

## THE REFUGEE CONVENTION OF 1951 AND ITS CHALLENGES: A CRITIQUE\*

### Abstract

*This article appraised the Refugee Convention of 1951 with particular response to its challenges. The Refugee Convention has created a system for providing protection to people at risk of persecution in their own countries. The Convention relating to the Status of Refugees (the Refugee Convention) 1951 together with its Protocol remains the foundation of the international refugee protection regime and the only truly universal instrument determining the minimum standards for refugee protection. This article has examined its provisions and found that it is inadequate in meeting the protection needs of refugees. It was recommended inter alia: the Refugee Convention should be amended to cover a wider category of refugees; another supervisory body with the power to authoritatively interpret the provisions of Refugee Convention should be agreed upon by States so as to ensure proper oversight of the application of the Convention; the burden allocation structure under the Refugee Convention needs to be addressed; There needs to be an international response. This structure could allocate the financial responsibilities to some states and hosting responsibilities to others in the region of the country of origin, or could allow for a swift resettlement of refugees on other States until they can return home; and States should garner the political will to fully implement the provisions of the Convention avoiding the use of restrictive policies so as to enable refugees have access to their territories, and also to reach agreements on the issues of concern in the Convention.*

**Keywords:** Refugee Convention of 1951, Protocol, Challenge, Critique

### 1. Introduction

On July 28, 1951, a Convention known as the Convention relating to the Status of Refugees (hereafter referred to as ‘the Refugee Convention’)<sup>1</sup> was adopted at a United Nations (UN) diplomatic Conference.<sup>2</sup> This was done against the background of the population displacement in Europe after the events of the World War II.<sup>3</sup> The Refugee Convention has created a system for providing protection to people at risk of persecution in their own countries. There are few countries willing to risk turning such people away. Nevertheless, it is unlikely than many governments would sign up to the Convention today.<sup>4</sup> The Refugee Convention defined who a refugee was relative to events occurring mainly in Europe<sup>5</sup> before January 1, 1951<sup>6</sup>, as well as made provisions for the protection of those who would so qualify as refugees. The Convention as adopted and ratified by state parties became the basis for the international protection of refugees.

However, more refugee situations began to crop up in different parts of the world. To fill the lacuna created by the lack of a legal framework for the protection of these ‘new refugees’, a Protocol to the Refugee Convention<sup>7</sup> was adopted in 1967. This Protocol removed the temporal limitation in the Refugee Convention and thus, made its provisions applicable to all refugees who qualify under the Convention regardless of the timing of the events that gave rise to their flight<sup>8</sup>. It also removed the geographical limitation in the Convention wherein State parties formally had a choice on whether to

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<sup>1</sup> July 28, 1951, 189 United Nations Treaty Series 50 (UNTS).

<sup>2</sup> G Antonio, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (UNHCR Publications, Switzerland 2011) 1 <<http://www.unhcr.org/4ec262df9.pdf>> accessed 2 January 2026.

<sup>3</sup> P Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analyzed with a Commentary* (Cambridge University Press 1995 UK) 4 <<http://www.Linhcr.org/4ca34be29.pdf>> accessed 8 June 2014.

<sup>4</sup> A Millbank, *The Problem with the 1951 Refugee Convention* (Department of the Parliamentary Library 2000) 1 <<https://scispace.com/pdf/the-problem-with-the-1951-refugee-convention-2cwifo5k42.pdf>> accessed 2 January 2026.

<sup>5</sup> The Refugee Convention 1951, art 1(b).

<sup>6</sup> *Ibid*, art 1A (2).

<sup>7</sup> Protocol to the Convention relating to the Status of Refugees 1967.

<sup>8</sup> Protocol to the Refugee Convention 1967, art 1.

limit the application of the Convention to events occurring only in Europe, or extend it to cover events occurring elsewhere.<sup>9</sup> This consolidated the role of the Convention as the basis for the international protection of refugees.

The 1951 Refugee Convention together with its 1967 Protocol has remained till date, the cornerstone of the international refugee protection regime. It is regarded as the most comprehensive legally binding international instrument, defining standards for the treatment of refugees.<sup>10</sup> Yet, the adequacy of the Convention in meeting the protection need of refugees has been called into question with reference often made to the difference in the political circumstances in the world at present to that in 1951, and the current dynamics of external displacement.<sup>11</sup> Other reasons for challenging the adequacy of the Refugee Convention include the lack of a burden/responsibility sharing mechanism for hosting refugees, a need that became apparent as the dynamics of displacement evolved;<sup>12</sup> and the need for an expanded definition of a refugee to again meet the current causes of external forced displacement,<sup>13</sup> among others. Arising from these developments, the continuing relevance of the Convention is often called into question.<sup>14</sup>

The Convention adopted in 1951 is now seen by some as obsolete and unfit to meet the needs of current realities. There abound numerous contemporary issues which give rise to refugee situations around the globe ranging from armed conflicts, religious differences, inter-tribal wars and even climate change. The Convention as at the time it came into existence did not anticipate nor articulate such problems and so they were not dealt with. This has resulted in ‘non-convention’ refugee status. This paper undertakes a critical appraisal of the Refugee Convention especially in relation to its adequacy in meeting the contemporary protection needs of the externally displaced. It shall also provide recommendations on how to reinforce the provisions of the Convention to ensure better international protection for refugees.

## 2. Conceptualising Refugee

The term ‘refugee’ is defined as ‘a person who has been forced to leave their country or home, because there is a war or for political, religious or social reasons.’<sup>15</sup> By this definition, a refugee could be said to be seen as any person who is forced to flee for safety from intolerable conditions or circumstances, varied as they may be. However, this is just the popular or ordinary usage of the term ‘refugee.’<sup>16</sup> Contrary to the above, the term ‘refugee’ in law, has a more restricted meaning. Though, this would seem to deny necessary humanitarian assistance to those in need, States have consistently restricted those who can legally lay claim to the refugee status as evidenced by exclusionary definitions in international instruments and municipal legislation.<sup>17</sup> For example, the definition of a refugee under the Refugee Convention in its Article 1A(2) restricts the refugee status to persons who for well-founded fear of persecution on five defined grounds, had cause to flee his country of nationality or habitual residence<sup>18</sup> (country of origin).

<sup>9</sup> *Ibid.*

<sup>10</sup> Weis (n 3) 4.

<sup>11</sup> Q B Baloch, ‘International Refugee System in Crisis’ [2006] 1 (1) *The Dialogue Quarterly Research Journal*; 124 <[http://www.qurtuba.edu.pk/thedialogue/The%20Dialogue/1\\_1/09-International%20Refugees%20System.pdf](http://www.qurtuba.edu.pk/thedialogue/The%20Dialogue/1_1/09-International%20Refugees%20System.pdf)> accessed 2 January 2026.

<sup>12</sup> E Quinn, ‘The Refugee Convention Sixty Years On: Relevant or Redundant’ [2011] 68 *Working Notes*; 19 <<http://www.workingnotes.ie/images/stories/Issue68/the%20refugee%20convention%20sisty%20years%20on-relevant%20or%20redundant.pdf>> accessed 2 January 2026.

<sup>13</sup> L Ferracioli, ‘The Appeal and Danger of a New Refugee Convention’ [2014] 40 (1) <<http://www.princeton.edu/~pcglobal/conferences/GLF/ferracioli.pdf>> accessed 3 January 2026.

<sup>14</sup> *Ibid.*

<sup>15</sup> S A Hornsby, *Oxford Advanced Learners Dictionary: International Student Edition* (8<sup>th</sup> edn, Oxford University Press 2010); *Online Etymological Dictionary* <<http://www.etymonline.com/index.php?term=refugee>> accessed 3 January 2026.

<sup>16</sup> G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford: 3<sup>rd</sup> edn, Oxford University Press 2007) 15.

<sup>17</sup> *Ibid.*

<sup>18</sup> The Convention relating to the Status of Stateless Persons 1954, art 1(1).

The Organisation of African Unity (OAU) Convention on Refugees adopts the definition in the Refugee Convention in its Article I. However, it also expands the definition as follows:

...every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular 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 former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>19</sup>

Most definitions of refugees are modeled after the definition in the Refugee Convention.<sup>20</sup> For example, in the United States of America, the Immigration and Nationality Act 1952 as amended by the United States Refugee Act 1980<sup>21</sup> defines a refugee in very similar terms as the Refugee Convention. However, the Act goes beyond the Convention by allowing for the extension on a discretionary basis, of the refugee status by the President of the United States after due consultation, to persons who are still within their country of origin but otherwise qualify under the above definition.<sup>22</sup> In addition, Canada, in sections 95 and 96 of its 2001 Immigration and Refugee Protection Act,<sup>23</sup> expressly adopts the definition of a refugee in the Refugee Convention. The definition of those entitled to refugee protection, is however expanded to cover persons already in Canada, who generally, would be in danger of torture<sup>24</sup> or be subject 'to a risk to their life or a risk of cruel and unusual punishment or treatment'<sup>25</sup> if they are sent back to their country of origin.<sup>26</sup> Nigeria also adopts the definition of a refugee as in the Refugee Convention, in her National Commission for Refugees, etc. Act<sup>27</sup>. However, the expanded definition in the OAU Convention on Refugees is also adopted in addition.<sup>28</sup>

From all the above legal definitions of a refugee, it is noted that there are quite defined circumstances which would result in a person emerging as a refugee, unlike in the popular usage of the term, in which the circumstances seem open-ended. The person in question must among others, be outside his country of origin. This is the major difference in law, between refugees and internally displaced persons (IDPs). The United Nations (UN) Guiding Principles on Internal Displacement<sup>29</sup> defines IDPs<sup>30</sup> as follows:

...persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or

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<sup>19</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, art 1(1).

<sup>20</sup> Goodwin-Gill and McAdam (n 16) 46; A E Shacknovel, 'Who is a Refugee?' [1985] 95 (2) *Ethics*; 275 <<http://thecureforcultureshock.files.wordpress.com/2012/02/shacknovel-who-i.s-a-refugee.pdf>> accessed 3 January 2026.

<sup>21</sup> J Fitzpatrick, 'The International Dimension of U.S. Refugee Law' [1997] 1 *Berkeley Journal of International Law*; 15 <<http://scholarship.law.berkeley.edu/cjji/viewcontent.cgi?article=1154&context=bjil>> accessed 3 January 2026.

<sup>22</sup> *Ibid.*

<sup>23</sup> Immigration and Refugee Protection Act (S.C. 2001, c. 27) <<http://laws-lois.justice.gc.ca/PDF/l-2.5.pdf>> accessed 3 January 2026.

<sup>24</sup> Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, art 1; Canadian Immigration and Refugee Protection Act 2001, s 97(1)(a).

<sup>25</sup> *Ibid*, s 97(1) (b).

<sup>26</sup> *Ibid.*

<sup>27</sup> National Commission for Refugees (Establishment, etc.) Act 2004, s 20(1)(a) and (b).

<sup>28</sup> *Ibid*, s 20(1)(c).

<sup>29</sup> W Kalin and Others, 'Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges On the Guiding Principles on Internal Displacement' [1998] *The American Society of International Law* <<http://brookings.edu/-/media/Projects/idp/OPEnglish.pdf>> accessed 3 January 2026; B Bern, 'Project on Internal Displacement, Protecting Internally Displaced Persons: A Manual for Law and Policy Makers' [2008] <<http://www.refworld.org/pdfid/4900944a2.pdf>> accessed 3 January 2026.

<sup>30</sup> J Rehman, *International Human Rights Law* (London: 2<sup>nd</sup> edn, Pearson Publishing Company 2010) 674.

natural or human-made disasters, and who have not crossed an internationally recognized state border.<sup>31</sup>

It is observed that a major component in the above definition is the fact that the involuntary movement or flight occurs within the borders of a State. Thus, a person might be otherwise qualified as a refugee under the Refugee Convention, but as far as he has not made it across an internationally recognised frontier, he is not a refugee in law and cannot benefit from the special status and international protection that are granted to refugees. Hathaway<sup>32</sup> ascribes three reasons for this limitation and they are; the concern for the availability of resources; the concern that including responsibility for the internally displaced within the purview of the Convention would deter states from participating in the protection regime; and ‘respect for sovereignty’.<sup>33</sup> Thus, Hathaway writes that:

The territorial dimension of the Convention refugee status...was not to divide involuntary migrants into those who are worthy of assistance and those who are not deserving, but was instead to define the scope of refugee law in a realistic, workable way.<sup>34</sup>

The refugee status ceases to apply to a person who has ‘voluntarily re-availed’ himself of the protection of his country of origin; or voluntarily reacquired a lost nationality; or acquires a new nationality and enjoys the protection of that country; or voluntarily re-establishes himself in his country of origin; or for whom, the circumstances which gave rise to his refugee status have ceased to exist in his country of origin.<sup>35</sup>

On the exclusion from refugee status, article 1F provides that the provisions of the Refugee Convention shall not apply to persons who have committed crimes against peace, war crimes or crimes against humanity as defined in international instruments that make provisions for such crimes;<sup>36</sup> persons who have committed serious non-political crimes<sup>37</sup> outside the country of refuge prior to his admission into that country; and persons guilty of acts contrary to purpose and principles of the United Nations.<sup>38</sup> This aim of the exclusion clause is not to protect a country from protection from potential criminals but rather not to offer protection to those who may have themselves committed acts amounting to persecution.<sup>39</sup>

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<sup>31</sup> B Bern, ‘Project on Internal Displacement, Protecting Internally Displaced Persons: A Manual for Law and Policy Makers’ [2008] para 2 <<http://www.refworld.org/pdfid/4900944a2.pdf>> accessed 3 January 2026.

<sup>32</sup> J C Hathaway, *The Law of Refugee Status* (Butterworths Publishers Canada Ltd. 1991) 30.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, 32.

<sup>35</sup> (n 5), art 1 C; UNHCR, *Guidelines on International Protection No.3 on Cessation of Refugee Status under Article I (5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, HCR/GIP 03:03, (10 February 2003) paras 1-25.

<sup>36</sup> London Charter of the International Military Tribunal August 8, 1945, 82 U.N.T.S. 279 (entered into force August 8, 1945), Convention on the Prevention and Punishment of the Crime of Genocide December 9, 1948, 78 U.N.T.S. 277 (entered into force January, (12, 1951), the four 1949 Geneva Conventions for the Protection of Victims of War together with the 1977 Additional Protocols, the Statutes of the International Criminal Tribunals for the former Yugoslavia, SC Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (May 25, 1993), 32 I.L.M. 1 159 and Rwanda SC Res. 955, UN SCOR 49th sess.. 3453rd mtg. U.N. Doc S/Res/955 (November 8. 1994), 32 I.L.M. 1598, and the 1998 Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

<sup>37</sup> UNHCR, *Guidelines on International Protection No.5 on Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, (September 04. 2003) paras 14 and 15; J Rehman (n 30) 656 -661

<sup>38</sup> The UNHCR states that “acts contrary to the purposes and principles of the United Nations” can “only be triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence.” Such acts include those “capable of affecting international peace, security and peaceful relations between States as well as serious and sustained violations of human rights.” As regards terrorism, the UNHCR states that an assessment of the effect of the act in the international sphere in terms of “its gravity, international impact and implications for international peace,” is necessary for a correct application of article 1 F(c).

<sup>39</sup> Rehman (n 30) 657.

### **3. The Refugee Convention and its Challenges**

The Refugee Convention identifies a ‘refugee’ as a person who is outside the country of nationality due to fear of being persecuted for reasons of religion, race, nationality, membership of any particular social group or a political opinion and this situation is well-founded, and such person is unable or, owing to such fear, is unwilling to avail him or herself of the protection of that country; or a person who, not having a nationality as well as being outside the country of his or her former habitual residence, is unable or, as a result of such fear, is not willing to return to it.<sup>40</sup>

This has been queried as being too narrow as neither persecution nor alienage captures what is essential about refugeehood.<sup>41</sup> The requirement of ‘persecution’ can be traced to the historical context in which the Convention was adopted, being the experience in Europe of totalitarian regimes in the period surrounding the Second World War where refugees were usually ‘persecuted victims’ of such regimes<sup>42</sup>. The author states as regards the requirement of persecution in the following terms:

Persecution is but one manifestation of a broader phenomenon, the absence of state protection of the citizen’s basic needs. It is this absence of state protection which constitutes the full complete negation of society and the basis for refugeehood. The same reasoning which justifies the persecutee’s claim to refugeehood justifies the claims of persons deprived of all other basic needs as well.<sup>43</sup>

On the requirement of alienage, the states that it is an ‘unnecessary condition for establishing refugee status.’<sup>44</sup> According to the author, what is necessary, is for the international community to have access to the person in need of protection, unimpeded by the government of the country protection is sought from, and that such person does not necessarily have to be physically absent from such country to have access to international protection.<sup>45</sup> Shacknove’s favoured definition of refugees are, ‘...persons whose basic needs are unprotected by their country of origin who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible.’<sup>46</sup>

Ferracioli argues that the position of the Refugee Convention on refugee is under-inclusive because of its insistence on persecution, such that other vulnerable members in the international community are left unprotected, for example, citizens of failed states and those displaced by climate change<sup>47</sup>. The author states that ‘an appropriately inclusive criterion of refugeehood is one that defined refugees as persons who cannot secure their most fundamental human rights without migration.’<sup>48</sup> The OAU Convention on the Specific Aspects of Refugee Problems in Africa<sup>49</sup> and the Latin American 1984 Cartagena Declaration on Refugees,<sup>50</sup> are cited as examples for comprehensive definition of the refugee with a focus on human rights.<sup>51</sup> On the whole, it is argued further that the Refugee Convention falls short of three important desiderata- its specification of who qualifies for protection must be appropriately inclusive, its assignment of legal responsibility to states must track their prior moral

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<sup>40</sup> (n 5), art 1A (2).

<sup>41</sup> A E Shacknove, ‘Who is a Refugee’ [1985] 95 (2) *Ethics*;274 <<http://thecureforcultureshock.files.wordpress.com/2012/02/shacknovel-who-i.s-a-refugee.pdf>> accessed 4 January 2026.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*, 277.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*; J C Hathaway, ‘Why Refugee Law Still Matters’ [2007] 8 (1) *Melbourne Journal of International Law*;98 <<http://www.law.unimelb.edu.au/files/dmfile/downloadfd281.pdf>> accessed 4 January 2026.

<sup>46</sup> Shacknove (n 41) 277.

<sup>47</sup> L Ferracioli, ‘The Appeal and Danger of a New Refugee Convention’ [2014] 40 (1) <<http://www.princeton.edu/~pcglobal/conferences/GLF/ferracioli.pdf>> accessed 6 January 2026.

<sup>48</sup> *Ibid*.

<sup>49</sup> (n 19), art 1 (2).

<sup>50</sup> Cartagena Declarations on Refugees 1984, conclusion 3 <<http://www.refworld.org/docid/3ae6b36ec.html>> accessed 6 January 2026.

<sup>51</sup> Ferracioli (n 47).

responsibility, and its text must give some guidance on how migration sits with other moral responsibilities enjoyed by recipient states.<sup>52</sup>

The principle of non-refoulement only imposes on states, a negative obligation not to return refugees, but that there is no stringent positive obligation to assist on them as the Refugee Convention does not actually state that refugees have a ‘positive right to immigrate.’<sup>53</sup> This could lead in some cases, to refugees’ placement in camps or receiving access to only temporary protection till situations in their home countries change. This allows them to protect their most fundamental needs but because of the temporary nature of such arrangements, they cannot settle, pursue and plan long-term<sup>54</sup>. A reform to the Convention must be sensitive to the fact that some vulnerable individuals can actually be helped in their own state of citizenship, while others can only be helped through inclusion in a new political community.<sup>55</sup> This will enable priority of asylum be given to those who cannot be otherwise sufficiently assisted and help States avoid bearing unnecessary costs.<sup>56</sup> In all, there is an urgent need of a more desirable refugee protection regime as the present one ‘no longer provides (if it ever did) the international community with the conceptual and normative tools it needs to secure robust protection of vulnerable individuals.’<sup>57</sup> The description under the Refugee Convention is relatively narrow as it does not sufficiently capture the ‘complex reality of the conditions which cause people to flee their homes.’<sup>58</sup>

The phenomenon of mass movements of people across borders as a result of wars and conflicts remains a challenge. The Refugee Convention in its description of a refugee takes an individualised approach hence, there has to be an individual determination of the claims of every person in such movements, on their qualification or not, for refugee status. Thus, this places a ‘significant burden and pressure on receiving states’ asylum determination systems.<sup>59</sup> However, it has been argued that the Refugee Convention ‘does not exclude a *prima facie* or group determination in the case of large numbers of applicants.’<sup>60</sup> Yet, it is noted that the *prima facie* determination has its own problems. Thus, Feller stated as follows:

As an approach, it has its limits, particularly when it comes to ensuring the civilian character of camps or when complicated issues of status come to the fore, like exclusion or cessation. A bridge certainly needs to be built between *prima facie* recognition of refugee status and the Convention regime.<sup>61</sup>

Another challenge to the Refugee Convention is the lack of burden-sharing provisions in it.<sup>62</sup> As a result of this, it has been stated that most refugees (three-quarters of the world) reside in countries neighboring their home states, which themselves are often poor with lack of infrastructure to support their own citizens and the influx of refugees<sup>63</sup>.

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, 11.

<sup>56</sup> *Ibid.*, 3.

<sup>57</sup> *Ibid.*, 5.

<sup>58</sup> E Quinn, ‘The Refugee Convention Sixty Years On: Relevant or Redundant’ [2011] 68 *Working Notes*;20 <<http://www.workingnotes.ie/images/stories/Issue68/the%20refugee%20convention%20sisty%20years%20on-relevant%20or%20redundant.pdf>> accessed 7 January 2026.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> E Feller, ‘The Refugee Convention at 60: Still Fit for its Purpose?’ [2011] 7 <<http://www.unhcr.org/4ddb679b9.pdf>> accessed 7 January 2026.

<sup>62</sup> Quinn (n 58) 20.

<sup>63</sup> *Ibid.*; S McNeill, ‘Inside Zaatari: Syrian Refugees turn Desert into One of the World’s Largest Refugee Camps’ *ABC News* (Australian, 10 June 2014) <<http://www.abc.net.au/news/2014-06-10/inside-7aatari-one-of-worlds-largest-refugee-camps/5506792>> accessed 9 January 2026.

Another challenge is mixed migration flows, that is, mixed movements of refugees alongside other migrants. It is noted that identification of the refugees within the movements is a significant challenge for states.<sup>64</sup> Access to territory in order to claim protection is another challenge. By this, it is noted that states are increasingly making it harder for refugees to reach their territory which is essential to claim asylum.<sup>65</sup> An example is the European Union, where it had been stated that there have been, over the past decade ‘increasing border controls (visas, interceptions on the high seas, carrier sanctions, pre-embarkation controls and specialist liaison officers’ abroad carriers), harsher detention policies and efforts to outsource asylum determination to states outside the Union.’<sup>66</sup>

Some criticisms of the Refugee Convention include its strict definition which is not flexible enough to provide protection for ‘new refugees’<sup>67</sup>, meaning that those not envisaged at the time of the drafting of the Convention such as new gender-based persecution are not protected.<sup>68</sup> The Refugee Convention is said to be ‘insensitive to national, regional and international security concerns.’<sup>69</sup> The major worry here is that the asylum process might hinder the fight against terrorism because of the principle of *non-refoulement* by which a terrorist may not be deported if he is likely to face persecution back home.

However, it is noted that the Refugee Convention adequately provides for security concerns as article 1(F) of thereof excludes certain categories of persons from protection, one of them comprising of persons believed to have committed acts contrary to the purposes and principles of the UN. Since the Security Council has repeatedly noted that terrorism is against the purposes and principles of the UN, then the Convention in no way hinders the fight against terrorism.<sup>70</sup> A challenge to the Convention is the fact that it does not deal with the causes of flight which has resulted in a shortage of intervention mechanisms which can effectively allow the international community to remedy the cause of flight.<sup>71</sup> This is considered very relevant.<sup>72</sup>

Challenges to the present regime of international refugee protection is not unique<sup>73</sup> as they have always featured in the discussions of past refugee movements.<sup>74</sup> Some of the challenges to the Refugee Convention include mixed migration flows, which States say task heavily their asylum system, and shake their belief in the relevance of the Convention. Kelley and Durieux point out as another cause of the loss of confidence in the Convention, a change in political circumstances or a shift in strategic interests.<sup>75</sup> In the first forty years of the Convention, most refugees were fleeing communist regimes

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<sup>64</sup> Quinn (n 58) 20.

<sup>65</sup> J Rehman, *International Human Rights Law* (London: 2nd edn, Pearson Publishing Company 2010) 678.

<sup>66</sup> *Ibid*; G Loescher and J Milner, ‘The Missing Link: The Need for Comprehensive Engagement in Region of Refugee Origin’ [2003] 76 (3) *International Affairs*; 595 <[http://www.chathamhouse.org/sites/files/chathamhouse/public/International%20Affairs/Blanket%20File%20Import/inta\\_325.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/public/International%20Affairs/Blanket%20File%20Import/inta_325.pdf)> accessed 9 January 2026.

<sup>67</sup> Chatham House, ‘The Refugee Convention: Why not Scrap It?’ (Being A Summary of Discussion at the International Law Programme Discussion Group at Chatham House on 20 October 2005) 1, <<http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilp20i005.pdf>> accessed 9 January 2026.

<sup>68</sup> L Druke, ‘Mobilizing for Refugee Protection: Reflections on the 60<sup>th</sup> Anniversary of UNHCR and the 1951 Refugee Convention’ [2011] (227) *INHCR, New Issues in Refugee Research*; 10 <<http://acuns.org/wpcontent/uploads/2012/06/MobilizingforRefugecProtection.pdf>> accessed 9 January 2026.

<sup>69</sup> *Ibid*.

<sup>70</sup> Druke (n 33).

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid*. G Loescher and J Milner, ‘The Missing Link: The Need for Comprehensive Engagement in Region of Refugee Origin’ [2003] 76 (3) *International Affairs*; 615 <[http://www.chathamhouse.org/sites/files/chathamhouse/public/International%20Affairs/Blanket%20File%20Import/inta\\_325.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/public/International%20Affairs/Blanket%20File%20Import/inta_325.pdf)> accessed 9 January 2026.

<sup>73</sup> N Kelley and Jean-Francois Durieux, ‘UNHCR and Current Challenges in International Refugee Protection’ [2004] (16) *Refugee*; 21 <<http://pi.library.yorku.ca/ojs/index.php/refuge/article/download/21312/19983>> 9 January 2026.

<sup>74</sup> *Ibid*.

<sup>75</sup> Kelley and Durieux (n 73) 9.

and as it was the Cold War period, they were welcome in the West. However, once the Cold War ended, this strategic aspect of refugee protection was lost.<sup>76</sup> Yet another challenge noted by Kelley and Durieux is the absence of a burden sharing formula that has seen most states in the developing world hosting the bulk of the world's refugees. Added to this, these states usually have national security concerns about the refugees especially when the conflict causing the flight crosses borders.<sup>77</sup> There is the resulting scare of militarisation of the refugee camps.<sup>78</sup> These developing states in turn use this as a reason to limit the scope of their protection of refugees for example confining them to camps and refusing the possibility of integrating them with the local population.<sup>79</sup>

The 1951 Refugee Convention was a product of the Cold War environment and the experiences of the Nazi persecutions during the Second World War.<sup>80</sup> This is submitted to be the reason for the reliance on persecution as the qualification for refugeehood. However, flight is more likely to be caused now by reasons such as civil wars, famine, ethnic violence, and so on rather than persecution or oppressive regimes.<sup>81</sup> Additionally, with the end of the Cold War and thus a change in political circumstances, there is no ideological or strategic interest in granting asylum and this has led to disenchantment with the asylum system.<sup>82</sup> Other challenges include; mixed migration movements<sup>83</sup> as well as restrictive measures increasingly employed by states to stem off the number of refugees, they have to admit.<sup>84</sup>

In addressing claims that the Refugee Convention is outdated and unfit for purpose for which was adopted, it is noted that the limitation of definition of a refugee in the Convention serves in extending protection to vulnerable persons.<sup>85</sup> There is no positive obligation on states compelling them to grant of asylum to refugees.<sup>86</sup> Lack of a burden sharing mechanism is a major gap in the Convention architecture, especially with regards to mass influx/migration flows.<sup>87</sup> Thus, the challenge of mixed migration flows is examined and maintained that it is not a weakness of the Convention, rather states

<sup>76</sup> *Ibid*; B S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' [1998] 11 (4) *Journal of Refugee Studies*;9

<[http://www.en.refugeelawreader.org/index.php?option=com\\_docman&task=doc\\_download&gid=445&Itemid=reproduced by permission of OxfordUniversityPress](http://www.en.refugeelawreader.org/index.php?option=com_docman&task=doc_download&gid=445&Itemid=reproduced%20by%20permission%20of%20OxfordUniversityPress)> accessed 10 January 2026.

<sup>77</sup> *Ibid*.

<sup>78</sup> P Kurui and J Mwaruvie, 'The Dilemma of Hosting Refugees: A Focus on the Insecurity in North-Eastern Kenya' [2012] 161 *International Journal of Business and Social Science*;3 <[http://www.ijbssnet.com/journals/Vol\\_3\\_No\\_8SpecialIssueApril2012/18.pdf](http://www.ijbssnet.com/journals/Vol_3_No_8SpecialIssueApril2012/18.pdf)> accessed 10 January 2026; I Salehyan and K S Gleditsch, 'Refugees and the Spread of Civil War' [2006] 60 (2) *International Organization*;335 <<https://www.jstor.org/stable/3877896>> accessed 10 January 2026; S Alien, 'Harbouring or Protecting? Militarized Refugees, State Responsibility, and the Evolution of Self-Defense' [2010] 8 *The Fletcher Journal of Human Security*;25 <<http://fletcher.tufts.edu/Praxis/Archives/-media/A5782790524D4DB7B2BC3D2726E6B7D7.pdf>> accessed 10 January 2026.

<sup>79</sup> *Ibid*.

<sup>80</sup> Q B Baloch, 'International Refugee System in Crisis' [2006] 1 (1) *The Dialogue Quarterly Research Journal*;124 <[http://www.qurtuba.edu.pk/thedialogue/The%20Dialogue/1\\_1/09-International%20Refugees%20System.pdf](http://www.qurtuba.edu.pk/thedialogue/The%20Dialogue/1_1/09-International%20Refugees%20System.pdf)> accessed 10 January 2026.

<sup>81</sup> *Ibid*, 125.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid*, 126.

<sup>84</sup> *Ibid*, 128.

<sup>85</sup> Feller (n 61).

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*, 7; J Hathaway and R A Neve, 'Making Refugee Law, Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' [1997] 15 *Harvard Human Rights Journal*;10 <[http://www.en.refugeelawreader.org/index.php?option=com\\_docman&task=doc\\_view&lang=en&gid=373&level=11&ml=5&mlt=system&tmplcomponent=omponent](http://www.en.refugeelawreader.org/index.php?option=com_docman&task=doc_view&lang=en&gid=373&level=11&ml=5&mlt=system&tmplcomponent=omponent)> accessed 12 January 2026; P H Schuck, 'Refugee Burden-sharing: A Modest Proposal' [1997] 245 *Yale Journal of International Law*;22 D Anker and Others, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck' [1998] 295 *Harvard Human Rights Journal*;11 <[http://www.en.refugeelawreader.org/index.php?option=com\\_docman&task=doc\\_download&lang=en&gid=360](http://www.en.refugeelawreader.org/index.php?option=com_docman&task=doc_download&lang=en&gid=360)> accessed 12 January 2026.

are responsible for the ‘effective management of irregular migration.’<sup>88</sup> Reliance on persecution in the definition of the Convention has made it to be considered unfit for purpose, and outdated.<sup>89</sup> This is argued to be a formula that was specifically designed for the Cold War whereas contemporary requirements are greatly different.<sup>90</sup>

The challenges facing the Refugee Convention ‘...is a staggering achievement which marks the realisation of the human right to asylum in cosmopolitan law. On the other hand, the Convention is neither fit for purpose nor universally accepted.’<sup>91</sup> The Convention was specifically drafted to meet the needs of the ‘European conception of the worthy refugee (to meet the needs of the European refugees at that time, fleeing oppressive regimes) and that this has implications for the transferability of the model to other places.’<sup>92</sup> Thus, even though the 1967 Protocol came to remove the temporal and geographical limitation that was inherent in the definition of the refugee, to make the Convention universally applicable, the Convention cannot be effective outside that conception of the worthy refugee (the politically persecuted one, within the specified grounds in the Convention). This is why the Convention is criticized for failure to recognise some forms of persecution specific to women such as rape and female circumcision, or those fleeing civil wars and those experiencing economic and social right violations.<sup>93</sup>

The system by which the Office of the United Nations High Commissioner for Refugees (UNHCR)<sup>94</sup> is funded<sup>95</sup> poses a major challenge to the Refugee Convention and that a Treaty body is needed to work in conjunction with the UNHCR to make for better implementation of the Convention.<sup>96</sup> It has been noted that UNHCR lacks the ability to directly criticise States, and interpret the Convention.<sup>97</sup> There is the need to make the implementation of the Refugee Convention more effective by creating new monitoring mechanisms going beyond the present supervisory regime.<sup>98</sup> Lack of uniformity in the actual application of the provisions of the Refugee Convention is a challenge.<sup>99</sup> There is need for monitoring/oversight mechanisms independent of the UNHCR to work in conjunction with it.<sup>100</sup> Any adopted monitoring mechanism must meet these requirements- independence and expertise, objectivity and transference, inclusiveness and operationality.<sup>101</sup>

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<sup>88</sup> Feller (n 61) 8.

<sup>89</sup> C Berg, ‘Why Cling to an Outdated Convention?’ [2011] *The Drum Opinion* <<https://www.ipa.org.au/news/2500/why-cling-on-to-an-outdated-refugee-convention-/category/6>> accessed 12 January 2026.

<sup>90</sup> *Ibid.*

<sup>91</sup> L Mayblin, ‘Historically European, Morally Universal? The 1951 Geneva Convention on the Status of Refugees’ <<http://www.e-ir.info/2010/03/28/historically-european-morally-universal-the-1951-geneva-convention-on-the-status-of-refugees/>> accessed 12 January 2026.

<sup>92</sup> *Ibid.*

<sup>93</sup> Hathaway (n 32) 136.

<sup>94</sup> The UN General Assembly in its Resolution 428 (V) adopted the Statute of the UNHCR and annexed it to the Resolution.

<sup>95</sup> UNHCR Statute 1950, art 20.

<sup>96</sup> (n 5), art 35; J Rehman and S C Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Leiden: Martinus Nijhoff Publishers 2007) 645.

<sup>97</sup> *Ibid.*

<sup>98</sup> W Kalin, ‘Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond’ [2001] <[http://www.en.refugeelawreader.org/index.php?option=com\\_docman&task=doc\\_download&gid--1566&Itemid](http://www.en.refugeelawreader.org/index.php?option=com_docman&task=doc_download&gid--1566&Itemid)> accessed 17 January 2026.

<sup>99</sup> Kalin (n 98).

<sup>100</sup> W Kalin, *Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond* (Cambridge University Press 2003) 634.

<sup>101</sup> *Ibid.*

Hathaway also writes on the need for an enhanced supervisory mechanism for a proper oversight of the Refugee Convention.<sup>102</sup> He notes that the absence of an external supervisory mechanism for the Convention is a reflection of the time in which it was adopted, where interstate supervision of human rights was the exception rather than the norm.<sup>103</sup> He notes two fundamental limitations of the UNHCR in its supervisory role- first is the fact that the UNHCR has increasingly become involved in providing direct humanitarian aid and thus directly involved in providing refugee protection.<sup>104</sup> Thus, in many cases overseeing the implementation of the Convention involves overseeing the activities of the UNHCR, a role which the UNHCR cannot be seen to perform on itself.<sup>105</sup> The second reason stated is that leaving oversight totally to the UNHCR allows States avoid ‘meaningful accountability between and among themselves that is at the root of the entire international human rights project.’<sup>106</sup> Hathaway notes that the ‘dynamic of persuading, cajoling and indeed shaming of partner states which has been so critical to the success of the international human rights project in general, is absent, for the most part in refugee law.’<sup>107</sup> He notes a third reason as the need to ‘facilitate UNHCR's basic work in protecting refugees.’<sup>108</sup> Hathaway notes that in operations in the fields, compromises might need to be made on the rules in pursuit of least bad options for refugees.<sup>109</sup> In its supervisory role in the implementation of the Refugee Convention, the UNHCR would thus be in a dilemma.<sup>110</sup> According to Hathaway, these reasons reveal the need for an arms-length expert supervisory mechanism for the Refugee Convention to complement the role of the UNHCR.<sup>111</sup>

From the above discussion on the views of the various authors, several challenges of the Refugee Convention are revealed. They include the under-inclusive definition of a refugee by the convention, conditioned by the political circumstances it was drafted around; current dynamics of external displacement such as mass movements due to conflicts and mixed migration flows; lack of a burden sharing mechanism in the Convention; security concerns arising from the hosting of refugees; non-focus on the root causes of displacement; and the lack of an independent oversight mechanism for the Convention.

On the under-inclusiveness of the definition of the Refugee Convention as revealed above, it is indeed true that the definition is under-inclusive. This is underscored by the necessity of the expansion of the definition in regional instruments such as the OAU Convention and the Cartagena Declaration on Refugees 1984. Of course, this has been traced to the ideology behind the definition, which was to protect victims of Nazi Germany and also those fleeing communist regimes during the Cold War hence, the reliance on persecution in terms of civil and political grounds as a status. Thus, there is in fact a need for an expansion of the definition to meet contemporary challenges such as movements due to violence, natural disasters, and so on. For displacement due to climate change, Bonnie Docherty and Tyler Gianni<sup>112</sup> propose a separate convention to protect climate change refugee.<sup>113</sup> Feller emphasises

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<sup>102</sup> J C Hathaway, ‘Overseeing the Refugee Convention: Taking Refugee Law Oversight Seriously’ [2001] *Working Paper No. UM-ICVA Overview*; 1 <<http://ssrn.com/abstract=294191>>; <<http://dx.doi.org/10.2139/ssrn.294191>> accessed 17 January 2026.

<sup>103</sup> *Ibid.*

<sup>104</sup> Hathaway (n 102) 7.

<sup>105</sup> Hathaway (n 102) 7.

<sup>106</sup> *Ibid*; 8.

<sup>107</sup> *Ibid.*

<sup>108</sup> J C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 996.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> B Docherty and T Gianni, ‘Confronting a Rising Tide: A Proposal for A Convention on Climate Change Refugees’ [2009] 33 *Harvard Environmental Law Review*; 350 <[https://www.law.harvard.edu/students/orgs/elr/vol\\_33\\_2/Docherty%20Gianni.pdf](https://www.law.harvard.edu/students/orgs/elr/vol_33_2/Docherty%20Gianni.pdf)> accessed 15 January 2026.

<sup>113</sup> *Ibid.* This Convention according to them, could either be a Protocol to the Refugee Convention, or to the United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (entered into force March 21, 1994).

same thing in reference to displacement other than by forces other than persecution, serious violations of human rights and ongoing conflict, stating that the Convention does not necessarily have to apply in those instances as other international human rights instruments offer greater potential to protect those categories of persons.<sup>114</sup> Really, it would be impractical for the definition in the Convention to be reworked to cover every situation that can give rise to refugeehood. The provisions in the Convention would likely be unwieldy and too wide to protect the particular needs of certain categories of persons. On the challenges posed by change in the dynamics of displacement, mass influx flows in particular really do pose a challenge to the effectiveness on the Convention. It not only tasks the receiving country's asylum system, but the absence of burden sharing mechanisms exacerbates the effect. This underscores the need for burden sharing deals as relating to refugees, in the international community. The challenge of mixed migration flows as Feller above has asserted, really is no fault of the Convention. Ease in transportation as a result of technological advancements has led to the increase in irregular migrants.

Lack of a burden sharing mechanism really is a huge concern. As stated above, the need for it was noted in the preamble of the Convention but nothing was put in place to put it in effect. This mostly leads to camping or warehousing of refugees and the resulting scare of militarisation of the camps near areas of conflict. This results in security concerns in the host nation. States, particularly Australia, have begun to make burden sharing deals with its neighbouring islands.<sup>115</sup> However, there are concerns about the standards of treatment received by the refugees sent to those islands and the lack of independent oversight of such arrangements.<sup>116</sup> Thus there is need for international oversight of any such agreement coupled with the need for international or regional arrangement of such deals, with set standards established. On the challenge of non-focus on root causes of displacement, it is submitted that refugee law should truly not only be reactive but proactive. It is difficult to deal with root causes of flight particularly when the government of a State contributes to such causes, because of the notion of sovereignty. However, steps need to be taken by the international community, to reduce to the barest minimum causes of external displacement.

On the lack of an independent oversight mechanism to oversee implementation of the Convention alongside the UNHCR, it is agreed that there is indeed a lacuna, and there is need for such mechanism to be devised, which would include input from refugees themselves.<sup>117</sup> The above reveals challenges in the regime of the present Refugee Convention and underscores the reasons why those challenges should be met.

#### **4. Conclusion and Recommendations**

The Convention relating to the Status of Refugees (the Refugee Convention) 1951 together with its Protocol remains the foundation of the international refugee protection regime and the only truly universal instrument determining the minimum standards for refugee protection. This paper work has examined its provisions and found that it is inadequate in meeting the protection needs of refugees. Accordingly, recommendations are made below on how to shore up its provisions to make for an improved refugee protection regime. It is hoped that they are taken into consideration so that refugees not only enjoy better protection, but that the causes of refugee flight would be dealt with so as to reduce to the barest minimum the need to seek refugee status. The following recommendations are made in this paper:

1. The Refugee Convention should be amended to cover a wider category of refugees. Persecution cannot remain the exclusive benchmark for qualification for refugeehood under the Convention. War refugees especially should be included in the new definition under the Convention.

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<sup>114</sup> Erika Feller (n 61) 8.

<sup>115</sup> Papua New Guinea and Nauru.

<sup>116</sup> PH Schuck, 'Refugee Burden-Sharing: A Modest Proposal, Fifteen Years Later' [2014] 39 <[www.researchgate.net/publication/254629125\\_Refugee\\_Burden\\_Sharing\\_A\\_Modest\\_Proposal](http://www.researchgate.net/publication/254629125_Refugee_Burden_Sharing_A_Modest_Proposal)> accessed 15 January 2026.

<sup>117</sup> J C Hathaway, 'Overseeing the Refugee Convention: Taking Refugee Law Oversight Seriously' [2001] 12 <[https://papers.ssrn.com/sol3/papers.com?abstract\\_id=294191](https://papers.ssrn.com/sol3/papers.com?abstract_id=294191)> accessed 15 January 2026.

2. Another supervisory body with the power to authoritatively interpret the provisions of Refugee Convention should be agreed upon by States so as to ensure proper oversight of the application of the Convention. Such body would work hand in hand with the UNHCR to promote the implementation of the provisions of the Convention. As already advocated, the designers of this body should incorporate the positive aspects of the already existing human rights treaty oversight bodies.
3. The burden allocation structure under the Refugee Convention needs to be addressed. This can only come through an amendment to the Convention. Positive obligations on how to share and allocate responsibilities for refugee hosting should be agreed upon so that there would be a standing mechanism to address cases especially mass influx situations when they arise. States could reasonably be expected to deal with a certain number of refugees for themselves, but at a certain threshold to be agreed upon by States.
4. There needs to be an international response. This structure could allocate the financial responsibilities to some states and hosting responsibilities to others in the region of the country of origin, or could allow for a swift resettlement of refugees on other States until they can return home. This standing mechanism would not only ease the pressure on States sharing borders with the country of origin in such instances, but would also assist in maintaining the civilian character of camps as such an approach would ensure that asylum systems do not get overstretched or swamped but would make them run more efficiently.
5. States should garner the political will to implement fully the provisions of the Convention avoiding the use of restrictive policies so as to enable refugees have access to their territories, and also to reach agreements on the issues of concern in the Convention such as a burden-sharing mechanism, a strong supervisory body and a wider Convention refugee definition. The will of States is very important as without it, nothing really can be achieved in this regard. The political will of States is also very important in addressing root causes of refugee flows.