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Introduction

Searching for ways to enhance the UNHCR's capacity to supervise international refugee law

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Introduction

The opportunity to bring together a distinguished group of leading expert researchers, legal scholars, academics, and practitioners in the field of refugee and forced migration studies to examine an important and pressing area of concern in international refugee law cannot be either overlooked or bypassed lightly. When this possibility was first broached I took some time to consider it before deciding that, despite my other substantial commitments, it was an opportunity that just could not be missed. Then after several years of persistent and sustained effort, and in the face of a number of obstacles, the event was realized finally when some eighty of the world's leading expert practitioners, legal scholars, academics, and university graduate and undergraduate students were hosted by the Centre of Refugee Studies at York University, Toronto, Canada, for the York 2010 International Conference on "Forced Displacement, Protection Standards and the Supervision of the 1951 Convention and 1967 Protocol and Other International Instruments," on May 17–20, 2010. This was an extraordinary gathering that was dedicated to examining and considering the United Nations High Commissioner for Refugees' (UNHCR) supervisory role under international refugee rights instruments and how the UNHCR's supervisory role might be enhanced to ensure that States Parties to these international instruments fulfill their obligations to provide international protection to refugees and other forced migrants.[1]

[1] It should also be noted that we used the occasion of the York 2010 International Conference to take advantage of the fact that a number of internationally renowned experts in the field of refugee law would be present at York University and, as a consequence, we arranged

It is evident from the York 2010 International Conference programme that it was a major effort and commitment on the part of a large number of people and organizations in different parts of the world. This edited collection is just one of a number of important outcomes and products of our international conference.

This edited collection includes fifteen original contributions on the substance of the York 2010 International Conference, the UNHCR's supervision of international refugee law, and what could and, perhaps, what ought to be done to enhance the UNHCR's supervisory capacity in this regard. These contributions are largely based on the papers that were presented at our international conference which was held at the fifth-floor conference centre in the York Research Tower, located on York University's Keele Street campus. The original papers that were presented at our international conference have been revised for publication. These original contributions have been transformed into chapters for this edited collection and are equally divided into four distinct parts or sections of this publication. We are very grateful to all those who agreed to make a contribution to our edited collection.

What follows is a brief introduction and review of a number of essential aspects of our research initiative and this edited collection. This introduction starts by making a fundamental point regarding the significance of this aspect of international refugee law – the supervision of the obligations of States to provide international protection to those deemed to be Convention refugees. Indeed, the topic of the supervision of international refugee law deals with one of the most relevant and significant aspects of public international law: what governs "the conduct of states and international organisations, and the relations between them."[2] This topic is also timely for a number of other reasons, including the fact that States are now limiting access to Convention refugee status through a variety of different means. It seems self-evident that while States are seeking measures to limit the number of those who wish to seek refugee status within

to hold a separate research workshop on our "War Crimes and Refugee Status" research project. See the War Crimes and Refugee Status Research Workshop website at www.yorku.ca/wcrs/index.html (accessed August 19, 2012). The York 2010 International Conference commenced with a welcome reception for our invited conference participants in the early evening on Monday, May 17. The "War Crimes and Refugee Status" research workshop was held during the morning and afternoon on Monday, May 17.

[2] Hester Swift, "Public International Law" (Institute of Advanced Legal Studies, School of Advanced Study, University of London, June 2012), http://ials.sas.ac.uk/library/guides/research/res_public.htm (accessed August 6, 2012).

their jurisdictions, the UNHCR should be undertaking its best efforts to ensure that States Parties comply fully with their treaty obligations, freely entered into, in providing international protection to refugees and other forced migrants.

The York 2010 International Conference is reviewed herein in some detail, including the manner in which it was structured and designed to maximize the expert participants' engagement and interaction with the major issues and concerns under consideration at the international conference. The use of breakout group sessions, which examined a number of pertinent issues and concerns with respect to UNHCR's supervision of international refugee law, contributed substantially to the expert participants reaching a consensus on seven key questions that were posed by Dr Volker Türk, Director of the Division of International Protection, UNHCR, Geneva, Switzerland and our international conference's official opening keynote speaker. Breakout group sessions were utilized at the end of the first two full days of the Conference during which the expert participants sought to reach a consensus on how best to proceed in enhancing the UNHCR's capacity to fulfill its supervisory role under the panoply of international refugee rights instruments.

This chapter concludes by outlining seven areas in which the expert participants had reached a consensus on the issues and concerns with respect to the supervision of international refugee law that were the substance of our international conference. These points of consensus provide a clear road map for how the UNHCR could go about enhancing its capacity to supervise international refugee law and the provision of international protection to those most in need – refugees and other forced migrants.

A clear consensus among the expert participants emerged in a number of crucial areas, including the following: establishing an Advisory Committee of outside experts to provide independent advice to the UNHCR; an expert or expert group should be appointed to report on States Parties' compliance with their obligations under international refugee rights instruments; and the Special Sub-Committee for the UNHCR Executive Committee (ExCom) on international protection should be re-established. Consensus also emerged amongst the expert participants on a number of other key points: although it was recognized that the UNHCR's mandate far exceeds its financial resources, it was generally agreed that the UNHCR's current financing arrangements and dependence on a number of major donor States in the Global North was not conducive to its supervisory responsibilities; international

non-governmental organizations (INGOs) and non-governmental organizations (NGOs) play a vital role in monitoring and reporting on the fulfillment of States' and the UNHCR's responsibilities in meeting their obligations in international law, accordingly, and it was agreed that INGOs and NGOs could do more in this regard; and, in many respects, it was recognized that the UNHCR's supervisory role can be equated with "capacity building" and assisting States Parties in being able to fulfill their obligations under the international refugee rights instruments that they have acceded to and that require them to provide international protection to refugees and other forced migrants. These points of consensus that emerged at the York 2010 International Conference are covered in detail in what follows in this introductory chapter.

These points of consensus amongst the expert participants at the York 2010 International Conference are also taken up in the concluding chapter of this volume. The pertinent issues and concerns with respect to the supervision of international refugee rights instruments are assessed and considered in some detail the concluding chapter along with a number of suggestions and recommendations that could be applied to strengthen the capacity of the UNHCR, in a decidedly more democratic manner, to fulfill one of its principal functional responsibilities in the international refugee protection regime – the supervision of international refugee law.

Public international law, restricting access to asylum, the North–South impasse and "cross-issue persuasion," and the challenges facing the UNHCR in the twenty-first century

International refugee law is clearly a branch of international human rights law and, evidently, both are part of public international law. It is worth keeping in mind that public international law has been defined as

> *international law, the law of nations*, under which nations are regarded as individual members of a common polity, bound by a common rule of agreement or custom; opposed to *municipal law*, the rules binding in local jurisdictions.[3]

[3] *Oxford English Dictionary*, as quoted in Kent McKeever, "Researching Public International Law" (Arthur W. Diamond Law Library Research Guides, Columbia University Law School, last updated January 2006), http://library.law.columbia.edu/guides/Researching_Public_International_Law#Background (accessed August 6, 2012) (emphasis as found in the original text).

Public international law has also been defined as follows:

> **international law**, also called **public international law** or **law of nations**, the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors. The term was coined by the English philosopher Jeremy Bentham (1748–1832).[4]
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> Public international law governs the conduct of states and international organisations, and the relations between them. Areas of public international law include air law, diplomatic relations, the law of armed conflict, environmental law and trade law.
>
> The Statute of the International Court of Justice, article 38(1), is often used to define the sources of public international law. It lists the following sources: treaties; international custom (hence "customary international law"); generally recognised principles of law; judicial decisions; and the teachings of publicists, that is, leading scholars. Judicial decisions and the teachings of publicists are classed as secondary sources (Art. 31(1)(d)).[5]

These definitions stress that public international law or the "law of nations" encompasses the laws between and among sovereign States and international organizations. International human rights law and international refugee law are then premised on the laws pertaining to human rights and to refugees between and among sovereign States and international organizations. However, issues of compliance and enforcement loom large within the sovereign-State dominated system that exists in the world today. Ensuring that sovereign States within the international community comply with the dictates of international law is, undoubtedly, the challenge when there are no enforcement mechanisms in place to deal with those States who fail to adhere to the law of nations. Moreover, and directly on point, this edited volume deals with a vital and core aspect of public international law: the laws between and among sovereign States and international organizations, as it pertains specifically to the supervision of international refugee law by the Office of the UNHCR, the UN Refugee Agency[6] (the most important international organization of its kind in the world today), and the sovereign States

[4] *Encyclopædia Britannica Online*, s. v. "international law," www.britannica.com/EBchecked/topic/291011/international-law (accessed August 6, 2012) (emphasis as found in the original text).
[5] Swift, "Public International Law."
[6] See the UNHCR main website at www.unhcr.org/cgi-bin/texis/vtx/home (accessed August 25, 2012).

that are signatories or non-signatories to international refugee rights instruments.[7]

The foremost treaties dealing with international refugee law are the 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees.[8] The Statute of the Office of the United Nations High Commissioner for Refugees must also be included in this list of key documents that pertain to international refugee law and the role of the UNHCR.[9] Volker Türk and Frances Nicholson have underscored this point when they note the following:

> 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.[10]

[7] The latest collection of international instruments that deal with refugees and others of concern to the UNHCR includes some 260 international instruments and legal texts. See *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to the UNHCR* (Geneva: UNHCR, June 2007), 4 vols. Foreword by George Okoth-Obbo, Director, Division of International Protection Services, 1 June 2007, www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=455c71de2&query=international (accessed August 25, 2012).

[8] Convention relating to the Status of Refugees, Geneva, adopted July 28, 1951, entry into force April 22, 1954, 189 UNTS 137, http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en (accessed August 5, 2012); Protocol relating to the Status of Refugees, New York, adopted January 31, 1967, entry into force October 4, 1967, 606 UNTS 267, http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=V-5&chapter=5&lang=en (accessed August 5, 2012).

[9] Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of December 14, 1950, www.unhcr.org/3b66c39e1.html (accessed August 6, 2012).

[10] Volker Türk and Frances Nicholson, "Refugee Protection in International Law: An Overall Perspective," in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), p. 6. See also Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Ithaca and London: Cornell University Press, 2009), p. 2, wherein he argues that "The 1951 Convention provides a definition of who is a refugee and the rights to which refugees are entitled, whereas UNHCR is mandated to work toward ensuring protection and long-term solutions for refugees and has supervisory responsibility for ensuring that states meet their obligations under the 1951 Convention."

The role of the UNHCR in this regard is both a simple and profound one. As Amnesty International has stated,

> Refugees are at risk of human rights violations that the international community has agreed should not be tolerated.
>
> It is time that governments took responsibility for refugees. They must ensure that all receive the protection to which they are entitled . . . They must share the costs. By breaking their own commitments to refugees they are betraying millions of women, children, and men who desperately need help.[11]

In this sense, then, the UNHCR must persuade States Parties that they must fulfill their obligations under international refugee rights instruments that they entered willingly into, presumably, in "good will" and in "good faith." Amnesty International and other international human rights organizations and a number of distinguished legal scholars and researchers have argued that

> Today, the international system of protecting refugees is in danger of being rendered irrelevant. Some states refuse to ratify and implement the refugee treaties. Many are flouting the provisions of international refugee law, challenging its premises and refusing to honour their responsibilities. States which break their promise to protect refugees are undermining international human rights guarantees. They should be exposed and challenged.[12]

W. Gunther Plaut, in *Asylum: A Moral Dilemma*, states that

> While the number of refugees in the world has increased, the willingness to help them has decreased, and existing laws have not been able to deal with increasing needs. According to Nanda (1989, 9), the major problems with refugee law may be summarized as follows:
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> (1) It does not address the issues of people who do not fit the persecution standard of the Convention passed after World War II. Today they are fleeing more often because of serious internal instability, disturbances or armed conflict, and are unable or unwilling to return. It also does not deal with refugees stranded within their own country.
> (2) States grant . . . asylum to those falling within the scope of the refugee definition, and since the nonrefoulement protection is applicable only to those . . . who meet the persecution standard contained in the

[11] Amnesty International, *Respect My Rights, Refugees Speak Out* (New York: Amnesty International Publications, 1997), p. 4.
[12] Ibid., p. 9.

> Convention definition, a large number of asylum seekers are denied the Convention protections.
> (3) The plight of a stateless refugee, who has no nationality, who has little or no protection, has not been addressed.
> (4) No Convention has addressed the question of resettlement.
> (5) The law has never dealt with mass expulsions.
>
> International refugee law has additional deficiencies: it addresses only individuals who can prove that they fall within the text of the definition, but protects neither the individual who is a de facto refugee (though "merely" uprooted), nor the group that needs assistance. It deals with the principle of nonrefoulement, which provides that people are not to be sent back if they are refugees but says nothing about any right to asylum.
>
> The general response to these problems has been to increase restrictions and to strengthen existing laws and institutions, rather than to develop a wider vision based on moral perceptions that international action needs to be taken to deal with the refugee problem. Law often acts as the mediator between morality and national self-interest, but if the latter is the sole master, it fails to fulfil this vital task.[13]

The highly restrictive definition of who is a refugee in the 1951 Convention and its 1967 Protocol is often raised as a concern with respect to providing protection to refugees and other forced migrants who are in need of international protection. But, the prospects for negotiating a new convention for refugees among States to cover the current deficiencies in international refugee law seem highly remote at best. Indeed, the concern is how to protect what rights States have already agreed to under international refugee rights instruments, given the efforts on the part of some States to retrench the rights that refugees are entitled to presently, as opposed to trying to enhance these refugee rights.[14]

Indeed, Guy S. Goodwin-Gill and Jane McAdam have argued that

> Denial of access is the objective of many States anxious to avoid the requirement to abide by certain peremptory obligations, such as *non-refoulement*.

[13] W. Gunther Plaut, *Asylum: A Moral Dilemma* (Toronto: York Lanes Press, 1995), pp. 139–40, quoting from Ved P. Nanda (ed.), *Refugee Law and Policy: International and US Responses* (New York: Greenwood Press, 1989).

[14] Gil Loescher and James Milner, "UNHCR and the Global Governance of Refugees," in Alexander Betts (ed.), *Global Migration Governance* (Oxford University Press, 2011), p. 192, wherein Loescher and Milner state: "However, in recent years there has been great resistance in the West to the pragmatic expansion of the refugee definition and of the UNHCR's mandate."

> Refugees and asylum seekers are directly "interdicted" while outside territorial jurisdiction, and their movements are increasingly controlled indirectly, through the application of restrictive visa policies and/or carrier sanctions. Those who arrive in the territory of the State may be denied access to a procedure for the determination of asylum or refugee status, or to courts and tribunals generally for the protection of their rights, or to the sources of information that ought to be the essential foundation for informed decision-making. Even when refugees secure admission, they may be denied access to relief or basic services, such as health care and education.[15]

States are aggressively pursuing various methods to limit the number of persons who arrive on their territories to claim refugee status. "Western governments adopted a series of migration control measures to deter new arrivals, by increasing pre-arrival screening, routinely detaining asylum seekers, and deporting refugees to so-called safe third countries."[16] For example, airlines are being charged for allowing passengers to board aircraft to come to Canada to make claims for Convention refugee status. All this does not bode well for those who are seeking asylum from a well-founded fear of persecution.

There is, in addition, an even more difficult structural problem confronting the international refugee protection regime. Alexander Betts has described this as the North–South impasse, in which Northern States do not have the incentives to cooperate in burden-sharing. He characterizes this situation in the following terms:

> In spite of the existence of the regime, international cooperation on protection is not unproblematic. The regime sets out two core norms: asylum, which relates to the obligations of states to provide protection to refugees who are in their territory, and burden-sharing, which relates to the obligations of states to contribute to the protection of refugees who are in the territory of another state. Whereas the norm of asylum is well-established and is based on a strong legal and normative framework, the norm of burden-sharing is subject to a very weak legal and normative framework. Given the overwhelming majority of the world's refugees come from and remain in the global South, the disjuncture between the norms has significant consequences. It means that the Southern states that neighbor on conflict-ridden or human rights-abusing countries have an obligation to

[15] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edn (Oxford University Press, 2007), p. 370.

[16] Gil Loescher, Alexander Betts, and James Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the Twenty-First Century* (London and New York: Routledge, 2008), p. 60.

> provide asylum to people who arrive on their territory but the Northern states that remain outside of the refugees' region of origin have no obligation to contribute to the protection of refugees who remain in the South. Contributions to burden-sharing are discretionary and voluntary. The regime has, consequently, been characterized by what can be described as a North–South impasse, in which Northern states have had very little incentive to cooperate on burden-sharing and Southern states have had very little ability to influence the North. This impasse has had significant negative consequences for refugees' access to protection and durable solutions.[17]

Despite this serious structural problem in the operation of the international refugee protection regime as it pertains to burden-sharing, Betts sees the UNHCR as playing a crucial role in being able to influence Northern States, through "cross-issue persuasion," to make a significant contribution to burden-sharing under the right conditions. Betts makes the following argument:

> The actions of the UNHCR have been important in altering, drawing on, or simply recognizing and effectively communicating substantive linkages to persuade other actors to change their behavior. Without this UNHCR role, the substantive linkages would not have influenced state behavior in the ways that they did. The case studies point to four mechanisms through which UNHCR has been able to change or recognize and effectively communicate substantive issue linkages: institutional design, an epistemic role, argumentation, and the provision of information.[18]

Accordingly, Betts concludes the following:

> Issue linkage is a tool that UNHCR can use to facilitate burden-sharing. It may be able to use tactical issue linkage in bargaining processes to connect Northern and Southern interests. And even in the absence of clear trade-offs and the possibility for negotiated conditionality across issue areas, it may be able to draw on and use substantive linkages. Cross-issue persuasion is a key means by which UNHCR can appeal to and channel the wider interests of states into a commitment to protection and durable solutions. Making use of cross-issue persuasion requires that UNHCR is aware of the broader substantive linkages that connect refugee protection to other issue areas.[19]

Using Betts' insights into how the UNHCR might be able to promote States' greater cooperation and collaboration in the protection of refugees and greater burden-sharing between the Northern and Southern States

[17] Betts, *Protection by Persuasion*, pp. 2–3. [18] Ibid., p. 180. [19] Ibid., p. 184.