

Refugee Protection in International Law

UNHCR's Global Consultations on International Protection

Millions of people are today forced to flee their homes as a result of conflict, systematic discrimination, or other forms of persecution. The core instruments on which they must rely to secure international protection are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. This book examines key challenges the Convention faces, including the scope of the principle of *non-refoulement* and the proper application of the elements of the refugee definition. The Office of the United Nations High Commissioner for Refugees (UNHCR) commissioned papers on these issues from some of the world's pre-eminent international refugee experts, and these were discussed at a series of expert roundtable meetings during 2001 as part of UNHCR's Global Consultations on International Protection. The papers and roundtable conclusions are published here, together with an overview and the landmark declaration of the 2001 Ministerial Meeting of States Parties to the Convention and/or Protocol.

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Refugee Protection in International Law

UNHCR's Global Consultations on International
Protection

edited by

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and

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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge, CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

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First published 2003

Printed in the United Kingdom at the University Press, Cambridge

Typeface Lexicon 1 A 9/12.5 pt. System L^AT_EX 2_ε [TB]

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication data

ISBN 0 521 82574 1 hardback
ISBN 0 521 53281 7 paperback

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Foreword

At the start of the twenty-first century, fifty years after the drafting of the 1951 Convention Relating to the Status of Refugees, international refugee protection is at a crossroads. In a globalizing world and a rapidly changing political environment, the Convention faces many challenges. These include new forms of persecution and conflict, complex mixed migration movements, the reluctance of many states to accept refugees, and restrictive interpretation of the Convention.

The papers and the conclusions contained in this volume are one outcome of the Global Consultations on International Protection, organized by UNHCR in 2000–2 to reinvigorate the international refugee protection regime. They address key questions relating to the 1951 Convention, where it was considered that greater clarity and coherence of interpretation was needed. They are the result of a series of expert roundtables which were held in 2001 as part of the Global Consultations.

This book examines some of the legal issues that are part of the system of governance for refugees. The cornerstone of this system remains the 1951 Convention and its 1967 Protocol. The aim is to ensure that this system can function more effectively, equitably, and efficiently, enabling refugees to obtain the protection to which they are entitled.

Refugee protection problems cannot be addressed in isolation. All stakeholders, whether they be international organizations, governments, judiciaries, civil society, non-governmental organizations, or academia, need to strengthen their partnerships and clarify their roles. Clearer understanding and more consistent implementation are an integral part of ensuring that refugee protection burdens and responsibilities are shared more equally, and that some of the world's most vulnerable individuals are able to find durable solutions to their plight and to enjoy the respect that they deserve.

The Declaration agreed by delegates at the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol in December 2001 called on States to 'strengthen asylum and render protection more effective'. I hope this volume will serve as a tool to assist those involved in refugee protection in this endeavour.

Ruud Lubbers
United Nations High Commissioner for Refugees

Preface

The world has changed radically since the establishment of UNHCR and the coming into force of the Convention Relating to the Status of Refugees some fifty years ago. The modern regime of international refugee protection has been built on these beginnings in the aftermath of the Second World War and is now a complex structure affording vital protection to millions of forcibly displaced people. Within this structure, the Convention and its 1967 Protocol are widely acknowledged as enduring instruments with a ‘central place in the international refugee protection regime’, as States Parties to the Convention and/or Protocol declared in December 2001.

Conclusions have, however, sometimes been drawn which put in question the ongoing relevance of the Convention or which seem to call for its complete overhaul, or even abandonment. Such conclusions are misguided, even dangerous. They contribute to the waning quality of asylum, as State commitment to protection using the available instruments starts to falter. UNHCR does of course recognize that the challenges today are many and various and that there are gaps in the protection framework, even while, at the core, the Convention regime’s fundamental principles are as sound and necessary as ever.

The Global Consultations on International Protection have been UNHCR’s effort to rise to modern challenges confronting refugee protection, to shore up support for the international framework of protection principles, and to explore the scope for enhancing protection through new approaches, which nevertheless respect the concerns and constraints of States and other actors. The process was designed to promote better understanding of today’s protection dilemmas, from the perspective both of the providers and of the beneficiaries of international protection. State interests and refugee needs have not been always easy to reconcile, but certainly the first step in this direction can only be taken when the possibilities and limitations are properly appreciated.

The Consultations were also conceptualized so as to realize better cooperation among all concerned. Best practices, or at least baselines, for making asylum systems work more justly and efficiently, coupled with a firming up of political will to improve the ‘doing’ of protection, not on an ad hoc and discretionary basis, but more predictably and consistently within the internationally agreed parameters, were likewise an objective. So too was a more reasoned approach to responsibility

sharing, in order to rationalize the assumption of responsibilities and balance the burdens in a more equitable manner. Finally, the Consultations had the goal of contributing to improved implementation of important framework principles, including by clarifying their meaning in a modern context.

The various issues raised in the course of the Global Consultations were organized along three ‘tracks’. The first culminated in an unprecedented Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol in Geneva in December 2001. The Declaration from that meeting – the first ever adopted by all States Parties – is reproduced in Part 1.3 of this book. That Declaration stands as an important measure of political commitment to better refugee protection within a strengthened Convention framework. The ‘second track’ of the Consultations involved a series of expert roundtables held during 2001 on specific issues in the interpretation of the 1951 Convention on which greater clarity is required, as set out in the table on p. xxi. A more harmonized understanding of how the Convention is to be applied in today’s world will, it is hoped, be one enduring outcome. The ‘third track’ brought together States and other actors, within the framework of the Executive Committee of the High Commissioner’s Programme, to examine various specific or thematic refugee protection concerns not directly, or not adequately, covered by the Convention and Protocol.

Overall the Global Consultations process has encouraged a cooperative spirit in tackling refugee issues. It has aroused an interest in multilateral dialogue to find solutions to an increasingly internationalized set of problems. The process has confirmed a willingness to pool concerns and jointly point the way forward to the durable resolution of problems whose solution is within our collective reach. Together, UNHCR and States have drafted an Agenda for Protection, which should help both to inform and to shape debate and policy formation. The Agenda comprises a comprehensive programme of action to tackle the various issues besetting refugee protection in today’s complex environment.

This book represents a key outcome very particularly of the second track roundtable meetings and the Summary Conclusions resulting from them. It focuses in a detailed manner on discrete legal issues of interpretation of the 1951 Convention, bringing together the expert papers presented to the participants at the roundtable meetings and their conclusions. The authors were asked to make proposals to establish common understandings on key issues of Convention interpretation in order to promote greater consistency in the application of the Convention in the different jurisdictions of the world. They were also asked to factor into their analysis subsequent developments in international law of relevance to forced displacement.

The book is introduced by an overview of refugee protection in international law, followed by a paper on the age- and gender-sensitive interpretation of the 1951 Convention and the text of the 2001 Declaration of the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol. The book then comprises nine

parts, each containing a paper by different leading international refugee experts on key issues of interpretation of the 1951 Convention. These concern *non-refoulement*, illegal entry, membership of a particular social group, gender-related persecution, internal flight, relocation or protection alternatives, exclusion, cessation, family unity and reunification, and UNHCR's supervisory responsibility under its Statute. Each of these issues was debated at an expert roundtable meeting in 2001 and the Summary Conclusions of those meetings follow the relevant paper.

I trust this book will offer a valuable resource for judges, adjudicators, legal practitioners, government officers, humanitarian workers, non-governmental refugee advocates, and academics alike in their various efforts towards the common goal of strengthening refugee protection worldwide. For its part, UNHCR will be drawing on these various contributions to refine its own guidelines, which it makes available pursuant to its responsibility under paragraph 8 of its Statute and Article 35 of the 1951 Convention itself.

Erika Feller
Director of International Protection
Office of the United Nations High Commissioner for Refugees

Acknowledgments

UNHCR would like to thank the co-organizers of the expert roundtables held as part of the ‘second track’ of the Global Consultations on International Protection for their important substantive and financial contribution in making these events possible. The co-organizers involved were the International Migration Policy Institute of the Carnegie Endowment for International Peace, New York, United States; the Luso-American Foundation for Development, Lisbon, Portugal; the Lauterpacht Research Centre for International Law, University of Cambridge, United Kingdom; the International Institute of Humanitarian Law, San Remo, Italy; and the Graduate Institute of International Studies, Geneva, Switzerland. Other significant financial contributors to the overall Global Consultations process, who also therefore helped to make these roundtables happen, were Australia, Canada, the European Commission, Japan, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States. In addition, the governments of Canada, China, Costa Rica, Egypt, France, Hungary, Norway, and South Africa each hosted regional meetings in the context of the ‘third track’ of the Consultations which likewise made an important contribution to the process.

The editors would especially like to thank Kate Jastram and Alice Edwards, who provided valuable substantive and organizational input as consecutive focal points for the second track of the Global Consultations, as well as Eve Lester, the non-governmental organization (NGO) liaison officer for the Consultations.

In addition, the editors are most grateful for the input and comments of colleagues Nicholas Arons, Alexander Beck, Walter Brill, Walpurga Englbrecht, Diane Goodman, Nathalie Karsenty, Irene Khan, Janice Marshall, Hugh Massey, Sophie Muller, Shahrzad Tadjbakhsh, Mignon van der Liet, and Wilbert van Hövell. Thanks also go to Finola O’Sullivan, Treena Hall, Jennie Rubio, Caro Drake, and Martin Gleeson at Cambridge University Press, as well as Lesley Dingle at the Squire Law Library in Cambridge, for their kind support in seeing this project through to publication.

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Expert roundtables and topics under the ‘second track’ of the Global Consultations

Roundtables	Topics
1st Roundtable Date: 3–4 May 2001 Venue: Lisbon Co-organizer: Carnegie Endowment for International Peace, Washington DC Hosted by: Fundação Luso-Americana para o Desenvolvimento	<ul style="list-style-type: none">• Cessation (Article 1C)• Exclusion (Article 1F)
2nd Roundtable Date: 9–10 July 2001 Venue: Cambridge Co-organizer: Lauterpacht Research Centre for International Law, Cambridge, UK	<ul style="list-style-type: none">• Principle of <i>non-refoulement</i> (Article 33)• Supervisory responsibility (Article 35)
3rd Roundtable Date: 6–8 September 2001 Venue: San Remo Co-organizer: International Institute of Humanitarian Law, San Remo, Italy	<ul style="list-style-type: none">• Membership of a particular social group (Article 1A(2))• Gender-related persecution (Article 1A(2))• Internal protection/relocation/flight alternative
4th Roundtable Date: 8–9 November 2001 Venue: Geneva Co-organizer: Graduate Institute of International Studies, Geneva, Switzerland	<ul style="list-style-type: none">• Illegal entry (Article 31)• Family unity (Final Act of the 1951 UN Conference)

Table of cases

Many of the cases cited in this volume are available on the UNHCR website, www.unhcr.org, and on UNHCR's Refworld CD-ROM, available from the Protection Information Section, Office of the UN High Commissioner for Refugees, Case Postale 2500, CH-1211 Gen`eve 2 D`ep`ot, Switzerland, e-mail HQPR11@unhcr.org. Other useful websites, all of which are freely accessible, are given below.

Permanent Court of International Justice *Consistency of*

Certain Danzig Legislative Decrees with the Constitution of the Free City,
Series A/B, No. 6, 1925, 1925, Series A, No. 2, 30 Aug. 1924 376n

International Court of Justice

Judgments are available on <http://www.icj-cij.org/icjwww/idecisions.htm>.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, ICJ Reports 1996, p. 595 636n

Barcelona Traction, Light and Power Co. Case (Belgium v. Spain), ICJ Reports 1970, p. 4 431n

East Timor (Portugal v. Australia), ICJ Reports 1995, p. 90 636n

Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997, p. 7 105

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 636n

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16 104–5, 113

Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 329; and Merits, Judgment, ICJ Reports 1986, p. 14 141, 142, 147, 460n, 473n

- North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3 142–3, 148
Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide,
 Advisory Opinion, ICJ Reports 1951, p. 15 104
South West Africa, Second Phase, Judgment, ICJ Reports 1966, p. 6 105
United States Diplomatic and Consular Staff in Tehran (Tehran Hostages Case), ICJ Reports,
 1980, p. 3 152n, 223n

International Criminal Tribunal for the former Yugoslavia

Judgments available at <http://www.un.org/icty/judgement.htm>.

- Prosecutor v. Drazen Erdemovic*, Judgment, Case No. IT-96-22-A, 7 Oct. 1997 473n
Prosecutor v. Anto Furundzija, ICTY, Case No. IT-95-17/1-T, 10 Dec. 1998 (judgment
 upheld by Appeals Chamber, 21 July 2000) 53n
Prosecutor v. Kunarac, Kovac, and Vukovic, Case No. IT-96-23 and IT-96-23/1, 22 Feb.
 2001 (judgment upheld by Appeals Chamber, 12 June 2002) 49n, 53n, 336n
Prosecutor v. Kupreskic, Case No. IT-95-16-T, 14 Jan. 2000 434n
Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal
 on Jurisdiction before the Appeals Chamber of ICTY, Case No. IT-94-1-AR72,
 1995 434n, 435n, 437n, 438n

International Criminal Tribunal for Rwanda

Decisions available at <http://www.ictt.org/>.

- Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 Sept. 1998 53n, 336n,
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Human Rights Committee

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights (Banjul Charter), 1981
ACHR	American Convention on Human Rights, 1969
All ER	<i>All England Law Reports</i> (UK)
ALR	<i>Australian Law Reports</i>
Asian-African Refugee Principles	Principles Covering Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee, 1966
Banjul Charter	African Charter on Human and Peoples' Rights, 1981
BIA	Board of Immigration Appeals (USA)
BverwG	<i>Bundesverwaltungsgericht</i> (Federal Administrative Court, Germany)
BVG	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court, Germany)
CA	Court of Appeal
CAHAR	Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (Council of Europe)
Cartagena Declaration	Cartagena Declaration on Refugees, 1984
CASWANAME	Bureau of Central Asia, South-West Asia, North Africa and the Middle East (within UNHCR)
CAT	Convention Against Torture, 1984
CDR	Centre for Documentation and Research (within UNHCR)
CEDAW	Convention on the Elimination of Discrimination Against Women, 1979
CERD	Convention on the Elimination of All Forms of Racial Discrimination, 1965
CFR	Code of Federal Regulations (USA)

CIREFCA	International Conference on Central American Refugees
CJ	Chief Justice
CLR	<i>Commonwealth Law Reports</i>
CRC	Convention on the Rights of the Child, 1989
CRDD	Convention Refugee Determination Division (Canada)
CRR	<i>Commission des recours des réfugiés</i> (Refugee Appeals Commission, France)
DAC	Development Assistance Committee (OECD)
DIP	Division of International Protection (within UNHCR) until 1999; Department of International Protection from 1999
DLR	<i>Dominion Law Reports</i>
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ECOSOC	UN Economic and Social Council
ECRE	European Council on Refugees and Exiles
EHRR	<i>European Human Rights Reports</i>
ELENA	European Legal Network on Asylum (ECRE)
EPAU	Evaluation and Policy Analysis Unit (within UNHCR)
ETS	European Treaty Series
Executive Committee	Executive Committee of the High Commissioner's Programme
FCA	Federal Court of Australia
FGM	female genital mutilation
HCA	High Court of Australia
HCHR	High Commissioner for Human Rights
HRC	Human Rights Committee
IAA	Immigration Appellate Authority (UK)
IARLJ	International Association of Refugee Law Judges
IAT	Immigration Appeal Tribunal (UK)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice

ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICVA	International Council of Voluntary Agencies
IFA	internal flight alternative
IFRCRCS	International Federation of Red Crescent and Red Cross Societies
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILO	International Labor Organization
ILR	<i>International Law Reports</i>
Imm AR	<i>Immigration Appeal Reports</i> (UK)
INA	Immigration and Nationality Act (USA)
INLA	Irish National Liberation Army
INLR	<i>Immigration and Nationality Law Reports</i>
INS	Immigration and Naturalization Service (USA)
IOM	International Organization for Migration
IPA	internal protection alternative
IRA	internal relocation alternative
IRB	Immigration and Refugee Board (Canada)
IRO	International Refugee Organization
J	Justice
LCHR	Lawyers Committee for Human Rights
LNTS	League of Nations Treaty Series
MINBYUN	Lawyers for a Democratic Society (Republic of Korea)
NGO	non-governmental organization
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NVwZ	<i>Neue Zeitschrift für Verwaltungsrecht</i>
NZLR	<i>New Zealand Law Reports</i>
OAS	Organization of American States
OAU	Organization of African Unity (African Union from 2002)
OAU Refugee Convention	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
OECD	Organization for Economic Cooperation and Development
OGH	<i>Oberster Gerichtshof</i> (Supreme Court, Austria)
OJ	<i>Official Journal of the European Communities</i>

PCIJ	Permanent Court of International Justice
QBD	Queen's Bench Division (UK)
RBAC	Regional Bureau for the Americas and the Caribbean (within UNHCR)
RDDE	<i>Revue du droit des étrangers</i>
RefLex	Digest of Canadian immigration and refugee law decisions of the IRB, CRDD, Immigration Appeal Division (IAD), Adjudication Division (AD), and of the Federal Court of Canada, available at http://www.irb.gc.ca/Legal/reflex/index.e.stm
Refworld	UNHCR CD-ROM database of refugee-related information including case law and treaties
REK	<i>Rechtseenheidskamer</i> (Law Unity Chamber, the Netherlands)
RRT	Refugee Review Tribunal (Australia)
RSAA	Refugee Status Appeals Authority (New Zealand)
RWLG	Refugee Women's Legal Group (UK)
SCIP	Sub-Committee of the Whole on International Protection (of the Executive Committee)
SCR	<i>Supreme Court Reports</i> (Canada)
SOPEMI	Continuous Reporting System on Migration (OECD)
TPS	temporary protected status (USA)
UDHR	Universal Declaration of Human Rights, 1948
UKTS	United Kingdom Treaty Series
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Fund for Population Activities
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund

UNITA	National Union for the Total Independence of Angola
Universal Declaration	Universal Declaration of Human Rights, 1948
UNREF	United Nations Refugee Fund
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USC	United States Code
WARIPNET	West African NGOs for Refugees and Internally Displaced Persons (Senegal)
WLR	<i>Weekly Law Reports</i> (UK)
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

