

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.

JAMES C. SIMEON is the Acting Director of the Centre for Refugee Studies (CRS) and an associate professor in the School of Public Policy and Administration, Faculty of Liberal Arts and Professional Studies at York University, Toronto, Ontario, Canada.

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Edited by

JAMES C. SIMEON



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CONTRIBUTORS

OSAMU ARAKAKI received an MA in political science (University of Toronto) and a PhD in law (Victoria University of Wellington). His past academic positions include a visiting associate professor at the University of Tokyo and a visiting fellow at Harvard University. Since April 2012, he has been a professor of international law and politics at Hiroshima City University in Japan. He has worked in the fields of refugee protection and development assistance for a decade. He served as an associate legal officer for the United Nations High Commissioner for Refugees in the early 1990s. Afterwards, he worked as an associate specialist with the Japan International Cooperation Agency. Additionally, he was a Refugee Adjudication Counsellor for the Japanese Minister of Justice.

MICHAEL BARUTCISKI is Associate Professor and Graduate Programme Director at the Glendon School of Public and International Affairs, York University, Toronto. He is also Editor-in-Chief of *Refuge* (Canada's Journal on Forced Migration) and Associate Editor of *Global Brief* (World Affairs in the 21st Century). Prior to joining the Glendon faculty, Barutciski directed the diplomacy programme at the University of Canterbury in New Zealand, and held a full-time appointment at the University of Oxford's Refugee Studies Centre. He has conducted research in conflict zones and refugee camps in Asia, Africa and the Balkans. Barutciski holds a doctorate from the Paris law faculty, and has been a member of the Quebec bar for the last two decades.

HON. MR JUSTICE NICHOLAS BLAKE graduated from Magdalene College, Cambridge, where he read History, and the Inns of Court School of Law. He was called to the Bar of England and Wales in 1974. He was appointed a Queen's Counsel in 1994, and in that capacity has argued a great many leading cases on refugee law, human rights and the like, before the most senior Courts in the United Kingdom (the Court of Appeal and the Appellate Committee of the House of Lords) and in international

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tribunals in Europe, including the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg, the Judicial Committee of the Privy Council, and the Inter American Court of Human Rights in San Jose, Costa Rica, and a number of other courts of the Commonwealth.

In November 2007 he was appointed to the High Court of Justice, Queen's Bench Division. He is a nominated judge of the Administrative Court that deals with challenges to decisions of public authorities. He was appointed first President of the newly created Immigration and Asylum Chamber of the United Kingdom Upper Tribunal with effect from 15 February 2010, where he has been concerned with establishing an appellate tribunal hearing some 8,000 appeals a year from decisions of first tier judges that may be wrong on points of law.

He has been a participant at many conferences and seminars on immigration, asylum and free movement law, a number of which have been published: *Implementing Amsterdam* (2000); *Immigration Asylum and Human Rights* (2002); *Irregular Migration* (2004); *Unity of Public Law* (2004); *Asylum Process and the Rule of Law* (2005) IARLJ; *Charting the Course of International Protection* (2009) IARLJ.

CLAUDE CAHN is Human Rights Adviser to the Office of the United Nations Resident Coordinator in the Republic of Moldova. He was previously Head of Advocacy Unit for the Centre on Housing Rights and Evictions (COHRE), a global housing rights initiative based in Geneva. Between 1996 and 2007 he was Director at the European Roma Rights Centre (ERRC), an international public interest law organization working to end the systemic human rights abuse of Roma ("Gypsies") in Europe. Mr Cahn's areas of expertise include community empowerment, cause and mission management, human rights law and policy, monitoring methodologies, policy and law analysis, international institutions, public outreach and matters relating to the Romani communities. Major achievements include: making a durable contribution to the recognition of discrimination against Roma as Europe's most pressing human rights issue, as well as contributing to the development of a viable Roma civil rights movement, through two decades of work on Roma rights; undertaking key actions leading to the 2009 recognition of an estimated 90,000 women victims of coercive sterilization in the territory of the former Czechoslovakia and working toward justice for them; contributing to interfaith dialogue and recognition of the right to freedom of religion, including through work leading to the first formal recognition of a

Muslim community in the Republic of Moldova, and the prevention of the expulsion of the Baclaran Muslim community in Manila, Philippines. Claude Cahn has also been a key player in the campaign for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

DR JOYCE CHIA completed a PhD in comparative immigration and refugee law from University College London in 2010. She has worked at the Victorian Court of Appeal, the Federal Court of Australia, the Australian Law Reform Commission and Melbourne Law School at the University of Melbourne. She is currently working as a Senior Policy Officer at the Australian Charities and Not-for-profits Commission.

THOMAS C. (TOM) CLARK, from 1983, coordinated the then Inter-Church Committee for Refugees, a coalition of ten national Canadian churches and church bodies for some eighteen years. The ICCR produced briefs and position papers and assisted in court actions on national and international refugee protection issues of concern. In 1992 obtained a diplôme in the International and Comparative Law of Human Rights, International Institute Human Rights, Strasbourg. Conceived, and from 1992–1997 coordinated, the Summer Course on Refugee Issues at York University's Centre for Refugee Studies. Published refereed articles, most recently: Tom Clark, "Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation" (2004) 16 *IJRL* 584; and, Tom Clark in collaboration with Francois Crépeau, "Human Rights in Asylum Sharing and Other Human Transfer Agreements" (2004) 22 *NQHR* 217. Authored two books: *The Global Refugee Regime: Charity, Management and Human Rights*, 2nd edn (Trafford, 2008); *Singh to Suresh: Non-Citizens, The Canadian Courts and Human Rights Obligations* (Trafford, 2006).

DAVID B. DEWITT joined the Centre for International Governance Innovation as vice-president of programs in July 2011, and oversees the strategy and implementation of all the organization's work programs and research-related activities. He is currently on leave from York University in Toronto where he was associate vice-president of research, social sciences and humanities, professor of political science, and holds the additional title of "university professor".

David earned a BA at the University of British Columbia and an MA and PhD from Stanford University, and served as director of York

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University's Centre for International and Security Studies from 1988 to 2006. He is author, or contributing editor, of numerous books, refereed articles and chapters, in addition to commissioned papers on Canadian foreign, security, and defence policy, international and regional security and conflict management in Asia Pacific and the Middle East, arms control and proliferation, and human security.

In the early 1990s he co-directed the North Pacific Cooperative Security Dialogue, a Foreign Affairs-sponsored Track Two Diplomacy initiative, and has been involved in various track two initiatives on security in the Asia Pacific and in the Middle East. He has led a number of policy focused research NGOs that have dealt with security and governance issues in these two regions.

PROF. DR HARALD DÖRIG is a Justice of the Supreme Administrative Court, Germany, and an Honorary Professor of the Friedrich-Schiller University Jena, Leipzig, Germany. He was appointed as a Justice of the Supreme Administrative Court in 2000 and was appointed to the Senate Chamber for Asylum and Migration Law in 2002. In 2007 he was appointed as the Vice-President of the Senate Chamber. Professor Dr Harald Dörig has published widely in German and international constitutional and administrative law. He serves on the Executive of the International Association of Refugee Law Judges (IARLJ).

ALICE EDWARDS is Senior Legal Coordinator and Chief of the Protection Policy and Legal Advice Section at the United Nations High Commissioner for Refugees (UNHCR) in Geneva. Her previous assignments with UNHCR have been in Bosnia and Herzegovina, Rwanda, Morocco and Geneva, where she was responsible for the 'second track' of the Global Consultations on International Protection in 2001–2. Prior to re-joining UNHCR in 2010, she held teaching positions at the universities of Nottingham and Oxford. She is a Research Associate at the University of Oxford's Refugee Studies Centre, a Research Fellow of St Anne's College, Oxford, and Fellow of Nottingham's Human Rights Law Centre. Her publications include *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011), a co-edited collection, *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010) and forthcoming co-edited collection, *Nationality and Statelessness under International Law* (2013). She holds a PhD in Public International Law from the Australian National University.

BRIAN GOODMAN was called to the Ontario Bar in 1974 and has a Masters Degree in Public Law. Before joining the Ontario Civil Service in 1983, he held a number of senior legal and executive positions at the Office of the Ontario Ombudsman. He has served as Chair of the Rent Review Hearings Board and acted as Mining and Lands Commissioner. He has been Co-Chair of the Dispute Resolution Forum, a Board member of the Council of Canadian Administrative Tribunals (CCAT) and Co-Chair of CCAT's 2008 Annual Conference, Chair of the Conference of Ontario Boards and Agencies, and Chair of the Society of Ontario Adjudicators and Regulators (SOAR) Committee on First Principles of Administrative Justice.

Before being appointed in May 1998 to the position of Executive Lead, Agency Reform for Ontario's Ministry of the Attorney General, he was Assistant Deputy Attorney General, Public Law. From 1997 to 1999, Mr Goodman co-chaired the Agency Reform Working Group, which advised and supported the work of the Agency Reform Commission and subsequently was responsible for overseeing the implementation of the Commission's recommendations. Mr Goodman also represented the Ministry on the Agency Sector Council.

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.

In 2006, Mr Goodman was named Deputy Chairperson of the Immigration Appeal Division (IAD). In this capacity, Mr Goodman led the Division through the planning and implementation of IAD Innovation to transform the IAD into a more flexible and proactive tribunal. Mr Goodman was designated Interim Chairperson of the IRB in March 2007, and was confirmed in this position three months later. Since becoming Chairperson Mr Goodman has continued to pursue the integration of the Board's three divisions as well as specific initiatives such as the implementation of a new code of conduct for decision-makers and a review of the Board's organizational and management structures. In 2009, Mr Goodman was elected to the governing Council of the International Association of Refugee Law Judges.

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In 2011 he received a two year re-appointment to prepare for and implement the changes at the IRB that will be required as a result of new legislation affecting refugee determination reform and irregular arrivals and human trafficking.

ELSPETH GUILD is Jean Monnet Professor *ad personam* at Radboud University, Nijmegen, the Netherlands, and Professor of Law at Queen Mary University of London. She is also Associate Senior Research Fellow at the Centre for European Policy Studies, Brussels, and a partner in the London law firm Kingsley Napley. She has published widely in the field of European law and human rights and advises both the Council of Europe and EU institutions, on an occasional basis, on issues relating to migration, asylum, human rights and citizenship.

MARTIN JONES is a lecturer in international human rights law at the Centre for Applied Human Rights at the University of York, United Kingdom. He has published and presented widely on refugee law, including on doctrinal issues in the understanding of refugee protection and on the tension between legal and political approaches to refugee protection. His current research focuses on the role of the law and legal assistance in refugee protection in the Global South, in particular in Asia and the Middle East. Before returning to academia, Martin was a practicing refugee lawyer in Canada and he is co-author of a textbook on refugee law in Canada. Martin is active in civil society on refugee issues, including in international networks such as the Southern Refugee Legal Aid Network and the Asia Pacific Refugee Rights Network. He has been consulted for advice on refugee law and policy by a number of governments and the UNHCR.

VITIT MUNTARBHORN is a Professor of Law at Chulalongkorn University, Bangkok. He has helped the United Nations (UN) in a variety of positions, including as UN Special Rapporteur on the Sale of Children (1990–1994); UN Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (2004–2010); Chairman of the UN Commission of Inquiry on the Ivory Coast (2011). He is currently a member of the Committee of Experts (on Recommendations and Conventions) of the International Labour Organization. He helps various non-governmental organizations pro bono and is co-Chairman of the civil society Working Group for an ASEAN Human Rights Mechanism. He is the recipient of the 2004 UNESCO Human Rights Education Prize.

THE HON. ANTHONY MAX NORTH was educated in Melbourne and graduated from the University of Melbourne LLB (Hons) and BA. He spent 1973 as associate to Sir Ninian Stephen, then a judge of the High Court of Australia. He then studied at the University of London and graduated LLM from the London School of Economics. He returned to Australia and signed the roll of counsel at the Victorian Bar in 1976. In 1989 he was appointed a QC and practised particularly in the area of industrial law.

In 1995 he was appointed a judge of the Industrial Relations Court of Australia and the Federal Court of Australia. A significant part of the work of the Federal Court of Australia is in refugee law. The Federal Court of Australia is the main forum for a judicial review of refugee decisions.

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.

BENJAMIN PERRYMAN is a lawyer with a passion for international human rights law. He has worked on refugee law issues as a Law Clerk at the Federal Court (Canada) and in the immigration and refugee division of a legal aid clinic. Benjamin obtained his law degree from Osgoode Hall Law School, and also studied at Yale Law School as a Fulbright Scholar. He lives in Dartmouth, Nova Scotia, Canada.

SRIPRAPHA PETCHARAMESREE is a full-time faculty member at the Institute of Human Rights and Peace Studies, Mahidol University, Thailand. She received her first degree in political science from Thammasat University, her DEA and then PhD (Doctorate) in international politics from the University of Paris-X Nanterre, France. Her first formal contact with human rights work started when she served as a social worker at UNICEF’s Emergency Operations for Cambodian Refugees. Since the 1990s she has been active in the human rights field, both among the academic community and with human rights activists at the national and regional levels.

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She works closely with NGOs, grassroots people and some marginalized groups, ethnic minorities, migrant workers, asylum seekers, among others. Her recent work is focused on issues of citizenship, migration, statelessness, rights to development, and human rights in international relations. She is presently researching and writing two books. One deals with the issues of citizenship, statelessness, borders and discrimination, and the other with ASEAN (Association of Southeast Asian Nations) and human rights. In October 2009, she was appointed by the Thai government as the Thai Representative to the ASEAN Intergovernmental Commission on Human Rights for a period of three years.

JAMES C. SIMEON is the Acting Director of the Centre for Refugee Studies and an Associate Professor in the School of Public Policy and Administration, Faculty of Liberal Arts and Professional Studies, at York University, Toronto, Ontario, Canada. Some of his recent publications include the following edited collections and academic journal articles: *Critical Issues in International Refugee Law: Strategies Toward Interpretative Harmony* (Cambridge University Press, 2010); *Forced Migration and the Advancement of International Protection*, 7th World Conference, November 5–9, 2006, International Association of Refugee Law Judges, MultiCopy Haarlem, 2008; “Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post-9/11” (2010) 29(4) *Refugee Survey Quarterly* 104–37; “A Comparative Analysis of the Response of the UNHCR and Industrialized States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration” (2010) 22(1) *International Journal of Refugee Law* 72–103.

VOLKER TÜRK is currently the Director of International Protection at UNHCR Headquarters in Geneva, Switzerland. From April 2008 to September 2009 he was Director for Organizational Development and Management in Geneva, leading the UNHCR’s structural and management change process. Before that he had a number of UNHCR assignments in various parts of the world, including in Malaysia, Serbia (Kosovo), Bosnia and Herzegovina, the Democratic Republic of the Congo and Kuwait. From 2000 to 2004 he was Chief of the Protection Policy and Legal Advice Section at the UNHCR Headquarters in Geneva, which had particular responsibilities for the Global Consultations process. Before his time with the UNHCR, he worked as university assistant at the Institute of International Law at the University of Vienna, where he

finished his doctoral thesis on the UNHCR and its mandate (published in German by Duncker & Humblot, Berlin, 1992). From 1985 to 1988, he was research assistant at the Institute of Criminal Law at the University of Linz, Austria. He has published widely on international refugee and human rights law.

THE HONOURABLE RUSSEL W. ZINN was born in Oxford County, Ontario. He was educated at Carleton University (BA 1973 and MA (Philosophy) 1976) and University of Ottawa (LLB 1979) and he was called to the Ontario Bar in 1981. He was an associate and partner: Gowling & Henderson and Gowling, Strathy & Henderson (1981–1993), partner: Zinn Hofley (1993–2001), partner: Ogilvy Renault LLP (2001–2005), senior partner: Ogilvy Renault LLP (2006–2008); Counsel before Supreme Court of Canada, Federal Courts, Ontario Court of Appeal, Ontario Superior Court, Bermuda Court of Appeal, federal and provincial boards and tribunals; author of *The Law of Human Rights in Canada: Practice and Procedure* (Canada Law Book, 1996) and numerous articles, and a frequent speaker. He was appointed Judge of the Federal Court and *ex officio* member of the Federal Court of Appeal, February 20, 2008, and he was appointed as a Judge of the Court Martial Appeal Court of Canada on November 20, 2008.

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 order¹ 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).

privations.² 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.³ 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

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.

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.

*David B. Dewitt**

*University Professor & Professor of Political Science,
York University (on leave) and
Vice President, Programs, Centre for International
Governance Innovation, Waterloo, Ontario*

* 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.

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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

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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

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).

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 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