



## The Refugees Convention: why not scrap it?

*A summary of discussion at the International Law Programme Discussion Group at Chatham House on 20<sup>th</sup> October 2005; participants included lawyers, academics and representatives from Governments and NGOs.*

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**Guy Goodwin-Gill** noted that the title of the talk would come as a shock to those who considered that the 1951 Convention had been a mainstay in his life. He noted that there was good news from Afghanistan: on 30 August Afghanistan became a party to the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) bringing the total number of States Parties to 143 or 146 if the Protocol was taken into account. This was perhaps a sign of the continuing relevance of the Convention.

### Arguments for scrapping the 1951 Convention

Some commentators see the 1951 Convention as a relic of the Cold War, when welcoming refugees fleeing Communist persecution had political capital.

For others the 1951 Convention is inadequate for refugee protection because it is not flexible in the face of what are perceived to be the new refugees; those fleeing for example from ethnic violence in Bosnia or Kosovo. It is not flexible enough it is argued to deal with the new gender-based persecution which is at the background of many women's reasons for seeking asylum.

The 1951 Convention is said to be insensitive to national, regional and international security concerns. Recent Security Council resolutions on terrorism make express reference to refugees and talk about the need for states to ensure the asylum process does not accommodate terrorists. It is said to be unsuitable to deal with terrorism itself or to deal with organised crime. In recent years the 1951 Convention has been criticised for being linked to the single solution of asylum only. The experience and practice of the West in the '50's and '60's was that nobody gave a thought to the idea that someone fleeing from Eastern Europe might return to their country of origin. If they were recognised as a refugee, that was enough for them to be granted permanent residence and eventually accorded citizenship. Return was not in the discourse or practice of the '50's and '60's.

Some argue from a different perspective that because human rights are now recognised and everyone is entitled to the protection of their human rights, deciding whether someone is a refugee is essentially redundant. It is necessary only to ask whether if a person is returned they will face violations of their fundamental human rights.

Academics often argue that the 1951 Convention is essentially euro-centric. There is a European flavour in the provisions of the 1951 Convention, particularly Articles 2-34 and the concentration on social and welfare rights, on education, on access to employment and on access to the liberal professions. In 1951, of the 26 states which

participated in drafting the 1951 Convention, 17 of those were from Europe, and another 4 of a West European/North American disposition.

Mr Goodwin-Gill noted however that despite these criticisms, in December 2001 at a meeting in Geneva to celebrate 50 years of the 1951 Convention, member states of the UNHCR Executive Committee adopted a Declaration acknowledging the continuing relevance and resilience of this international regime of rights and principles comprising the 1951 Convention, the 1967 Protocol and other instruments.

The 1951 Convention was framed in different circumstances; however, it is important to analyse how those circumstances differ from those present today and how and why any differences may therefore justify radical change to the Convention.

### **Changed Circumstances**

The 1951 Convention was the latest in a long line of international arrangements which began in 1922 after the League of Nations appointed the first High Commissioner for Refugees. That inter-war period saw successive attempts by the community of nations to deal with different refugee problems as they emerged. The 1951 Convention was not the first treaty or instrument to be drafted to deal with war refugees. That had been dealt with to a large extent by the creation, first on a provisional then on a more permanent basis, of an organisation called the IRO (the International Refugee Organisation), a specialised agency of the United Nations which was set up specifically to deal with the refugees and the displaced who remained at the conclusion of hostilities.

In 1951 not only was the Cold War underway but the UN Charter was still relatively young and certain principles of the Charter continued to exercise a great deal of power; sovereign equality and non-intervention meant a great deal more then. That context of sovereign and non-intervention explains to some extent why the statute of the UN High Commissioner and the definition of a refugee in the 1951 Convention are oriented very much to the fact of crossing a border or an international frontier. That was the nature of how international obligations and rights of states were perceived in the 1940's. It was only on the crossing of a frontier that the international community's interest was sparked and it was in light of that fact that it was thought appropriate to attach certain obligations to states prepared to sign up to the 1951 Convention.

1951 was just 3 years after the adoption of the Universal Declaration of Human Rights, Article 14 of which proclaims the right of everyone to seek and to enjoy asylum from persecution. When evaluating the 1951 Convention or the refugee regime, it helps to recall that that right has not been developed and was not incorporated in later universal or (with some exceptions) even regional regimes to any great extent. But states have clearly indicated their uneasiness with recognising a right on the part of the individual in flight from persecution to be granted asylum. That may also explain the malaise with which some commentators at the political level view the way in which the 1951 Convention impacts on what they perhaps would like to think of as their sovereign and unfettered right to decide who enters, leaves or stays the country.

In 1950/51 those looking for a replacement to the International Refugee Organisation had in mind a complementary regime of agency and obligation. The establishment of the Office of the UN High Commissioner for Refugees was seen as a complement therefore to the regime of obligations which states would accept as and when they

ratified the 1951 Convention. It was expected and anticipated that the two would effectively work together. The UN High Commissioner's office was set up in 1950 as a temporary regime and was expected to have finished its work by 1953/54. It now finds its mandate regularly reviewed every 5 years.

The UNHCR has the purpose, defined in paragraph 1 of its statute, of providing international protection to refugees and seeking permanent solutions to their problems. However the Convention may be criticised that does encapsulate an enduring basis of principle that refugees need protection and it is necessary to find solutions for them.

One of the major bases for criticism of the 1951 Convention is in relation to the definition of who is and is not a refugee; the definition reflected the experience of the thirty preceding years. The League of Nations approach was simple: who does not enjoy the protection of their country, and does that person not have another nationality? States had as much difficulty applying that definition as they do applying that of the 1951 Convention. The IRO had a long list of persons who shall be refugees, victims of fascist regimes, Spanish republicans, those displaced by the Second World War and those who had been persecuted.

The 1951 Convention leaves that list approach behind, and proposes a limited general approach. It defines the refugee as someone who has, *inter alia*, a well-founded fear of persecution on certain grounds; race, religion, nationality, social group or political opinion. The Soviets and their allies saw this definition as directed at them and an unfair criticism of what they considered to be essential social restructuring exercises. There is some weight to be attributed to that Cold War background although it is difficult to see in the *travaux préparatoires* any clear indication of an intention on the part of the West to chastise their Eastern partners in this drafting process. The West's position was driven more by the experience of the Second World War and by that developing body of law now known as human rights.

That approach to deciding who is a refugee is limited and potentially inadequate. In the final act in 1951 of the conference of plenipotentiaries in Geneva, the hope is expressed that the 1951 Convention will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting refugee status as far as possible to persons in their territories and who may not be covered by the terms of the 1951 Convention. This may indicate an understanding on the part of the drafters in 1951 that there were going to be new waves of refugees who would not be covered by the 1951 Convention.

Certainly in the intervening years, inadequacies in the 1951 Convention approach were revealed at regional level. In 1969 the Organisation of African Unity, while under pressure from Geneva, adopted the 1951 definition of refugee but broadened it accommodating the social reality of refugees in Africa at a time of decolonisation and national liberation.

Not much later, in the Americas, the Cartagena Declaration approved a similar extension of the traditional understanding of the definition of refugee to accommodate the realities of displacement in Central America. Europe in the 1970's and thereafter adopted different categories and statuses for refugees who were recognised as not falling within the 1951 Convention but as nonetheless requiring some level of protection; the Dutch 'A' and 'B' status. The UK had 'exceptional leave to remain' now being translated into 'humanitarian protection' and other states in Europe did similarly.

The UK has a great deal of difficulty with the 1951 Convention. In 1951 no-one anticipated that the process of refugee determination would become institutionalised. It was not foreseen that there would be a requirement of due process by virtue of which the claimant would have a right, expectation or entitlement to advice and legal representation. Further, decision makers would be required to understand the situation in the claimant's country of origin and to come up with a reasoned decision which applied the law to the facts and made a determination on, amongst other things, the individual's credibility.

That is something which has clearly changed. The drafters of the 1951 Convention did not consider that decision-making would be anything but discretionary by an enlightened administration but without their being hampered by the requirements of due process as we understand them.

### **Other limitations**

A definition framed in terms of fear of persecution that is well-founded on certain grounds is limited. Decision-makers know how difficult it can be to get good, accurate information about the conditions in an individual's country in order to determine whether he/she does have a well-founded fear of persecution. The nature of the decision that an adjudicator has to make is also inherently difficult. It is not like a judge looking backwards and saying on the balance of probabilities or, beyond all reasonable doubt this happened. In refugee decision-making it is necessary to look to the future and ask whether if returned to their country of origin, the claimant would face a serious risk of persecution, and to try and quantify that risk.

The refugee definition places a burden on the state party in the event of a large scale influx. The refugee definition is framed in terms of the individual therefore each individual has rights and his or her case must be looked at individually. Refugee advocates have often argued however that when there is good information about conditions in a country, it is not necessary to go through this process for each individual as it can be determined *prima facie* that everyone from that country is likely to be a refugee. This does not sit well with states who anticipate that would lead to their being swamped. States to some extent are their own worst enemies in this regard, they claim to suffer the burden of individual case by case determination but they do not want to go the other way lest they be the soft touch in their region.

There is the 'problem' of human rights in the sense that it may be redundant to make a decision on whether someone is a refugee under the 1951 Convention when human rights dictate that in any event you cannot for good reason require a person to return to their country of origin under e.g. Article 3 of the European 1951 Convention, Article 3 of the Convention Against Torture, or Article 7 of the International Covenant

With a definition drafted in these terms which is expected to face up to evolving issues whether they be movements of people or due process developments, and lawyers who look to the 1951 Convention as a tool to be used and to be interpreted and reinterpreted and to be developed in the interests of the better protection for a class of persons who we consider to be in need of protection, we end up with the present situation where refugee determination has become a battleground between refugee advocates and the system (mediated to some extent by the courts).

There is the perennial complaint that many asylum-seekers are not refugees but cannot be returned to their country of their origin but does the Refugee Convention really prevent that? It is not clear that what the Refugee Convention says in Article 33 is that no state should send a refugee back to a country where he may be

persecuted. It does not say that you are not allowed to send a non refugee back; on the contrary you are. Therefore where is the 1951 Convention at fault for apparently frustrating the desire of states to rid themselves of the unworthy asylum seeker?

Likewise, it is said that the 1951 Convention gets in the way of the fight against terrorism; in particular the proposition that a terrorist cannot be sent back to their country of origin if they might face persecution or torture. This is more as a consequence of the European Convention than the Refugee Convention. Further, the 1951 Convention provides for the security of the state; in particular at Article 1(f). This provision excludes from the protection of the 1951 Convention, amongst others, the war criminal, the serious non-political offender, and someone who there are reasons to believe has committed acts contrary to the purposes principles of the UN. As the Security Council has hammered home since 2001, terrorism is contrary to the purposes and principles of the UN so there should be no problem. Again this is where the history of the Convention is important, as the world was not a secure and safe place in 1951 either. When the drafting committee first proposed *non-refoulement*, they proposed it without exception. However they later introduced a qualification in paragraph 2 of Article 33 to cover the return, even at the risk of persecution, of a person posing a security risk.

Turning to migrants, a criticism of the 1951 Convention is that they cannot be returned. If the majority of asylum-seekers in the EU do not meet the criteria for refugee or subsidiary status then the reason why so many use the asylum process may well have something to do with the labour market. The needs of the labour market do seem to play a silent part, if not in government policy, at least in government inertia. The reasons why those found not to need international protection cannot be returned to their country of origin are usually very complex and in part this is due to a lack of capacity on the part of sending states. Bilateral mechanisms may not be in place in order for people to be sent back. Until the extent to which sending states have an interest in what their citizens do overseas is recognised (and how much money they send back) then the reluctance of the state to readmit is understandable, even if that state has in place an infrastructure to determine whether or not someone is indeed their citizen.

The problem of removal is also a self-generated problem. There is an international refugee regime dating from 1951 but no migration regime because states in the developed world have not wanted to sacrifice what they perceive to be the last bastion of their sovereign rights; the right to control entry and removal.

### **Possible changes?**

While not in favour of the 'scrap it' arguments, Guy Goodwin-Gill was of the view that there are issues to be considered. The refugee definition is ripe for review and reconsideration in the light of the practice of states since 1951 and in the light of the evolution that has taken place in their international obligations. However, whether additional protection is required against terrorism or other threats to the security of the community is doubtful. Not only Article 1(f) but also Article 9 deal with the issue and allow states to take measures in respect of someone whom they consider to be a security risk.

It is helpful to recall that the title of the 1951 Convention is the Convention Relating to the Status of Refugees and that is what it is primarily about. Articles 2-34 of the Convention deal essentially with status and to some extent the rights of the refugee but the word 'right' hardly appears in the 1951 Convention. The Convention was not

intended to deal with the sharing of responsibility between states; it was not intended to deal with identifying which state should look at each case.

Further, the 1951 Convention does not deal with why people flee or why they do not flee, which is another relevant question. Therefore one can understand that those concerned with the refugee issue at large are worried also that there seem to be a shortage of intervention mechanisms which can effectively allow the international community to remedy the causes of flight.

An institutional issue for the UNHCR more than for the signatories to the 1951 Convention is that the regime does not deal with internally displaced persons. If forced migration is to be looked comprehensively this issue, which very often extends into external displacement, cannot be ignored.

The migration issue is a separate one which shows very little prospect of being remedied. The Global Commission of International Migration published its report on the 6<sup>th</sup> October. This was a state-driven initiative which was looking at ways to facilitate better migration management. But those who drafted the final report recognised that states were not willing at this stage to countenance a new agency which would engage in the migration phenomenon or the drafting of new treaties. The report is very slight on rights and comes out with very weak recommendations.

### **Conclusion**

If the Convention is scrapped the problems will not go away. There will always be people who plead not to be sent home and who claim that they will be tortured or killed or locked up if they are returned. That means that there will always have to be someone who will have to decide what to do with these people. The 1951 Convention at least provides a framework within which those decisions can be made.

Guy Goodwin-Gill concluded by saying he was not averse to reform but was interested in results; if the Convention was scrapped he would like to see something multilateral, and capable of accommodating the interests of the frontline states who actually bear the burden of providing protection and assistance to the bulk of the world's refugees. He would raise some follow-up questions such as, who is a refugee today? How and when are we going to decide who needs international protection? Where are we going to provide that protection? And, how ultimately are we going to prevent forced migratory movements?

### **Discussion**

With the session opened up to the group, a question was put as to whether, in the absence of the Convention, the same result would be achieved by reliance on international human rights conventions, for example Article 3 of the ECHR which precludes sending someone to a country where he is at risk of inhumane treatment. **Guy Goodwin-Gill** replied that in most cases anyone recognised as a refugee ought in principle to be able to benefit from Article 3; but the ECtHR does apply a stricter standard of proof to Article 3 claims than a decision-maker does under the Refugee Convention. The 1951 Convention requires a refugee to show a well-founded fear and most courts in most jurisdictions have recognised that it is not for the applicant to show a likelihood of persecution on a balance of probabilities let alone anything higher; the standard is lower than that although it is a little unclear as to where it falls. The ECtHR on the other hand requires a substantial risk, which is a higher standard. Further, those who benefit from Article 3 protection do not benefit from refugee status. They come within a class of persons who will not be expelled but they have no right to work, no right to social security, and have got to survive on their own.

A comment raised by a representative of **ECRE** was the fact that both the 1951 Convention and subsidiary protection have been codified at least at EU level in the Qualification Directive which needs to be transposed by member states by 2006. So the obligations under the 1951 Convention are now firmly rooted in EU law which will in turn become part of member states' national legislation. In looking for solutions to complement and deal with some of the gaps not covered by the 1951 Convention, how does the concept of effective protection in regions of origin and addressing the root causes of migration fit into the picture?

**Guy Goodwin-Gill** responded that the regional protection areas initiative was an inspiring one. Who could argue with better protection closer to home? If the refugee from Zimbabwe crosses into Mozambique or South Africa it would certainly be better if he or she could be effectively protected there and not have to or see themselves as obliged to move on whether to Africa or to Europe. But the record of performance in providing support to first countries of asylum or front-line states has not been as good as it should have been. A study in the 1980's showed that the primary reasons refugees moved from the first country of refuge were protection-related either by being at risk from the agents of their country of origin or simply not being able to survive and earn a living. Although this was recognised twenty years ago nothing much has been done about it which leads one to wonder whether indeed the regional protection area is to be a mechanism of providing effective protection to refugees in their regions of origin or whether it is simply to be a mechanism to allow states in the developed world to disembarass themselves of a certain group or category of refugees as they can be deemed to have come from these so-called areas.

A representative of the **ICRC** mentioned the recent report in relation to the phenomenon of migration post-environmental disasters. It is likely we will be faced with large numbers of people moving not because they are being persecuted by a particular government but because they simply cannot survive in the country of origin.

**Guy Goodwin-Gill** recalled the headline in the Guardian was 50 million environmental refugees by 2010, but asked whether this would be a wake-up call for anyone. There were dimensions to the question of forced movement that were not being considered effectively or coherently at national or regional governmental level. To some extent environmental refugees from drought, famine and other environmental disasters had been accommodated on the basis of short term measures taken by organisations such as the ICRC, but clearly with the development in scale of environmental catastrophes something more long-term ought to be considered requiring serious thinking and serious financing.

A speaker commented on the significant problem in Latin America and in Colombia with regard to internally displaced people. There was a gap in the 1951 Convention, and the relationship of states was still on the basis of state sovereignty. Could a regional approach to the question of refugees, and in particular at the level of the Inter-American system, be better if it used international human rights law to deal with the question of internally displaced persons; a revised 1951 Convention might not be able to do so?

**Guy Goodwin-Gill** agreed. The problem of IDPs had been debated extensively at this month's executive meetings at UNHCR. An organisation which had always been there to protect international refugees i.e. those who have crossed an international frontier was likely to find itself compromised by having to assist the internally displaced. The UNHCR experience in Bosnia-Herzegovina in many respects was

disastrous from an institutional level even if successful at the level of individual officers who by their presence did offer some level of protection. But it found the UNHCR in a dilemma as to whether to facilitate exodus, flight and therefore ethnic cleansing or whether to encourage remaining, and therefore possibly death. Those dilemmas also arise in a situation where on the one hand the international community expects the UNHCR to provide protection to the internally displaced but where it also encourages, facilitates and promotes the repatriation of those who might have crossed a frontier. It might find itself, as it did in Myanmar, making judgments about facts on the ground that would not stand up in court in order to satisfy the externally generated need for repatriation.

In response to a question about holding zones on the fringes of Europe for asylum-seekers, **Guy Goodwin-Gill** noted that this issue was still current in Europe notwithstanding the ECtHR's decision in a case where the French had tried to establish a rights-free zone at Charles de Gaulle airport which the Court rejected. A similar fate was likely to await zones that are on the periphery of Europe too and, even if they were just across the border from greater Europe, the Court would probably not see that as an obstacle to jurisdiction in particular given the likely *de facto* control which will be exercised by countries with an interest in maintaining those areas.

On the possibility of sending people back to countries like Libya and Algeria following the conclusion of memoranda of understanding with those countries, **Guy Goodwin-Gill** noted that these were agreements by elites with elites; they seemed inherently contradictory in that they assumed that states may torture but asked whether in certain individual cases they would refrain from doing so. We should have the greater aim of trying to abolish torture altogether. A decision by the Canadian Supreme Court in *Suresh* was often represented as providing an exception to the prohibition of return to torture but in fact the Supreme Court listed the obstacles to doing that and the hurdles which must be overcome in order that diplomatic assurances be accepted; any government worth its salt would think it was not worth trying to take that approach. From the rule of law perspective there are very serious concerns as to the nature of the assurance, the monitoring and the overall value of an assurance given by one elite to another and in a situation where the promising elite cannot guarantee results in any event.

In response to a question about sending people back to parts of the country that are deemed safe, **Guy Goodwin-Gill** noted that the 1951 Convention may seem to imply that the availability of protection somewhere in the country trumps the claim for refugee status. But taking into account the object and purpose of protection it is necessary to be sure about the effectiveness of the protection overall in someone's country of origin. Generally this approach has not received the approval of the courts but that does not mean that governments won't continue to try to send people back. He noted there was a difficulty about refugee applicants who by their behaviour in the host country made it impossible for that country to return them to their country of origin, but he did not believe that the fact that they had made themselves entitled to refugee status subsequent to leaving their country of origin removed their entitlement.

As a general point he did not believe that the current 1951 Convention had shown itself to be redundant. However there were current frustrations with the 1951 Convention because it was perceived to frustrate the fight against terrorism; it placed burdens on states - but with principle comes a price.