THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW

The 1951 Convention relating to the Status of Refugees, and its 1967 Protocol, and many other important international instruments recognize the unique role the UNHCR plays in protecting refugees and supervising international refugee law. This in-depth analysis of the UNHCR’s supervisory role in the international refugee protection regime examines the part played by key institutions, organizations and actors in the supervision of international refugee law. It provides suggestions and recommendations on how the UNHCR’s supervisory role can be strengthened to ensure greater States Parties’ compliance with their obligations under these international refugee rights treaties, and contributes to enhancing the international protection of refugees and to the promotion of a democratic global governance of the international refugee protection regime.

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THE UNHCR AND THE SUPERVISION OF INTERNATIONAL REFUGEE LAW

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Mr Goodman was awarded the SOAR medal in 2000 in recognition of his many contributions to administrative justice. In 2001, following a stint as a member of the Consent and Capacity Board, Mr Goodman was appointed a member of the Immigration and Refugee Board of Canada, and assigned to the Convention Refugee Determination Division in Toronto. He was reappointed in 2003. Since joining the IRB, Mr Goodman has heard and decided numerous claims for refugee protection from claimants from the Middle East, Eastern Europe and the United States.

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Justice North was the trial judge in the case brought in relation to the ‘rescuees’ aboard the MV *Tampa*, involving a claim for habeas corpus on behalf of about 400 asylum seekers held on board the MV *Tampa* near Christmas Island, off the coast of Australia. He held that the Australian Government was obliged to allow the asylum seekers who had been rescued at sea by the MV *Tampa* to be landed on Australian territory, and thereby have access to the refugee processes of Australia.

Justice North has a special concern for refugee law, and has been a member of the International Association of Refugee Law Judges since 1990, President from 2005–9 and the Immediate Past President and Special Advisor from 2009 to present.

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FOREWORD

The end of the Cold War brought with it a range of optimistic assertions, not least those that expressed confidence that much of the world was entering into a new period of peace. Building a new global order was the declared intent of the American presidency and its foreign policy elite, an expectation generally embraced not only from within the Organisation for Economic Co-operation and Development (OECD) countries but by political leaders of the developing world who saw this as the opportunity to move beyond the shadow of the Cold War architecture as they asserted their new-found sense of sovereignty and independence. With this was to come a dramatic reduction in the number of forced migrants and those fleeing persecution and domestic upheaval, along with greater capacity in addressing those in camps and the stateless.

The reality has proven to be somewhat different. Two Gulf Wars separated by a decade and by father-and-son presidents, Somalia, Iran, Haiti, Kosovo, Belarus, Chechnya, Darfur, the DRC, North Korea, Zimbabwe, South Sudan, Nigeria, Liberia, Côte d’Ivoire, Burma, Lebanon, Gaza, Afghanistan, al-Qaeda, and even the so-called Arab Spring, to name but some, have proven that state sponsored or supported violence shows little abatement. The concept of human security and the emerging norms and UN resolutions on “responsibility to protect” may suggest that there is growing recognition that the old ideas of the Westphalian state system and its concomitant inviolability of sovereignty are under challenge, but states continue to lead or to lend support for large-scale organized violence. And with such action comes massive human misery.

Moreover, the global population is on the move, whether as a result of planned mass violence, anomic violence committed by roving but organized bands, ecological catastrophes, or systemic economic

1 There are many overviews and reflections on this period. For example, see David Dewitt, David Haglund, John Kirton (eds.), Building a New Global Order: Emerging Trends in International Security (Oxford University Press, 1993).

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privations. Refugee camps continue to be a necessary but wholly inadequate response to people crossing state borders fleeing persecution and violence. The internally displaced, forced to relocate as they too become the victims of such drastic situations, have become a newly recognized challenge to humanitarian agencies where the UN conventions don’t readily define such persons or permit intervention within sovereign states. Floods, droughts, and famines – once a part of the regular and somewhat traditional, if not predictable, cycle in many parts of the world now have become both less predictable but more likely and more extreme as climate change emerges as a systemic part of the course of events, thereby exacerbating the already difficult issue of how to define and to respond to “environmental” refugees. And we have yet to consider, in an informed and analytically rigorous way, the impact of the internal movement of the millions of individuals in China or in India, or on a lesser scale elsewhere but for similar reasons, seeking but not finding employment, housing or food as governments fail to grapple adequately with the implications of globalization, climate change, and ecological degradation.

Observing that international law, as currently codified, and the UN, as well as regional institutions as currently established, are inadequate to these dramatic challenges is not new. The tragedy is that, in spite of such obvious recognition, little in the past twenty years has moved the debate forward and, more importantly, the practical responses to such current or anticipated protracted humanitarian crises have not progressed.

The acknowledgment of these very large and troubling concerns motivated a series of conversations involving scholars, practitioners and other leading experts on international refugee law and its implementation. York University’s Centre for Refugee Studies took the initial lead, supported by an outstanding group of colleagues from around the world, many of them represented in the pages that follow. Out of these efforts occurred a series of meetings focusing principally upon the 1951 Convention, but with an effort to bring together the knowledge gained from a principled but always independently critical examination of international

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2 One could easily include transnational organized crime, prevalent now in most parts of the world, often linked to corrupt government officials and/or the military and police forces. Human smuggling, drugs, and arms all have both direct and indirect impact on the vulnerability and dislocation of people, as well as the capacity of governments and international agencies to act.

3 For example, see James C. Hathaway (ed.), Reconceiving International Refugee Law (Leiden: Martinus Nijhoff, 1997) for an early post-Cold War critical examination of the UNHCR and international law.
foreword

refugee law, international humanitarian law, and international criminal law.

Tempered by the reflexive appreciation that the statistics which represent both the metrics and the vastness of the challenges to be faced are no less daunting for also representing discrete indicators of human suffering and lost potential, the UNHCR as the principal agency for supervising the 1951 Refugee Convention may be a necessary but no longer sufficient institutional mechanism for addressing this increasingly complex, multi-causal, multi-variate, and multi-final phenomenon. The world now faces a vast array of causes that contribute to displacing large numbers of people, many, but not all, of whom cross state borders – often more than once – and who find themselves in protracted situations of extreme vulnerability. Furthermore, many of the “hosts” to these people are fragile or even failed states with limited administrative capacity, so that their own domestic security is placed in jeopardy, especially when various aspects of identity politics – ethnicity, tribe, religion, language – transcend those borders. The internally displaced may pose an even more provocative challenge to regime security and to international norms, and yet they are, so far, not well protected through equivalent legal instruments. 4

The chapters that follow provide few direct answers; they do, however, offer the critical reader with much to consider and the outline of opportunities for those sufficiently engaged to redraw the boundaries of legal definition, interpretation, and enforcement. This is no easy matter. We sit at the interstices of a world that struggles with the administrative convenience and political legacies of the sovereign state, the dynamics of a marketplace of ideas and wealth accumulation defined in terms of globalization, and the struggle for individual and community survival in the midst of dramatic inequalities.

Professor James Simeon, the principal organizer of the series of meetings, including the conference in spring 2010 at York University in Toronto, that brought together these authors, made reference to the fact that the gathering was occurring at the sixtieth anniversary of the 1951 Convention relating to the Status of Refugees and the fiftieth anniversary of the 1961 Convention on the Reduction of Statelessness. In a private communication he wrote: “It is only fitting... that one should consider both the achievements of these international instruments... as well as

4 A perusal of Refworld www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain from the UNHCR’s website makes it quickly evident how much more complex and challenging this scourge of modern global affairs is.
their evolution . . . and possible limitations, and what the future might and should hold for these international human rights treaties.” This volume does just that.

Unfortunately, so much more is yet required. The array of international humanitarian agencies remains under-resourced. The barriers posed by the politics of sovereignty remain basically impermeable. The resilience of legacies, of humanly constructed identities, and of the drive for wealth accumulation impedes cooperative mechanisms for addressing such disparities. The ability of groups – whether official or ad hoc – to access and to employ weapons in pursuit of their goals seems not to be reduced. Although numbers killed in inter-state wars have declined considerably over the past two decades, sufficient violence and intimidation continues both across and within boundaries that the numbers of displaced and forced migrants have increased. And yet international institutions, including international law, have yet to adequately address these challenges in spite of attention and, with the creation of the International Criminal Court and with the UN recognition of the doctrine of responsibility to protect, one sees some very modest and tentative movement.

The hope is that this volume, emerging from serious discussion among highly qualified and committed experts, will contribute to further developing and promoting legal instruments – both international and domestic – that establish norms, principles, and procedures that are accompanied by accepted mechanisms of enforcement. Both those who receive, as well as those who produce, refugees and others forcibly displaced are culpable. While researchers may not be able to prevent the tragedies of forced human migration, it is the job of scholars and practitioners alike to contribute to a world that ensures that each individual can face a future beyond fear.

The chapters that follow make a very modest but significant contribution to this conversation.

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∗ During the period when the conference and related research and meetings occurred that contributed to this volume, Dewitt was then Associate Vice-President Research, Social Sciences and Humanities, York University.
It would be trite to note that this edited collection would not have been possible without the support and able assistance of many talented, committed, and dedicated organizations and individuals who have provided their time and effort and their sustaining financial support and who have worked on this research initiative over a number of years. Less evident, perhaps, but no less significant, is the fact that this edited collection is also the product of sheer tenacity, patience and fortitude. In part, this is due to the number of contributors to this volume, but, also to the fact that it is never a simple or straightforward undertaking to have senior international organizations and states officials, jurists, legal scholars and practitioners – all extremely busy people – commit to provide their work for publication. The journey that has led to this publication has been rather a long one, with many twists and turns and not without its challenges at various points along the way. Nonetheless, we are hopeful that the final product will have been well worth the wait. Accordingly, I am deeply grateful and indebted to all those who contributed their work for publication in this edited collection. Indeed, I am also thankful to those who presented their work at the York 2010 International Conference on “Forced Displacement, Protection Standards, and the Supervision of the 1951 Convention and 1967 Protocol and Other International Instruments” and contributed directly to this final publication in some manner, whether by providing their revised papers for this edited collection or by their presentation and participation in the international conference (for more information and detail on the York 2010 International Conference, please see www.yorku.ca/fdpss/). Acknowledging as much, however, is far from sufficient, given the important contribution of a number of persons at key times throughout the research, from the very outset, through to the present, and into the foreseeable future. In many respects this research project has only just commenced, although admittedly it has come to the end of its preliminary phase.
The origins of this research initiative can be traced back to the first Critical Issues in International Refugee Law Research Workshop that was hosted by the Centre for Refugee Studies (CRS) and held at York University in 2008. The idea for holding the York 2010 Conference on the supervision of international refugee law and, more specifically, the feasibility and practicality of the establishment of an International Judicial Commission for Refugees, as advocated for a number of years by Justice Tony North, Federal Court of Australia, and who was President of the International Association of Refugee Law Judges (IARLJ) at the time, was a direct consequence of the side meetings that were held in conjunction with the 2008 Critical Issues in International Refugee Law Research Workshop (please see www.yorku.ca/ciirl/2008/). Hence, the proposal for holding such an international conference was first broached by Justice North at this international research workshop that he chaired and presided over. However, this idea was then taken up in earnest by others and, more specifically, by Professor David Dewitt, who was then the Associate Vice-President Research and Innovation, Social Science and Humanities, at York University. In fact, the York 2010 International Conference would not have been possible without the initial encouragement of Professor David Dewitt, whose support and reassurance crystallized this research initiative into a fully fledged and viable research project. Without Professor Dewitt’s support and assistance throughout the planning and organizing for this international conference it would not have gone forward. Accordingly, I should like to thank Professor Dewitt, first and foremost for his commitment and faith in our research initiative at all key times throughout the planning process, as well as the conference itself.

The second person that ought to be acknowledged for their unstinting support and encouragement throughout is Professor Susan McGrath, who was the Director of the Centre for Refugee Studies during this period. Professor McGrath’s support of this research initiative was essential to see us through to holding the successful international conference on which this edited collected volume is based. However, I would be remiss if I did not equally acknowledge the contribution of my colleagues at the Centre for Refugee Studies (CRS) at York University, such as Wenona Giles; Jennifer Hyndman; Don Dippo; Nergis Canefe; Fahimni Quadir; Howard Adelman; Ranu Basu; Luann Good Gingrich; Obiora Okafor; Sean Rehaag; Christina Clark-Kazak; Michael Barutciski; Audrey Macklin; James Milner; Sharry Aiken; and Michele Millard, CRS Coordinator, among many others, including staff and students, affiliated with the CRS. Likewise, I should like to acknowledge the support of my colleagues at the
School of Public Policy and Administration (SPPA), including: Joanne Magee, Ian Greene, Brenda Spotton Visano, Robert Drummond, Tom Klassen, Lorne Foster, and Daniel Cohn, among others, and my Faculty of Liberal Arts and Professional Studies at York University. In particular, I should like to thank Barbara Crow, who was the Associate Dean (Research) at the time and was a generous and enthusiastic supporter of the York 2010 International Conference. Professor Crow is a great champion of research at York University and has given her unstinting encouragement and support to many innovative and fascinating research endeavours at York University. We are grateful that our research project was identified as meriting her support and our Faculty’s financial assistance. I would also like to thank Research Officer Kay Li for her support and assistance on this research initiative.

I was also very fortunate to have the opportunity to work closely with Kees Wouters, UNHCR Headquarters in Geneva, Switzerland, and Hy Shelow, UNHCR in Ottawa, Canada, at the time, and Rana Khan, UNHCR in Toronto, Canada, on this international conference. Having the participation of the UNHCR in this effort, as one might well imagine, made a significant difference.

I must acknowledge the contribution of the incomparable Professor Guy Goodwin-Gill, Senior Research Fellow, All Souls College, University of Oxford, and Barrister with Blackstone Chambers, London, United Kingdom, for agreeing to be the York 2010 International Conference Chairperson. Professor Goodwin-Gill was the consummate conference chairperson and guided the sessions and deliberations to their fruitful conclusions. His daily conference summaries and conference closing remarks were a brilliant analysis of the legal issues and challenges under examination as well as the carefully balanced and considered directions necessary to move forward to constructive solutions in the best interest of protecting and promoting the rights of refugees. I am deeply indebted to Professor Goodwin-Gill for agreeing to serve as the intellectual and policy solutions leader in this critical area of international refugee law throughout our international conference and beyond. The manner in which Professor Goodwin-Gill presided over the international conference still has the conference participants talking about his dazzling display of virtuosity.

For my 2009–10 sabbatical academic year I had the good fortune to spend the Michaelmas and Hilary Terms at the Refugee Studies Centre (RSC) at the University of Oxford which afforded me the opportunity to approach Professor Goodwin-Gill and persuade him, most fortunately, to
serve as the York 2010 International Conference Chairperson. During my stay at the RSC as a Visiting Research Fellow, I was also fortunate to have Dr Alice Edwards serve as my Academic Advisor. Dr Edwards was not only an outstanding academic advisor but someone who provided me with essential guidance and advice with respect to the key and most sensitive aspects necessary for planning and organizing the York 2010 International Conference. Dr Edwards’ contribution to the York 2010 International Conference was absolutely crucial to its ultimate success. During my stay at the RSC I also had the opportunity to meet and seek the guidance and support of a number of other leading scholars in the field of refugee and forced migration studies, including: Roger Zetter, who was at that time the RSC Director; Matthew Gibney; Gil Loescher; Dawn Chatty; Richard Haavisto; Elena Fiddian-Qasmiyeh; Nando Sigona; Emanuela Paoletti; Alexander Betts; Katy Long; Barbara Harrell-Bond; Nick Van Hear; Oliver Bakewell; Robin Cohen; and Valpy FitzGerald, among others, in addition to a number of RSC staff and graduate students who were enrolled in the Masters of Forced Migration programme during that academic year. It was a most conducive and stimulating intellectual environment that afforded me the chance to seek the advice, guidance, and wisdom of some of the most experienced and accomplished academics in the field. Any success of the York 2010 International Conference is due in no small part to the opportunity to work on this project at the RSC during the 2009–10 academic year.

I should also like to thank Justice Allan Lutfy, who was Chief Justice of the Federal Court (Canada) at the time, for his immediate support for this international conference. Likewise, I am most grateful to Justice Tony North, Federal Court of Australia, for his support, advice, and assistance with the international conference.

Naturally, such a research initiative would not have been possible without the financial support of a number of key donors, both within and outside York University. I should like to thank the following external sponsors for helping to make the international conference possible: the International Development Research Centre, Citizenship and Immigration Canada, the Department of Foreign Affairs and International Trade, the Swiss Department of Foreign Affairs and the Swiss Consulate in Toronto, and the Japan Foundation.1

I must also acknowledge the important contribution of Justice Tony North to the York 2010 International Conference. He was most generous

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1 For a full list of the York 2010 International Conference sponsors please visit the international conference website at www.yorku.ca/fdpss/sponsors.html.
and accommodating with his time and advice with respect to key aspects of the York 2010 International Conference and, ultimately, to the production of this edited collection. I am very fortunate, indeed, to include Justice North as one of my friends and close colleagues in the field of international refugee law and practice and as members of the International Association of Refugee Law Judges (IARLJ). It should also be acknowledged that Justice North was the first to suggest the possibility of holding such an international conference with the aim of considering in some detail his proposal for the establishment of an International Judicial Commission for Refugees.

I should like to thank a number of colleagues who were quite supportive of this research initiative and who have also collaborated on our work together on the War Crimes and Refugee Status Research Project. Professors Kate Jastram, Geoff Gilbert, Jane McAdam, Joseph Rikhof and Guy Goodwin-Gill are all collaborators in our Social Science and Humanities Research Council of Canada funded research project on War Crimes and Refugee Status (for more information on this research project please see www.yorku.ca/wcrs/ and www.yorku.ca/wcrs/conference/). In fact, Professor Jastram was my co-applicant on this research project. All of these senior legal scholars supported the York 2010 International Conference and took on important roles, such as panel session chairs or breakout group facilitators, and I am very grateful to them all for their involvement in this additional research initiative. They are all undoubtedly among the foremost legal scholars in the field of international refugee law and they made outstanding contributions to the success of the international conference.

I must also acknowledge the work of a number of talented and gifted students who contributed substantially to the success of the York 2010 International Conference. Chief among these was the Conference Coordinator, Nomusa Taylor-Dube, and Eric Leung. Both put in long hours at key times to address all the logistical arrangements and details necessary to ensure that the international conference ran as smoothly as possible. Nomusa and Eric were also responsible for hiring all of the student rapporteurs for the international conference as well as coordinating the student volunteers who worked on the conference. Following the York 2010 International Conference, both Nomusa and Eric have gone on to work on other international conferences sponsored by the CRS at York University. I am most thankful for the contribution of all the undergraduate and graduate students who worked on the York 2010 International Conference at York University (for a full list please see www.yorku.ca/fdpss/participants/index.html).
xxvi ACKNOWLEDGMENTS

One person that should also be acknowledged in terms of their overall contribution to the York 2010 International Conference, as well as to the efforts that went into to the production of this volume and its wider distribution online, is the website architect and designer Sanja Begic, Learning Technology Support Specialist, eServices Office, Faculty of Liberal Arts and Professional Studies, York University. Sanja’s contribution to the York 2010 International Conference website, as well as many other websites at York University, never ceases to amaze. I am most fortunate to be able to work with such creative and talented specialists in the field of website development, functionality and design.

Last, but certainly not least, I should like to acknowledge the contributions of Michele Millard, Coordinator of our Centre for Refugee Studies, for all her hard work and assistance in ensuring that the York 2010 International Conference received the necessary funding for it to go forward and for all the work behind the scenes, as it were, to ensure that the international conference was, indeed, a great success. Michele Millard is a gifted master at organizing any type of event or activity and without her support and guidance the York 2010 International Conference would not likely have gone forward and, consequently, this edited collection would not have been possible.

These are only some of the many key individuals who made a direct or indirect contribution to realize this edited collected volume. However, I would be entirely remiss if I did not thank Finola O’Sullivan, Legal Editor at Cambridge University Press, for her advice, assistance and guidance in taking this edited volume from a concept to a book. Indeed, Finola was amongst the very first supporters of the York 2010 International Conference and then nurtured the book proposal at every phase of its development and eventually through to the manuscript’s final printing and through to the book’s marketing, distribution and sales. I am most privileged to have the opportunity to be able to work with Finola on this and other book projects.

I am most grateful to all those who I have had the opportunity to work with on the production of this edited collection. My hope is that our work will make some useful contribution to the important subject-matter to which this volume is dedicated: addressing and advancing the interest of achieving an international refugee protection regime that protects and promotes the rights of world’s most vulnerable persons, refugees.

Dr James C. Simeon