Refugee Protection In International Law: UNHCR's Global Consultations on International Protection

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BOOK REVIEW

REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION


Reviewed by Taylor H. Garrett*

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I. INTRODUCTION: GLOBAL CONSULTATIONS AND REFUGEE PROTECTION IN INTERNATIONAL LAW

The 1951 Convention Relating to the Status of Refugees is the keystone document of international refugee protection. While the Convention has remained the same since its drafting, the type of situations to which it has been applied has changed significantly. The United Nations High Commissioner for Refugees (UNHCR) initiated the Global Consultations on International Protection in 2001 to affirm the continued keystone value of the 1951 Convention in international refugee protection in the wake of changes since its drafting.

* L.L.M (expected 2004), London School of Economics and Political Science; J.D. (2003), University of Michigan; B.A. (2000), Southwestern University. If such an effort merits a dedication, one should be to the author's sister and grandmother, for they were never far from his mind during the writing of this paper.
UNHCR divided the Global Consultations process into three “tracks.” The first track consisted of meetings of all states parties to the 1951 Convention and/or the 1967 Protocol. This meeting produced a declaration by which states parties formally affirmed their political commitment to the continued and expanded use of the 1951 Convention as the basis for refugee protection. The second track, a series of round-table discussions eliciting expert opinions on the 1951 Convention, derived its stamp of approval from the states parties who agreed to the first track and the Declaration. The third track of discussions has taken place within the Executive Committee of UNHCR and is “structured around a number of protection policy matters, including issues not adequately covered by the 1951 Convention.”

Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection is a compilation of the “second track” legal opinions and the Summary Conclusions of the expert working groups. These opinions and Conclusions address nine specific areas of international refugee law within the framework of the 1951 Convention. Some of the refugee, legal community’s most gifted minds contributed to the opinions and the Conclusions are the result of round-table discussions of a broad international group of experts in the field of refugee protection.

Any critical analysis and review of this book must acknowledge the human hours invested into the process and the extensive experience brought together under one cover as well as the political will of many countries necessary to push forward such a process. Moreover, this compilation goes beyond contributing to academic discourse; the authors seek to persuade an audience of policy-makers, politicians, practitioners and jurists.

As a result, Refugee Protection in International Law is both an analysis of the development of the law of international refugee status and a significant development in and of itself. The breadth, depth and focus of the book demands less narrow legal criticism and call for a different mode of analysis.

Such an analysis of Refugee Protection in International Law, in its parts and as a whole, is possible by situating the chapters of the text in relation to the goals of the Global Consultations process. Moreover, such

2. UNHCR, Protecting Refugees: Global Consultations on International Protection, at http://www.unhcr.ch/cgi-bin/texis/vtx/home/+ywwFgqvxsqwnWx6xFgqxssqwnWx6mFgAm72ZRoRfZNhFqhbT0NultFqprGdNqBzFqr72ZR0gRAFqwDzmwwwwwwwww1Fqr72ZR0gR (last visited June 21, 2004).
Refugee Protection in International Law is useful to determine how Refugee Protection in International Law fits into the evolving framework of refugee protection. In her preface to the book, Erika Feller, Director of International Protection for UNHCR, explains the goals of the Global Consultations process. These interrelated goals flow throughout the entire book:

- To reach a clearer understanding and a more consistent implementation of international refugee law;
- To realize durable protection solutions for refugees;
- To maintain respect for the world’s most vulnerable people, those most likely displaced in any refugee situation;
- To strengthen the asylum system and make protection more effective;
- To rise to the challenges facing modern international refugee law;
- To shore up the framework of international protection principles;
- To explore the scope of enhancing protection through new approaches;
- To share best practices between states;
- To work toward sharing burdens more equitably;
- To work toward the implementation of framework principles clarified to a modern meaning;
- To achieve all of this within the same original document: the 1951 Convention.¹

The importance of *Refugee Protection in International Law* becomes clear in situating and analyzing the book as an instrument of these goals and of the Global Consultations on Refugee Protection, as opposed to a report or commentary of the "second track" of the Global Consultations. This review traces the threads of the goals through each of the legal opinions in the book and then summarizes the impact of the collection of legal opinions on international refugee law. The work as a whole and its individual parts is not merely a significant analysis and commentary on the 1951 Convention fifty years after its drafting. *Refugee Protection in International Law* is a significant development in the international protection of refugees.

II. THE INDIVIDUAL LEGAL OPINIONS

A. Non-refoulement

The rights of the individual as against the interests of the state flow through the goals of the Global Consultations and must play a critical role in the future of refugee protection. By placing the interests of the individual above those of the state in all but the most specific circumstances, refugees realize enduring and safe solutions and the world's most vulnerable people realize full respect. Such a prioritization fundamentally strengthens the granting of asylum and makes protection more effective. *Non-refoulement* is at the heart of this prioritization.⁴

*Refugee Protection in International Law* begins with an analysis of *non-refoulement* in Article 33 of the 1951 Convention. Article 33 is the cornerstone of the Convention and critical to refugee protection. Sir Elihu Lauterpacht QC and Daniel Bethlehem set out a comprehensive analysis of the scope and content of the principle. *Non-refoulement* is an absolute norm of state conduct and Lauterpacht and Bethlehem argue for a liberal construction of the language of the provision. Article 33(1) describes the rights of the individual against a state and Article 33(2) describes the abilities of a state against the individual. By arguing for a maximized, liberal reading of Article 33(1) and of the customary international law of *non-refoulement*, and for a minimized, narrow view of Article 33(2) and the exceptions to the customary international law of

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⁴ "Non-refoulement is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk [on life or freedom due to] race, religion, nationality, membership of a particular social group, or political opinion." Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion, in Refugee Protection in International Law, supra note 1, at 89.*
non-refoulement, Lauterpacht and Bethlehem affirm the priority of the individual over the interests of the state in refugee protection.\(^5\)

The primacy of the individual anchors certain goals of the Global Consultations process: attempts to rise to modern challenges, such as the changing conflict between the state interest in migration control and the right to seek asylum on the part of individuals;\(^6\) efforts to shore up the existing framework of protection, notably with regard to gender;\(^7\) and exploration of new approaches to enhance protection. In addition, the sharing of best practices with a view to a uniform approach and of the burden of refugees between states, and clarification of framework principles, depend on the priority of individual rights. State interests vary and these interests cannot be uniform across borders. Common sense dictates that if the individual is prioritized in protection some uniformity across borders can be realized.

Lauterpacht and Bethlehem lay a legal foundation rooted in the 1951 Convention for the future of refugee protection by reminding of the priority of the individual over the state in the core principle of non-refoulement.

**B. Penalties and Detention of Asylum Seekers or Refugees**

Guy Goodwin-Gill’s argument for interpretation of Article 31 of the 1951 Convention maximizes the rights of the individual as against the interests of the state, like the work of Lauterpacht and Bethlehem on non-refoulement. Goodwin-Gill argues that states can impose penalties on or detain asylum seekers or refugees only after meeting particular

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5. Id.


7. The “public/private” distinction and its problematic effect on women in international law is well-noted. The evolving legal framework to recognize persecution of women within the “private” sphere and not only within the “public” sphere requires a firm recognition of the rights of the individual over interests of the state. Such a recognition of “private” persecution potentially increases the number of individuals seeking asylum, contrary with a state interest in regulating borders and controlling migration. See *Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Analysis*, (2000).
conditions. Unlike the principle of non-refoulement, however, the law of penalties and detention is not particularly clear nor have states parties implemented it consistently. Goodwin-Gill therefore explains clearly the law of penalties and detention within the object and purpose of the 1951 Convention with a view towards more consistent implementation. Durable solutions—any protection solutions—are not possible if states parties penalize and detain refugees and asylum seekers on grounds of convenience instead of necessity. States parties cannot maintain respect for vulnerable persons who seek protection abroad if penalties or detention are imposed unnecessarily.

To so explain, Goodwin-Gill uses interpretive principles of treaty law and developments subsequent to the 1951 Convention to show the continued relevance of the 1951 Convention to the areas of penalties and detention. In so doing, his work strengthens the granting of asylum and allows for more effective protection by showing the limited circumstances under which the process from entry to a grant of asylum may be slowed by penalties or detention. Goodwin-Gill addresses one of the pertinent challenges facing refugee protection—growing national security concerns that threaten to overshadow individual rights.

Goodwin-Gill shores up the current framework of protection relating to penalties and detention and lays a foundation for new legal approaches, namely improved state practice. His detailed analysis both of the law and the failure of states in practice to adhere clarifies this specific protection dilemma and shadows the problem of sharing best


9. Goodwin-Gill points out that mere formal compliance in terms of national legislation or case law inadequately meets the obligations of a state party under Article 31. Instead, there must be an inquiry as to whether the system of refugee protection in the State party concerned has “attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.” Id. at 216. Therefore, it is possible to frame Goodwin-Gill’s analysis of both the difficult terms of Article 31(1) and the national legal systems of states parties charged with putting Article 31(1) into practice in a legal standard: has there been a systemic failure on the part of a state party to put into practice policies consistent in result with a purposeful reading of Article 31(1)? If so, state parties are in violation of their obligations under the 1951 Convention.

10. Goodwin-Gill also discusses Article 31(2) relating to detention of refugees and asylum seekers. Detention presents a significant problem for refugee protection. States have a margin within which to detain in certain circumstances but these circumstances are not altogether clear. Goodwin-Gill examines how international law has moved to address what is permissible within this margin. Id. at 224–25. From Goodwin-Gill’s analysis, a second legal standard, relating to Article 31(2) can be posited: Is detention the only possible option, necessary and proportional to a legitimate conditional justification, with appropriate safeguards for the detained? If not, the detention in question is not permissible under the 1951 Convention.

11. Id. at 188.
practices in this area. Increased penalties and detention, moreover, may facilitate burden sharing of refugees, as deterrents to entry and channels for refugee flows to other states. Yet Goodwin-Gill's emphasis on the rights of the individual over the interests of the state forces states to look to less convenient methods to reallocate refugee burdens.

In clarifying and uniting the international law, national statutes and case law and state practice, Goodwin-Gill addresses well an area of refugee law with significant ramifications for those individuals seeking and obtaining asylum.

C. Membership of a Particular Social Group

While the issue of detention and penalties raises questions of how far the 1951 Convention can be used to regulate the entry and granting of asylum, 'membership of a particular social group' takes the 1951 Convention in an altogether different direction. How far will the 1951 Convention bend to grant protection to those individuals who do not clearly fall within its grounds for relief before it breaks under the ambiguity of the term: 'membership of a particular social group?'

Alexander Aleinikoff acknowledges that a clearer understanding of what was originally meant by 'membership of a particular social group' may not be possible. Thus, he proposes a correct interpretation modern decisionmakers can apply that leads to consistent application of the 1951 Convention. Correct interpretation is crucial to maintain the 1951 Convention's integrity and the system of refugee protection. Solutions and respect for the plight of refugees would be difficult to realize, and the granting of asylum and effectiveness of protection would be crippled, if an overbroadening of the social group category threatened international refugee protection. The 1951 Convention's ambiguity on this point is the source of concern and Aleinikoff's implicit challenge in this chapter is to resolve this ambiguity consistent with the object and purpose of the 1951

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12. Id.
14. On this question of great ambiguity in the Convention, ironically the travaux are cryptic and sparse, and unhelpful. T. Alexander Aleinikoff, Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group', in REFUGEE PROTECTION IN INTERNATIONAL LAW, supra note 1, at 265. The UNHCR Handbook is some 26 years old, and as such its guidelines for 'membership of a particular social group' reflect the lack of serious challenges at that time to the problematic ambiguity of the category. Aleinikoff, supra, at 266.
Convention. He succeeds by taking interpretations from primarily common law courts and crafting a synthesis of those ideas.\(^\text{15}\)

Aleinikoff's synthesis clarifies the current framework by examining current questions of interpretation\(^\text{16}\) and setting out an interpretive framework based on current best practices and approaches.\(^\text{17}\) This synthesis provides a good understanding of the protection dilemma posed by the social group category, to begin. Moreover, such a common interpretation may lead to more proportionate refugee burden sharing between states.\(^\text{18}\) This chapter clarifies protection based on membership of a particular social group within a modern meaning, although Aleinikoff's approach may be criticized by those who note the increasing role that non-state actors may play in private sphere persecution of women and the emerging value of the 'membership of a particular social group' category in addressing this persecution.\(^\text{19}\)

Through his clarification and analysis, Aleinikoff sorts through the complex and challenging issue of 'membership of a particular social group', towards clear understanding and uniform application of the 1951 Convention.

\(^{15}\) Aleinikoff examines jurisprudence from Canada, Australia, the United Kingdom, the United States, and New Zealand. Id. at 270, 272, 274, 275, 280.


\(^{17}\) Aleinikoff puts forward two approaches that he argues govern the core inquiry in the case of a claim brought on membership in a particular social group: the protected characteristics approach of Canada (Attorney-General) v. Ward [1993] 2 S.C.R. 689 and the social perceptions approach of Applicant A & Another v. Minister of Immigration & Ethnic Affairs & Another (1997) 190 C.L.R. 225 (Austl.). For Aleinikoff, the social perception test of Applicant A is closer to the meaning and purpose of the Convention than the approach in Ward and thus doctrinally preferable as an approach for interpretation. Aleinikoff, supra note 14, at 296.

\(^{18}\) For the idea that different standards lead to disproportionate burdens, see Walter Kälin, Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond, in REFUGEE PROTECTION IN INTERNATIONAL LAW, supra note 1, at 632 (“Disregard for international refugee law might create secondary movements of refugees and asylum seekers who have to look for a country where their rights are respected.”).

\(^{19}\) See Melanie Randall, Refugee Law and State Accountability For Violence Against Women: A Comparative Analysis of Legal Approaches to Recognising Claims Based on Gender Persecution, 25 HARV. WOMEN'S L.J. 281 (2002). A chief concern of any liberal interpretation of 'membership in a particular social group' is whether the refugee protection system will be overwhelmed with applications. Aleinikoff notes that the linking of a protected ground with a failure of state protection is an inherent and critical constraint that, if properly applied, can reduce this concern in the context of persecution at the hands of non-state actors. He argues that the system of protection will not be overwhelmed, for example by claims of women who are abused in the 'private' sphere as opposed to the public, if decision makers require a systemic or sustained failure of protection before granting refugee status. Aleinikoff, supra note 14, 301-03. Concerns about the evidentiary burden of proving failure of state protection for women abused domestically aside, Aleinikoff applies his framework for analysis to three other particularly pertinent current situations: claims based upon sexual orientation, family-based claims and Chinese coercive family practices. Id. at 304-09.
D. Gender-related Persecution

Gender-related persecution is closely related to 'membership of a particular social group.' As gender is not a specified ground for relief under the 1951 Convention, claims of gender-related persecution have been brought under the heading of 'membership of a particular social group' in the past. Gender-related persecution gives rise to tensions that, on their face, are not resolved simply by categorizing gender as a 'social group'. Roger Haines wrestles with several sets of these tensions in his examination of gender-related persecution.20

Haines negotiates between the obvious reality that women and men are inherently different and may thus suffer different persecution21 and the inclination to reduce the persecution experiences of women to simply issues of gender (and to essentialize women within the refugee law framework).22 Haines must also address the remarkable failure of states parties to apply the 1951 Convention in a gender-sensitive manner and the impulse to create a new framework—one that recognizes persecution for reasons of gender as an independent ground for granting refugee status.23

Haines analysis succeeds in reaching a clearer understanding of refugee law by reminding the reader that gender sensitivity and non-discrimination are integral concepts of the 1951 Convention. It is not the Convention but its application that is problematic; Haines challenges the patriarchal notions that have historically tainted the view of refugee decisionmakers.24 In so doing, Haines' argument strengthens the granting of

20. Rodger Haines QC, Gender-related Persecution, in REFUGEE PROTECTION IN INTERNATIONAL LAW, supra note 1, at 319.
21. Haines notes the emerging understandings of sex and gender in international refugee law in jurisprudence, state practice, and scholarly works. Id. at 322.
22. Simply because a woman brings a claim for asylum rooted in her gender or her sex does not mean that she should be "automatically" granted refugee status. Id. at 322. She must still satisfy the criteria of the 1951 Convention for that status to be granted. See also Randall, supra note 16, at 303.
24. To begin, women must have the same access as men to apply for refugee protection. Haines, supra note 20, at 324. At the same time, the focus of any refugee inquiry must remain on the specific characteristics of the claimant. Moreover, sex and gender must be integral elements of that refugee inquiry. Id. at 325. Haines notes that the 1951 Convention must be viewed, in light of the 1967 Protocol, as a dynamic human rights instrument and no longer a static document fixed in time. Id. at 326. Finally, decision-makers must view sex and gender as an integral, albeit implicit, part of the refugee definition. As a result of the prevalence of a male perspective in the granting of asylum, however, decision-makers have not heeded these areas of concern regarding the refugee claims of women. Thus, the interpretation of the
asylum and makes protection more effective under the existing framework.25

A question arises: is the existing framework adequate? Or should a different framework be explored? Haines answers, without much doubt, that the 1951 Convention adequately addresses gender-related persecution in its current form.26 Does this adherence rise to the modern challenge of violence against women as persecution27 and to the doubts on the part of many that the 1951 Convention can provide protection from such persecution?

These questions are part of the tensions that Haines must balance and his chapter promotes a clearer understanding of the protection dilemma facing decision-makers regarding gender-related persecution. The tensions in this area are balanced towards a clarification of framework principles and their modern meanings. Haines infuses the meaning of persecution under the refugee definition of Article 1(A)(2) with guidelines for a gender-sensitive interpretation that preserves the current Convention.28 Gender must inform the assessment of all five current convention grounds. Once a gender-sensitive assessment is utilized, the extent to which gender colours and strengthens these grounds is evident, to the benefit of women seeking refugee protection.29

Haines succeeds in resolving perhaps the most critical tension: between the face of the framework principles and the modern meaning

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25. The granting of asylum and protection are strengthened in the state of asylum's acknowledgement of the validity of the persecution faced by a woman due, in many ways, to the mere fact that she is a woman. Through a nuanced understanding of the different types of persecution, there is a richer and stronger awareness and mainstreaming of gender. This understanding allows a fuller definition of "protection" from persecution, both for men and women.


A simple double standard is at work here. What fundamentally distinguishes torture, understood in human rights terms, from the events that [women who submitted stories of abuse to the author] have described is that torture is done to men as well as to women. Torture is regarded as politically motivated not personal; the state is involved in it. I want to ask why the torture of women by men is not seen as torture, why it is not seen as politically motivated, and what is the involvement of the state in it?

MacKinnon, supra, at 25.


29. Id. at 342.
demanded of them. Decision-makers should consider properly the question of gender-related persecution within the current framework.39

E. The Internal Protection Alternative

The principle of state protection is another example of a fundamental framework principle that must be clarified in light of recent developments. The internal alternative to external asylum must now be taken into account as a possible basis for denial of surrogate state protection. Although this basis is not directly contemplated by the language of the 1951 Convention,31 the internal alternative is strongly rooted in the principle of state protection of Article 1.32 Simply put, where country of origin protection exists, surrogate state protection by cannot exist.

The conceptual basis for the internal alternative contains common elements but otherwise is in disarray, as James C. Hathaway and Michelle Foster note.33 Hathaway and Foster identify the commonalities in approaches;34 the proper procedural place of the inquiry into existence of an internal alternative;35 and rhetorical and substantive baselines that should be established.36 They clarify the internal alternative with a view towards needed consistent implementation.

30. Of critical importance is Haines’ analysis of “political opinion” as a ground for protection, for it is here that he situates the public/private divide and how it can be addressed, via a gender sensitive interpretation, in the 1951 Convention. Id. at 346.


32. Hathaway & Foster, supra note 31, at 358.

33. See id. at 365–81.

34. There are three commonalities to most approaches, rooted in the original formulation of the UNHCR Handbook, supra note 31: the inquiry into internal protection may be retrospective or prospective; may use a ‘reasonable person’ standard or an analysis of the individual circumstances of each applicant; and may focus on the mindset of the individual in seeking out an internal alternative or the willingness of the country of origin to provide protection. The differences in approaches revolve around these three poles.

35. Only if a clear division between an analysis of well-founded fear and an analysis of a failure of state protection is made can the possibility of an internal alternative be assessed properly within the assessment of a failure of state protection: without confusion, without undue influence given to factors which have no real bearing upon the parts of this framework and without short-changing the required well-founded fear inquiry, once such a framework is put in place. Hathaway & Foster, supra note 31, at 366.

36. Hathaway and Foster submit that the correct term is not ‘internal flight alternative’ nor ‘internal relocation alternative’ but rather should reflect the inquiry into state protection:
The internal alternative becomes a durable solution only if coherent, stringent principles guide the determination of the viability of that internal alternative. These principles must allow the "adequacy of accessible protection" to emerge in status determination. As Hathaway and Foster point out, in the hands of an experienced decision-maker there is no need for such principles—it is in other situations in which such guidelines are necessary to protect individuals from refoulement. While Hathaway and Foster may take some discretion away from decision-makers, they do so to strengthen the granting of asylum. Their proposal makes protection more effective, preserves the integrity of surrogate protection and respects the vulnerabilities of asylum seekers in the process.

Hathaway and Foster seek out the best approach to a practice rooted in "state protection" of Article 1 of the 1951 Convention. They address and synthesize the responses of states of asylum to failures of states of origin to protect all internal areas of their territories. States of asylum should deny refugee protection where surrogate protection is not necessary. The lines in procedure, substance and rhetoric must be clear to avoid refoulement.

F. Exclusion

States may also deny refugee protection where it is deemed undeserved. The exclusion clauses of Article 1F and Article 33(2) of the 1951 Convention deny refugee protection without any consideration of circumstances beyond the acts that bring an individual under the purview of the clauses. Geoff Gilbert analyzes these potentially dangerous provisions. A clear understanding of how these clauses operate is elusive and at times the exclusion clauses suffer from the age of their terms. This

38. The experienced decision maker will often reach the same conclusion under these principles, the authors point out, as in a reasonable exercise of their discretion. Id. at 409.
39. Specifically, the system of burden allocation at the status determination level in the authors’ proposal critically relieves the applicant of a possibly insurmountable burden of proof in proving that in all areas of the country of origin there is a lack of state protection. Hathaway & Foster, supra note 31, at 409.
40. Geoff Gilbert, Current Issues in the Application of the Exclusion Clauses, in REFUGEE PROTECTION IN INTERNATIONAL LAW, supra note 1, at 425.
41. For example, Article 1F(a) revolves around three definitions, none of which are particularly clear. Id. at 433. Furthermore, analysis of Article 1F(b) snags on the meaning of a serious non-political crime. Id. at 439. Article 1F(c) runs the risk of being so vague as to lead
Refugee Protection in International Law reflects a historical reality. The current climate of terrorism, ethnic conflict and general international instability have turned a focus to the exclusion clauses as at no point in the history of the 1951 Convention. Gilbert's argument for how states should apply the exclusion clauses strengthens asylum law in two ways. First, their judicious application strengthens the institution of asylum by ensuring that protection is granted to those who deserve it. Second, avoiding capricious application or lack of application of the exclusion clauses preserves the integrity and legitimacy of the asylum process. This is to be lauded if we in the law value a logical, process-based result, if not as much as the result alone but preservative of individual dignity and thus the propriety of systems and their eventual result. Most decision-makers do not want to send another person home to a country where that person faces harm but sometimes that happens. The legitimacy of the asylum process and its results depends upon ensuring that the exclusion clauses operate using proper procedures and standards.

Specifically, Gilbert argues that additional steps to the current framework should be taken to avoid reliance on other human rights conventions. His approach is to make a second inquiry after an individual is found excludable into the harm of the exclusion to the individual. This is in order to protect those individuals whom the 1951 Convention is on its face unable to protect yet whom should receive protection under international law.

Through his analysis, Geoff Gilbert describes the dilemma presented by the lack of historical and definitional clarity that results in uncertain application of the exclusion clauses. His chapter goes beyond this
to abusive and unwarranted exclusion of claimants from protection. \textit{Id.} at 455. Aside from terrorism, it is unclear what other acts constitute those contrary to the purposes and principles of the United Nations, or who, in terms of seniority in an entity, can commit such acts. Finally, Gilbert notes the confused relationship in State practice between Article 1F and Article 33(2). The two articles are used interchangeably and at misplaced points in the status determination inquiry by many states parties. \textit{Id.} at 458.

42. \textit{Id.} at 429.


44. Gilbert argues that a purposive approach to the 1951 Convention should develop Article 1F(b) particularly to include a double balancing test, and reduce usage of external treaties as safety nets: one, the decision-maker should consider whether a non-political crime is significant enough to merit exclusion, and if so, decision-makers should then balance the result of exclusion against the fear of persecution. \textit{Id.} at 453. Gilbert argues that a second double balancing test should be employed in the operation of Article 33(2), as in Article 1F(b). Once an individual is found to be returnable under Article 33(2), a decision-maker should then balance the individual’s fear of persecution upon return with the harm to the host country if the individual remains. \textit{Id.} at 462.
dilemma, moreover, and moves toward a clarification of the modern meaning of two fundamental framework principles—non-refoulement and exclusion.

G. Cessation of Refugee Status

Cessation of refugee status is another potentially dangerous area of refugee law. Whereas exclusion from refugee status denies state protection alone, cessation of refugee status denies state protection and removes a legal status as well. Joan Fitzpatrick and Rafael Bonoan assess the cessation clauses without arguing for their increased use—yet presenting procedures that could facilitate the increased use of the cessation clauses.45

The approaches of UNHCR and states parties to the operation of Article 1C(5)–(6) give rise to several concerns. These concerns revolve mainly around a lack of attention to and resources for proper operation, stemming largely from the to-date infrequent application of the clauses.46 Regarding Article 1C(1)–(4), Fitzpatrick and Bonoan argue that decision-makers should focus on several areas: the voluntariness of the change in personal circumstances; the intent of an individual in seeking the change; and the existence of effective, lasting protection as a result of such a change.47 The arguments of the authors imply that increased usage and visibility of the clauses will lead to better practices in their operation.

By highlighting the current problems and possible responses, Fitzpatrick and Bonoan give both a clear understanding of cessation under the 1951 Convention and a foundation for consistent and possibly increased application of the clauses in the future. This is done, moreover, with a view towards a durable solution—repatriation. At the same time, by arguing for proper steps in applying the cessation clauses, Fitzpatrick and Bonoan insure that those individuals who have benefited from international protection will not have that protection removed in error. Vulnerability does not end with a granting of asylum and individuals who may potentially be returned to a frontier where they face persecution at as vulnerable as when they first arrived in a country of asylum.

The modern challenge for Fitzpatrick and Bonoan is resolving the proper and successful operation of the cessation clauses. To resolve they flesh out the framework with procedural measures currently lacking that yet mean a great deal to the application of the law of cessation. Modern

45. Joan Fitzpatrick & Rafael Bonoan, Cessation of Refugee Protection, in Refugee Protection in International Law, supra note 1, at 491.
46. See generally id. at 499–522.
47. Id. at 523.
interest in the cessation clauses is increasing and Fitzpatrick and Bonoan’s chapter anticipates this in its solutions.

H. Refugee Family Unity and Reunification

While cessation pertains to the end of a state’s role in protection for an individual and is clearly understood, complex questions of refugee law and international law arise when a state’s protection role extends beyond an individual to include her family. Refugee situations often dislocate families and family members on both sides of borders are vulnerable to human rights violations. Durable solutions to refugee crises begin with family unity, and Kate Jastram and Kathleen Newland’s argument for family reunification in a refugee context accounts for the vulnerabilities of refugee families.

Importantly, reuniting families makes protection more effective and strengthens asylum. The willingness of a state to grant entry to a refugee’s family, specifically, shows the commitment of a state to the value of protecting an individual—an individual’s rights as opposed to the interests of the state in migration control. There is no clear legal impetus for states to unify refugees and their families, however. The 1951 Convention does not mention family unity nor reunification and there are no current uniform instrumental approaches to family unity and reunification. Any existing foundation lies in other human rights conventions or in Executive Committee conclusions. Thus there is no existing framework to support and no previous legal approaches based on the 1951 Convention itself.

Jastram and Newland, however, argue that family unity and reunification are consistent with the object and purpose of the 1951 Convention. Yet they present a quandary: how far should states recognize the value of the family in refugee protection? Does such a value outweigh state interests in migration control? The implicit answer in this

48. Id. at 555.
49. Kate Jastram & Kathleen Newland, Family Unity and Refugee Protection, in Refugee Protection in International Law, supra note 1, at 562–565.
51. Id. at 558, 593–97.
52. The explicit basis of the right to family life for refugees is not found in the 1951 Convention itself but in the non-binding Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.
53. The 1949 Fourth Geneva Convention, the 1977 Additional Protocol II to the Geneva Conventions and the Convention on the Rights of the Child are the key documents that provide for family reunification in international law, but make no specific mention of refugee situations. Jastram & Newland, supra note 49, at 576–77. Executive Committee Conclusion No. 85 is the most pertinent ExCom Conclusion on family unity cited by Jastram and Newland beyond the early Recommendation B. Id. at 571 n.47.
54. Id. at 570.
chapter is affirmative. Yet where does legal justification exist to maximize the value of such a recognition? It remains to be seen whether the 1951 Convention as drafted provides adequately provides for family unity and reunification. Is the 1951 Convention, even in combination with other instruments, the best tool available to maximize the value of families in refugee protection?55

I. Supervision of the 1951 Convention

The future of UNHCR supervision of 1951 Convention implementation as provided for by Article 35 of the Convention is the final chapter in Refugee Protection in International Law. Walter Kälin argues that UNHCR’s hybrid role of state party supervision and field protection in partnership with states parties is no longer tenable.56 Kälin proposes a monitoring Sub-Committee that would report to the Executive Committee on Convention implementation worldwide.57

Kalin helps the reader reach a clearer understanding of UNHCR’s role under Article 35 and also why many current problems raised in the other legal opinions remain potentially unresolved. For Kälin’s proposal to be implemented and then successfully to resolve problems in the status quo would require a significant directional shift in refugee protection. His chapter is notable as well, however, for the contradictions suggested in the current system of UNHCR supervision.

For Kalin, the current system of Convention supervision prevents the goals of the Global Consultations from being realized, at least in part. A monitoring and supervising body could facilitate a clearer understanding of international refugee law and the protection dilemmas that arise in implementation. Such a body could allow for shared information and best practices and eventual consistent implementation of the law. A lack of uniformity and supervision undermines to a large extent durable solutions to refugee problems and respect for vulnerable displaced people.58 The refugee community expects states to embrace modern challenges, to shore up protection principles and to explore new approaches without any uniform, independent guidance. Perhaps most importantly, there is at

55. "A perspective broader than that of the 1951 Convention is essential to understanding the scope and content of the right to family unity for refugees." Id. at 569.
56. Kälin, supra note 18, at 628–34. Put simply, UNHCR cannot publicly push states parties on issues of deficient 1951 Convention implementation as a monitor and at the same time maintain close working relationships to provide protection in the field as a partner of states parties.
57. See generally id. at 657–59.
58. Id. at 633–634.
present no external uniform international pressure brought to bear in decisions of states parties on these issues.  

By highlighting these roadblocks to achievement of the Global Consultations goals, Walter Kälin furthers those same goals. The pace at which such a change should take place, however, is a variable in his chapter, and a variable in all the chapters, albeit largely unspoken. How urgent are the collective authors’ calls for change? Does the political will for implementation exist?

III. CONCLUSION: GLOBAL CONSULTATIONS, REFUGEE PROTECTION IN INTERNATIONAL LAW AND INTERNATIONAL REFUGEE LAW

The goals of the second track of the Global Consultations as stated by Erika Feller, Director of International Protection, were:

- To reach a clearer understanding and a more consistent implementation of international refugee law;
- To realize durable protection solutions for refugees;
- To maintain respect for the world’s most vulnerable people, those most likely displaced in any refugee situation;
- To strengthen the asylum system and make protection more effective;
- To rise to the challenges facing modern international refugee law;
- To shore up the framework of international protection principles;
- To explore the scope of enhancing protection through new approaches;
- To share best practices between states;
- To work toward sharing burdens more equitably;
- To work toward the implementation of framework principles clarified to a modern meaning;
- To achieve all of this within the same original document: the 1951 Convention.

59. *Id.*
60. *Id.* at 660–61.
Since the drafting of the 1951 Convention, uncertainty of law has arisen in many areas. At the turn of the century this uncertainty is mainly in the following areas:

- The continued validity of the principle of refoulement under the 1951 Convention and in customary international law;
- Detention and penalties for asylum seekers;
- The meaning of "membership in a particular social group";
- Gender-related persecution;
- The internal alternative to international refugee protection;
- Exclusion from refugee status;
- Cessation of refugee status;
- Family unity and reunification in refugee protection;
- Supervision of the 1951 Convention.

The continued validity of the 1951 Convention framework of refugee protection logically depends on the realization of the goals of the Global Consultations. The future of refugee protection depends on solutions to the areas of uncertainty outlined above. Thus, it can be argued that the future of refugee protection under the 1951 Convention depends at least somewhat upon realizing the Global Consultation goals through resolution of the problems addressed by the authors in *Refugee Protection in International Law*. Do efforts to address the specific protection issues address the more general concerns embodied in the goals?

Individually, the legal opinions address the uncertainties in refugee protection and this review shows the threads of the Global Consultations goals running through each opinion. This may seem an anachronistic analysis for nowhere in the legal opinions are the goals of the Global Consultations mentioned or referenced. It is no coincidence, however, that the goals correspond with the analysis of each author, for the goals of the Global Consultations are not new concepts but answers to problems shared by many in the refugee protection community.

Yet the Global Consultations process itself is a new concept with a specific mandate from states parties. The discussion of areas of uncertainty within the framework of the Global Consultations must acknowledge this framework and seize the opportunity to link specific refugee protection issues with broader goals of the system of refugee protection. Thus, I respectfully present two simple criticisms of the book as a whole: first, more effort could have been taken to identify the goals of the Global Consultations both as goals of a process and for the future
of refugee protection; and second, more effort should have been taken to identify the achievement of the goals of the Global Consultations within the analysis of each area of uncertainty. *Refugee Protection in International Law* is a persuasive, impressive and authoritative book. It could be all the more so if it had been explicitly situated, in its parts and as a whole, as seizing and succeeding in a great opportunity to lay the foundation for the future of refugee protection.

*Refugee Protection in International Law* is a unique work and a significant achievement both in academic scholarship and in refugee protection. The depth of knowledge brought together is both daunting and inspiring, for here are starting points for legal solutions to many of the uncertainties that have perplexed practitioners, decision-makers, policy-makers and academics alike for some time. Both emotions on the part of the reader speak to the authority of the book and the effort of its contributors and editors. *Refugee Protection in International Law* addresses the uncertainties for future refugee protection with a view to the goals of the Global Consultations, in turn furthering those goals themselves. It lays a foundation for academic work that will flesh out ideas necessary to the continued realization of these goals. Finally, the book argues strongly that the 1951 Convention is the proper document for future refugee protection.

*Refugee Protection in International Law* is a fitting tribute to the continuing value of the 1951 Convention on its fiftieth anniversary.