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0521825741 - Refugee Protection in International Law: UNHCR's Global Consultations on International Protection

Edited by Erika Feller, Volker Turk and Frances Nicholson

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*Part 1*

**Introduction**

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## 1.1 Refugee protection in international law: an overall perspective

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### I. Background

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention<sup>1</sup> are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin. For half a century, they have clearly demonstrated

\* The views expressed are the personal views of the authors and may not necessarily be shared by the United Nations or by UNHCR.

<sup>1</sup> 189 UNTS 150; 606 UNTS 267.

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their adaptability to changing factual circumstances. Beginning with the European refugees from the Second World War, the Convention has successfully afforded the framework for the protection of refugees from persecution whether from repressive regimes, the upheaval caused by wars of independence, or the many ethnic conflicts of the post-Cold War era.<sup>2</sup>

International refugee protection is as necessary today as it was when the 1951 Convention was adopted over fifty years ago. Since the end of the Cold War, simmering tensions of an inter-ethnic nature – often exploited by populist politicians – have erupted into conflict and strife. Communities which lived together for generations have been separated and millions of people displaced – whether in the former Yugoslavia, the Great Lakes, the Caucasus, or Afghanistan. The deliberate targeting of civilians and their enforced flight have not only represented methods of warfare but have become the very objectives of the conflict. Clearly, this forced displacement is for reasons which fall squarely within the Convention refugee definition. Yet States in some regions have often been reluctant to acknowledge this at the outset of the crisis and have developed ad hoc, discretionary responses instead.

There are also many longstanding refugee situations resulting from conflicts which have not been resolved with the ending of the Cold War and have taken on a life of their own, often fuelled by the plunder of valuable natural resources and/or illicit trade in small arms.<sup>3</sup> Endemic instability and insecurity often accompany displacement within and from failed States or States where central government only controls part of the territory – hardly offering conditions for safe return.

The displacement resulting from such situations can pose particular problems to host States, especially if they provide asylum to large refugee communities, sometimes for decades. There is thus a real challenge as to how best to share responsibilities so as to ease the burden on any one State unable to shoulder it entirely. There is also a need to put in place burden sharing – not burden shifting – mechanisms which can trigger timely responsibility sharing in any given situation.

Xenophobia and intolerance towards foreigners and in particular towards refugees and asylum seekers have also increased in recent years and present a major problem. Certain media and politicians appear increasingly ready to exploit the situation for their own ends.

In addition, security concerns since the attacks in the United States on 11 September 2001 dominate the debate, including in the migration area, and have at times overshadowed the legitimate protection interests of individuals. A number of countries have, for instance, revisited their asylum systems from a security angle

2 See generally, UNHCR, *The State of the World's Refugees* (Oxford University Press, 2000).

3 See, e.g., UN General Assembly resolution on the role of diamonds in fuelling conflict, UN doc. A/RES/55/56, 1 Dec. 2000; generally also <http://www.un.org/peace/africa/Diamond.html>. For the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9–20 July 2001, see UN doc. A/CONF.192/15 and <http://disarmament.un.org/cab/smallarms/>.

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and have in the process tightened procedures and introduced substantial modifications, for example, by broadening grounds for detention or reviewing claims for the purpose of detecting potential security risks. In some situations, it has been noticeable that the post-September 11 context has been used to broaden the scope of provisions of the 1951 Convention allowing refugees to be excluded from refugee status and/or to be expelled. The degree of collaboration between immigration and asylum authorities and the intelligence and criminal law enforcement branches has also been stepped up.

The growth of irregular migration, including the smuggling and trafficking of people, presents a further challenge. These developments are in part a consequence of globalization, which has facilitated and strengthened transport and communication networks and raised expectations. In part, the increase in irregular migration can also be viewed as a result of restrictive immigration policies in many industrialized States, which oblige economic migrants and refugees alike to use irregular channels, whether they are in search of a better life or, more fundamentally, freedom from persecution. Visa requirements, carrier sanctions, readmission agreements, the posting of immigration officers abroad and other similar measures are all migration control tools which require proper protection safeguards and procedures if refugees are to be able to reach safety.

More specifically, in terms of the interpretation of the 1951 Convention itself, some States use various complementary forms of protection, which have had the effect in some instances of diverting Convention refugees to lesser forms of protection. When the protection afforded by international human rights instruments is also taken into account, the result is that many States now have several different procedures for determining international protection needs. This in turn raises questions concerning the inter-relationship between international refugee law on the one hand and international humanitarian and human rights law on the other.

Within the asylum procedure, systems in many States face significant challenges in ensuring a proper balance between the need for fairness and for efficiency. Dilemmas abound. How can notions such as safe third countries, and safe countries of origin or indeed accelerated procedures for manifestly unfounded cases, which have been introduced in many jurisdictions, be implemented both efficiently and in a protection-sensitive manner? Are the victims of violence and persecution by non-State actors – militias, paramilitary groups, separatist rebels, bandits, mafia, violent husbands – entitled to protection as refugees in another State? To what extent can the notion of ‘persecution’ and the ‘particular social group’ ground in the 1951 Convention refugee definition reasonably be extended to protect women from gender-related violence, not least rape in the context of conflict but also, perhaps, harmful traditional practices, trafficking or domestic violence? If only part of the State of origin is affected by conflict, to what extent are individuals able to relocate to other areas inside that State and how does this affect their claim for refugee protection? What bearing do other conventions such as the 1989 Convention on

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the Rights of the Child<sup>4</sup> have on asylum procedures and the treatment of refugee children?

Differing approaches within regions have also led States to develop regionally specific legal frameworks for handling refugee claims. Such endeavours can strengthen refugee protection but need at the same time to ensure consistency with the 1951 Convention regime and thereby promote its 'full and inclusive application'.<sup>5</sup> Concepts, such as the safe country of origin or safe third country notions, developed in some regions are sometimes also 'exported' to other parts of the world, which may receive far fewer claims or have less well-developed protection capacities.

Ultimately, the full realization of the international protection regime with the 1951 Convention at its heart hinges on the ability of the international community to find durable solutions to forced displacement situations, whether these be voluntary repatriation, resettlement in a third country, local integration, or a combination thereof. The challenge is how to realize solutions for individuals, as well as for refugee groups, which are both lasting and protection based.

In short, the 1951 Convention and 1967 Protocol are the global instruments setting out the core principles on which the international protection of refugees is built. They have a legal, political, and ethical significance that goes well beyond their specific terms. Reinforcing the Convention as the foundation of the refugee protection regime is a common concern. The Office of the United Nations High Commissioner for Refugees (UNHCR), as the guardian of the Convention, has a particular role to play, but this is a task which requires the commitment of all actors concerned.<sup>6</sup>

## II. The structure of the book and the purpose of this overview

The different parts of this book address nine key legal themes of contemporary relevance to the international refugee protection regime and in particular the interpretation of the 1951 Convention. These nine subjects were considered under the 'second track' of the Global Consultations on International Protection,

4 UNGA Res. 44/25, 20 Dec. 1989.

5 See, e.g., European Council, 'Presidency Conclusions', Tampere, Finland, 16–17 Oct. 1999, para. 13.

6 See generally, E. Feller, 'International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future', 83 *International Review of the Red Cross*, Sept. 2001, pp. 581–605; other special journal issues on the occasion of the fiftieth anniversaries of the 1951 Convention and of UNHCR include 14(1) *Revue Québécoise de droit international*, 2001; 10 *Forced Migration Review*, April 2001; and 35 *International Migration Review*, Spring 2001. See also, UNHCR, *The State of the World's Refugees*, above n. 2; G. Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press, 2001); I. C. Jackson, *The Refugee Concept in Group Situations* (Kluwer Law International, The Hague, 1999).

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which were launched by UNHCR in 2000 and are outlined in the table on p. xxi of this book.<sup>7</sup> The book is therefore a concrete outcome of the second track and is also specifically mentioned in the Agenda for Protection.<sup>8</sup> The wider political, operational, and other challenges to the refugee protection regime, which were addressed in the third of the three ‘tracks’ of the Global Consultations, lie outside the scope of this book, which focuses on selected aspects of the legal protection of refugees.<sup>9</sup>

The purpose of this overview is to provide additional background to the debate against which the examination of the nine legal topics developed in this book has proceeded, not least in the context of the ‘second track’ of the Global Consultations, but also beyond. The overview seeks to highlight the essential tenets of the issues emerging from the background papers and the discussions at the four expert roundtables held on these topics in 2001. At the same time, it attempts to synthesize possible ways forward on a number of issues, bearing in mind the complex nature of parts of the current debate. It is hoped that this overview can serve as a guide to the reader and provide some further insight into the current thinking on these issues.

In addition to this overview, Part 1 of the book contains a paper on the age- and gender-sensitive interpretation of the 1951 Convention. This indicates some of the ways in which gender equality mainstreaming and age-sensitivity are being or could be implemented to ensure the age- and gender-sensitive application of international refugee law. Part 1 also contains the text of the Declaration adopted at the first ever Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol, which was co-hosted by UNHCR and the Government of Switzerland in Geneva on 12–13 December 2001 as the ‘first track’ of the Global Consultations.

7 For further details, see also preface by the Director of International Protection, E. Feller, in this volume; UNHCR Global Consultations on International Protection, ‘Update’, Aug. 2002.

8 UNHCR, ‘Agenda for Protection’, UN doc. A/AC.96/965/Add.1, 26 June 2002.

9 Background papers written for the ‘third track’ of the Global Consultations intended to address these issues were UNHCR, ‘Protection of Refugees in Mass Influx Situations: Overall Protection Framework’, UN doc. EC/GC/01/4, 19 Feb. 2001; UNHCR, ‘The Civilian Character of Asylum: Separating Armed Elements from Refugees’, UN doc. EC/GC/01/5, 19 Feb. 2001; UNHCR, ‘Practical Aspects of Physical and Legal Protection with Regard to Registration’, UN doc. EC/GC/01/6\*, 19 Feb. 2001; UNHCR, ‘Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations’, UN doc. EC/GC/01/7, 19 Feb. 2001; UNHCR and IOM, ‘Refugee Protection and Migration Control: Perspectives from UNHCR and IOM’, UN doc. EC/GC/01/11, 31 May 2001; UNHCR, ‘Asylum Processes (Fair and Efficient Asylum Procedures)’, UN doc. EC/GC/01/12, 31 May 2001; UNHCR, ‘Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems’, UN doc. EC/GC/01/17, 4 Sept. 2001; UNHCR, ‘Complementary Forms of Protection’, UN doc. EC/GC/01/18, 4 Sept. 2001; UNHCR, ‘Strengthening Protection Capacities in Host Countries’, UN doc. EC/GC/01/19\*, 19 April 2002; UNHCR, ‘Voluntary Repatriation’, UN doc. EC/GC/02/5, 25 April 2002; UNHCR, ‘Local Integration’, UN doc. EC/GC/02/6, 25 April 2002; UNHCR, ‘Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities’, UN doc. EC/GC/02/7, 25 April 2002; UNHCR, ‘Refugee Women’, UN doc. EC/GC/02/8, 25 April 2002; and UNHCR, ‘Refugee Children’, UN doc. EC/GC/02/9, 25 April 2002. These documents are available on the UNHCR website, [www.unhcr.ch](http://www.unhcr.ch).

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The nine parts of this book which follow Part 1 each address a key legal issue, namely, *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.

Each of these parts contains, first, the background paper which formed the basis for discussion at the relevant expert roundtable. These papers present the position of the individual refugee law expert. Sometimes a paper advocates one particular interpretation rather than the range of approaches which may exist. The papers do not therefore purport to be a definitive position, but rather are part of a process of taking the debate forward on key issues of interpretation on which opinion and jurisprudence continue to differ. Each paper has been updated in the light of the discussions and major relevant developments since the roundtables and is therefore more comprehensive than the earlier versions posted on the UNHCR website, [www.unhcr.ch](http://www.unhcr.ch), at the time of the second track of the Global Consultations.

Secondly, each part contains the 'Summary Conclusions' of the expert roundtable concerned which reflect the tenor of the discussion at the roundtable. These do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion on the issue under consideration. Finally, each part contains a list of participants at the roundtable. In the interests of ensuring a fruitful and in-depth discussion of the topics, and in view of funding and space constraints, UNHCR was obliged to limit participation in the expert roundtables. Participants were selected by UNHCR on the basis of their experience of and expertise in these issues. In drawing up the lists for the four roundtables, UNHCR's Department of International Protection reviewed the academic literature on the relevant topics, considered names suggested by governments and non-governmental organizations (NGOs), and consulted UNHCR field offices. Care was taken to ensure a diversity of viewpoints by including experts working in government, as well as NGOs, academia, the judiciary, and the legal profession. Regional and gender balance were also taken into consideration. To broaden discussion and draw on an even wider pool of experts, the discussion papers were posted on the UNHCR website for comments, which were received from States, NGOs, and many individuals.

The second track consultations process, including notably the Summary Conclusions, is already feeding into the policy-making process at the international level. Drawing on this process, UNHCR is in the process of revising, updating and publicizing its guidelines on many of the issues discussed at the roundtables. These are being issued as a series of 'UNHCR Guidelines on International Protection', the first two of which were issued in May 2002, followed by the third in February 2003.<sup>10</sup> These Guidelines are issued pursuant to UNHCR's supervisory role under

10 UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating

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its Statute<sup>11</sup> in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol. They are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field. At the regional level, the Summary Conclusions from the second track roundtable meetings have also begun to feed into discussions in other forums. One example concerns the Council of Europe's Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), as is described in greater detail below in section III.C on membership of a particular social group.

### III. The nine different topics of the papers and roundtable Summary Conclusions

This section provides a brief outline of each of the nine topics addressed in the papers and expert roundtable meetings. It identifies the significant new issues and understandings which have resulted from the process of analysis, discussion, and synthesis involved in the second track of the Global Consultations. Where relevant, it draws attention to areas where differing interpretations or approaches persist.

#### A. The scope and content of the principle of *non-refoulement*

Part 2 of this book contains a Legal Opinion by Sir Elihu Lauterpacht QC and Daniel Bethlehem on the scope and content of the principle of *non-refoulement*. It conducts a detailed survey of international and regional human rights and refugee law instruments and standards as they relate to the principle of *non-refoulement*, under both Article 33 of the 1951 Convention and international human rights law, their application by international courts, and their incorporation into national legislation. In our view, this represents a tangible and wide-ranging manifestation of State practice coupled with evidence of *opinio juris*.

Both the Opinion and the Summary Conclusions of the roundtable held in Cambridge, United Kingdom, in July 2001 state that *non-refoulement* is a principle of customary international law.<sup>12</sup> The Declaration of the December 2001 Ministerial

to the Status of Refugees', UN doc. HCR/GIP/02/02, 7 May 2002; UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', UN doc. HCR/GIP/02/01, 7 May 2002; UNHCR, 'Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the "Ceased Circumstances" Clauses)', UN doc. HCR/GIP/03/03, 10 Feb. 2003, available on [www.unhcr.ch](http://www.unhcr.ch).

11 Statute of the Office of the United Nations High Commissioner for Refugees, A/RES/428 (V), 14 Dec. 1950.

12 See also, e.g., Executive Committee, Conclusion No. 25 (XXXIII), 1982, para. b. A recent article goes as far as to assert that the principle of *non-refoulement* has acquired the status of *jus cogens*.



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Meeting mentioned above also affirms the principle of *non-refoulement* as being embedded in customary international law.<sup>13</sup>

The Opinion shows that States' responsibility for their actions encompasses any measure resulting in *refoulement*, including certain interception practices, rejection at the frontier, or indirect *refoulement*, as determined by the law on State responsibility. On this issue, the Opinion brings into the analysis the draft Articles on State responsibility adopted by the International Law Commission of the United Nations on 31 May 2001<sup>14</sup> and endorsed by the General Assembly at the end of that year,<sup>15</sup> demonstrating how they affect State action. Such action may be taken beyond a State's borders or carried out by individuals or bodies acting on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc. These actions are frequently carried out at borders far from public scrutiny, beyond borders in other countries, or on the high seas – the prohibition on *refoulement* applies in all such situations.

In their detailed analysis, Sir Elihu and Bethlehem also make a distinction between rejection, return, or expulsion in any manner whatsoever to torture or cruel, inhuman or degrading treatment or punishment, and such measures which result in return to a threat of persecution on Convention grounds. The former draws on principles of international human rights law and allows no limitation or exception. In the case of return to a threat of persecution, derogation is only permissible where there are overriding reasons of national security or public safety and where the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a third country.

See, J. Allain, 'The *Jus Cogens* Nature of *Non-Refoulement*', 13(4) *International Journal of Refugee Law*, 2001, pp. 533–58.

13 The Declaration acknowledged:

the continuing relevance and resilience of this international regime of rights and principles [comprising the 1951 Convention, its 1967 Protocol, other human rights and regional refugee protection instruments], including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.

For the full text of the Declaration, see Part 1.3 of this book.

14 International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', UN doc. A/CN.4/L.602, 31 May 2001. See also, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), ch. 2.

15 In a resolution on 12 Dec. 2001, the UN General Assembly, expressed 'its appreciation to the International Law Commission for . . . the completion of the final draft articles'. See UNGA, 'Report of the International Law Commission on the Work of its Fifty-Third Session', UN doc. A/RES/56/82, 18 Jan. 2002, para. 2.

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Since the drafting of the Opinion, the attacks in the United States on 11 September 2001 and their aftermath have led governments to contemplate and/or introduce a range of security measures.<sup>16</sup> Obviously, States have legitimate concerns to ensure that all forms of entry and stay in their territories are not abused for terrorist ends. It is nevertheless essential that more stringent checks at borders, strengthened interception measures, particularly against illegal entrants, and other such measures also include mechanisms to ensure the identification of those with international refugee protection needs. It is therefore, for instance, important that admissibility procedures do not substitute for a substantive assessment of the claim, which could result in the State failing to identify someone in danger of return to persecution.<sup>17</sup>

In the contemporary context, it is worth recalling that the principle of *non-refoulement* also applies with respect to extradition.<sup>18</sup> The 1951 Convention does not in principle pose an obstacle to the extradition and prosecution of recognized refugees in third countries as long as the refugee character of the individual is respected by the third State, as set out in Article 32(2). In this case, the State's obligations towards the refugee would in effect be transferred to the extraditing State. Agreement would therefore need to be reached on return after prosecution has been completed and/or the sentence served (unless of course exclusion, cancellation or cessation arise), so that any danger of indirect *refoulement* is avoided. Extradition requests from the country of origin may, however, be persecutory in intent and therefore require particular scrutiny. If, in a specific case, it is assessed that extradition would amount to return to persecution, prosecution in the country of asylum would be the appropriate response.<sup>19</sup>

Whereas extradition is a response to crimes committed elsewhere, the exception to the *non-refoulement* principle in Article 33(2) of the 1951 Convention could under extraordinary circumstances also come into play in response to crimes committed in the country of refuge. The Convention specifies that refugees have obligations or duties towards the host country. This reflects the necessity that refugees not be

16 See generally, UNHCR, 'Addressing Security Concerns Without Undermining Refugee Protection', Nov. 2001.

17 *Ibid.*, paras. 5–9. See also, UNHCR, 'Regional Workshops in Ottawa, Ontario (Canada) and in Macau', UN doc. EC/GC/01/13, 31 May 2001; UNHCR, 'Refugee Protection and Migration Control: Perspectives from UNHCR and IOM', UN doc. EC/GC/01/11, 31 May 2001; UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', UN doc. EC/50/SC/CRP.17, 9 June 2000; UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)', above n. 9.

18 See generally, Executive Committee Conclusion No. 17 (XXXI), 1980. The issue is also addressed in the paper on the application of the exclusion clauses by G. Gilbert in Part 7.1 of this book.

19 Where a serious crime has been perpetrated, multilateral conventions, including in the anti-terrorism context, have in recent years stipulated a duty to extradite or prosecute. In the post-September 11 context, there is a danger that the increased tendency to depoliticize offences in the extradition context could make persecution considerations secondary in the overall assessment of cases.