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Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees

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I. INTRODUCTION

There are, as most of us know, many problems with the Refugee Convention.[1] This chapter will not discuss all of them. Nor, indeed, will it solve any of them. Rather, its purpose is to suggest one way of addressing a critical problem. The problem is that while the Convention is a universal humanitarian treaty, designed to offer universal protection, the *interpretation* of the treaty differs from country to country, and even within countries. The result is that a refugee in Canada may not be a refugee in the United States, and vice versa. Seeking asylum, in the words of the European Council on Refugees and Exiles, becomes a 'dangerous lottery'.[2]

* We gratefully acknowledge in particular the invaluable assistance of Elizabeth Lacey, a previous Associate at the Federal Court of Australia; Bianca Hill, a former Research Associate at the Federal Court of Australia; and Jessica Howard, Lecturer, University of Melbourne. We extend our appreciation for the helpful comments of Professor James Hathaway, Professor Philip Alston, Professor Hilary Charlesworth and the referees. All errors and omissions remain our own.

[1] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (together 'Convention or Refugee Convention').

[2] European Council on Refugees and Exiles, 'Europe Must End Asylum Lottery: Refugee NGOs' PR6/11/2004/EXT/RW (Press Release, 4 November 2004) <http://www.ecre.org/press/asylumlot.pdf> (accessed 10 June 2007).

In this chapter, we propose a practical way of addressing this issue. We acknowledge that our proposal will not solve the problem of conflicting interpretations. In the present climate, the obvious solution—an international court with the power to bind States parties—is not a practical one. Rather, we hope to create an international forum in which different interpretations can be discussed, and from which may be built an international consensus on the interpretation of the Convention.

The proposal is simple. We suggest that the United Nations High Commissioner for Refugees ('UNHCR') establish an independent international judicial commission, comprised of a small number of eminent jurists and experts in refugee law. The function of the commission would be to provide carefully reasoned opinions on major questions relating to construction of the Convention. These opinions would be neither binding nor enforceable. Rather, their authority would be derived from their institutional mandate and their intellectual and practical quality.

In essence, this proposal continues and expands the second track of the Global Consultations process convened by UNHCR in 2001–02,[3] in which experts discussed difficult issues regarding the interpretation of the Convention and from which, subsequently, UNHCR produced legal guidance in the form of Guidelines on International Protection.[4]

Such a commission would provide useful international 'soft law', alongside the UNHCR Handbook, UNHCR Executive Committee Conclusions and the Guidelines on International Protection. It would, however, have significant advantages over these other sources of soft law. As a

[3] The Global Consultations on International Protection were an initiative of UNHCR which aimed to 'rise to modern challenges confronting refugee protection, to shore up support for the international framework of protection principles, and to explore the scope for enhancing protection through new approaches': E Feller, 'Preface' in E Feller, V Türk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2003) xvii. They consisted of three 'tracks', the second of which consisted of expert roundtables held during 2001.

[4] For a summary, see V Türk, 'Introductory Note to UNHCR Guidelines on International Protection' (2003) 15 *International Journal of Refugee Law* 303. UNHCR has issued the following Guidelines, available at <http://www.unhcr.org>: 'Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention/or Its 1967 Protocol relating to the Status of Refugees' UN Doc HCR/GIP/02/01 (7 May 2002); '"Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention/or Its 1967 Protocol relating to the Status of Refugees' UN Doc HCR/GIP/02/02 (7 May 2002); '"Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' UN Doc HCR/GIP/03/04 (23 July 2003); 'Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' UN Doc HCR/GIP/03/03 (10 February 2003); 'Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' UN Doc HCR/GIP/03/05 (4 September 2003); and 'Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees' UN Doc HCR/GIP/04/06 (28 April 2004).

permanent body, it would be able to address on-going issues of interpretation in a detailed way, based on an extensive knowledge of the principles and practice of refugee law. Our hope is that these opinions will begin to shape the direction of domestic interpretations, and thus move us towards the convergence of interpretations of the Convention.

The aims of this chapter are to make a case for further convergence in interpretation of the Convention and to attempt to formulate a method to promote such convergence. We hope to provoke and stimulate both debate and action. As such, the chapter focuses on the practical aspects of the proposal, instead of attempting a scholarly disquisition on the niceties of treaty interpretation or international judiciaries. It is also, we emphasise, a *proposal*; namely, it is open to improvements, criticisms and changes.

The chapter begins with an exploration of why, in our view, further convergence in the interpretation of the Convention is desirable, although it is not the purpose of this chapter to discuss this at length. We then examine the prospects for further convergence through existing efforts and mechanisms, concluding that the prospects are inherently limited. In the third section, we explain the principles underlying our proposal, with reference to the experience of existing international judicial bodies. Finally, we set out the details of the proposal.

II. THE NEED FOR CONVERGENCE IN INTERPRETATION

In this section of the chapter, we establish why, in our view, there is an unacceptable degree of diversity in the interpretation of the Convention.

A. Like Cases Treated Alike

It is an elementary principle of fairness that like cases ought to be treated alike in the application of laws. It is elementary common sense that a refugee, recognised as such pursuant to the definition in Article 1A of the Convention, should also be recognised as a refugee in another country using the same definition. As will be discussed later, this is far from the position today. As a consequence, the application of the Convention is unfair. It is unfair to refugees, who may be treated differently depending on which country they happen to end up in. It is also unfair to States that adopt more generous interpretations. This unfairness is most obvious in the case of refugee recognition, but it also extends to interpretation of other aspects of the Convention. For example, the loss of refugee status or the exclusion of refugees under the Convention should not depend upon quirks of national interpretation. It goes without saying that unfairness in these matters has very real ramifications for refugees and for States.

Of course, the principle that like cases be treated alike does not compel uniformity of interpretation. Interpretation, we recognise, is a dynamic process, in which diversity of opinion is a necessary and healthy element. It is important, however, that in interpreting an international treaty designed to offer universal protection we do not lose sight of this fundamental, and easily overlooked, principle of justice.

In the case of international refugee law, the present degree of diversity undermines this principle of justice. While diversity exists in domestic legal systems, the balance is held in check by forces such as the notion of precedent in common law systems. The pressures in favour of convergence are much looser in international law, where treaty interpretation is left up to States parties and any adjudicatory mechanism they decide to adopt, subject to the accepted principles of treaty interpretation. As the UN Human Rights Committee has noted in relation to reservations, these principles do not operate adequately in relation to human rights treaties, because in those treaties State interests are rarely at stake.[5] Indeed, the Human Rights Committee has felt it necessary to perform the role of treaty interpretation in relation to reservations itself, vividly illustrating the need for greater consistency in treaty interpretation.

The purpose of the proposed commission is to correct the balance between uniformity and diversity in interpretation in respect of the Convention. It would encourage convergence of interpretation by exposing differences in interpretation of the Convention, and expounding and explaining the preferable construction.

We recognise that convergence of interpretation in itself will not remedy other aspects of unfairness, such as different procedures for refugee determination, which also have important effects on the fairness of the regime. However, while the convergence of interpretation will not solve all the world's ills, it will be a concrete and achievable step towards improving the fairness of the current refugee regime.

B. The Special Position of Refugee Law

It may be argued that the rules of treaty interpretation, which confer the right of interpretation upon States parties, do not place much emphasis on the principle that like cases be treated alike. However, there are at least four good reasons why international refugee law requires a different approach.

[5] Human Rights Committee, 'General Comment No 24: Issues relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant' UN Doc CCPR/C/21/Rev.1/Add.6 (4 November 1994).

First, while the obligations under the Convention are owed by States to each other, they are owed *in relation to* refugees, who are the substantive beneficiaries of the Convention.[6] While there may be some position of equality in the case of States parties, which all have the right to interpret the treaty, clearly this is not true in the case of refugees themselves.

Secondly, the Convention is designed to be a universal humanitarian instrument, offering a regime of international protection to the most vulnerable. In this respect, the aims and context of the treaty are fundamentally undermined if there are substantial differences between the views taken by States parties of their obligations. Obviously, the rights of the refugee are impaired. Further, other States parties may be forced to shoulder a heavier burden. A stark illustration of this may be seen in the case of *R v Secretary of State for the Home Department, ex parte Adan*,[7] in which three asylum seekers who claimed persecution by non-State actors transited through Germany and France before arriving in the United Kingdom. At that time, unlike the United Kingdom, Germany and France did not recognise persecution by non-State actors as a Convention basis for refugee status. It was held that the UK Secretary of State was unable to authorise the asylum seekers' return to either Germany or France because they were not 'safe third countries', resulting in the United Kingdom having greater obligations than other States parties.

The same case also illustrates the third point, namely that international refugee law includes a framework in which refugees are 'shared around' through the mechanisms of settlement and regional agreements. This international framework of refugee burden-sharing is impeded by the fact that a refugee in one country may not be considered a refugee in another country. Divergences in interpretation do not always favour the interests of States. The recent European Union Directive on the qualification for refugee status[8] indicates that States may, in the context of regional burden-sharing and forum-shopping agreements, have a greater interest in harmonisation than in divergence.

Finally, while in some cases diversity in interpretation has roots in the recognition of legitimate differences, this is not true of interpretation of the Convention. Federalism and the doctrine of the 'margin of

[6] But see the views of the majority of the High Court of Australia in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, (2005) 213 ALR 668, para 27, and contrast the position of Kirby J at para 68.

[7] *R v Secretary of State for the Home Department, ex parte Adan* [1999] EWCA Civ 1948, [1999] 4 All ER 774; affirmed [2001] 2 AC 477 (HL).

[8] Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

appreciation' in the European Union, for example, permit variations between States and on the basis of different values and systems that ought to be given due recognition. Such values may well justify differences in the procedures for refugee determination, but they do not sustain the more general differences in interpretation of the Convention, which rarely, if ever, arise out of such due deference.

C. The Present State of Divergence in the Interpretation of the Convention

The next logical step is to demonstrate that the present balance between consistency and diversity in interpretation is inappropriate. To many, this may be self-evident. As has been said, 'the interpretation of the criteria for granting refugee status and asylum displays almost as many variations as there are countries'.[9]

This section of the chapter sketches some of the areas of debate to demonstrate that the difficulties—and their impact—are substantial.

One indication of the extent of the difficulties is the existence of debate about the broad interpretative approach taken to the Convention. Judges of the High Court of Australia, for example, have disagreed whether the interpretation of the Convention should be confined by its original historical meaning, or whether an evolutionary approach should be taken.[10]

The most notable controversies, however, concern the definition of 'refugee', enshrined in Article 1A(2) of the Convention, which states that a 'refugee' is a person who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Perhaps the most controversial element of this definition is the category of 'membership of a particular social group', which is the subject of one

[9] E Arboleda and I Hoy, 'The Convention Refugee Definition in the West: Disharmony of Interpretation and Application' (1993) 5 *International Journal of Refugee Law* 66 at 76, quoting Report of the Lawyers Committee for Human Rights, *The UNHCR at 40: Refugee Protection at the Crossroads* (February 1991).

[10] *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 204 CLR 1 (HCA) 46–57 (Gummow J) and 70–71 (Kirby J). See generally E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion', in Feller, Türk and Nicholson (n 3 above) 104–06.

set of UNHCR Guidelines.[11] Does the particular group have to exist outside of a social perception of a group?[12] Most common law jurisdictions require it to, except Australia,[13] and the United States has applied two different tests in different circuits.[14] In contrast, European civil law jurisdictions such as France, Germany and the Netherlands have avoided analysis of this ground.[15] The difference between approaches may result in differential recognition among, for example, women opposed to a prevalent practice of genital mutilation.[16]

Even where the case law is consistent, it is 'lost in a mosaic when these definitions are applied to certain categories of persons',[17] perhaps best illustrated by the controversy over China's 'one child policy'.[18] In Australia, these asylum seekers are not 'members of a particular social group',[19] although children born in contravention of that policy are members.[20] In the United States, the courts have rejected such claims made either on

[11] See, eg *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (HCA) 259. This area is usefully summarised in UNHCR's Guidelines on Membership of a Particular Social Group (n 4 above). See also P Dimopoulos, 'Membership of a Particular Social Group: An Appropriate Basis for Eligibility for Refugee Status' (2002) 7 *Deakin Law Review* 367.

[12] TA Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"' in Feller, Türk and Nicholson (n 3 above) 263.

[13] *Applicant A* (n 11 above).

[14] The line of authority in the Ninth Circuit differed from that adopted by the Board of Immigration Appeals ('BIA') and other circuits. The Ninth Circuit required a 'cohesive, homogeneous group': *Sanchez-Trujillo v INS* 801 F 2d 1571 (9th Cir 1986), while the BIA and other circuits required 'a group of persons all of whom share a common, immutable characteristic': *Matter of Acosta* 19 I & N Dec 211 (1 March 1985). In *Hernandez-Montiel v INS* 225 F 3d 1984 (9th Cir 2000) 1093 the Ninth Circuit seemed to combine the two standards, holding that a particular social group was 'one united by a voluntary association, including the former association, or by an innate characteristic that is so fundamental to the identities and consciences of its members that members either cannot or should not be required to change it'. See generally Aleinikoff (n 12 above) 275–80.

[15] See Aleinikoff (n 12 above) 280–85. This also appears true of Austria and Spain, while Belgium prefers the 'protected characteristics' approach and Denmark interprets the term very strictly: J-Y Carlier, D Vanheule, K Hullman and C Peña Galiano (eds), *Who is a Refugee?: A Comparative Case Law Study* (The Hague, Kluwer Law International, 1997) 49 (Austria), 100–01 (Belgium), 330 (Denmark), 368 (Spain). In H Crawley and T Lester, 'Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe' (UNHCR Evaluation Report, EPAU/2004/5, May 2004) para 379, it is said that only four of the surveyed countries had case law guidance on this definition (namely, France, Lithuania, the Netherlands and the United Kingdom).

[16] See Aleinikoff (n 12 above) 298.

[17] See Carlier and others (n 15 above) 713.

[18] *Applicant A* (n 11 above) 261–3.

[19] *Ibid*. Whether they could rely on the ground of political opinion has not been definitively settled: see *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559 (HCA).

[20] *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 (HCA).

the ground of 'political opinion' or on the ground of 'membership of a particular social group', but Congress has overturned that interpretation.[21] In Canada, the courts are divided on the issue.[22] Such claims have been accepted in the Netherlands,[23] but not in France.[24]

Changes in methods of persecution have resulted in divergent views on the Convention's application to cases of civil war[25] and to non-State agents of persecution,[26] while changes in perception, such as the more recent concern with gender-sensitive interpretations of the Convention, have also resulted in differences among countries,[27] even where gender guidelines have been issued.[28]

Recently, attention has shifted to the exclusion[29] and cessation[30] clauses (Articles 1F and 1C) of the Convention. Article 1F excludes the application

[21] P Mathew, 'Conformity or Persecution: China's One Child Policy and Refugee Status' (2000) 23 *University of New South Wales Law Journal* 103 at 114. The US definition was amended by the Illegal Immigration Reform and Immigrant Responsibility Act 1996, 8 USC § 1101(a)(42).

[22] Compare *Cheung v Canada* [1993] 2 FC 314, (1993) 102 DLR (4th) 214 with *Chan v Canada* [1993] 3 FC 675, 692–3.

[23] Aleinikoff (n 12 above) 284, citing Afdeling Bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State) RV 1996, 6 GV 18d-21 (7 November 1996).

[24] Aleinikoff (n 12 above) 281, citing *Zhang*, CRR, SR, Dec No 2228044 (8 June 1993); *Wu*, CRR, SR, Dec No 218361 (19 April 1994).

[25] See, eg *Ibrahim* (n 10 above) (a 4:3 decision) esp 63–6 (Kirby J, dissenting); cf *R v Secretary of State for the Home Department, ex parte Adan* [1998] UKHL 15, [1999] AC 293; cf *Salibian v Canada (Minister of Employment and Immigration)* [1990] 3 FC 250.

[26] See, eg Arboleda and Hoy (n 9 above) 86–7; *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477 (HL) esp 490–93 (on the position of the UK in contrast to other European countries); European Council on Refugees and Exiles, 'Non-State Agents and the Inability of the State to Protect: The German Interpretation' (London, September 2000) <http://www.ecre.org/research/nsagentsde.pdf> (accessed 10 May 2007).

[27] See, eg K Luopajärvi, 'Gender-Related Persecution as Basis for Refugee Status: Comparative Perspectives', Åbo Akademi University, Finland, Institute of Human Rights Research Report No 19 (2003); Crawley and Lester (n 15 above); A Macklin, 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998) 13 *Georgetown Immigration Law Journal* 25; R Haines, 'Gender-Related Persecution' in Feller, Türk and Nicholson (n 3 above).

[28] Macklin (n 27 above).

[29] See generally Lawyers Committee for Human Rights, 'Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective' (2000) 12 *International Journal of Refugee Law* 317 at 324–5; PJ van Krieken (ed), *Refugee Law in Context: The Exclusion Clause* (The Hague, TMC Asser Press, 1999); G Gilbert, 'Current Issues in the Application of the Exclusion Clauses' in Feller, Türk and Nicholson (n 3 above); J Handmaker, 'Seeking Justice, Guaranteeing Protection and Ensuring Due Process: Addressing the Tensions between Exclusion from Refugee Protection and the Principle of Universal Jurisdiction' (2003) 21 *Netherlands Quarterly of Human Rights* 677.

[30] See generally J Fitzpatrick and R Bonoan, 'Cessation of Refugee Protection' in Feller, Türk and Nicholson (n 3 above); D Milner, 'Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Refugee Convention' (2004) 16 *International Journal of Refugee Law* 91.

of the Convention in respect of those who have committed prohibited acts in certain categories, all three of those categories having no accepted definition.[31] All three are also subject to different procedures in terms of determining refugee status prior to applying the clause,[32] balancing the seriousness of the alleged crime against that of the feared persecution,[33] the level of evidence that constitutes 'serious reasons for considering',[34] and whether decision-makers can infer 'serious reasons' merely from the asylum seeker's membership of a particular organisation.[35]

Attention has also moved outside the text of the Convention to the practices of the 'safe third country',[36] the doctrine of 'effective protection',[37] and the 'internal flight' or 'internal protection' alternative.[38] As already noted, the 'safe third country' approach depends on a similarity

[31] See Gilbert (n 29 above) 434–57; W Kälin and J Künzli, 'Article 1F(b): Freedom Fighters, Terrorists, and the Notion of Serious Non-Political Crimes' (2000) 12 (Spec Issue) *International Journal of Refugee Law* 46.

[32] The UK says that the exclusion clauses should be applied after considering whether a person is a refugee; France increasingly agrees; Belgium's practice is inconsistent; while in the US and Canada there is normally no obligation to consider refugee status prior to applying the exclusion clauses: M Bliss, '"Serious Reasons for Considering": Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses' (2000) 12 *International Journal of Refugee Law* 92 at 106–8. The Netherlands has put in place a special procedure for exclusion that precludes an inquiry into whether a person is a refugee: Handmaker (n 29 above) 685–6.

[33] Generally European countries engage in a balancing exercise, but this is not the case in common law countries: see *T v Secretary of State for Home Department* [1996] AC 742 (UK); *INS v Aguirre-Aguirre* 526 US 415 (1999) (US); *Applicant NADB of 2001 v Minister for Immigration and Multicultural Affairs* (2002) 126 FCR 453 (Australia); *Malouf v Canada (Minister of Citizenship and Immigration)* [1995] 1 FC 537 (Canada).

[34] There is a conflict in Canada between 'lower … than the balance of probabilities': *Ramirez v Canada* [1992] 2 FC 306 at 311–13, and 'clear and convincing evidence': *Cardenas v Canada* (1994) 23 Imm LR (2d) 244; in the UK the evidence must 'point … strongly to his guilt': *T's case* (n 33 above); and in the US 'probable cause' is enough: *Ofosu v McElroy* 933 F Supp 237 (SDNY 1995). UNHCR itself has proposed a 'more likely than not' test in its own practice: Lawyers Committee for Human Rights (n 29 above) 329.

[35] Contrast, eg the US Immigration and Naturalization Act § 219(a), 8 USC § 1189(a)(l) with *T's case* (n 33 above). In the Netherlands, in practice the determination body predetermines whether the organisation, and by association, the applicant, has a 'cruel purpose': Handmaker (n 29 above) 687.

[36] See, eg G Bordelt, 'The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and Violation of International Human Rights Standards' (2002) 33 *Columbia Human Rights Law Review* 473.

[37] The doctrine was first developed in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543. This was strongly questioned, although followed, in *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 144, and the appeal was allowed by the High Court in *NAGV and NAGW* (n 6 above). The legislature has also intervened, amending the Migration Act 1958 (Cth) to include its own 'safe third country' exception: see s 36. See generally R Germov and F Motta, *Refugee Law in Australia* (Melbourne, Oxford University Press, 2003) 463–75.

[38] JC Hathaway and M Foster, 'Internal Protection/Relocation/Flight Alternative' in Feller, Türk and Nicholson (n 3 above).

of interpretation between countries. Under the recent 'safe third country' agreement between the United States and Canada,[39] for example, different treatment of gender-related claims could result in Canada breaching its obligations under the Convention, as defined by Canadian law.

While diversity in interpretation is mainly a result of legitimate differences in judicial interpretation, there is a trend for governments to provide legislative definitions of key terms of the Convention. Foreign policy and domestic xenophobia often inform these definitions. Such legislative definitions obviously limit the extent to which convergence is possible, although a commission could examine whether such definitions are in breach of international law. Nevertheless, the majority of these conflicting interpretations are within the province of refugee decision-makers and judges, and it is this interpretative community that the international judicial commission would address.

It is, of course, impossible to gauge the numbers likely to be affected by these divergences, although it is fair to infer from the divergences' range and depth that the numbers are not insignificant. Wide variations in acceptance rates by different countries seem to support this inference,[40] although of course—as with all statistics—the numbers can be deceptive.[41] In 2004, for example, Jordan recognised 90 per cent of Iraqis as refugees, Belgium recognised 66.3 per cent as refugees, and the United Kingdom recognised 0.1 per cent as refugees.[42] Indeed, the European Council on Refugees and Exiles declares that, even after five years of harmonisation, 'a person can have a 90% chance of being accepted as a refugee in one EU country, while her chances are virtually nil next door'.[43]

D. Redressing the Balance

The preceding review suggests that there are significant differences in the interpretation of the Convention. These differences are, in the main,

[39] Agreement between the Government of Canada and the Government of the United States of America for Co-operation in the Examination of Refugee Status Claims from Nationals of Third Countries (signed 5 December 2002, entered into force 29 December 2004).

[40] Arboleda and Hoy (n 9 above) 80–81.

[41] See, eg P Mares, 'The Generous Country? Asylum Seeking in Australia: Myths, Facts and Statistics', Lecture, Storey Hall RMIT, Melbourne (13 September 2001) <http://www.carad-wa.org/library/mares131101.htm> (accessed 20 April 2007).

[42] UNHCR, *2004 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers, Stateless and Other Persons of Concern to UNHCR* (Geneva, UNHCR, 17 June 2005) Table 8, available from UNHCR's website: <http://www.unhcr.org>.

[43] European Council on Refugees and Exiles (n 2 above).

unjustified, particularly as the Convention is designed as a universal instrument of humanitarian protection. That the degree of divergence appears to lead to dramatically different results of acceptance in neighbouring countries offends the normative goals of equality before the law, certainty and stability. It does so with, one can only imagine, tragic consequences. In the arena of refugee law, we need to tilt the balance between consistency and divergence in favour of greater consistency.

III. PROSPECTS FOR FURTHER CONVERGENCE

If further convergence is desirable, the next question is whether we can achieve such convergence through existing initiatives and mechanisms. In this section, we review these and conclude that, while they are of some significance, their potential is limited.

A. UNHCR

UNHCR has, of course, already made significant efforts in the area of interpretation. It publishes the leading soft law instrument, commonly known as the Handbook.[44] It has issued the previously-mentioned Guidelines on International Protection, as well as a variety of position papers.[45] Occasionally, UNHCR intervenes in and presents amicus curiæ briefs in significant cases.[46] Lastly, the Executive Committee sometimes gives interpretative guidance in its Conclusions.[47]

This work demonstrates the value of international soft law. These sources of guidance have substantially impacted upon the interpretation of the Convention, due to their institutional authority, their global nature and their wide dissemination. The Handbook is routinely referred to by decision-makers. It is considered by the Council of the European

[44] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* UN Doc HCR/IP/4/Eng/Rev.1, 2nd edn (Geneva 1992).

[45] These can be accessed from the UNHCR website: <http://www.unhcr.org>.

[46] UNHCR has been involved in eg *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1; *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 3 All ER 304; *El-Ali v Secretary of State for the Home Department* [2002] EWCA Civ 1103, [2003] 1 WLR 95; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 2002 SCC 1; *Islam v Secretary of State for the Home Department* [1999] 2 AC 629 (HL); and *Haitian Centers Council v McNary* 969 F 2d 1326 (2nd Cir 1992) vacated as moot, 113 S Ct 3028 (1993). UNHCR's documents for these can be found on its website: <http://www.unhcr.org>.

[47] See generally J Sztucki, 'The Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme' (1989) 3 *International Journal of Refugee Law* 285.

Union as 'a valuable aid'.[48] The House of Lords views it as having 'high persuasive authority',[49] while the Canadian Supreme Court views it as 'highly relevant authority',[50] and it provides 'significant guidance' to the US Supreme Court.[51]

Such enthusiasm has not always been universal, as comments by Lord Bridge of Harwich[52] and a former Australian Chief Justice evidence.[53] Indeed, one Australian judge recently suggested that 'a certain conservatism should attend' usage of the Handbook, because of a 'general lack of enthusiasm for using the Handbook' among judges (a comment that was, however, disapproved of on appeal).[54] It remains true, at least in Australian courts, that where there is a conflict of opinion, greater weight is generally accorded to decisions of other common law courts and learned commentators.[55]

It is perhaps too early to say whether the recent Guidelines on International Protection carry more authority,[56] although in a recent Australian case they were considered to be 'statements that should

[48] 'Joint Position of 4 March 1996 defined by the Council on the Basis of Article K.3 of the Treaty on European Union on the Harmonized Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees' [1996] OJ L63/2.

[49] *Adan* (n 26 above) 520.

[50] *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593, 620, 628. See also *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 713–14.

[51] *INS v Cardoza-Fonseca* 480 US 421 (1987) 439 fn 22.

[52] See, eg *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (HL) 524.

[53] *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA) 392.

[54] *Savvin v Minister for Immigration and Multicultural Affairs* (1999) 166 ALR 348 (FCA) 358 (Dowsett J); on appeal, *Minister for Immigration v Savvin* (2000) 98 FCR 168 (FCAFC) 192–3.

[55] See, eg *Applicant NADB* (n 33 above); *Minister for Immigration and Multicultural Affairs v WABQ* (2002) 121 FCR 251 (FCAFC) 275–8. In particular, the texts by JC Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991) and GS Goodwin-Gill and J McAdam, *The Refugee in International Law*, 3rd edn (Oxford, Oxford University Press, 2007) are often cited.

[56] As at July 2007, the Global Consultations and the resulting Guidelines on International Protection have had some impact on jurisprudence in common law jurisdictions. In Australia, the Global Consultations were cautiously cited in support in *QAAH v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 136, (2005) 145 FCR 363, 373–7 (Wilcox J), an approach adopted also in the Federal Magistrates Court in *VXAJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FMCA 234, para 15, and *MZWLH v Minister for Immigration* [2005] FMCA 1200, paras 16–18. They were also cited in support in dissenting judgments in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53, (2006) 231 ALR 340, paras 73–81 (Kirby J); *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 61, (2006) 231 ALR 556, para 79 (Kirby J); *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 60, (2006) 150 FCR 522, 563–4 (Allsop J); and *Minister for Immigration and Multicultural Affairs v Applicant S* (2002) 124 FCR 256, 269 (North J). In the US, the Guidelines have been cited four times as at July 2007. They were cited in support by the Court of Appeals in *Castillo-Arias v United States AG* 446 F 3d 1190 (11th Cir 2006); *Mohammed v Gonzales* 400 F 3d 785 (9th Cir 2005); *Zhang v Ashcroft* 388 F 3d 713 (9th Cir 2004); and *Castellano-Chacon v INS* 341 F 3d 533 (6th Cir 2003) 548–9, where the court noted that the

be taken into account' by decision-makers, as they were 'documents prepared by experts published to assist States … to carry out their obligations under the Convention'.[57] The Conclusions of the Executive Committee are in a slightly different position. In the United Kingdom they are regularly invoked,[58] but in Australia they are rarely used.[59]

Although there is potential to improve the acceptance of UNHCR instruments by decision-makers, there remain inherent limitations. These instruments are published as and when time and resources permit. The Handbook has not been updated for more than 10 years. This limits its usefulness as circumstances throw up new challenges for interpretation and as jurisprudence evolves.[60] Even if it were updated more regularly, the Handbook can never be comprehensive and, to retain its utility, it must remain concise and therefore, to some degree, abstract. The Conclusions of the Executive Committee are only adopted at yearly

definition of 'membership of a particular social group' might evolve along the path indicated by the Guidelines. In Canada, the Guidelines were cited in support in *Ventocilla v Canada (Minister of Citizenship and Immigration)* [2007] FC 575, para 14; *Avila v Canada (Minister of Citizenship and Immigration)* [2006] FC 359, para 24; *Joseph v Canada (Solicitor General)* [2006] FC 165, paras 17–18; *Nagamany v Canada (Minister of Citizenship and Immigration)* [2005] FC 1554, para 53; and *Rahaman v Canada (Minister of Citizenship and Immigration)* [2002] 3 FC 537, 561–3. The UK has been most receptive, with endorsements of the Guidelines by the House of Lords in *K v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412, paras 15, 52, 85, 98–103, 118–20; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, paras 20–21 (with some caution) and 67; and *R (on the Application of Hoxha) v Secretary of State for the Home Department* [2005] UKHL 19, [2005] 4 All ER 580, paras 31–5. They were also cited in support in *HH (Iraq) v Secretary of State for the Home Department* [2006] EWCA Civ 1374, para 42. They were discussed but not found to have a significant impact in *Hamid v Secretary of State for the Home Department* [2005] EWCA Civ 1219, paras 19–27. A Guideline was dismissed in *L v Secretary of State for the Home Department* [2004] EWCA Civ 1441, [2004] All ER (D) 43 (Nov).

[57] *QAAH* (n 56 above) para 46 (Wilcox J).

[58] See, eg *European Roma Rights Centre* (n 46 above); *A v Secretary of State for Home Department* [2004] UKHL 56, [2005] 2 AC 68; *R v Special Adjudicator, ex parte Hoxha* [2005] UKHL 19, [2005] 4 All ER 580. They were also cited in *Rahaman v Canada* (n 56 above) para 45.

[59] In the Federal Court of Australia, since 1995 (as at July 2007) they have only been cited in *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294, para 52, and *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119, 128, and noted in *Thiyagarajah* (n 37 above) 561, *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (unreported, Sackville J, 4 May 1995), and *Wu v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245, 295. They were referred to in passing in *Applicants M160/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 195, (2005) 219 ALR 140 paras 17–18. They were also cited in *QAAH* (n 56 above) para 118, *Re Woolley; ex parte Applicants M276/2003 by Their Next Friend GS* [2004] HCA 49, (2004) 210 ALR 369, para 107 fn 127, and *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, (2002) 210 CLR 1, para 127 fn 114.

[60] See, eg in Australia *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405, 413; in Canada *Xie v Canada* (*Minister of Citizenship and Immigration*) [2004] 2 FCR 372, para 25; and *Pushpanathan v Canada* (*Minister of Employment and Immigration*) [1996] 2 FC 49, para 22; reversed on appeal [1998] 1 SCR 982.

intervals, and although the Executive Committee's inter-governmental character may lend it greater legitimacy, it also inhibits a consensus on politically controversial questions.[61] These instruments, therefore, cannot provide the kind of on-going, context-specific jurisprudential reasoning that would be of particular use to the interpreters of the Convention.

B. European Union Common Asylum Policy

In the European Union, the much wider project of converging asylum and immigration policies[62] has included a Directive on minimum standards for the qualification of refugee status and other forms of international protection ('Qualification Directive'),[63] which deals with some significant areas of divergence in interpretation. As this will have a direct effect on the domestic law of the Member States,[64] it is a much more effective method of harmonisation. Given the size of the European Union, the Directive is bound to have a significant impact on the deliberations of the proposed commission.

Nevertheless, although the Qualification Directive will reduce divergence in interpretation, it suffers from the same inherent limitations as the UNHCR publications: it cannot hope to anticipate all future scenarios to provide future guidance, it is not comprehensive, and it speaks in general terms only.

Three other significant limitations arise. First, such a method cannot be exported outside of the European Union. Secondly, there is the potential for regional interpretations to undermine a universal regime. Thirdly, and perhaps most importantly, the method of achieving such convergence is by political negotiation and compromise, rather than by the proper construction of the Convention, using the accepted tools of legal reasoning. Unfortunately, this can lead to a lowering of protection, a charge made by

[61] 'The 44th Session of the UNHCR Executive Committee: A View from the Side' (1994) 6 *International Journal of Refugee Law* 63.

[62] The Tampere programme, which began in 1999, concluded in 2004: see 'Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations' COM(2004) 0401 final (2 June 2004) and its Annex I, 'List of the Most Important Instruments Adopted' SEC(2004) 680 (2 June 2004). The next phase, the Hague Programme, aims for a common European asylum system: see the Presidency Conclusions (4–5 November 2004). For a recent overview, see P Shah (ed), *The Challenge of Asylum to Legal Systems* (London, Cavendish, 2005); E Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' (2004) 29 *European Law Review* 198.

[63] See n 8 above.

[64] See generally S Douglas-Scott, *Constitutional Law of the European Union* (Harlow, Pearson Education, 2002) 288–91.

many observers. For example, a leading commentator ended a review of the harmonisation process on this bitter note:

> [W]hen one comes to examine the developing EU acquis in the field one has the impression that the Member States are seeking to draw up a whole new acquis unencumbered by their international commitments. Indeed, the Member States have insisted on the inclusion in EU measures of provisions which either have already been criticised by the supra-national courts … or by national courts … . They thereby give the impression that they wish to re-write the rules to get rid of inconvenient human rights issues. Some Member States appear to be seeking the right to crush protection seekers like soft drink cans which are no longer wanted.[65]

C. Other Efforts

Two further types of initiatives are worth mentioning. The first is other regional approaches, such as the work of the Council of Europe's Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons ('CAHAR').[66] CAHAR has issued several recommendations and resolutions directly relevant to the interpretation of the Convention.[67] Much less intensive (and not particularly useful) regional approaches exist in Africa, Latin America[68] and South Asia.[69] These suffer from the same limitations already mentioned, and also suffer from a lesser institutional authority.

The other category consists of efforts made by non-governmental organisations, academic experts and legal associations. These include

[65] Guild (n 62 above) 218; see also Shah (n 62 above).

[66] For a recent summary of the activities of the Council of Europe generally, see M Ochoa-Llidó, 'Recent and Future Activities of the Council of Europe in the Fields of Migration, Asylum and Refugees' (2004) 5 *European Journal of Migration and Law* 497.

[67] See, eg Committee of Ministers, Recommendation No R (2004) 9 on the Concept of 'Membership of a Particular Social Group' (MPSG) in the context of the 1951 Convention relating to the Status of Refugees (30 June 2004); Recommendation No 4 (97) 22 to Member States containing Guidelines on the Application of the Safe Third Country Concept; Recommendation No (98) 13 on the Right to an Effective Remedy by Rejected Asylum-Seekers against Decisions on Expulsion in the Context of Article 3 of the European Convention on Human Rights; Recommendation No R (99) 23 to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection. For a full list, see <http://www.coe.int/T/E/Legal%5FAffairs/Legal%5Fco%2Doperation/Foreigners%5Fand%5Fcitizens/Asylum%2C%5Frefugees%5Fand%5Fstateless%5Fpersons/Texts%5Fand%5Fdocuments/> (accessed 10 June 2007).

[68] See generally JH Fischel de Andrade, 'Regional Policy Approaches and Harmonization: A Latin American Perspective' (1998) 10 *International Journal of Refugee Law* 391; and the San José Declaration on Refugees and Displaced Persons, adopted by the International Colloquium in Commemoration of the 'Tenth Anniversary of the Cartagena Declaration on Refugees' (San José, 5–7 December 1994).

[69] See generally P Oberoi, 'Regional Initiatives on Refugee Protection in South Asia' (1999) 11 *International Journal of Refugee Law* 193.

position papers by the European Council on Refugees and Exiles,[70] guidelines published by the University of Michigan,[71] a project on the exclusion clauses funded by 'Human Rights First',[72] and workshops conducted by the International Association of Refugee Law Judges.[73] While these efforts are all valuable, and altruistically motivated, they lack institutional authority, are not always widely disseminated and, once again, are limited by their generality and abstraction from facts.

D. Existing Institutions with Competence

The interpretation of the Convention is already within the institutional competence of a number of bodies. The International Court of Justice ('ICJ') has direct institutional competence,[74] as does the Inter-American Court of Human Rights.[75] Refugee-related issues may be raised indirectly before the UN Human Rights Committee, the European Court of Human Rights, the European Court of Justice ('ECJ') (through the Qualification Directive) and the UN Committee against Torture.

Of these, the ICJ would be the preferred forum for resolving disputes about the interpretation of the Convention because of its truly international character, its institutional competence as the court of the United Nations and its judicial expertise. However, this jurisdiction of the ICJ has never been invoked, and the prospects of it being used are remote. States or even UNHCR[76] are unlikely to go to the trouble and expense of beginning long and complex proceedings over these issues of interpretation, particularly as it is of no tangible benefit to States. The adversarial procedure would be an extremely inefficient process of harmonisation, even if the docket of the court were not already 'full'.[77]

[70] European Council on Refugees and Exiles, 'Position on the Interpretation of Article 1 of the Refugee Convention' (September 2000) <http://www.ecre.org/policy/position_papers.shtml> (accessed 10 June 2007).

[71] JC Hathaway, 'The Michigan Guidelines on the Internal Protection Alternative' (1999) 21 *Michigan Journal of International Law* 131. There are also Guidelines on 'well-founded fear', and on 'nexus': <http://www.refugeecaselaw.org/fear.asp> (accessed 12 June 2007).

[72] Previously 'Lawyers Committee for Human Rights' (see n 29 above).

[73] See JC Hathaway, 'A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop' (2003) 15 *International Journal of Refugee Law* 418.

[74] Under Arts 36(2) and 65 of its Statute; see also Art 38 of the Refugee Convention.

[75] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art 64(1), which allows for interpretation of 'other treaties concerning the protection of human rights in the American states'.

[76] At present, UNHCR is not authorised to request an advisory opinion, but this could be permitted by a resolution of the UN General Assembly. Further, it could ask a State party to raise the matter, as suggested by W Kälin, 'Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and Beyond' in Feller, Türk and Nicholson (n 3 above) 653.

[77] At the time of writing, there were 12 cases pending: see <http://www.icj-cij.org/docket/index.php?p1=3&p2=1>.

For this reason, it seems unprofitable to pursue convergence by adjudication. These comments apply a fortiori to the other courts, which suffer the additional problem of providing only regional solutions and, with respect to the European courts, would involve interpreting the Convention indirectly through the lens of the Qualification Directive (in the case of the ECJ) or the European Convention on Human Rights (in the case of the European Court of Human Rights).[78] The European courts also suffer from large backlogs. Although these latter defects do not affect the Inter-American Court of Human Rights, disharmonies in interpretation are less pronounced in its Member States since UNHCR assesses most of the claims for asylum, and because of the broader regional refugee definition.[79]

The problems of indirect interpretation and large backlogs also attend the use of the Human Rights Committee and the Committee against Torture, which are increasingly being used for refugee issues in the absence of a specific supervisory mechanism for the Convention.[80] (Indeed, most cases before the Committee against Torture now involve asylum seekers.[81]) Additionally, the committees only meet part-time and their opinions have less normative force than the judgments of courts.

E. Conclusion

Current prospects for minimising divergent interpretations of the Convention using existing mechanisms are not, in our view, promising. There are significant limitations in using general guides, which are not timely or context-specific; political methods of harmonisation appear

[78] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ETS No 5.

[79] See Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85).

[80] See, eg J Fitzpatrick (ed), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (Ardsley, Transnational Publishers, 2002); O Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures' (1997) 9 *International Journal of Refugee Law* 392; S Takahasi II, 'Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention' (2002) 20 *Netherlands Quarterly of Human Rights* 53; and Amnesty International and the International Service for Human Rights, *The UN and Refugees' Human Rights: A Manual on How UN Human Rights Mechanisms Can Protect the Rights of Refugees* AI Index 30/02/97 (August 1997) <http://web.amnesty.org/library/pdf/IOR300021997ENGLISH/$File/IOR3000297.pdf> (accessed 15 June 2007).

[81] Of the 18 decisions made on the merits reported in the 2004 report of the Committee against Torture to the UN General Assembly, 15 concerned asylum seekers. The other three were cases brought by Tunisian nationals granted refugee status in Switzerland: *Report of the Committee against Torture*, UN General Assembly Official Records ('GAOR'), 59th session, Annex VII, UN Doc A/59/44 (2004).

undesirable in the present climate; and convergence by adjudication is not an efficient method of harmonisation.

However, this review does indicate that there is value in international soft law as a method of guidance. It also points to the following conclusions:

— The interpretation of the Convention should be global, not regional, in character.
— In order for such interpretation to be accepted by national decision-makers, it should be arrived at by accepted judicial techniques and have an authority derived from the expertise and integrity of the institution.
— Such interpretations should address practical factual circumstances rather than general and abstract questions.
— There should be an on-going interpretative body, to ensure continuity over time and relevance to the current needs of decision-makers.
— Such interpretations must be widely promoted and publicised to ensure that they come to the attention of decision-makers.

These conclusions have informed the design of the proposal, which is developed below.

IV. THE PRINCIPLES OF THE PROPOSAL

A. The Purpose of the Commission

The ultimate aim of this proposal is to promote greater consistency in the interpretation of the Convention, for the reasons outlined. This aim has shaped our proposal in distinctive ways.

The first distinctive feature is the judicial character of the commission. While the commission would not be a court, we aim to emphasise features that draw from the tradition of the judiciary, and in that broad sense the commission could be called 'judicial'. This is partly for the practical reason that, in many countries, interpretation of the Convention is the province of the judiciary, and if we are to promote convergence of interpretations, the people who are best equipped to persuade judges are fellow jurists and experts. More importantly, however, the judicial character of the commission would endow it with particular values such as independence, impartiality, intellectual integrity and legal expertise. These are qualities that are essential to the enterprise of interpreting the Convention.

This feature draws upon the demonstrated value of present international judicial institutions. These perform useful functions in international law: they adjudicate disputes, interpret the law, supervise the development of the law and legitimate the system by ensuring independent and (at least in theory) apolitical oversight. International judicial institutions have

been responsible for greatly elaborating the content and extending the reach of international law, as well as providing an alternative discourse for international politics and the legitimacy of State actions. These would all be valuable additions to the present refugee regime.

The second distinctive feature is that, unlike most international judicial bodies, this body would not be an adjudicatory forum. The aim of promoting consistency can be more effectively achieved by addressing divergences directly, rather than waiting for applications to raise issues relevant to the development of the jurisprudence of refugee law.

Such a view is supported by the experience of the UN treaty committees. Among the many useful functions of these supervisory committees has been their elaboration of the various treaties that they monitor, primarily through the issuing of General Comments and consideration of individual complaints. However, the effectiveness of the committees has been undermined by large backlogs of complaints.[82] Further, such elaboration is an incidental function of the committees, and as a result the guidance given by these bodies in this respect, although useful, tends to be ad hoc and reactive.

In addition, the scale of resources required for adequate adjudication is immense, as the increasing workload of the European Court of Human Rights evidences.[83] Prior to its reform in 1998, the court and its partner, the European Commission of Human Rights, had delivered a total of 38,389 decisions and judgments in 44 years; within the first five years of its operation since then, the court had delivered 61,633 judgments.[84]

Although there is, of course, a practical value in allowing individual adjudication, the present proposal takes as its basis the primary purpose of convergence in interpretation. Adjudication is, as experience shows, a costly and time-consuming route to such interpretation, and for those reasons the proposed body would not have an adjudicatory function.

A third distinctive feature of the proposal is that the mission of the commission would be to promote reasoned discussion on the major interpretative controversies. The use of expository reasoned opinions should promote debate, and use a method of intellectual persuasion rather than the power of compulsion. By explaining different interpretations within these opinions, the commission's opinions would allow room for the expression and testing of a diversity of opinions.

[82] See, eg P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge, Cambridge University Press, 2000); and AF Bayefsky, *The UN Human Rights System: Universality at the Crossroads* (The Hague, Kluwer Law International, 2001).

[83] See, eg P Mahoney, 'New Challenges for the European Court of Human Rights resulting from the Expanding Case Load and Membership' (2002) *Penn State International Law Review* 101.

[84] *Ibid*.

B. Legitimacy

Two of the key measures of the success of an international (and indeed a domestic) court or tribunal are its legitimacy and its effectiveness. The two dimensions are, of course, related: illegitimacy undermines effectiveness, and ineffectiveness undermines legitimacy. However, the distinction is useful for analytical purposes.

Legitimacy involves the acceptance of the authority of the international judicial institution. The importance of legitimacy to the effectiveness of an institution is vividly illustrated by the routine protestations of illegitimacy against international criminal tribunals by defendants such as Milosevic.[85] Legitimacy may be assessed in relation to the different actors involved: the parties; those directly affected by the outcome of the proceedings; the international political elite; States; the broader international legal community; and the population in general. From the perspective of the Rwandan government, for example, there have been serious doubts about the legitimacy of the ad hoc tribunal for Rwanda: the government voted against the establishment of the International Criminal Tribunal for Rwanda,[86] and recently denounced a controversial acquittal.[87] Nor have the ad hoc tribunals necessarily gained legitimacy in the eyes of the communities they are meant to serve, with one opinion poll finding that 32 per cent of Serbs think that the International Criminal Tribunal for the former Yugoslavia's major goal is 'to place all the blame for war suffering on Serbs'.[88] By contrast, the extremely heavy workload of the European Court of Human Rights indicates a perception of success among litigants.

Legitimacy may have different sources. An important, although not sole, source is institutional authority. For example, the ICJ enjoys great institutional authority as the principal judicial organ of the UN. The Statute of the International Criminal Court ('ICC') is a source of great legitimacy, evincing as it does the consent of a large number of States to a pioneering court, a consent strengthened by its speedy ratification.

[85] For an excellent account see P Hazan, *Justice in a Time of War: The True Story behind the International Criminal Tribunal for the Former Yugoslavia* (College Station, Texas A & M University Press, 2004) 159–70.

[86] SW Tiefenbrun, 'The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court' (1999–2000) 25 *NCJ International Law and Commercial Regulation* 551.

[87] 'Thousands Demonstrate against UN Tribunal' (29 February 2004) <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2004/0229against.htm> (accessed 15 June 2007).

[88] A Uzelac, 'Hague Prosecutors Rest Their Case' (27 December 2004) <http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/1227rest.htm> (accessed 15 June 2007).

The global character of the human rights treaties and their widespread ratification[89] confers legitimacy on the UN treaty committees.

In contrast, the institutional legitimacy of the ad hoc criminal tribunals has been questioned, based as they are on resolutions of the UN Security Council passed in a frenzied political climate.[90] This has hampered their functioning, with some nations refusing to assist the tribunals in their work.[91]

However, the experience of the ad hoc tribunals also demonstrates that legitimacy need not merely be conferred: it can be self-generated. The persistence of dedicated personnel has generated more confidence about the usefulness of ad hoc tribunals among the human rights community and among States, a confidence that eventually enabled the fulfilment of the dream of the ICC.[92]

Another key source of legitimacy is the relationship between States and the institution. The textbook criticism of the ICJ, for example, is that too few States submit to its jurisdiction,[93] and too many States attack or ignore its decisions.[94] The institutional legitimacy conferred by treaties may be undercut by the political negotiations and compromises inherent in them, as was demonstrated by the lengthy negotiating process involved in the creation of the ICC, the flaws of which have been described at length elsewhere.[95] The UN treaty committees have complained of the delayed compliance or non-compliance of States with their obligations to report and their implementation of decisions on communications.[96]

[89] Bayefsky (n 82 above) 7. The statistics for non-participation of UN Member States by treaty given in that text are: one per cent for the Convention on the Rights of the Child, 13 per cent for the Convention on the Elimination of All Forms of Discrimination against Women, 19 per cent for the Convention on the Elimination of All Forms of Racial Discrimination, 23 per cent for the International Covenant on Civil and Political Rights, 25 per cent for the International Covenant on Economic, Social and Cultural Rights, and 35 per cent for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[90] The International Criminal Tribunal for the Former Yugoslavia was established by United Nations Security Council ('UNSC') res 827 (25 May 1993). The International Criminal Tribunal for Rwanda was established by its Statute annexed to and adopted by UNSC res 955 (8 November 1994).

[91] For a vivid account, see Hazan (n 85 above).

[92] L Arbour and A Neier, 'History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (1997–98) 15 *American University International Law Review* 1495 at 1496–7.

[93] As at 31 July 2006, only 67 of the 192 UN members had adhered to the ICJ's compulsory jurisdiction, and the UK is the only permanent member of the Security Council that maintains a declaration under Art 36(2) of the ICJ's statute: *Report of the International Court of Justice, 1 August 2005–31 July 2006*, UN GAOR, 61st sess, UN Doc A/61/4 (2006) para 45.

[94] The Israeli reaction to the recent judgment on the Israeli security barrier is an example: see C McGreal, 'Israel Lashes out at EU for Backing UN Vote on Wall' *The Guardian* (22 July 2004).

[95] See M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell International Law Journal* 443.

[96] See, eg the statement of 'deep concern' at the situation in the *Report of the Human Rights Committee*, UN GAOR, 59th sess, UN Doc A/59/40 (2004) para 256.

State co-operation is vital to the success of the institution. Governments have obstructed the ad hoc tribunals from investigating, arresting[97] and extraditing suspects,[98] and the tribunals continue to rely on political and financial pressure from the United States and European countries to procure reluctant co-operation.[99] Although it is too early to judge the success of the ICC, its legitimacy has been undermined by the United States' wide-ranging attack on it,[100] and the failure by certain States to ratify it. The Inter-American Court of Human Rights was undermined when its rulings led to Peru seeking to withdraw from its jurisdiction[101] and Trinidad and Tobago denouncing it.[102]

In contrast, one of the reasons for the success of the European Court of Human Rights and the ECJ is the general support and compliance of their Member States. A recent review of the European Court of Human Rights, for example, found that only a few decisions were not complied with for political reasons.[103]

[97] Arbour and Neier (n 92 above) 1501–2.

[98] Tiefenbrun (n 86 above) 582; C Jeu, 'A Successful Permanent International Criminal Court … "Isn't it Pretty to Think So?"' (2004) 26 *Houston Journal of International Law* 411 at 426.

[99] See, eg 'EU Keeps Pressure on Croatia before Entry Talks' (Reuters, 21 February 2005) <http://www.alertnet.org/thenews/newsdesk/L21710159.htm> (accessed 15 June 2007); 'Serbia and Montenegro Assistance' (23 January 2005) <http://www.voanews.com/uspolicy/archive/2005-01/a-2005-01-24-8-1.cfm> (accessed 15 June 2007).

[100] This includes a UN Security Council resolution that for one year from its establishment, the ICC will not begin or proceed with investigations or prosecutions against current or former officials and personnel from a State contributing to a UN peacekeeping mission but not a party to the Rome Statute: UNSC Res 1422 (12 July 2002); bilateral 'impunity' agreements purporting to invoke Art 98(2) of the Rome Statute: see C Eubany, 'Justice for Some? US Efforts under Article 98 to Escape the Jurisdiction of the International Criminal Court' (2003) 27 *Hastings International and Comparative Law Review* 103; the American Servicemembers' Protection Act of 2002, which essentially proscribes American co-operation with the ICC: 22 USC §7421–32; and attempts to revise the status of forces agreements. See generally RT Alter, 'International Criminal Law: A Bittersweet Year for Supporters and Critics of the International Criminal Court' (2003) 37 *International Law* 541 at 547–50; Jeu (n 98 above); and DF Orentlicher, 'Judging Global Justice: Assessing the International Criminal Court' (2003) 21 *Wisconsin International Law Journal* 495 at 495–6.

[101] On 9 July 1999, President Fujimori presented Peru's declaration of withdrawal to the Secretary-General of the Organization of American States, in response to its judgment in *Castillo Petruzzi*. However, on 9 February 2001, the new Peruvian government presented the court with a note reaffirming its acceptance of the contentious jurisdiction, without interruption, since its original declaration was deposited. See CM Cerna, 'The Inter-American System for the Protection of Human Rights' (2003) 16 *Florida Journal of International Law* 195 at 204, 206–8.

[102] See G McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol' (2001) 23 *Human Rights Quarterly* 769.

[103] Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, 'Report on the Execution of Judgments of the European Court of Human Rights', Doc 8808 (28 September 2000), reprinted in (2000) 21 *Human Rights Law Journal* 275; European Commission for Democracy through Law (Venice Commission), 'Opinion 209: Implementation of the Judgments of the European Court of Human Rights', reprinted in (2003) 24 *Human Rights Law Journal* 249.

The independence of members of the institution is also an important component of legitimacy. Allegations of horse-trading at the UN treaty committees and of close links between States and their representatives affect the perception of the committees, and therefore their legitimacy. External pressure has also been cited for the high rate of resignations of officials at the ad hoc tribunal for Rwanda.[104]

Legitimacy also depends upon the extent to which international judicial institutions are supported, not only by States but also by an international legal community and broader activist and popular communities. Although governments of States are frequently embarrassed by, or constrained by, international judicial institutions, support outside of the government encourages recognition of the normative force of the decisions, and in turn compliance with them. This is evidenced by recent studies that have concluded that the decisions of the ICJ are generally effective.[105]

Perhaps the importance of broader political support is most vividly illustrated in the differences between the European Court of Human Rights and the Inter-American equivalent. The European Court of Human Rights is supported by, and promotes, a well-versed human rights culture that accepts the authority of its decisions and the importance of human rights. Its high-profile cases receive significant media attention and have worked dramatic changes on domestic laws, as the recent ruling on the requirement for legal aid in the long-running British 'McLibel' case demonstrates.[106]

The Inter-American Court of Human Rights has been notably less successful, having made decisions in only 86 cases,[107] although a large number of cases are dealt with by the Inter-American Commission on Human Rights. This is largely because States are reluctant to submit to the court's contentious jurisdiction,[108] and its work was thus confined mostly to an advisory jurisdiction during many of the worst abuses in the 1980s.[109] The obvious

[104] 'Rwanda Alarmed by Resignation of Top Tribunal Officials' Hirondelle News Agency (18 May 2004) <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2004/0518external.htm> (accessed 15 June 2007).

[105] C Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434; C Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford, Oxford University Press, 2004).

[106] *Steel and Morris v United Kingdom*, App No 68416/01 (15 February 2005); M Oliver and agencies, 'McLibel Two Win Legal Case' *The Guardian* (15 February 2005).

[107] See the list of judgments at <http://corteidh.or.cr/casos.cfm>, as at 10 July 2007. 17 of those judgments were in 2006 alone. This calculation includes only judgments on the merits.

[108] See generally AS Dwyer, 'The Inter-American Court of Human Rights: Towards Establishing an Effective Regional Contentious Jurisdiction' (1990) 13 *Boston College of International and Comparative Law Review* 127.

[109] See generally *ibid*; and D Shelton, 'Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights' (1988) 3 *American University of International Law and Policy* 323.

reason for this comparative lack of success is the lack of support of relevant institutions and a hostile political climate. People involved in cases in the 1980s, for example, were sometimes threatened or even murdered.[110] As the region has become more democratic, the court's effectiveness has revived, although States are still rarely prepared to investigate, try and punish the perpetrators.[111]

The difficulty for our proposal is that the traditional international law source of legitimacy for such an international judicial body, namely the consent of States in the form of a treaty, is likely to affect negatively its legitimacy in terms of its acceptance by the broader refugee advocacy community. The increasingly restrictive temper of many governments makes it more than likely that they would wish to control the composition of any commission and seek to influence its opinions in their perceived national interest. The form of the proposal therefore places emphasis on other sources of legitimacy.

(i) Creation under the Supervisory Mandate of UNHCR

First, and foremost, it is proposed that the body be created under the supervisory mandate of UNHCR. Paragraph 8 of the UNHCR Statute provides that the High Commissioner

> shall provide for the protection of refugees falling under the competence of his Office by … promoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application* and proposing amendments thereto (emphasis added).[112]

Articles 35 and 36 of the Convention provide for the corresponding obligations of States to co-operate with UNHCR in this respect.[113] The creation of the limited body we have described falls within that supervisory mandate, as described more fully by Kälin.[114] In essence, the proposal involves little more than giving the Global Consultations process a permanent form.

This method of creation has a number of advantages. First, the commission is designed to *supplement*, rather than usurp, the function of UNHCR. As mentioned earlier, it is in essence a continuation and expansion of UNHCR's own supervisory efforts. Such a supplementary role would

[110] Dwyer (n 108 above) 148.
[111] Cerna (n 101 above) 203–4.
[112] Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res 428 (V) of 14 December 1950.
[113] See V Türk, 'UNHCR's Supervisory Responsibility', UNHCR, *New Issues in Refugee Research*, Research Paper No 67 (October 2002) 19.
[114] Kälin (n 76 above).

also preserve the coherence of the international refugee regime, and ensure that the commission would be international in character.

Secondly, the mandate of UNHCR is created by treaty. The creation of a commission within that mandate would not, therefore, trespass on sovereign rights. Rather, it would serve to fulfil the expectations of the treaty.

Thirdly, courts and decision-makers already refer to the 'soft law' created by UNHCR in fulfilment of its mandate. As has been discussed, the weight placed upon UNHCR's interpretations varies. Nevertheless, UNHCR has an unrivalled *institutional* legitimacy in the minds of courts and decision-makers.

Fourthly, there are some very considerable practical advantages in utilising UNHCR's extensive experience in refugee law. UNHCR is in touch with changing refugee realities and would inform the priorities of the commission.

Fifthly, this more flexible method of creation would allow the commission to evolve with changing circumstances and needs. Experience often demonstrates flaws in the best-laid plans. Experience may also breed trust. As States and decision-makers become more comfortable with the new commission, changes in the commission's function might become desirable. The evolution of the European Court of Human Rights, for example, suggests that we also take an evolutionary perspective in designing the commission.

(ii) Judicial Character

A second source of legitimacy is the judicial character of the commission, which was briefly mentioned earlier. Two aspects of this warrant further discussion: (a) the separation of powers; and (b) the discipline of the law.

The principle of separation of powers has, to some extent, been translated at the international level[115] through the recent proliferation of international judicial and quasi-judicial bodies.[116] Independent experts have increasingly been entrusted with the job of monitoring

[115] See, eg P Mahoney, 'Separation of Powers in the Council of Europe: The Status of the European Court of Human Rights vis-à-vis the Authorities of the Council of Europe' (2003) 24 *Human Rights Law Journal* 152.

[116] See generally CP Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709; T Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 *Leiden Journal of International Law* 267; P-M Dupuy, 'The Danger of Fragmentation of Unification of the International Legal System and the International Court of Justice' (1998–99) 31 *New York University Journal of International Law and Politics* 791; and JI Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1998–99) 31 *New York University Journal of International Law* 697.

the implementation of treaties, and independent dispute settlement mechanisms have either been introduced or strengthened in respect of a large number of important treaties. While the significance and practical effect of these institutions are often exaggerated, the trend expresses the value of an independent dispute settler in a way analogous to that of the domestic dispute settler.

The doctrine of separation of powers expresses the value of fragmenting the functions of governance. Adjudication of disputes is accepted as fair if, among other things, the adjudicator is impartial and independent. The independence of the judiciary, although not necessarily in the short-term interests of a government, legitimates executive power in the long run.

But the separation of the judiciary does more than simply legitimate the system of governance. It allows disputes to be resolved that cannot be resolved politically, not only in cases of high political importance such as the election of a President, but also in the detail of interpreting nuances of legislation and regulating the private disputes of citizens.

Unlike other major human rights treaties, the Refugee Convention presently does not have a separation of executive and interpretative power. Yet such a separation suits the hybrid nature of UNHCR. Presently, UNHCR is open to the charge that its operational needs undermine its authority as an interpreter of the Convention. A natural pressure exists upon UNHCR not to condemn a country that allows it to operate within its territory, nor to condemn the handful of donor countries.[117] UNHCR could more effectively achieve both its supervisory and operational objectives by devolving some of its supervisory responsibility to an independent judicial body.[118]

Another factor underpinning the legitimacy of an independent judicial body is the special authority of law.[119] There is no hard and fast line between law and politics, and the notion of law as a morally or politically neutral sphere has long ago been exploded. Yet the law is a discipline and the rules of law are different from the rules of politics. The law is concerned with reasoning from principles and rules using accepted legal techniques, and the loyalty of lawyers and judges is to the law itself. Judges are servants of the law and owe their allegiance to it, not to the political masters of the day. In particular, they have

[117] According to UNHCR, 10 donors provide 80 per cent of its funding, with three donors covering 53 per cent of its funding: UNHCR, *Global Appeal 2007: Strategies and Programmes* (Geneva, UNHCR, 2007) 57–8 <http://www.unhcr.org/publ/PUBL/4565a6872.pdf> (accessed 10 July 2007).

[118] See generally Takahasi (n 80 above) 61–3.

[119] See MN Shaw, 'The International Court of Justice: A Practical Perspective' (1997) 46 *International and Comparative Law Quarterly* 831 at 853.

a function in ensuring the legality of government and in restraining arbitrary exercises of power, a function and value that has special importance in the current age.[120]

(iii) International Composition and Representation

Of course, to some extent the value of the judiciary is already present in the international refugee regime, as in many countries the judiciary plays a leading role in the interpretation of the Refugee Convention. However, an international judicial body would have other benefits. An international judicial body dedicated to refugee law would benefit from the special expertise of its members in international law and by its sole focus on refugee law.

An international judicial body would also be particularly appropriate given the international nature of the Convention, and in light of the present state of disharmony that has resulted from divergent national interpretations. By looking at the Convention directly, rather than through the distorting lens of national legislation, an international body could see the Convention for what it is, namely, an international humanitarian instrument. It is likely that an international judicial body would have greater capacity to resist the politicisation of refugee law by national governments and would be able to expose breaches of international law with greater authority than national courts. The normative influence of a persuasive international judicial body is a resource for national courts, as recent judgments of the House of Lords demonstrate.[121] The principled development of international refugee law would promote a certainty and predictability that could only enhance the legitimacy of national judicial decisions.

(iv) The Legitimacy of Expertise

The contemporary world is the age of the expert. There are good reasons for this, but expertise is not a prerequisite for those currently involved in the interpretation of the Refugee Convention. While superior appellate courts often engage in sophisticated analyses of the Convention, this is not an option for most primary decision-makers. Refugee law also poses particular problems that even senior appellate judges may struggle to overcome. It lies at the intersection of humanitarian law and international law, two areas that have developed significantly since most judges were

[120] See, eg J Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1. For case law examples, see *A v Secretary of State for Home Department* (n 58 above); *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (NZSC); *Rasul v Bush* 542 US 466 (2004); and *Rumsfeld v Padilla* 542 US 426 (2004).

[121] See, eg *A v Secretary of State for Home Department* (n 58 above).

educated. Moreover, a sophisticated analysis requires access to, and understanding of, material across a variety of jurisdictions and a range of international instruments. There are some landmark refugee cases that may have been decided differently had an expert in refugee law been sitting.

(v) The Thorny Issue of State Involvement

Despite the foregoing, it may be desirable to have some form of State involvement to assist in developing the legitimacy of the commission. States supporting the creation of such a body might, for example, have privileges in relation to the appointment of members, or standing to make submissions to the commission. It might be desirable to bring together interested States parties for consultation prior to the creation of the commission, and it would be advisable to liaise with them through the process. However, a balance must be struck between co-operation and dialogue with States, and impermissible interference by States. Furthermore, while engagement with States might be useful, the primary target audience of the commission would be decision-makers and the judiciary. It would also be necessary to develop good working relationships with these people.

(vi) Absence of Enforceability

It might be objected that the legitimacy of the commission would be greatly undermined by its lack of powers to enforce its views. To lawyers familiar with domestic courts, the enforcement powers of courts appear to be fundamental to their authority, and international bodies are often criticised for being no more than talking shops.

There are, however, insuperable difficulties in the way of establishing a body capable of delivering binding judgments. Specific consent by States parties would be required in order to make the opinions binding. Such consent is not likely to be forthcoming, and in some cases may be constitutionally impossible. The experience of the ICJ, and the small number of States parties that have agreed to accept its compulsory jurisdiction,[122] indicates the magnitude of the task.

Nevertheless, the experiences of the ICJ and other international bodies illustrate the normative value and political influence of judicial opinions,[123] even when their judgments are defied. What is more important, in our view, would be political and cultural acceptance of the legitimacy of the commission's decisions.

[122] See n 93 above.
[123] See n 105 above.

Although enforcement is not a practical possibility, some powers could be assigned to the body by UNHCR. UNHCR could make the interpretations determinative for the purposes of the refugee status determination which it conducts in many countries.[124] By making the opinions of the commission enforceable in this area, there would exist the potential to stimulate a pattern of State acquiescence.

The lack of power to enforce its opinions would have two positive aspects for the commission. It would make the creation of the body simpler. The consent of States, which is essential for the creation of a court that renders binding judgments, would not be necessary. And non-binding opinions attract less controversy, and hence less resistance, from States jealous of their sovereign powers.

C. Effectiveness

Three aspects of effectiveness are addressed here. First, in order to be effective at all, the proposal has to be politically feasible. Secondly, effectiveness measures the gap between the objectives of the body and its performance. Thirdly, effectiveness depends partly upon the efficiency of the body.

The first aspect explains why the proposal is modestly framed, with the commission's function being limited to a traditionally judicial task, and with the commission being designed to supplement the existing refugee regime. It also explains why we do not favour the method of treaty creation. As the experience of the ICC has shown, such a method has as many risks as it has rewards. It also explains why we have opted for an advisory model.

The second aspect supports the narrow focus on the objective of promoting convergence in interpretation. Such narrow objectives are much more easily fulfilled than wide-ranging and broad ones. This is supported by the experience of the UN treaty committees, in which grand objectives and multiple functions are placed upon part-time committees, with the inevitable result that few of the objectives can realistically be achieved. This tends to undermine the legitimacy of the bodies.

The third, related, aspect is the question of efficiency. Narrower objectives permit more carefully targeted use of resources. As already explained, the absence of an adjudicatory function promotes efficiency. In the case of an adjudication, applications have to be received and processed, parties given due time to prepare and argue cases, and, if necessary, appeal. Where such applications are made in relation to human

[124] See generally M Alexander, 'Refugee Status Determination Conducted by UNHCR' (1999) 11 *International Journal of Refugee Law* 251.

rights treaties with broad jurisdiction, there is almost invariably a mismatch between the number of applications and resources. Another mismatch also often occurs, in which petitioners from particular countries are over-represented, because they are aware of, and have greater access to, such courts and bodies. An obvious example is the difference in workload between the Inter-American Court of Human Rights and the European Court of Human Rights, which clearly does not reflect a difference in the extent of human rights abuses in the various regions.

The proposal takes into account the critical importance of resources. A persistent criticism of the UN treaty committees[125] and the ad hoc criminal tribunals[126] has been that resources are inadequate to meet the demands of wide-ranging briefs. The need for resources often also diminishes legitimacy, as the States that hold the purse strings can attach conditions to their financial support. In the case of the ad hoc criminal tribunals, overdue payments by States have resulted in large funding gaps,[127] and escalating costs have partly motivated the decision to close the tribunals by 2010.[128]

We recognise that UNHCR's budget is stretched. For that reason, we have felt it important to develop a funding model that seeks support from committed private sources such as universities, law firms, and professional organisations and foundations. Further, the commission would seek to establish its secretariat within one or two academic centres devoted to refugee studies. It would be possible for appointees to serve part-time and to minimise the costs of meeting by utilising electronic communications. A further advantage of such a model is that an independently *funded* commission would emphasise the independence of the body, thereby assisting the body to gain further legitimacy.

[125] See generally E Evatt, 'Ensuring Effective Supervisory Procedures: The Need for Resources', and M Schmidt, 'Servicing and Financing Human Rights Supervisory Bodies' in Alston and Crawford (n 82 above).

[126] See the (first) *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN GAOR, 49th sess, UN Doc A/49/342–S/1994/1007 (1994) 28–51.

[127] See *Ninth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, UN GAOR, 59th sess, UN Doc A/59/183–S/2004/601 (2004); *Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN GAOR, 59th sess, UN Doc A/59/215–S/2004/627 (2004).

[128] UNSC Res 1534 (26 March 2004).

V. THE PROPOSAL

A. Foundational Principles

The essence of the proposal is that an international judicial commission be created under the supervisory mandate of UNHCR, for the primary purpose of promoting convergence in the interpretation of the Refugee Convention by the method of producing authoritative opinions. A secondary purpose of such a commission would be to promote discussion about the interpretation of the Convention. It would not be involved in determining applications made by individual asylum seekers.

In order to achieve the primary objective, the commission would produce compelling opinions analysing, and providing practical legal guidance in relation to, current divergences in interpretation. Such opinions, directed towards interpretation rather than adjudication, would consolidate and draw upon all sources of international and domestic law, and provide guidance both at the level of general principle and in relation to particular factual situations.

While presently the primary difficulties with divergence in interpretation focus upon the definition of refugees, the commission would also be well placed to consider the question of refugee rights, an issue that will probably become more prominent in the future. Indeed, the commission could fill a critical void on this subject.

As discussed above, the authority of the commission would depend upon a mixture of its institutional mandate, its judicial character, its international composition, and—to a lesser extent—involvement by States parties to the Refugee Convention. It would also depend on the quality of its appointees and its overall conduct. It is imperative, therefore, that the commission be independent and composed of judges (including former and serving judges, as well as experts with academic or practical expertise) of the highest skill, reputation and integrity.

B. The Role of UNHCR

As already explained, it is proposed that the commission be created pursuant to the existing supervisory mandate of UNHCR. In this way, the commission would supplement the authority of the UNHCR, and recognise its fundamental role in the international refugee regime. At the same time, the funding arrangements for the commission are designed to avoid adding to the financial burden on UNHCR.

The commission could be created informally by UNHCR or perhaps by way of a formal resolution. The commission's proposed function is

clearly within the supervisory mandate of UNHCR. Creation by treaty would, even if all States could be persuaded to participate, significantly delay the creation of the commission. Not all States would be persuaded to ratify, thereby fragmenting a universal regime. More importantly, there would probably be compromises caused by bargaining between States, and the present trends in the refugee policies of many States—as well as the experience of the process of developing a common asylum policy in the European Union—suggest that the negotiation of any treaty may undermine, rather than strengthen, the protections of the Refugee Convention.

It is expected that UNHCR would play a significant role in the operation of the commission. We would suggest that UNHCR have a role in making appointments to the commission; have the right to apply for an opinion of the commission; and have the right to make submissions on any question before the commission. Former UNHCR officials would also be considered for appointment to the commission. The opinions of the commission could be used by UNHCR where it undertakes refugee status determination.

However, the commission would have to be, and be seen to be, independent of UNHCR in the formulation of its opinions. Indeed, by separating the function of providing interpretations of the Refugee Convention from the other work of UNHCR, the commission would benefit UNHCR by allowing it to concentrate on its protection mandate.

C. Engagement with Interested Parties

The special relationship between the commission and UNHCR would give the commission a certain immediate recognition. This would be a starting point for dialogue and liaison between the commission and the participants in the world of refugee status determination and protection. As the commission would be a new and unique body, it would need to advocate its reason for existence widely in order to gain the necessary acceptance. While the most persuasive form of advocacy would come from the quality of its opinions, certain arrangements might be necessary to advance the cause of the commission.

It is proposed that a UN rapporteur be appointed to disseminate information about the work of the commission. A retired Chief Justice or like person would be ideal. The rapporteur would visit judges and decision-makers the world over to explain the work of the commission and encourage understanding of its opinions and their use in domestic decision-making. In the early stages there would be a place for a liaison officer to assist the rapporteur, while the reputation of the commission is being built.

D. Methods of Operation

This section of the paper makes some concrete proposals as to the operation of the commission. However, as we have noted, this remains a framework only, and one that is open to change. In particular, this proposal is directed towards the initial stage of setting up the commission. We envisage that, as with all institutions, the commission would evolve over time. The proposal therefore addresses the operation of the commission at the stage of inception.

(i) Composition of the Commission

For the reasons already canvassed, the members of the commission should be eminent experts in international refugee law, whether that expertise be derived from academic, judicial or practical experience (such as former high-level UNHCR officials). Minimum legal qualifications would be required. However, a mixture of academic, judicial and practical experience is desirable.

The commission should initially comprise nine judges, in view of the heavy workload likely to be involved in establishing the institution and determining priorities in the early stages. A small number of judges is more practical, as they require fewer resources, are likely to produce opinions more quickly and more likely to achieve agreement. A larger number is not necessary as the task of the commission is quite confined, and because we propose that it have broad powers to set its priorities and organise its workload.

For similar reasons, part-time appointments are preferable. First, higher calibre personnel would more likely be available, as many academics and sitting judges would be capable of engaging in the task part-time but be unwilling or unable to give up their full-time positions. Secondly, such judges might well be able to rely on the institutional support of their staff in their full-time positions, thereby minimising the resources required by the body. Thirdly, such appointments would not require full-time judicial salaries.

Part-time appointments have caused difficulty in other international bodies, most notably with the UN treaty committees. This is largely because of the increase in workload, although it has also been said that committee members are unable to devote the requisite time because of the demands of their primary employment. However, this may be suitably addressed at the appointment stage. Candidates unable to dedicate a certain amount of time to the task, or who have a potential conflict of interest, could be eliminated during the appointment process, and the terms of office might require that candidates who find themselves unable to fulfil their duties for whatever reason must resign.

As discussed earlier, part of the legitimacy of the commission would derive from its representation of different regions, cultures, legal systems

and genders. This is particularly important given that much of refugee law is context-dependent and involves dealing with a wide range of cultures.

(ii) Appointment and Conditions of Office

The appointment process, and the terms and conditions of office, should conform to the recently published International Law Association's 'Burgh House Principles on the Independence of the International Judiciary'.[129] In particular, in contrast to other international judicial bodies, States should not have control over the appointments process, although some form of State involvement might be desirable.

The experience of other institutions has been that selection by States has resulted in politicking. The political influence is said to be 'omnipresent', for example, in elections to the ICJ,[130] although judges are usually well qualified.[131] The European Court of Human Rights recently found it necessary to make reforms to counter criticisms of the independence of its judges.[132] Procedures such as standard curricula vitæ and informal examination of the candidates[133] might be usefully adopted.

Appointments should be made by an appointments commission. The composition of this commission would be critical. It should include representatives of relevant organisations, such as the International Association of Refugee Law Judges, and involve sitting members of the commission. It may also be desirable to involve government representatives to some degree.

In order to engage the wider refugee advocacy community, the first stage of the process might involve open nominations, in which individuals, non-governmental organisations, judges, legal practitioners and academics could formally propose names to the appointments commission. Vacancies, and the criteria for appointment, would be widely published.

[129] 25 November 2004 <http://www.pict-pcti.org/FINAL%2025%20November%202004%20ILA%20Study%20Group%20Principles.doc> (accessed 10 June 2007).

[130] N Blokker and S Muller, 'The 1996 Elections to the International Court of Justice: New Tendencies in the Post-Cold War Era?' (1998) 47 *International and Comparative Law Quarterly* 211 at 213.

[131] See generally CF Amerasinghe, 'Judges of the International Court of Justice: Elections and Qualifications' (2001) 14 *Leiden Journal of International Law* 335. Contrast the earlier comments by GM Wilner and TJ Schoenbaum, however, which questioned the quality and independence of the judges: 'Forum: American Acceptance of the Jurisdiction of the International Court of Justice: Experiences and Prospects' (1989) 19 *Georgia Journal of International and Comparative Law* 489 at 497–500.

[132] Interights, 'Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights' (2003) 24 *Human Rights Law Journal* 262.

[133] See A Drzemczewski, 'The European Human Rights Convention: A New Court of Human Rights in Strasbourg as of November 1, 1998' (1998) 55 *Washington and Lee Law Review* 697 at 723–4.

The appointments commission would adopt a transparent procedure for selection that would include consultation with relevant organisations and individuals.

Appointments would be for a term of five years, although this could be left up to the discretion of the appointments commission since it would depend on the preferences of candidates. As the appointment process would not be politically determined, some flexibility in the length of terms and re-appointment could be permitted without undue interference. The appointments commission would have the power to require a resignation in the event of incapacity, misconduct, conflict of interest and similar specified circumstances.

In order to attract the highest calibre candidates, it would be necessary to remunerate them appropriately for their time. The conditions of office should be similar to those available to other international judges, albeit with appropriate recognition of the part-time nature of the duties.

(iii) Selection of Cases

Given that the primary purpose of the commission would be to promote convergence, it would isolate the major areas of debate over the construction of the Refugee Convention and prioritise the delivery of its opinions accordingly. The commission would invite suggestions from UNHCR, leading academic commentators, governments, the legal profession and NGOs concerning appropriate issues for consideration.

Additionally, the commission might find it useful to allow certain parties, such as UNHCR, to ask the commission for an opinion. The commission would have the discretion to accept or refuse such an application, so as to avoid becoming a tool for political causes and to manage its resources wisely.

The commission should also be able to review or re-open opinions if it appeared necessary to do so.

(iv) The Deliberation Process

The rules of the commission would be flexible, allowing it to choose the best procedure for determining each case. In some instances it might be appropriate to conduct oral hearings, but many issues could be determined from written submissions from invited parties and research papers prepared for the commission.

The commission would have power to invite submissions from any source it considered could usefully contribute, and would usually invite submissions from UNHCR, NGOs, concerned governments, leading academic commentators and refugee law practitioners. As judges are likely to be spread across the world, there might be a place for hearings by telephone or video-conferencing. However, there would also be value

in providing for the members of the commission to meet and discuss the issues for opinion.

(v) Single or Multiple Opinions?

The civil law method that generally envisages the production of a single opinion by a judicial body has the value of certainty and of providing clear guidance for future cases. This system avoids the morass of separate opinions, which often arrive at the same conclusion with barely distinguishable paths of reasoning. Such decisions generate confusion in the administration of the law.

The virtue, however, of the common law tradition that allows for dissenting opinions is that it exposes contrary standpoints, and thereby stimulates the development of the jurisprudence.

Given that the purpose of the commission would be to promote convergence of interpretations, it is envisaged that initially, at least, it would produce joint opinions. However, such a rule need not be inflexible, particularly as the commission would not finally determine individual applications.

(vi) Funding and Support of the Commission

In order to hasten the creation of the commission, it is envisaged that public financial support would be minimal. Private foundations, leading law firms and commercial organisations with an interest in the project would be invited to fund the salaries and travelling expenses of judges, a limited number of registry and support staff, as well as a space for its headquarters. Such a space could be usefully located in an academic centre for refugee studies, allowing access to expertise and relevant resources.

A novel approach to the funding of research support would be taken. Thus, the commission would offer to a recognised faculty or faculties a memorandum of understanding whereby academic staff would be made available to support the work of the commission. The support might also extend to the provision of information technology and translation facilities.

VI. CONCLUSION

As was noted in the Global Consultations process, 'the viability of a universal commitment to protection [in refugee law] is challenged by divergence in State practice'.[134] This chapter has set out a modest, and practical, proposal to address one aspect of divergence: the interpretation of the Refugee Convention.

[134] Hathaway and Foster (n 38 above) 358.

The present inconsistency in the Convention's interpretation is both undesirable and unjustifiable. The universal regime of international law envisaged by the Convention is, in practice, fragmented by diverging national interpretations. As has become evident in relation to many other international instruments, an international judicial authority is an essential element of a regime based on international law. This is not a problem that, as the present proposal indicates, demands significant resources or political will. It is a problem that is eminently capable of resolution by the international legal community. Indeed, it is a problem that can be addressed at minimal cost, and not at the expense of the pressing material needs of refugees.

For many commentators, the prospect of an international refugee court has been a pipe dream. Looked at closely, however, what is needed is not yet another *court* to determine refugee status, but an authoritative interpreter of the Refugee Convention. That fundamental insight informs the proposal. A small number of internationally-renowned experts in refugee law, endowed with the authority of UNHCR and with their own formidable intellectual, analytical and rhetorical gifts, would be an invaluable asset in the task of promoting convergence in the interpretation of the Convention. Funded by civil society and the legal community in particular, untainted by the political control of States, and untroubled by the procedural and administrative difficulties of deciding real cases, such a body would avoid many of the difficulties experienced by other international courts and tribunals. Instead, it could focus clearly on the task at hand: interpreting the Refugee Convention by the fearless and authoritative application of legal knowledge and rules.