

## FOREWORD

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It was in 1954 that Australia's ratification of the 1951 Convention Relating to the Status of Refugees brought this treaty into force under Article 43. With just one amending protocol adopted in 1967, it remains the focal point in an international regime of refugee protection now fast approaching its fiftieth year.

The 1951 Convention, adopted during the height of the Cold War, is sometimes seen as very much a document of its time, representing polarised attitudes to the concepts of refugee and persecution, unrealistically focused on social and economic entitlements, and insensitive to the larger picture of both national and international interests. These days, too, it is not uncommon for the Convention to be held responsible for the international community's failure to deal with the tragedy and exploitation of trafficking, or for the inadequate protection of the internally displaced, or for frustrating states in their good faith attempts to manage migration. The notion of the individual refugee with a well-founded fear of persecution as someone who has *rights* which can be claimed and defended is also commonly seen as imposing impossible burdens on administrative and legal systems, while others argue that this very concept falls short, and fails adequately to cover the broader range of displacement caused by violations of human rights.

It is true that the 1951 Convention's concept of the refugee does not encompass the whole picture of forced migration. Nevertheless, it is representative and symbolic of the commitment of the international community to the individual as someone having dignity and worth, and deserving respect; in my view, it *can* be implemented effectively, and it ought not to be undermined by unilateral, short-term policies and practices incompatible with the intrinsic value of the human being.

The determination of refugee status is said to be hard. Some of the criteria are clear-cut; others are open, and must inevitably be filled out by human experience; there are new groups of refugees, and there have always been new groups of refugees. Certain sections of the media and political circles, however, tend regularly to confuse failure to meet refugee criteria with being manifestly unfounded, whereas anyone working among the cases can tell you that 'failure' is commonly just a matter of degree, dependent upon complex and varying

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assessments of the individual elements in the refugee definition. The essential question remains, as always, that of risk of relevant harm, while the indices of a founded claim to be a refugee are denial or lack of protection of human rights, whether that lack of protection is due to state or non-state actors.

We turn to human rights law and doctrine for assistance in filling out those grey areas. This is not always viewed with equanimity. Many policy-makers, even some policy-makers who are lawyers, nowadays assert their dissatisfaction with the role and place of law in the determination of who should receive protection as a refugee; often they argue for a national asylum practice that is essentially or largely political and discretionary. Others claim that law leads to excessive legalism, to tortured meanings, to protracted proceedings which themselves frustrate efficient action.

That some of this may be true, cannot be denied; but that it should always be true, is manifestly incorrect.

Human rights and refugee protection are necessarily a matter of *tensions*, for example, between government and applicants, or between government and judiciary. The business of resolving these tensions is an integral part of the dynamic of any civil society founded upon values such as individual integrity, and on the rule of law. And there is necessarily a *cost* attaching to principle, whenever principle moves out of the abstract and into the practical.

Any refugee decision, positive or negative, which is based on the facts, on an effective opportunity for the claimant to present his or her claim, and which is reasoned and presented in writing, is worth defending. Decisions which are decisions to avoid decisions, or which focus on matters irrelevant to risk of harm, or which seek to make another state responsible, without regard to the merits, are generally not worth the trouble of defending, and do nothing for the credibility of the state in regard to its international obligations.

At the same time, it must be recognized that, despite the experience of the years, many states have not done all that well in the matter of refugee determination. Australia's engagement in this field largely dates from 1978, with the creation of the Determination of Refugee Status ("DORS") Committee, on which the writer served as the UNHCR Observer until 1983. Times and expectations have changed since then, on all sides, but the goal of fair and expeditious decision-making that is in tune with the evolving sense of human rights and flight from persecution often seems as elusive as ever.

It is not that governments and the refugee advocacy community are unaware of the basic rules. On the contrary, in the many states which take decision-making under the Refugees Convention seriously, it is increasingly recognized that the first essential step is to bring the procedure to the problem, and to ensure the procedure itself conforms to recognized due process requirements; this means that advice and legal representation should be available, that decisions should recognize the individual in his or her social and political context, and that full, authoritative and credible country of origin information is available to all parties. Equally important is the requirement that decisions be backed by reasons and reduced to writing – there is nothing that so concentrates the mind as the requirement to explain why an individual does or does not qualify for

international protection. And the goals of consistency and accountability to law require at least one appeal on the facts, and the continuing supervisory jurisdiction of the courts by way of judicial review.

Implementation and balance in regard to the Refugees Convention are essentially functional problems, a question of governance and management; they need not be and should not be at the expense of the individual and his or her human rights. Of course, the world has changed, and there is much still to be done in the related fields of migration and conflict prevention; but the integrity of the asylum system depends on fairness and efficacy, not on deterrence, detention, or disproportionate penalties.

Perhaps the most hopeful development over the last twenty years has been the growth in refugee scholarship, to which this special issue of the *University of New South Wales Law Journal* makes a notable and welcome contribution. There is indeed a wealth of experience out there, and in the matter of refugee protection no one any longer need feel that they are working in isolation. The problems are common in all states facing the challenges of new groups of refugees fleeing new forms of persecution and new forms of conflict. It is particularly satisfying, therefore, to be able to introduce and commend this special issue to what I hope will be the widest range of readers – not just the converted in the community of refugee advocates, but also to the sceptics, to those who just do not know what it is that drives individuals to break, or see broken, the link with the land of their birth, and to those who must find a way to achieve the goal of protection while remaining solidly grounded on the rule of law.

It is trite knowledge that the drafters of the Refugees Convention did not foresee how the world would develop, or that more people would be able to travel more easily to more places far and wide, or that the situation of women in many countries would give rise to flight, or that ‘ethnic cleansing’ would enter the vocabulary of protection, or that human rights would help to raise up the status of the individual in his or her relations with government and state. Yet they were able to identify the enduring and universal characteristics of the refugee, and to single out the essential, though never exclusive, reason for flight in a well-founded fear of persecution. That certainly has not changed, and it is for today’s scholars and practitioners to ensure that the refugee definition remains in touch with the reality of the refugee experience.

Oxford  
27 November 2000