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## INTRODUCTION

The need for international action to protect and assist refugees has been recognised and undertaken by many States for nearly a century. The principal universal instrument which defines who is to be considered a refugee, and which sets minimum standards for the treatment of refugees, is the United Nations 1951 Convention and the 1967 Protocol relating to the Status of Refugees (henceforth referred to as the Convention).

Australia was one of the 26 states that helped draft the Convention in 1951. As the sixth State to become a signatory, Australia also enabled the Convention to come into force in 1954. There are now 140 States that are parties to the Convention.

## GLOBAL CONSULTATIONS

With the aim of revitalising the international protection regime, UNHCR organised a process of Global Consultations on International Protection with States, which were initiated in October 2000. The Global Consultations were held through three 'Tracks' to promote the full and effective implementation of the 1951 Convention, while simultaneously developing new approaches, tools and standards to strengthen protection in areas not adequately covered by the Convention regime.

The First Track reaffirmed the commitment of State Parties to full and effective implementation of the 1951 Convention and the 1967 Protocol and to promote further accessions to both instruments at a meeting of State Parties convened by UNHCR and the Government of Switzerland. The intervention made at the Ministerial Meeting of States Parties by the Australian Minister for Immigration, Multicultural and Indigenous Affairs, Philip Ruddock in December 2001, is reproduced at Appendix I. As a result of Track One, Australia endorsed a Declaration by Contracting States<sup>1</sup>—the first such Declaration in 50 years—which reaffirmed the enduring importance of the Convention as the primary global instrument for the protection of refugees.

The Second Track consultations, held over the period, May 2001 to November 2001, examined specific interpretative aspects of the Convention and the recommendations on protection of the refugee's family in the non-binding Final Act of the Conference on Protection of the Refugee's Family. The process comprised a series of Roundtables convened by UNHCR, involving experts drawn from governments of State Parties, academia, the judiciary, the legal profession and relevant non-governmental organisations. The Australian contribution is reproduced in this volume.

The Third Track consultations organised by UNHCR and held over the period March 2001 to March 2002, brought together ExCom members and observers in discussions designed to foster a common understanding of the protection challenges; enhance cooperation to address them; identify and promote practical responses to protection issues; and lead to the development of new approaches, tools and standards to strengthen protection in areas not adequately covered by the Convention. The Australian contribution will be reproduced in a later volume.

As a result of this process, an Agenda for Protection has been drafted by UNHCR for consideration by members of the ExCom in October 2002.

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<sup>1</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, adopted at the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 12–13 December 2001, HCR/MMSP/2001/09 (16 January 2002). See Appendix Two.

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## THE TRACK TWO PROCESS – ROUNDTABLE DISCUSSIONS

The Roundtable series of discussions allowed for a thorough stocktaking of developments and trends in judicial interpretation, in order to inform and enhance the understanding of decision makers. UNHCR identified a number of issues for consideration and commissioned background papers from academic commentators.

The papers contained in this volume outline Australia's contribution to the Track Two process. The papers are self-contained, but incorporate appropriate cross-references where some of the topics are closely related. All are available on <http://www.immi.gov.au>

The first Roundtable focused on the conditions under which a person ceases to be a refugee (Article 1C),<sup>2</sup> and the circumstances under which a person may be excluded from refugee status (Article 1F).<sup>3</sup>

The second Roundtable focused on the principle of non-refoulement (Article 33)<sup>4</sup> and supervisory responsibility of the United Nations in implementing the Refugees Convention (Article 35).<sup>5</sup>

The third Roundtable considered the topics of membership of a particular social group<sup>6</sup>, gender-based persecution<sup>7</sup> and the internal flight alternative.<sup>8</sup>

The fourth Roundtable considered the topics of illegal entry (Article 31)<sup>9</sup> and family unity, drawing on a recommendation of the Final Act of the Conference on Protection of the Refugee's Family.<sup>10</sup>

## INTERPRETATION OF THE REFUGEES CONVENTION

Interpretation of the Refugees Convention is governed by clear principles of international law. Article 31 of the Vienna Convention on the Law of Treaties [the Vienna Convention] sets out the general rule of interpretation of treaty provisions. Art 31 states:

- 1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose
- 2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- 3) There shall be taken into account, together with the context:
  - a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

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<sup>2</sup> Background papers were prepared by Joan Fitzpatrick, Jeffrey and Susan Brotman Professor (2001) and Rafael Bonoan (2001).

<sup>3</sup> A background paper was prepared by Geoff Gilbert (2001).

<sup>4</sup> A background paper was prepared by Sir Elihu Lauterpacht and Daniel Bethlehem (2001).

<sup>5</sup> A background paper was prepared by Walter Kälin (2001). Note that Australia's contribution will be published at a later date.

<sup>6</sup> A background paper was prepared by T. Alexander Aleinikoff (2001).

<sup>7</sup> A background paper was prepared by Rodger Haines QC (2001).

<sup>8</sup> A background paper was prepared by James C. Hathaway and Michelle Foster (2001).

<sup>9</sup> A background paper was prepared by Guy S. Goodwin-Gill (2001b).

<sup>10</sup> A background paper was prepared by Kate Jastram and Kathleen Newland (2001).

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- c) Any relevant rules of international law applicable in the relations between the parties.
- 4) A special meaning shall be given to a term if it is established that the parties so intended.<sup>11</sup>

The written text of the Refugees Convention must be the starting point for its interpretation, informed where necessary with consideration of the object and purposes of the treaty.<sup>12</sup>

The Refugees Convention intentionally addresses only the protection needs of those who fear persecution for a narrow range of grounds and does not impose broad obligations on States not to *refoule* those in general humanitarian need<sup>13</sup>, whether the result of war, natural disasters or economic deprivation.<sup>14</sup>

Developments in States' practices will not be significant in the terms of Art 31 (3)(b) of the Vienna Convention in the absence of "at least a tacit or implicit agreement of the parties regarding its interpretation"<sup>15</sup>.

It is widely recognised that the lack of precision in the text of the Convention provides ample scope for differing interpretations, particularly given the imprecise and sometimes conflicting information on the object and purpose of the Refugees Convention.

There is no prescribed means by which States must give effect to or fulfil human rights obligations. In implementing their treaty obligations, State Parties enjoy a 'margin of appreciation'. This margin allows States to determine with some flexibility the best means by which to implement their international obligations given their particular circumstances.

Comity between states requires that respect be given to these differences, which in turn can allow for inconsistencies in international interpretations of the Convention.

## AUSTRALIAN PERSPECTIVES

Australia is firmly committed to meeting its obligations under the Refugees Convention and contributing to the international protection system. However, the Australian Government is concerned that community support for refugees and Australia's capacity to participate in international burden sharing may be undermined by an expanded interpretation of the Convention and the extent of abuse by non-bona fide asylum-seekers of its provisions.

An understanding of the intentions of States as to the object and purpose of the Refugees Convention can be gleaned from a close examination of the *travaux préparatoires* and commentaries on the drafting process. The following papers draw heavily from such sources to show that most of the challenges facing States today were clearly envisaged by the founders of

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<sup>11</sup> Cited in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 at 349–50

<sup>12</sup> Dawson J noted that 'Under that rule, the starting point must be the text of the treaty... Article 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear' (*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 at 340). See also Zekia J in *Golder v United Kingdom* (1975) 1 EHRR 524 at 544 describing textual analysis as 'the primary source of ...interpretation' and Murphy J in *Commonwealth v Tasmania* (1983) 158 CLR 1 at 177 'The [UNESCO] Convention [for the Protection of the World Cultural and National Heritage] should be interpreted giving primacy to the ordinary meaning of its terms in their context and in the light of its object and purpose'.

<sup>13</sup> Hathaway (1990 at 148–50) notes that 'only persons who feared "persecution" in the sense of being denied basic civil and political rights would fall within the international mandate... In sum, the first main feature of modern international refugee law is its rejection of comprehensive humanitarian or human rights based assistance in favour of a more narrowly conceived focus'. See also Gummow J in *MIMA v Haji Ibrahim* 175 ALR 585 at 623, where he states 'The Convention was not designed to confer any general right of asylum upon classes or groups of persons suffering hardship and was deliberately confined in its scope'.

<sup>14</sup> Gummow J in *MIMA v Haji Ibrahim* (2000) 175 ALR 585 at 621

<sup>15</sup> Gummow J in *MIMA v Haji Ibrahim* (2000) 175 ALR 585 at 622

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the Convention. The Articles of the Convention were carefully crafted to acknowledge State sovereignty over who can enter and stay in their territory and under what conditions.

In the Australian Government's view, the original intentions of the Convention's drafters should be given primacy in a contemporary examination of interpretation and application of the Refugees Convention, leaving it up to States to determine to what extent and in what manner they choose to augment the Convention's provisions.

The following papers incorporate a rigorous analysis of key Articles of the Convention and the recommendations concerning family unity and examine Australian legislation, policy and practice in that context.