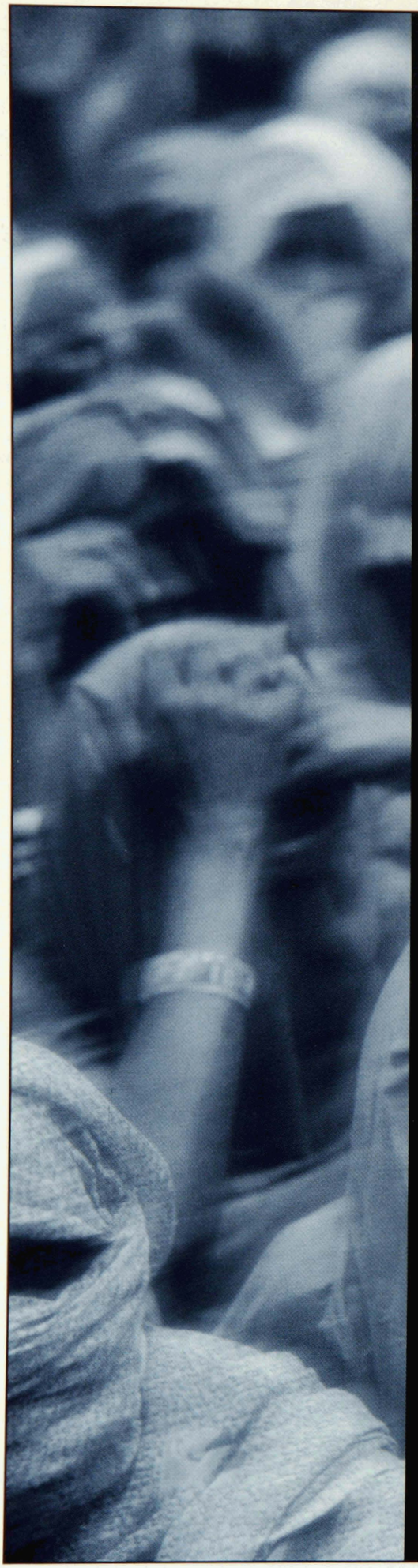
Law Quadrangle (formerly Law Quad Notes)

Volume 45 | Number 1 Article 9

Spring 2002

Who Should Watch Over Refugee Law

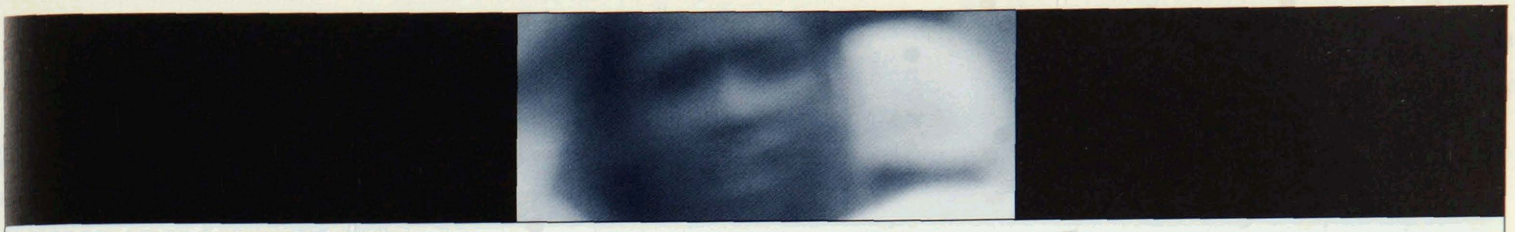
James C. Hathaway
University of Michigan Law School



Who should watch over refugee law?

By James C. Hathaway

The following essay is based on a talk delivered at the Global Consultation on International Protection convened by the International Council of Voluntary Agencies (ICVA) in Geneva on Dec. 11, 2001, on the occasion of celebrating the 50th anniversary of the Refugee Convention and the Ministerial Meeting of States Parties to the 1951 Refugee Convention and/or its 1967 Protocol, held Dec. 12-13, 2001. Under the author's supervision, students in the University of Michigan Law School's Program in Asylum Law produced research-based working papers to assist the ICVA and the UN High Commissioner for Refugees in discussing implementation of the Refugee Convention. (See related story on page 11.) A complete version of this talk is to appear in issue 13 of *Forced Migration Review* in May 2002. (See w.w.w.fmreview.org for back issues and subscription information; the journal is published in English, Spanish, and Arabic.) This excerpt appears with permission of *Forced Migration Review*.



The fact that states have now committed themselves ". . . to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or 1967 Protocol" is a wonderful thing. We should celebrate the fact that after a half-century, we may finally be on the verge of taking oversight of the treaty seriously.

I am concerned, however, that having watched this matter languish for half a century, activists may now feel the need immediately to build on this new commitment by endorsing some kind of a mechanism — even if only a minimally effective one — for overseeing the Refugee Convention. I worry that we may allow ourselves to be rushed into embracing a particular model for oversight of refugee rights in order to lock-in at least some progress on this issue, only to find that we have committed ourselves to an approach that, in the long run, really is inadequate. While there is of course the possibility that a minimalist project may provide the experience and confidence needed to move in a more ambitious direction in the future, there is also the possibility that states will take the view that, having established a minimalist mechanism, they have "dealt with the supervision question." Thus, they might argue, there is no need to revisit the issue, at least not any time soon.

We simply cannot afford to sell out the future of refugee protection in a hasty bid to establish something that looks, more or less, like an oversight mechanism for the Refugee Convention.

To be clear, this debate is not about how to stay on top of UNHCR [United Nations High Commissioner for Refugees] as an agency. UNHCR has a mandate that is much broader than supervising the Refugee Convention. In recent years, its work as a humanitarian relief agency has, in fact, come to overshadow its core protection functions. Its work on behalf of the internally displaced has in many instances eclipsed its primary duty to protect refugees. It has often taken on roles that put it into the realm of the political, notwithstanding its explicitly non-political mandate. While there can and should be initiatives more effectively to supervise UNCHR as an agency, these are matters which, to my mind, are logically entrusted to UNHCR's executive committee (EXCOM), or indeed to the ECOSOC [UN Economic and Social Council] itself. We should not allow the question of how best to oversee the Refugee Convention to be redirected toward difficult but distinct questions of supervising UNHCR's compliance with its broader statutory mandate, much less of how to monitor the various jobs it has taken on outside of its mandate.

On the other hand, it is equally wrong for UNHCR to attempt artificially to cut off debate on the appropriate range of potential mechanisms to oversee the Refugee Convention by reliance on its institutional authority under Article 35 of the Refugee Convention. As we all know, UNHCR has a special responsibility under Article 35 to "supervise *the implementation*" of the Refugee Convention. But this provision does not create a monopoly on treaty oversight in favor of UNHCR. To the contrary, the Convention, as an international pact, is the responsibility of the states that signed it. As the mechanisms for enforcement of the Convention itself make clear, it is states that have the fundamental right and duty to ensure that other states actually live up to their obligations under the Refugee Convention. There is nothing in Article 35 which precludes the states that are both the objects and the trustees of the refugee protection system from deciding to establish an arms-length mechanism to provide general guidance on, and oversight of, the Refugee Convention. Indeed, a move in this direction is precisely what I believe is required now.

In considering this task, a first question must surely be: Why is it that the Refugee Convention, virtually alone among major human rights treaties, still has no freestanding mechanism to promote interstate accountability?

In part, it is a question of history. The Refugee Convention was the second major human rights treaty adopted by the United Nations, having been preceded only by the Genocide Convention. It is noteworthy that the Genocide Convention, like the Refugee Convention, is not externally supervised. In part, then, the absence of an external supervisory mechanism for the Refugee Convention is simply a reflection of the historical reality that, in the late 1940s and early 1950s, the entire idea of interstate supervision of human rights was new, potentially threatening, and not truly accepted by states. Yet with the adoption of the human rights covenants and more specialized treaties beginning in the mid-1960s, the establishment of an independent mechanism for interstate oversight of the human rights treaties has become routine. Unless there is some good, principled reason why refugee law should be immune from this general commitment, it is high time to reverse the historical aberration by bringing the commitment to oversight of refugee law into line with the practice in human rights law more generally.

It might be suggested, however, that it was — and is — the existence of a United Nations High Commissioner for Refugees that distinguishes refugee law from every other UN human rights project. Only in refugee law is there an international organization assigned exclusively to supervise implementation of the treaty. At best, other UN human rights treaties can rely on the recently established, generic authority of a (grossly under-funded) UN High Commissioner for Human Rights. Because refugee law has its own institutional guardian in the person of the High Commissioner, it might be thought that any additional mechanism for oversight would be superfluous.

I believe that this would be a tragic error of judgement. UNHCR clearly makes some essential contributions to oversight of the Convention via its supervisory

authority codified in Article 35. In particular, the Department of International Protection (DIP) has real expertise in assisting governments to draft policy and legislation; in engaging directly and indirectly in defensive case interventions; and in organizing and conducting refugee law outreach and training. DIP's role is complemented by the critical function of UNHCR's Executive Committee, which symbolically reaffirms the commitment of states to refugee law, and provides democratic legitimacy to the agency's work. There is therefore no need for a mechanism of international oversight to take on any of these roles.

But there are also some things that are usually understood to be central to a meaningful project of international oversight that UNHCR does less well, and is perhaps not ideally positioned to take on. In practice, neither DIP nor EXCOM has done enough to provide systematic, non-crisis policy guidance on the substance of refugee law, carefully anchored in the real context of protection challenges. There has been a lack of leadership in the design of mechanisms to implement burden and responsibility sharing, so as to enable the imperatives of refugee law duties to be reconciled to the political and social realities of asylum states. There has not really been a genuinely inclusive range of voices, including those of refugees themselves, brought into the supervisory process. And not enough efforts have been made to empower local institutions to make enforcement of refugee rights meaningful in a way that no international institution can ever aspire to do. These are all examples of the kinds of work which, in most other contexts, are entrusted to an autonomous supervisory body.

Beyond the importance of setting reasonable expectations for the sorts of supervisory tasks that UNHCR should itself be expected to take on, there are two more fundamental reasons why vesting UNHCR with sole responsibility to oversee the Refugee Convention is not a credible proposition.

First, UNHCR has been fundamentally transformed during the 1990s from an agency whose job was, in large measure, to serve as trustee or guardian of refugee rights as implemented by states, to an agency that is now primarily focused on direct service delivery. Simply put, UNHCR is no longer at arms-length from the implementation of refugee protection. In most big refugee crises around the world today, UNHCR is — in law or in fact — the means by which refugee protection is delivered on the ground. UNHCR therefore faces a dilemma, in my view. Either it must return to concentrating on the implementation of its core supervisory responsibilities, and leave what has become the majority of its operational mandate to others; or it must concede that it cannot ethically supervise itself, and endorse the establishment of a genuinely arms-length body to ensure the oversight of the Refugee Convention.

Second, the difficulty with relying solely on UNHCR to oversee the Refugee Convention is that it encourages states to avoid the meaningful accountability between and among themselves that is at the root of the entire international human rights project. Because states presently take little if any direct responsibility for ensuring that their fellow states live up to international refugee law obligations, the dynamic of persuading, cajoling, and indeed shaming of partner states — so critical to the success of the international human rights project in general — is largely absent in refugee law. It is simply too easy to leave the task to UNHCR.

Yet, as we all know, UNHCR is not really positioned to apply meaningful forms of pressure on states. UNHCR is, after all, an entity with a tiny core budget, and which is effectively dependent on the annual voluntary contributions of a very small number of powerful states, virtually none of which has been predisposed to empower UNHCR to act autonomously to advance a strong regime of international refugee protection. Yes, these states have been generous in providing funds for refugee relief and for humanitarian assistance. But too often they have either avoided or, on occasion, evaded UNHCR's insistence on the importance of protection principles. Recent tragic events off the coast of Australia, and the legally indefensible domestic reaction to the attempt to bring international law to bear on Australia, are more than adequate testimony to this problem.

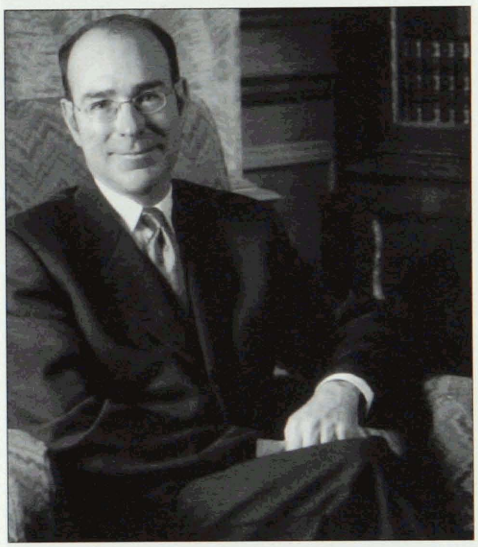
Moreover, because UNHCR is, and will remain, politically and fiscally constrained by design, it cannot reasonably be expected to provide the sort of strong voice in favor of unflinching attention to refugee protection that is now required. There may also be no good reason to compromise UNHCR's on-the-ground efforts to promote implementation of the Refugee Convention — which do frequently require compromise and even expediency in the interest of saving lives — by forcing that same organization to be the source of critique and broad guidance on acceptable international practice under the Refugee Convention. Nor may it be reasonable to expect UNHCR, as an interstate organization, to devise the sorts of complex political mechanisms — involving international burden and responsibility sharing — that are critical to the continued effectiveness of refugee law in the modern world.

In short, my point is that those of us concerned to advance refugee protection would be ill-advised to limit the scope of our thinking to models that are housed within, or functionally intertwined with, the work of UNHCR as an international organization. By the same token, UNHCR as an organization would be ill-advised to insist that any mechanism to reinforce oversight of the Refugee Convention be situated within its walls. To do so may simply constrain its operational effectiveness in protection and other fields, and reinforce the current sense of despair among many UNHCR staff brought on by expectations not matched by either political independence or fiscal autonomy.

In light of these realities, we should not rush from celebration of the critical commitment to enhanced oversight of the Refugee Convention secured at the meeting of state parties in December to embrace any particular model for oversight of the treaty. It is critical that we take the time to learn the lessons of treaty oversight in other parts of the UN system. In particular, the successes and failures of the six major United Nations treaty bodies provide a wealth of information, both for and against particular modes of oversight, which we ignore at our peril. At a time when the chairpersons of all of the UN human rights treaty bodies insist on regular coordination and mutual learning, it would be sadly ironic for those of us in the refugee protection community to rush forward to embrace any model not predicated on an intimate knowledge of the range of potential protection options.

In conclusion, we must not be intimidated by institutional insistence that oversight of the Refugee Convention be a function exclusively of the UNHCR. The High Commissioner's duty to supervise implementation of the Convention and the more general obligation of state parties to take collective responsibility to oversee their treaty obligations are, in fact, compatible — not mutually exclusive — responsibilities.

Because no precise model of oversight for the Refugee Convention will be adopted imminently, there is no need to rush to embrace any particular approach. Having waited 50 years, it is better to take the time to engage in a solid, broadly based initiative to build a mechanism of oversight that will withstand the test of time. We must commit ourselves to a process of learning the lessons of human rights history, and of thinking hard and creatively about the context-specific goals of overseeing refugee law. Only on the basis of such a process will we be able to put forward a model for serious, genuinely responsive oversight of the Refugee Convention.



James C. Hathaway *is professor of law and director of the Program in Refugee and Asylum Law at the University of Michigan Law School. He is also senior visiting research associate at Oxford University's Refugee Studies Programme.*

Professor Hathaway is a leading authority on international refugee law, whose work is regularly cited by the most senior courts of the common law world. He is the author of a leading treatise on the refugee definition, The Law of Refugee Status *(Butterworths, 1991) and, most recently, editor of* Reconceiving International Refugee Law *(Kluwer, 1997). He has also provided training on refugee law to academic, non-governmental, and official audiences in Europe, North America, Oceania, Asia, and Africa, and is a regular lecturer at both the International Secretariat of Amnesty International and the European Council on Refugees and Exiles.*

Immediately prior to joining the University of Michigan faculty in 1998, Hathaway was professor of law at the Osgoode Hall Law School of York University, in Toronto (1984-1998), where he served as associate dean and founding director of the Refugee Law Research Unit. He was previously a professor at the École de droit de l'Université de Moncton (1980-1983); consultant on Special Legal Assistance for the Disadvantaged to the Canadian Department of Justice (1983-1984); Fulbright Senior Visiting Scholar at the University of California at Berkeley (1991-1992); and held the Fromm Chair in International and Comparative Law at the University of California's Hastings College of the Law (1996-1997).

Professor Hathaway presently teaches International Law, International Refugee Law, Comparative Asylum Law, and an interdisciplinary research seminar on Emerging Responses to Forced Migration.