities.” UNCHR, THE STATE OF THE WORLD’S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 49 (2006). The same text added later that “[w]hile there is a broad consensus within the international community concerning the continuing relevance of the 1951 UN Refugee Convention, there is also a recognition that the world has changed significantly in the past five decades.” *Id.* at 52.

³ The reaffirmation of the relevance of these international refugee instruments was indeed one of the major objectives of a series of initiatives undertaken by UNHCR in the beginning of the new century, i.e. the three-track Global Consultations on International Protection, especially the first track at the end of which the above mentioned Declaration was adopted. The outcomes of the second track were published in REFUGEE PROTECTION IN INTERNATIONAL LAW, UNHCR’s GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION (Erika Feller, Volker Turk & Frances Nicholson eds., 2003). The outcomes of the third tract were published in Walpurga Englbrecht et al., *Protection Policy in the Making: Third Track of the Global Consultations*, 22 (2/3) REFUGEE SURV. Q. (2003).

⁴ “[T]he term ‘refugee’ shall apply to any person who ... [a]s a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular

even after it was modified by the 1967 Protocol,⁵ due to its focus on the notion of persecution.⁶ This view, which focuses on the Convention's refugee definition, is said to be out of step with our times by being too narrow, too concerned with persecution, and not in tune with the plight of the overwhelming majority of contemporary refugees, who are the victims of large-scale international or (increasingly) communal violence.

Many of these critics also refer to the fact that most of the large-scale refugee flows in the decades since the 1960s have tended to be into developing countries, which *ipso facto* can scarcely afford to grant to foreigners in general, and refugees in particular, all the social and economic rights provided for by these international refugee instruments.

Regarding the first preoccupation, others have replied that the problem is not so much the notion of persecution, but the way it has been applied in contradistinction to the notions of conflict, violence, massive violations of human rights, and the like.⁷ Indeed, in both the

social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." Convention, *supra* note 3, art. 1(A)(2). "[T]he words 'events occurring before 1 January 1951' in Article 1, Section A, shall be understood to mean either (a) 'events occurring in Europe before 1 January 1951'; or (b) 'events occurring in Europe or elsewhere before 1 January 1951'...." *Id.* art. 1(B)(1).

⁵ See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol]. According to Article I (2) of the Protocol, "[t]he term 'refugee' shall ... mean any person within the definition of Article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ...' and the words' ... 'a result of such events', in Article 1 A (2) were omitted." According to Article I (3) of the Protocol, "[t]he present Protocol shall be applied by the States Parties without any geographical limitation."

⁶ This concept of persecution was, of course, already enshrined in the Statute of UNHCR as adopted by the General Assembly as an annex to its Resolution 429 (V) of December 1950. See G.A. Res. 429, 5th Sess., Annex (Dec. 14, 1950).

⁷ On the protection implications of mass refugee influxes, see generally IVOR C. JACKSON, THE REFUGEE CONCEPT IN GROUP SITUATIONS (Martinus Nijhoff Publishers 1999).

152 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

General Assembly and at the level of regional conventions and declarations, efforts were made beginning early in the 1960s to make up for whatever lacunae may have been created by the application of the concept of persecution found in the UNHCR Statute and the 1951 Convention. The United Nations General Assembly did so by calling on UNHCR to use its good offices to assist or protect refugees not falling under its mandate.⁸ In Africa and in Latin America, it is significant that the OAU Convention governing the Specific Aspects of Refugee Problems in Africa ("1969 OAU Convention")⁹ and the Cartagena Declaration on Refugees ("Cartagena Declaration")¹⁰ respectively, did not substitute a broader definition to that of the Convention and the Protocol, but rather added one to the former. By doing so, they were, among other things, affirming the continued relevance of the refugee definition of the 1951 Convention as modified by the 1967 Protocol.¹¹ Furthermore, the continued increase in the number of States Parties to the Convention and the Protocol, which as of December 1, 2006, stood at 147 of the 192 member countries of the United Nations, is another concrete indication of the continued relevance of these two

⁸ See G.A. Res. 1784, 17th Sess. (Sept. 7, 1962); G.A. Res. 1959, 18th Sess. (Dec. 12, 1963); G.A. Res. 2197, 21st Sess. (Dec. 16, 1966); G.A. Res. 2399, 23^d Sess. (Dec. 6, 1968); G.A. Res. 2594, 24th Sess. (Dec. 16, 1969); G.A. Res. 2650, 25th Sess. (Nov. 30, 1970); G.A. Res. 3143, 28th Sess. (Dec. 15, 1976); G.A. Res. 3454, 30th Sess. (Dec. 9 1975).

⁹ Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 (*entered into force* June 20, 1974) [hereinafter 1969 OAU Convention].

¹⁰ Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held in Cartagena, Colombia, on Nov. 19-22, 1984. Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).

¹¹ Already in adopting the Protocol in 1967 the Contracting Parties to the 1951 Convention passed up an opportunity to proclaim the latter's obsolescence. Instead, they chose to incorporate the bulk of the Convention into the Protocol in these terms at the very beginning of the operative part of the Protocol: "The States Parties to the present Protocol undertake to apply [a]rticles 2 to 34 inclusive of the Convention to refugees as hereinafter defined." Protocol, *supra* note 5, art. I(1). This is an example of the incremental approach through which the international refugee regime has developed from its early years.

international instruments.

As far as the second preoccupation is concerned, the drafters of the Convention were not unmindful of the problems that its implementation could cause a contracting party faced with a major influx. This is indeed at least one of the possible meanings of the fourth paragraph of the Preamble to the Convention:

Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.¹²

Not surprisingly, eighteen years later the problem was more pressing and the drafters of the 1969 OAU Convention not only “*not[ed] with concern* the constantly increasing numbers of refugees in Africa” in the first paragraph of its Preamble, but went farther in the operative part of the text, in its Article II on Asylum (the very subject of which is itself an important innovation for an international convention outside of Latin America), stating in its paragraph 4:

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.¹³

II. Implications of the Relevance and Related Issues

These issues are often put in an ahistorical perspective, in as much as the refugee situation prevailing in recent decades is often perceived as a new development. The fact is that in the early decades of the international refugee regime, or the period from 1921 until World War II, or more precisely since 1914 and the outbreak of

¹² Convention, *supra* note 1, pmb.

¹³ 1969 OAU Convention, *supra* note 9, art. 4.

154 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

World War I, the advent of the Russian Revolution, and the collapse of the Ottoman Empire, the consequence of which was the creation of that international regime, the prevailing refugee flows were very similar to those that characterize the latter decades of the twentieth century and the beginning of the twenty-first, though in the meantime the majority of the flows have been displaced from Europe to Africa, Asia, and the Americas. It is worth mentioning, in passing, the direct connection between events in Russia in the second decade of the twentieth century and the birth of the international regime of refugee protection. The first international agency for refugees ever created was the Office of the High Commissioner for Russian Refugees set up by the League of Nations in 1923.

Understandably, the refugee criteria incorporated into the international refugee instruments of these early decades were objective in nature, referring to groups of persons from certain countries or in certain situations rather than to their fear of persecution. This focus reflected the novelty of the regime, the circumstances that provoked its creation, and the eventually persistent hope that the refugee problem would not be a lasting one and therefore that a generic refugee definition was not called for. The 1951 Convention definition itself was the result of a process of evolutionary development lasting three decades. An aspect of this approach is to be found in the fact that each of the successive international instruments adopted from the 1920s onwards would recuperate in its refugee definition those persons or groups recognized under the respective previous instruments.¹⁴

As for the evolution since 1951, including the adoption of the 1967 Protocol, that removed the temporal limitation which had limited the refugee definition to people who sought international protection as a result of events occurring prior to January 1, 1951, and omitted the optional geographical limitation which had accorded international protection only to people seeking it as a result of events occurring in Europe, it has reflected developing refugee needs, especially as perceived at the regional level and primarily outside of

¹⁴ For the definitions of the term refugee in the UNHCR Statute and the 1951 Convention, see paragraph 6 (A) (i) and art. 1(A)(1) respectively.

Europe.

It has been suggested by refugee advocates that, in so highlighting the allegedly narrow scope of the 1951 Convention's and its 1967 Protocol's refugee definition, those who question the relevance of these instruments have, albeit unwittingly, given credence to the perception that the concept of persecution is indeed a narrow one, thereby comforting states in their restrictive construction and application of the definition.

Actually, it is true that, taken alone, the Convention refugee definition is indeed obsolete. However, as indicated above, this was remedied by the 1967 Protocol in removing the January 1, 1951, dateline and not offering the geographical option limiting its application to asylum-seekers from Europe. As a result of the latter innovation, most of the signatories which had adopted the geographical limitation under the 1951 Convention eventually dropped it in acceding to the Protocol.

When the obsolescence argument focuses on the protection of social and economic rights under the Convention, it may take two contradictory forms. It may consider this protection inadequate, a problem that, as will be seen below, can be remedied by the resort to the corresponding human rights instruments, which normally provide for a fuller protection of these rights to all human beings.¹⁵ The critique may, alternatively, point out that most of those rights are irrelevant to the realities of most current refugee situations, which are characterized by refugees being kept in quasi-detention (or even

¹⁵ Jane McAdam warns, however, that the human rights conventions, while useful and at times necessary, are not adequate substitutes for the 1951 Convention and the 1967 Protocol. She argues indeed that, “[w]hereas a grant of Convention status entitles the recipient to the full gamut of Convention rights, no comparable status arises from recognition of an individual’s protection need under a human rights instrument. The Refugee Convention alone creates a status recognized in domestic law.” Jane McAdam, *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection*, New Issues in Refugee Research (UNHCR, Research Paper No. 125 at 4, July 2006). For a more human rights system-oriented thrust, see Brian Gorlick, *Human Rights and Refugees: Enhancing Protection through International Human Rights Law*, New Issues in Refugee Research (UNHCR, Working Paper No.30, Oct. 2000).

real detention) in more or less closed camps, or remote or isolated settlements under conditions of great marginality and dependence in countries where the local populations are often no better off, or may be even worse off, than the refugees themselves. This is indeed the concrete reality that has led to the coining and increasing usage of the term “refugee warehousing,” which has even slipped of late into the language of UNHCR itself.¹⁶ Here, the countering argument might be that this does not make the convention irrelevant or obsolete, but rather it makes it a set of minimum standards that the state and international authorities must strive to achieve in their providing of protection and assistance to refugees and asylum-seekers.

III. The Limitations of the 1951 Convention and the 1967 Protocol, their Remedies, and the Evolution of the Regime

One of the most glaring omissions of both the Convention and the Protocol is that they do not provide for an unambiguous obligation for contracting states to examine asylum claims. The Convention does make an oblique reference to refugee status determination in its Article 9 on provisional measures.¹⁷ It is considered essential to the national security in the case of a particular person that it allows a Contracting State to undertake such measures “in time of war and other grave and exceptional circumstances . . . pending a determination by the Contracting State that that person is in fact a refugee . . .”¹⁸ This indirect approach is a logical consequence of the reluctance of states to accept an obligation to grant asylum. As a result, various other international instruments resort to such formulas as “the right to seek and to enjoy asylum

¹⁶ However, the concrete reality is also that there are hundreds of thousands of urban refugees and asylum-seekers around the world, some of whom are in rich countries, others in not so poor countries, and for whom the codification of these rights is quite relevant. The issue of refugee livelihood is of late the subject of much research, analysis, and evaluation, not least by UNHCR. For a recent series of studies of refugee and IDP (internally displaced persons) livelihoods *see generally*, 25(2) REFUGEE SURV. Q. (2006).

¹⁷ Convention, *supra* note 1, art. 9.

¹⁸ *Id.*

from persecution,”¹⁹ or at best provide that “[m]ember States . . . shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees. . . .”²⁰ In comparison, however, the 1951 Convention and the 1967 Protocol do not even mention the word “asylum” in their operative parts and the Convention does so only in the fourth paragraph of its Preamble with respect to the issue of the unduly heavy burdens that the grant of asylum might impose on some contracting parties.

On a related issue, the absence of a clearly stated obligation to examine an asylum claim may also explain the long debate that took place in the European Union (“EU”) over the basic issue of the state responsible for examining an asylum claim when the asylum-seeker has passed through at least one other EU country before arriving at the EU country of destination. This has led to the drafting and adoption of the Schengen Agreement and the Dublin Convention. Taking this one step further made it possible for the same States to adopt “safe third country” legislation and policies whereby it may be deemed safe for the asylum-seekers who stopped there on their way to EU territory, to return to certain countries outside the EU. However, as will be seen below, the 1951 Convention does protect a refugee’s right to *non-refoulement*: the right not to be involuntarily returned to a place of potential persecution, which makes up to some extent for the absence of a refugee’s right to demand asylum.

The refugee definition in the 1951 Convention and the 1967 Protocol distinguishes refugees from stateless persons. Though the

¹⁹ Universal Declaration of Human Rights, art. 14, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948); United Nations Declaration on Territorial Asylum, art. 1.2, G.A. Res. 2312, 22d Sess. (Dec. 14, 1967) [hereinafter Declaration on Territorial Asylum]. The latter instrument adds, in its Art. 1.3, that “[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.” It is also proclaimed for every person “the right to seek and be granted asylum . . . in the event he is being pursued for political offences or related common crimes.” Organization of American States, American Convention on Human Rights, art. 22.7, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

²⁰ 1969 OAU Convention, *supra* note 9, art. II (1).

158 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

said definition refers to stateless persons both in its inclusion and its cessation clauses, it does so only with respect to stateless persons who are also refugees, those refugees designated as “not having a nationality.”²¹ While the initial intent of the drafters of the Convention was to include under its coverage both refugees and stateless persons, this was later found to be impractical and, therefore, it was decided to limit this instrument to refugees. Consequently, two other conventions were later adopted to fill this vacuum: the 1954 Convention relating to the Status of Stateless Persons²² and the 1961 Convention on the Reduction of Statelessness.²³

The 1951 Convention does not cover migrants. This does not mean that migrants do not have rights; only that those rights are protected under other international instruments,²⁴ including those relating to human rights as they apply to all human beings. This is important to remember, in light of the recently reported treatment of clandestine migrants trying to enter Spain and the European Union area through the Kingdom of Morocco via the Spanish enclave of Melilla.²⁵ More to the point, it must also be remembered that some of these migrants may very well be asylum-seekers who might perhaps be discovered to be refugees if they were allowed to go through a refugee status determination process before being sent away with or without food or water into the desert. The whole point

²¹ Convention, *supra* note 1, art. 2.

²² See generally Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

²³ See generally Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175, UN doc. A/CONF.9/15, 1961.

²⁴ See The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, Annex (Dec. 18, 1990); see also BARBARA BOGUSZ et al., IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN AND INTERNATIONAL PERSPECTIVES (Martinus Nijhoff ed., 2004); IMELDA HIGGINS & KAY HAILBRONNER, MIGRATION AND ASYLUM LAW AND POLICY IN THE EUROPEAN UNION (2004); PETER J. VAN KRIEKEN, THE MIGRATION ACQUIS HANDBOOK (2001); ARISTIDE R. ZOLBERG & PETER M. BENDA, GLOBAL MIGRANTS, GLOBAL REFUGEES: PROBLEMS AND SOLUTIONS (2001).

²⁵ One should mention also the rise and increasing politicization of antagonism to illegal and other immigrants in the United States.

of the Convention and the Protocol is nevertheless to differentiate between refugees and migrants and to provide for the protection of the former, without prejudice to the respect for the fundamental human rights of the latter as human beings.

It goes without saying that the international community has other means by which to protect the latter, but needs to do much more in this respect, especially in regard to the phenomenon of human trafficking and other forms of exploitation of human beings, especially women and children, across national borders. Many abuses of rights are known to occur in the realm of migration, especially of the illegal or clandestine kind, and it needs to be more effectively addressed, bearing in mind that the two realms are not strictly separated from one another. Indeed, it is more and more evident that migration flows are mixed flows, including both refugees and migrants. A proper refugee protection strategy must therefore factor in this consideration.

For this reason, one needs to be aware of some of the institutional and legal resources in the field of migration. The International Labour Office (“ILO”), also headquartered in Geneva, is a United Nations specialized agency that promotes and supervises the implementation of international instruments on the rights of all workers, including migrant workers. This includes the International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families adopted by the UN General Assembly on December 18, 1990.²⁶ Outside of the UN system, the International Organisation for Migrations (“IOM”), unlike UNHCR, has a mandate for migrants. In addition, it cooperates quite closely with UNHCR and the countries concerned, in particular in organizing the travel of repatriated refugees and of refugees resettled to third countries.

It would be tempting to say that the Convention and the Protocol do not cover so-called “war refugees,” those refugees who constituted the principal actors of the mass refugee flows of most of the twentieth century and who caused some commentators to claim

²⁶ See G.A. Res. 145/158, 45th Sess., Doc. A/RES/45/158 (Dec. 18, 1990).

160 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

the obsolescence of the Convention. However, as indicated before, being a victim of international or communal violence does not necessarily mean not being a victim of persecution, especially in the case of intrastate violence. This is why both the OAU Convention and the Cartagena Declaration embrace the 1951 Convention as modified by the 1967 Protocol, as they propose a broader definition of refugees based on the claimant's having had to flee his or her country as a result of civil or international war, ethnic conflict, large-scale communal violence, massive violations of human rights, and other events disrupting public order in all or part of the country of origin.

Unfortunately, potential asylum states often attempt to evade their obligations under the 1951 Convention and the 1967 Protocol by treating all victims of large-scale violence as if they could not possibly have a claim of persecution under the Convention and/or Protocol and, thereby shunting them off into the less demanding B-status, humanitarian asylum, or temporary protection (status) without looking to see if they have a well-founded fear of persecution on 1951 Convention grounds.

The 1951 Convention and the 1967 Protocol do not cover internally displaced persons, since the latter have remained within their country of origin or habitual residence.

Therefore they are technically under the protection of their own national and local authorities. For the same reason all international refugee definitions require that refugees be persons outside their country of origin or nationality.²⁷ IDPs who, unlike

²⁷ This is not necessarily the case in United States law, however. The US refugee definition is found in section 207 (c) (2) of The Refugee Act of 1980, which was meant to bring US refugee law into harmony with the Protocol. According to U.S. law, there are two possible meanings to the term refugee: First, it "means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion ..." This corresponds quite closely to the refugee definition in Article 1 A (2) of

refugees, do not have their own international organization for their protection or assistance, have traditionally been dealt with by UNHCR on an ad hoc basis when it is asked to do so by the UN Secretary-General or the General Assembly. This takes place within a collective framework that involves various other UN organizations and NGOs in the so-called “collaborative approach,” under the difficult coordination of a UN Humanitarian Coordinator, when there is one, and the no less difficult leadership of an ad hoc designated “lead agency,” a role which was often given to UNHCR.²⁸ The

the Protocol to which the US is a party. However, the text continues with an alternative definition: “or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207 (e) of this Act [8 U.S.C. § 1157 (e)]) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such a person is habitually residing, and who is persecuted or who has a well –founded fear of persecution ...” *See Immigration and Nationality Act, 8 U.S.C. § 1101 (2000).* It is noteworthy to mention, in light of the evolution of the construction of the Convention and protocol and as per notes 34 and 35 *infra*, that, after listing the exclusion clauses, the text goes onto add: “For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.” *Id.*

²⁸ It should be noted, however, that the role of UNHCR with IDPs has recently been enhanced through the instauration by the United Nations Inter-Agency Standing Committee (IASC) of the “*cluster approach*”. In this successor to the erstwhile collaborative approach, each organization is deemed firmly responsible for a cluster of activities, UNHCR’s being those of protection, shelter provision, and camp management. This new arrangement is meant to reduce the risk of protection and assistance gaps experienced under the less constraining collaborative approach. Under this new arrangement, “UNHCR’s commitment to the ‘cluster leadership approach’ should result in a more consistent and predictable exercise by the Office of the mandates it has received from the General Assembly to protect and assist internally displaced persons ...” *See UNHCR, Executive Comm. of the High Comm’r Programme, Standing Comm., UNHCR’s Expanded Role in Support of the Inter-Agency Response to Internal Displacement Situations,* ¶ 1, U.N. doc. EC/57/SC/CRP.18 (June 8, 2006), available at <http://www.unhcr.org/excom/EXCOM/44892fc82.pdf>. A May 2007 assessment of the working of UNHCR’s leadership in the cluster approach concluded as follows:

162 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

Representative of the Secretary-General for Internally Displaced Persons has, in the meantime, systematically compiled international norms and principles applicable to IDPs.²⁹ These were drawn from human rights law, humanitarian law, and refugee law by analogy and have been distilled into a document entitled *Guiding Principles on Internal Displacement*.³⁰

Likewise, the Convention, understandably, is silent on so-called “environmental refugees.” However, former UN High Commissioner for Refugees, Mr. Ruud Lubbers, was known to be concerned about such persons whose lands are expected to be submerged by the seas as global warming progresses and the level of the seas rises. In the face of the calamitous hurricanes of the last year or two and the visible acceleration of the melting of the polar ice caps and of long stable glaciers, this scenario seems less and less improbable. It is in any case already a matter of serious concern for a number of Pacific Islands that rise only a few meters above sea level. At some time in the near future, the international community

“At the end of the first year of the cluster approach, a number of challenges remain for 2007. An ongoing priority is to encourage more partners, particularly NGOs, to participate in the clusters and to undertake operational activities at the field level to fill humanitarian gaps. UNHCR will need to continue to ensure that cross-cutting issues, such as protection, gender, HIV and AIDS, and the environment, are properly mainstreamed within the work of the clusters.” See UNHCR, *UNHCR’s Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement: Update on UNHCR’s Leadership Role within the Cluster Approach and IDP Operational Workplans*, ¶ 64 (May 25, 2007), available at <http://www.unhcr.org/excom/4464dd68f2.pdf>. That sounds very much like the old complaints under the collaborative approach that led to the setting up of the cluster approach in the first place. It is not easy to make up for the inexistence of an agency with a specific and exclusive mandate for IDPs.

²⁹ U.N. Econ. & Soc. Council [hereinafter ECOSOC], Comm'n on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Comm'n Human Rights, Mass Exodus and Displaced Persons*, U.N. Doc. E/CN.4/1996/52/Add.2 (Feb. 22, 1996).

³⁰ ECOSOC, Comm'n on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Comm'n Human Rights, Mass Exodus and Displaced Persons*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998).

will have to turn to this issue and try to find ways of creating an international regime, or adapting the current refugee regime, for coping with the forced displacements that this phenomenon is likely to provoke.

More immediately, however, there are certain specific rights, which, under the 1951 Convention, are provided with a level of protection that is lower than one might prefer. For example, the right of access to secondary and tertiary education is given a lower standard of protection than that to primary education.³¹ The Convention and the Protocol also fail to identify the particular problems and rights of certain specific vulnerable groups. For instance, they do not contain any reference to refugee children, women, or seniors. They do not provide specifically for all those vulnerable categories that refugee caretakers are accustomed to attend to in their everyday practice, and they certainly do not make specific reference to victims of war, civil violence, or ethnic conflict. However, the generic approach was characteristic of the broader international regime for the protection of human rights as well in its initial stage. We had first the Universal Declaration of Human Rights in 1948. Only in 1953 and 1989, respectively, did we have the Convention on the Political Rights of Women³² and the Convention on the Rights of the Child,³³ although in later years there were alternations between the general and the particular.

Still, we do not have now, and may not have in the future, conventions on refugee women, refugee children, or refugee seniors, either at the universal or at the regional level. Nevertheless, at least for women and children, there are the above mentioned human rights conventions relating to them that have been resorted to in the search for a more effective protection for refugee women and children. Furthermore, refugee advocates have been successful, as indicated above, in obtaining judicial and quasi-judicial decisions that have

³¹ Convention, *supra* note 1, art. 22.

³² Convention on the Political Rights of Women, Dec. 20, 1952, 193 U.N.T.S. 135.

³³ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

164 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

been effective in utilizing the ground of particular social groups in Article 1 (A) 2 of the 1951 Convention to make up for the existing specificity gaps in conventional refugee law.³⁴ The same is true for homosexuals, labor union members, family members, victims of sexual violence, and of cruel, dangerous, or degrading traditional or state-imposed practices, and all those other persons not specifically provided for in either universal or regional refugee law instruments.³⁵ It is, therefore, important to recognize and encourage to the full extent the use of international human rights in refugee protection, without prejudice to the priority relevance of the 1951 Convention and 1967 Protocol.

There are, of course, as already indicated, other sources of law, including so-called soft law, which address these groups and their specific problems. In particular, concerning women and sexual violence, aside from the Convention on all Forms of Discrimination against Women, there are several UNHCR Executive Committee (“EXCOM”) conclusions,³⁶ including Conclusion No. 39 (XXXVI) 1985 on Refugee Women and International Protection, by which EXCOM endorsed, in paragraph (k), the idea first expressed by the Council of the European Union that “women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as

³⁴ UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).

³⁵ T. ALEXANDER ALEINIKOFF, PROTECTED CHARACTERISTICS AND SOCIAL PERCEPTIONS: AN ANALYSIS OF THE MEANING OF ‘MEMBERSHIP OF A PARTICULAR SOCIAL GROUP’, IN REFUGEE PROTECTION IN INTERNATIONAL LAW 263, 263-311 (Erika Feller, Volker Türk, & Frances Nicholson eds., 2003). For the availability of resort to the political opinion ground in such cases in the United States, *see note 35 supra*.

³⁶ While Excom conclusions are evidently not binding international instruments, they express vigorously negotiated consensuses among the members of the UNHCR Executive Committee, made up of the representatives of the most influential states of the world in refugee matters. For the full text or excerpts of Excom conclusions, *see generally* UNHCR, *Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, U.N. Doc. HCR/IP/2/Eng/REV.1991 (1991).

'a particular social group' within the meaning of Article 1A(2) of the 1951 Refugee Convention."³⁷ There are also Conclusions No. 54 (XXXIX) 1988 on Refugee Women,³⁸ No. 60 (XL) 1989 on Refugee Women,³⁹ No. 64 (XLI) 1990 on Refugee Women and International Protection,⁴⁰ No. 73 (XLIV) 1993 on Refugee Protection and Sexual Violence,⁴¹ and 98 (LIV) 2003 on Protection from Sexual Abuse and Exploitation.⁴²

There are also Executive Committee conclusions on children which give guidelines on the way to protect and assist refugee children, quite apart from the 1989 Convention on the Rights of the Child, in which Article 22 calls for appropriate protection to an unaccompanied child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures.⁴³ Among the EXCOM Conclusions on children are: No. 47 (XXXVIII) 1987 on Refugee Children,⁴⁴ No. 59 (XL) on Refugee Children,⁴⁵ and No. 84 (XLVIII) 1997 on Refugee Children and Adolescents.⁴⁶ This is in addition to the UNHCR's detailed guidelines on refugee women and refugee children, which enjoy considerable authority, although they are not sources of law properly speaking. The Executive Committee has been mindful of the family as well, in Conclusions No. 9 (XXVIII) 1977 on Family Reunion,⁴⁷ No. 24 (XXXII) 1981 on Family Reunification,⁴⁸ and No. 88 (L) 1999 on the Protection of the

³⁷ UNHCR, A THEMATIC COMPILATION OF EXECUTIVE COMMITTEE CONCLUSIONS 426 (2005), <http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf>.

³⁸ *Id.* at 427-428.

³⁹ *Id.* at 160, 206, 370, 399.

⁴⁰ *Id.* at 428-429.

⁴¹ *Id.* at 371-373.

⁴² *Id.* at 375-379.

⁴³ CRC, *supra* note 33, art. 22.

⁴⁴ EXCOM Conclusions, *supra* note 37, at 72-74.

⁴⁵ *Id.* at 74-75.

⁴⁶ *Id.* at 75-77.

⁴⁷ *Id.* at 166.

⁴⁸ *Id.* at 167.

Refugee's Family.⁴⁹

Thus, while it cannot be said that the Convention and the Protocol have themselves actually evolved (as there has not been any modification to the texts since the Protocol modified the Convention's refugee definition in 1967), it can nevertheless be argued that both instruments have been integral parts of a distinct evolutionary process along with the evolution of the international refugee regime. The engines of this evolution have been judicial and quasi-judicial decisions on refugee issues, soft law on refugees, and advances in international human rights law, to which we could add those in international humanitarian law and international criminal law. Their cumulative effect is not to make the 1951 Convention and 1967 Protocol irrelevant or obsolete, but to render their application more effective.

IV. The Scope of the Convention and the Protocol

In spite of the limitations reviewed in the previous section, the 1951 Convention covers a great deal of ground that further enhances its relevance and usefulness. At the outset the Convention establishes most forcefully the parameters and fundamental principles of refugee law and protection. The very first paragraph of its Preamble places it squarely in the human rights domain when it refers to the UN Charter and the Universal Declaration of Human Rights that "have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."⁵⁰ The concern for fundamental rights and freedoms is repeated in the second paragraph of the Preamble.⁵¹ It is as if the drafters wanted to make sure that, in implementing the Convention, the decision-makers make no mistake and entertain no ambiguity as to the intent of the drafters and the meaning of the prescriptions, and proscriptions, contained in the document.⁵² Other principles highlighted in the

⁴⁹ *Id.* at 169.

⁵⁰ Convention, *supra* note 1, pmb..

⁵¹ *Id.*

⁵² More and more, however, States are imagining and implementing policies

preamble include international co-operation and burden-sharing, as well as the social and humanitarian character of the problem of refugees.⁵³

The architecture of the Convention is indeed most interesting. The operative part starts with Chapter I on General Provisions which further develops the framework outlined in the Preamble, beginning with the universal refugee definition, complete with its inclusion, exclusion and cessation clauses.⁵⁴ Other elements of this framework include the general obligations of refugee towards the laws and regulations of “the country where he finds himself”⁵⁵— the Convention, in its extreme prudence, dares not say “country of asylum”— as well as a reiteration of the non-discrimination principle⁵⁶ (a must for any human rights instrument) first affirmed at the beginning of the Preamble, and a special provision for the freedom of religion.⁵⁷ Mindful of the limitations of their text, the drafters of the Convention are careful not “to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.”⁵⁸ The drafters of the Convention then listed a series of exemptions and other provisions mostly aimed at reinforcing the humanitarian nature of refugee protection and the coverage and the humanitarian character of the Convention itself.⁵⁹

The Convention’s Chapter IV on Administrative Measures is

that seem at odds with the objectives and purposes of the Convention, even as they are claiming otherwise.

⁵³ Convention, *supra* note 1, pmb1.

⁵⁴ *Id.* art. 1

⁵⁵ *Id.* art. 2.

⁵⁶ *Id.* art. 3.

⁵⁷ *Id.* art. 4

⁵⁸ *Id.* art. 5. In light of current negative developments in asylum countries, it is refreshing to note that, consistent with this injunction of the Convention, there were resolutions and decisions of the Council of Europe in earlier times encouraging its members to act in a liberal and humanitarian spirit in relation to persons seeking asylum on their territories. *See, e.g.*, Res. 14 on Asylum to Persons in Danger of Persecution (June 29, 1967) [hereinafter Res. 14]; Comm. of Ministers of the Council of Eur., Declaration on Territorial Asylum (Nov. 18, 1977).

⁵⁹ Convention, *supra* note 1, arts. 6-11.

168 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

a trove of dispositions solidly anchoring the protection of asylum-seekers and refugees. In the absence of a provision on asylum, the central core of the Convention is its *non-refoulement* clause which is the closest substitute for the missing subjective right to asylum. The clause in question merits being quoted in full as it is the first of a long line of clauses on the subject of *non-refoulement* in international human rights instruments at both the universal and regional levels.⁶⁰ In light of its upholding by a series of international conventions and declarations on human rights, and in spite of the States' efforts to circumvent this prohibition through various subterfuges and misrepresentations, *non-refoulement* is recognized as a norm of *jus cogens*.⁶¹ Therefore, it is binding upon all States, regardless of whether they are parties or not to these conventions, though the issue has been a matter of some debate among international lawyers.⁶² Article 33 (1) of the 1951 Convention states that “[n]o contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁶³

While this formulation may appear rather straightforward, it has nevertheless given rise to much debate. In particular, the debate has revolved around the issue of whether it applies only to persons who have actually been determined to be refugees, or as well to asylum-seekers who may be refugees but have not yet been formally determined, and as to whether it applies only to refugees already firmly on the territory of the state concerned or also to those who are still at the border or even still on the high seas sailing toward the

⁶⁰ *Id.* art. 33(1).

⁶¹ See note 88 *infra*.

⁶² See generally Guy Goodwin-Gill, *Non-Refoulement and the New Asylum-Seekers*, 26 VA J. INT'L L. 897 (1986); Kay Hailbronner, *Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?* 26 VA J. INT'L L. 897 (1986); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 24 (1991); and Sir Elihu Lauterpacht QC & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion, in REFUGEE PROTECTION IN INTERNATIONAL LAW*, *supra* note 3, at 89, available at <http://www.unhcr.org/protect/PROTECTION/3b33574d1.pdf>.

⁶³ Convention, *supra* note 1, art. 33(1).

country concerned.⁶⁴ UNHCR's position on these questions is of course consistent with common sense and the humanitarian intent of the Convention, by providing international protection to those who need it. Therefore, the UNHCR's position is that: a) the norm applies to asylum-seekers (pending the final determination of their status) as well as to confirmed refugees, and b) it also applies to refugees at the frontier, in territorial waters, or even on the high seas.

The Convention evolved in its relevance, primarily under the impact of universal and regional human rights and refugee instruments. It must be borne in mind that Article 33 (2) provides significant exceptions to the protection of the norm of *non-refoulement*.⁶⁵ These exceptions apply to "a refugee whom there are reasonable grounds for regarding as a danger to the security of a country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the country."⁶⁶ Already, the 1967 United Nations Declaration on Territorial Asylum⁶⁷ undertook to resolve any ambiguity that might have been perceived in Article 33 of the 1951 Convention by providing in Article 3 (1) that:

No person referred to in article 1, paragraph 1 ("persons entitled to invoke article 14 of the Universal Declaration of Human Rights") shall be subjected to such measures as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected

⁶⁴ See *Sale v. Haitian Centers Council Inc. et al*, 509 U.S. 155 (upholding the U.S. Government's narrower interpretation that US Coast Guard interception of Haitian asylum-seekers on the high seas and sending them home on the basis of an agreement with the Haitian government and without access to refugee status determination is consistent with US obligations under international law and therefore does not constitute *refoulement*). Most interestingly, see Justice Blackmun's sharp dissent in *Sale*. See Lauterpacht and Bethlehem, *supra* note 61, at 109, for a detailed analysis of the scope of the norm of *non-refoulement*, which is totally at variance with the reasoning and conclusions of the US Supreme Court in *Sale*.

⁶⁵ Convention, *supra* note 1, art. 33(2)

⁶⁶ *Id.*

⁶⁷ Declaration on Territorial Asylum, *supra* note 19.

170 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

to persecution.⁶⁸

This Declaration provides in Article 3 (2) for exceptions “for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.”⁶⁹ However, it provides in such cases that the State should “consider the possibility of granting to the person concerned . . . an opportunity, whether by way of provisional asylum or otherwise, of going to another State.”⁷⁰

At the universal level, a major step forward was taken through the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁷¹ which expanded the norm of *non-refoulement* by prohibiting the expulsion, return or extradition of “any person . . . to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁷²

Moreover, in 1966, at the regional level, the Principles Concerning Treatment of Refugees (“Bangkok Principles”), adopted by the Asian-African Legal Consultative Committee (“AALCC”), which has now been renamed Asian-African Legal Consultative Organization (“AALCO”), also included a clause against *refoulement*.⁷³ Article III on Asylum to a Refugee excluded the rejection at the frontier, return or expulsion, except for overriding

⁶⁸ *Id.* art. 3(1).

⁶⁹ *Id.* art. 3(2). United Nations Declarations, which constitute soft law, are of course not binding *per se*, but they do carry some weight and often evolve into conventions or they may, under certain circumstances, rise to the level of customary international law, e.g. Universal Declaration of Human Rights, *supra* note 19.

⁷⁰ *Id.* art. 3(3).

⁷¹ See Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. Res. 39/46, 93d plen. mtg (Dec. 10 1984).

⁷² *Id.* art. 3(1).

⁷³ Asian-African Legislative Consultative Committee, Principles Concerning Treatment of Refugees (1966) reprinted in UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND OTHERS OF CONCERN TO UNHCR 201 (1979). Of course, the Bangkok Principles constitute only a regional declaration, not a treaty or convention. Thus, the same may be said of this instrument at the regional level as of U.N. declarations at the universal level. See *supra* note 68.

reasons of national security or safeguarding the population, of anyone seeking asylum in accordance with these Principles, which would result in compelling him to return or to remain in the territory of his country if there is a well-founded fear of persecution endangering his life, physical integrity or liberty.⁷⁴ In the same declaration, Article VIII on Expulsion and Deportation prohibited expulsion of a refugee, “[s]ave in the national or public interest or on the ground of the violation of the conditions of asylum,” a rather unique notion, and, without providing for any exception, the deportation or return of a “refugee . . . to a State or Country where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group”⁷⁵. In case of an expulsion decision, paragraph 2 of Article VIII provided for the State to “allow [the expellee] a reasonable period within which to seek admission into another State,”⁷⁶ while retaining “the right to apply during the period such internal measures as it may deem necessary.”⁷⁷

The Bangkok Principles were subsequently updated. Culminating a process that started in 1996 under the impulsion of UNHCR, a new version of this document was adopted at the 40th Session of the AALCO in New Delhi.⁷⁸ In this version, *non-refoulement* was separated from asylum in Article II and became the subject of a new Article III in which the exceptions to the rule of *non-refoulement* took the form of a second paragraph identical to Article 33 (2) of the 1951 Convention.⁷⁹ A separate clause on expulsion and deportation in Article V, reproduces Article XVIII of the original document and, in a fourth paragraph, outlines in the same terms as those of Article 32 (2) of the 1951 Convention, the

⁷⁴ *Id.* art. 3.

⁷⁵ *Id.* art. 8.

⁷⁶ *Id.* art. 8(2).

⁷⁷ *Id.*

⁷⁸ See Final Text of the AALCO’s 1966 Bangkok Principles on Status and Treatment of Refugees, Asian-African Legal Consultative Org., 40th Sess., (Jun. 24, 2001).

⁷⁹ *Id.* art. 3.

172 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

limitations and conditions under which expulsion can be effected.⁸⁰

Still at the regional level, the previously mentioned Council of Europe Resolution 14 (1967) on Asylum to Persons in Danger of Persecution recommended as follows to the Member Governments:

They should, in the same [liberal and humanitarian] spirit, ensure that no one [without exception] shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular group or political opinion.⁸¹

This spirit perhaps explains why, although the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸² ("European Convention") does not have a clause of *non-refoulement* properly speaking, though its Protocol No. 4 prohibits in Article 4 the collective expulsion of aliens,⁸³ and its Protocol No. 7 prohibits the expulsion without due process of an alien lawfully resident in the territory of a State, except on grounds of public order or national security,⁸⁴ Article 3 of the European Convention, which states "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment," is interpreted by the European Court of Human Rights in Strasbourg, France, as meaning that returning someone to a country where he risks being subjected to torture is equivalent to submitting him to torture himself, and is therefore prohibited as well.⁸⁵

⁸⁰ *Id.* art. 5.

⁸¹ See Res. 14, *supra* note 32.

⁸² See Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, 213 U.N.T.S. 222 (November 4, 1950) (*as amended by Protocols Nos 3, 5, 8, and 11*).

⁸³ See Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 46 (Sept. 16, 1963).

⁸⁴ See Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117 (November 22, 1984).

⁸⁵ In the *Soering* case, the European Court of Human Rights held unanimously that if Soering, a German citizen in British custody, accused of a crime punishable

The late 1960s were a fertile period for the evolution of the principle of *non-refoulement*, especially at the regional level. After the Bangkok Principles of 1966, the 1967 UN Declaration on Territorial Asylum and the 1967 Council of Europe Resolution 14 on the Protection of Persons in Danger of Persecution, came the 1969 OAU Convention and the American Convention on Human Rights (“American Convention”). The OAU Convention adopted on 10 September 1969 holds in Article III (3) that:

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or to remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2 [the 1969 OAU Convention’s two refugee definitions].⁸⁶

The American Convention of 22 November 1969 provides in Article 22 (8) that:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.⁸⁷

These last two contributions have the virtue of providing for no exceptions to the norm. The same is true of the 1984 Cartagena Declaration which, like the OAU Convention, extends the concept to rejection at the frontier. It is worth noting that the Cartagena Declaration went one step further and undertook in its Section III (5):

To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of the rejection

by the death penalty in the United States of America, were extradited to the US by the Government of the United Kingdom, this would be a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See Soering v. U.K., 161 Eur. Ct. H.R. (ser. A) (1989).

⁸⁶ 1969 OAU Convention, *supra* note 9, art. 3(3).

⁸⁷ American Convention on Human Rights, *supra* note 19, art. 22(8).

174 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.⁸⁸

The principle of *non-refoulement* is further re-stated in the 1992 Declaration on the Protection of all Persons from Enforced Disappearance, which in its Article 7 (1) holds that “[n]o State shall expel, return (*refouler*), or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.”⁸⁹ An International Convention for the Protection of All Persons from Enforced Disappearances was adopted by the UN General Assembly on 20 December 2006 and officially opened for signature at a ceremony in Paris on 6 February 2007.⁹⁰ It too contains a clause of *non-refoulement* in the same terms as the Declaration.⁹¹ Thus, through the combined effect of universal and regional declarations and conventions on refugees and on human rights, the principle of *non-refoulement* has evolved from one which, under the 1951 Convention and 1967 Protocol, was subjected to exceptions, may or may not have applied to rejection at the frontier, and concerned refugees and asylum-seekers, to one without exceptions, that includes rejection at the frontier, and protects all persons or aliens exposed to man-made danger if sent back against their will.⁹²

⁸⁸ Cartagena Declaration on Refugees, *supra* note 10, § 3(5).

⁸⁹ Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, at 8(1), U.N. GAOR, 47th Sess., 92d plen. mtg. U.N. Doc. A/Res/47/133/8(1) (Dec. 18, 1992). [hereinafter Enforced Disappearance Declaration].

⁹⁰ International Convention for the Protection of All Persons from Enforced Disappearance, U.N. Doc. E/CN.4/2005/WG.22/WP.1/Rev. 4 (Sept. 23, 2005), *available at* <http://www.ohchr.org/english/issues/disappear/docs/E.CN.4.2005.WG.22.WP.1.R.EV.4.pdf>.

⁹¹ Enforced Disappearance Declaration, *supra* note 89, art.16.

⁹² This interpretation of the evolution of the Convention and Protocol is consistent with Article 31 (2 and 3) of the 1969 Vienna Convention on the Law of Treaties that defines the context for the interpretation of a treaty. Vienna

The relevance and ability of the 1951 Convention and Protocol to empower states to protect refugees and asylum-seekers is further heightened by two other clauses that should be considered in combination with that of *non-refoulement*. One is the prohibition of imposing penalties upon refugees for illegal entry or stay.⁹³ This prohibition is not unconditional. It requires that the refugee come directly from a territory where his or her “life or freedom were threatened in the sense of Article 1 [i.e. as per the refugee definition]”;⁹⁴ that “they present themselves without delay to the authorities and show good cause for their illegal entry.”⁹⁵ Of course, the drafters in a fit of migration control concern, did not wish to give *carte blanche* to a refugee to enter any country any time he or she wishes and to do whatever he or she pleases after entry.

Some countries have jumped into this breach and penalized or, worse, rejected asylum-seekers for not coming directly or not declaring themselves within some arbitrarily defined periods. Thus were invented the notion of safe first country of asylum and that of an implacable deadline to respect and beyond which the claim is declared not receivable. It is obvious, however, that some common sense and flexibility are due here, in light of the fact that such rules, when applied rigidly, defeat the humanitarian and protection purposes of the Convention and the Protocol. The question whether a person should be given protection cannot be subsumed into a mere issue of procedure or schedule, albeit without prejudice to the role of procedure in ensuring the primacy of the rule of law. This calls into play Article 31 on general rules of interpretation of the Vienna Convention on the Law of Treaties.⁹⁶

Convention On The Law Of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 63 AM.J. INT'L. L. 875 (1969), 8 I.L. M. 679 (1969).

⁹³ Convention, *supra* note 1, art. 31(1).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ “A treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and its purpose.” Vienna Convention on the Law of Treaties, *supra* note 93, art. 31(1). In the case at hand, the ordinary meaning of the terms is at odds with the context, the object and the purpose of the treaty, which are not to direct the refugee to any particular country, at any particular time, or within a particular time frame, but to

176 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

Another noteworthy clause is that on expulsion.⁹⁷ The Convention, in fact, goes into even greater details in restricting expulsion than it does with *non-refoulement* as such. It puts serious restrictions on the expulsion of refugees lawfully on the territory of a Contracting State. It prohibits expulsion, except on grounds of national security or public order.⁹⁸ It requires due process of law, including allowing the refugee, except in cases of compelling reasons of national security, to submit evidence to clear himself and to appear before the competent authorities or their representatives.⁹⁹ The refugee shall also be allowed a reasonable period to seek admission elsewhere, pending which necessary internal measures may be applied.¹⁰⁰

The 1966 Covenant on Civil and Political Rights extends the due process protection to all aliens lawfully in the territory of a State party, but without the prohibition of expulsion or the requirement of time for seeking admission elsewhere.¹⁰¹ The same goes for the 1985 Declaration on the Human Rights of the Individuals who are not Nationals of the Country in which they Live,¹⁰² but the latter prohibits individual or collective expulsion of aliens lawfully in the territory, if it is on grounds of race, colour, religion, culture, descent or national or ethnic origin. The grounds identified in this instrument correspond to those of the refugee definition in the UNHCR Statute and to most of those in the 1951 Convention as modified by the 1967 Protocol.

Chapter V on Administrative Measures of the 1951 Convention completes its panoply of measures to reinforce the

provide him/her with international protection if s/he is in danger or at risk.

⁹⁷ Convention, *supra* note 1, art. 32.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ As indicated above, some of these safeguards were reproduced in varying forms in relevant international instruments adopted in the late 1960s.

¹⁰¹ International Covenant on Civil and Political Rights art. 13, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁰² Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, art. 7, G.A. res. 40/144, Annex, U.N. Doc. A/40/53 (1985).

protection of refugees with clauses regarding the latter's freedom of movement, his or her assets, and the finding of a permanent solution to his or her problem. The continued relevance and importance of these protections is undeniable, especially the last one on solution by naturalization. The right to freedom of movement is accorded to refugees lawfully in the territory of a Contracting State, subject of course to regulations applying to aliens in the same circumstances.¹⁰³ Similar, though more explicit terms are found in the Covenant on Civil and Political Rights.¹⁰⁴ In the case of the 1951 Convention, the right to freedom of movement is reinforced by the obligation to issue identity papers to any refugee in the territory.¹⁰⁵ The issuance of identity papers requires of course the registration of refugees and asylum-seekers. Since then, registration has become a major issue for UNHCR, an indispensable instrument to ensure protection, assistance, and durable solutions for the refugees. A travel document is a valuable instrument for allowing freedom of movement across national borders. Article 28 requires the travel document to be issued to refugees lawfully in the territory of a Contracting State and recommends doing so as well for other refugees, especially those who are unable to obtain such documents from their country of lawful residence.¹⁰⁶

Regarding financial and related matters, the Convention provides that refugees shall not be imposed taxes that are "other or higher than those . . . levied on nationals in similar situations."¹⁰⁷ Refugees shall also be allowed to transfer assets that they have brought into a Contracting State, in conformity with laws and regulations.¹⁰⁸ Actually, no other refugee instrument covers such a broad range of legal protection issues or goes into such detail in doing so. For that alone, it deserves the title of "Bill of Rights for refugees."

¹⁰³ Convention, *supra* note 1, art.26.

¹⁰⁴ ICCPR, *supra* note 102, art. 12.

¹⁰⁵ Convention, *supra* note 1, art. 27.

¹⁰⁶ *Id.* art. 28.

¹⁰⁷ *Id.* art. 29.

¹⁰⁸ *Id.* art. 30.

178 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

Of related importance is Chapter II on Juridical Status, covering personal status, including marriage,¹⁰⁹ property rights,¹¹⁰ artistic rights, and industrial property,¹¹¹ the right of association,¹¹² and the high point of which is access to court,¹¹³ which ensures access to all the other rights. In fact, so central is Article 16 (1), which states, “[a] refugee shall have free access to courts on the territory of all Contracting States,”¹¹⁴ that it is not subject to reservation, just like Articles 1 (the definition), 3 (non-discrimination), 4 (freedom of religion), 33 (*non-refoulement*), and 36-46 (executory and transitory provisions and final clauses).¹¹⁵

Among the latter, Article 36 requires the Contracting States to inform the United Nations Secretary General of measures they have taken to ensure the implementation of the Convention.¹¹⁶ In article 35, the Contracting Parties do undertake to co-operate with UNHCR and facilitate its duty of supervising the application of the provisions of the Convention.¹¹⁷ However, while the Contracting parties undertake in Article 35 (2) to make reports to the competent organs of the United Nations and provide them with information and statistical data, that has not made them into treaty bodies in the sense of the treaty bodies in the UN system for the protection and the promotion of human rights; hence, the importance of a human rights approach to refugee protection that includes utilizing the services provided by the treaty bodies to the human rights conventions.¹¹⁸

Finally, Chapters III on Gainful Employment and Chapter IV

¹⁰⁹ *Id.* art. 12.

¹¹⁰ *Id.* art. 15.

¹¹¹ *Id.* art. 14.

¹¹² *Id.* art. 15.

¹¹³ *Id.* art. 16.

¹¹⁴ *Id.* art. 16(1).

¹¹⁵ *Id.* art. 42.

¹¹⁶ *Id.* art. 36.

¹¹⁷ *Id.* art. 35.

¹¹⁸ In the late 1980s some elements within UNHCR toyed with the idea of promoting the implementation of Article 35 in the manner practiced by the human rights treaty bodies, but the idea was quietly abandoned.

on Welfare, including housing,¹¹⁹ public education,¹²⁰ and social security,¹²¹ complete this Bill of Rights. The point is not that these dispositions are irrelevant to today's refugee situation. It is in this respect as it is for the economic and social rights of citizens in their own country. The authorities in poorer countries may not be able to guarantee such rights, but they are expected to strive toward the fulfilment of these second-generation rights.

V. The Importance of Context: The Need for a Holistic Approach to Refugee Protection

The obsolescence view often fails to consider the Convention and Protocol in context, to take effectively into account the fact that they are part of an overall international regime of refugee protection and that these two international instruments both reinforce, and are supplemented by, the other elements of that regime. It is indeed unrealistic to treat the Convention and Protocol as if they existed in a vacuum rather than in the midst of a complex of values, principles, norms, structures, institutions, and practices that can be more effectively marshalled to achieve international protection of refugees and asylum-seekers. Achieving permanent solutions to the problems of refugees is often elusive, but it is not clear that any change to the Convention or the Protocol alone could improve that situation.

In the first place, it bears reiterating that the Convention does not stand alone. The overwhelming majority of the signatories to the Convention are also contracting parties to the Protocol. Only a handful of countries (including the United States) are parties to the Protocol alone, or for that matter to the Convention alone.¹²²

¹¹⁹ *Id.* art. 21.

¹²⁰ *Id.* art. 22.

¹²¹ *Id.* art. 24.

¹²² While 140 states are parties to both the Convention and the Protocol, only Cape Verde, the United States of America, and Venezuela are parties to the Protocol alone, and only Madagascar, Monaco, and Saint Kitts and Nevis are parties to the Convention alone. While technically, accession to the Protocol alone is enough, most countries that came into existence only after it was adopted nevertheless decided, for symbolic reasons, to accede to the Convention as well.

180 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

Furthermore, values, principles, and norms applying to refugees and asylum-seekers are found in general principles of law, conventional and customary law, as well as in general international law and especially in human rights law, humanitarian law and international criminal law.¹²³ General principles of law and customary international law are, of course, applicable to both signatories and

One may justifiably wonder what the United States, or for that matter Venezuela, is doing among the small island countries just mentioned. This is a pertinent question, for it relates to the very crucial issue of the non-accession of the United States of America to certain human rights conventions, including the 1954 Convention relating to the Status of Stateless Persons, 26 April 1954, 360 U.N.T.S. 117 (Jun. 6, 1960), and the 1961 Convention on the Reduction of Statelessness, 30 August 1961, 989 U.N.T.S. 175 (Dec.13, 1975). Furthermore, the U.S. signed the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, art. 27(1), Dec.10, 1984, on April 18, 1988, and ratified it on October, 21 1994. However, that ratification was subjected to such a massive array of reservations, by far the most of any state made party to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, that it is hard to imagine under what circumstances the U.S. can be made accountable for its actions under such a Convention. These reservations foreshadow and partly explain the current U.S. efforts to legalize its harsh treatment of the so-called “enemy combatants” in the war on terrorism, *available at* <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited December 6, 2006).

¹²³ The importance and the relevance of international criminal law has been enhanced in recent years by the creation and operation of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Mixed Tribunal for Sierra Leone (MTSL), and the International Criminal Court (ICC). It is not without significance that the first three of these institutions have been created to deal with situations that had generated great refugee outflows into surrounding countries and that the first cases of indictment by the ICC involve the Democratic Republic of Congo (DRC) and Uganda, both of which are associated with significant refugee (and internally displaced) movements as well. See generally *supra* notes 34 and 35. The jurisprudence of the ICTY and ICTR has contributed considerably to the development of case law in support of female victims of sexual violence used as an instrument of warfare, thereby contributing also to the development of case law of refugee status for these women victims on the ground of membership of a particular social group within the meaning of the Convention as modified by the 1967 Protocol. In light of the many atrocities committed in former Zaire and its successor, the DRC, no less should be expected from the ICC, in spite of the almost relentless opposition it faces from the current U.S. administration.

non-signatories of the Convention or Protocol.¹²⁴ Finally, the panoply of principles applicable to refugees and asylum-seekers include as well, in descending binding order, selected resolutions of the UN Security Council on various conflict situations around the world, the Statute of UNHCR, the many resolutions on refugees adopted by the UN General Assembly and the UN Economic and Social Council, and the Conclusions on International Protection of UNHCR's Executive Committee of the High Commissioner's Programme.

The foregoing shows that universal and regional human rights instruments have significantly expanded the scope of protection available to refugees. What needs to be done is to promote further accession to the refugee and human rights instruments; lobby in favor of the removal of incapacitating reservations, promote the incorporation of these international norms and principles into national legislation and regulation, and their concrete implementation in the refugees' everyday life. It may even be argued that securing more widespread implementation is more useful than more accession to the Convention and the Protocol. The Convention and the Protocol provide a framework within which, or a core around which, various innovations have been undertaken through soft law internationally or through national legislation. It provides a bedrock upon which to base a variety of initiatives not foreseen by its drafters.

In the late 1980s, the Comprehensive Plan of Action on Indo-Chinese Refugees showed that it was possible to extract a small portion of the Convention and the Protocol, in this instance the refugee definition, and make it the centrepiece of a difficult operation to solve a major refugee problem among countries most of which were either non-contracting parties or contracting parties without relevant legislation.¹²⁵ This is also the perspective within

¹²⁴ It is notable that two of the countries that have received, for a number of years, some of the largest refugee flows in the 20th century, Thailand and Pakistan, have to this date remained non-signatories.

¹²⁵ See generally, Shamsul Bari, *Refugee Status Determination under the CPA*, 4 INT'L J. REFUGEE L. 487, at 498 (1992); Arthur Helton, *Refugee Status*

182 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 2]

which to see the *Convention Plus Initiative* of UNHCR,¹²⁶ as well as the *Global Consultations*. In an operational sense, temporary protection could be seen as one such initiative as well, but only if it is not used as a device to circumvent the requirements of the Convention and in the end provide less protection than is warranted in the circumstances.

There is a need to enhance the implementation of international human rights instruments as well. In this respect, the human rights treaty mechanisms need to be reinforced or transcended. Some of the human rights treaty bodies, in particular the UN Commission of Human Rights, have been accused of becoming overly political and therefore, not able to fulfil their mission to the optimal level. In this respect, the establishment of the UN Council on Human Rights in June 2006, which replaced the Commission, was officially aimed at achieving a higher level of human rights professionalism and effectiveness, while protecting the status of the lesser powers. However, indications so far are that the politicization problem is far from having been solved.

Determination under the CPA; Overview and Assessment, 5 INT'L J. OF REFUGEE L. 544 (1993); Pierre-Michel Fontaine, *The Comprehensive Plan of Action (CPA) on Indochinese Refugees, Prospects for the Post-CPA, and Implications for a Regional Approach to Refugee Problems*, 7 PACIFICA REV. 39 (1995); Richard Towle, *Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?* 18 INT'L J. REFUGEE L. 537 (2006).

¹²⁶ See UNHCR's *Progress Report: Convention Plus*, High Commissioner's Forum (Nov. 8, 2005).