

2001

Why Supervise the Refugee Convention?

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Recommended Citation

Hathaway, James C. "Why Supervise the Refugee Convention?" Talk Back: Newsl. of Int'l Council of Voluntary Agencies (ICVA) 3, no. 5 (2001): 12-3.

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ISSUE OF THE MONTH: THE 1951 CONVENTION: A NEW SUPERVISORY MECHANISM

WHY SUPERVISE THE CONVENTION?

*James C. Hathaway**

Editor's Note: This Issue of the Month on a new supervisory mechanism for the 1951 Convention brings together five contributions on various aspects to be taken into consideration for such a mechanism. The first examines why supervision of the Refugee Convention is necessary. The second summarises possible options for supervising the Convention. The third raises questions of accountability, with the fourth taking that argument further. The final piece provides a suggested mechanism that could readily be implemented by UNHCR to improve supervision of the Convention. It is hoped that many of these views will feed into the 11 December pre-Ministerial meeting, as well as the Ministerial meeting commemorating the 50th anniversary of the Convention on 12 and 13 December 2001, in Geneva, Switzerland.

The Refugee Convention is the only major human rights treaty that is not externally supervised. Under all of the other key UN human rights accords — on the rights of women and children, against torture and racial discrimination, and to promote civil and political, as well as economic, social, and cultural rights — there is at least some effort made to ensure that States are held accountable for what they have signed onto.

All of these treaties require governments to file periodic reports setting out their cases for having complied with international law and to submit to a face-to-face review of their assertions. These reviews are conducted by independent experts, usually armed with strong NGO background information and sometimes assisted by direct NGO interventions. Beyond periodic reporting, UN human rights treaties may allow one State Party to file a formal complaint against another State Party for breach of the treaty (though no government has ever elected to do so); and some permit individuals whose rights have been breached and who have not been able to remedy their situation domestically to file complaints directly with a UN human rights supervisory body.

Under the Refugee Convention, in contrast, no external body has been set up to receive and comment on periodic reports, much less to adjudicate inter-State or individuated complaints. Instead, under Article 35 of the Convention, State

Parties agree to cooperate with UNHCR's efforts to ensure that the Refugee Convention is respected by, for example, reporting to UNHCR on legislative and practical steps taken to ensure refugee rights.

UNHCR protection officers in the field do provide confidential reports to headquarters staff, but States are not required to submit to public, or even collegial, scrutiny of their records. As a result, there is no forum within which to require governments to engage in the kind of dialogue of justification that is a standard feature of the other human rights systems. Nor has there been any effort by UNHCR, formally, to involve refugees or their advocates in the supervision of refugee rights. The tenor of Article 35 aside, supervision of refugee rights by UNHCR remains very much a matter of private representations to States.

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UNHCR's public supervisory role has instead focused on the issuance by its Executive Committee (EXCOM) of Conclusions on International Protection of Refugees. While not formally binding, the moral force of these consensus

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recommendations adopted by representatives of major governments has often influenced the conduct of States. The EXCOM has, however, become increasingly reluctant to grapple with critical contemporary protection issues, recently refusing even to affirm the legal significance of its own work. There is, therefore, some doubt about the continuing viability of even this minimally intrusive approach to the external supervision of refugee rights.

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To respond to this void, UNHCR commissioned a study of the possibility of enhanced supervision of refugee law, submitted last July by highly regarded expert Walter Kälin (available on UNHCR's website: www.unhcr.ch). Kälin rejects a periodic reporting system for the Refugee Convention on the grounds that such mechanisms impose too high a burden on States, are plagued by delays, and result in supervision of questionable quality. He also recommends against allowing individual complaints to an expert body, arguing that a disproportionate share of such complaints would originate in the developed world, and that the volume of applications would soon overwhelm any expert body.

Instead, Kälin opts for a three-part approach to supervision of the Refugee Convention. First, selective country-specific protection reviews of State Party compliance would be conducted by EXCOM-approved experts. They would review a government-prepared memo and (with consent) conduct an on-site visit and consultations in the country concerned, leading to a discussion within an EXCOM sub-committee and a public report. Second, an effort should be made to gain support for the establishment of an international judicial body with power to issue advisory opinions on

refugee law at the request of States, domestic courts, or UNHCR. Third, the EXCOM would be asked to appoint expert rapporteurs to review specific concerns across States (whether parties to the Convention or not) — for example on the protection of refugee women and children or on access to asylum. The rapporteurs would report to EXCOM, hopefully generating public discussion and possible recommendations. (For more detail on Kälin's paper, see "Some Options for Supervising the 1951 Convention" in this issue of *Talk Back*.)

There is no doubt that both the decision to open a debate on a supervisory mechanism and the specifics of the Kälin proposal mark a significant advance on the status quo, but important questions remain to be addressed. The time is right for refugees and their advocates to consider, for example:

- Does the EXCOM-based structure proposed meet Kälin's own insistence that the mechanism be not only feasible, but also independent, objective, transparent, and open to the voices of all?
- Is there really no value in considering ways by which to revitalise periodic reporting and/or the use of individuated complaints to advance the protection of refugee rights?
- Can the same mechanism proposed meaningfully oversee not only respect for refugee rights, but also the (highly legalised) interpretation of the refugee definition?
- And perhaps most fundamentally, is it appropriate for the supervisory mechanism to be directed only to oversight of State actions, or should those of inter-governmental and non-governmental entities involved in refugee protection be scrutinised as well? ♦

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