



# Refugee Protection in International Law

UNHCR's Global Consultations on  
International Protection

Edited by  
Erika Feller, Volker Türk and Frances Nicholson

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Refugee Protection in International Law  
UNHCR's Global Consultations on International Protection

Millions of people are today forced to flee their homes as a result of conflict, systematic discrimination, or other forms of persecution. The core instruments on which they must rely to secure international protection are the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. This book examines key challenges the Convention faces, including the scope of the principle of *non-refoulement* and the proper application of the elements of the refugee definition. The Office of the United Nations High Commissioner for Refugees (UNHCR) commissioned papers on these issues from some of the world's pre-eminent international refugee experts, and these were discussed at a series of expert roundtable meetings during 2001 as part of UNHCR's Global Consultations on International Protection. The papers and roundtable conclusions are published here, together with an overview and the landmark declaration of the 2001 Ministerial Meeting of States Parties to the Convention and/or Protocol.

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**UNHCR's Global Consultations on International  
Protection**

edited by  
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and  
FRANCES NICHOLSON

PUSTAKA PERDANA



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## Contents

<i>List of annexes</i>	page viii
<i>Notes on contributors and editors</i>	ix
<i>Foreword</i>	xv
<i>Preface</i>	xvii
<i>Acknowledgments</i>	xx
<i>Expert roundtables and topics under the 'second track' of the Global Consultations</i>	xxi
<i>Table of cases</i>	xxii
<i>Table of treaties and other international instruments</i>	xlvi
<i>List of abbreviations</i>	lv

### *Part 1* Introduction

- 1.1 Refugee protection in international law: an overall perspective 3  
**VOLKER TURK AND FRANCES NICHOLSON**
- 1.2 Age and gender dimensions in international refugee law 46  
**ALICE EDWARDS**
- 1.3 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees 81

### *Part 2 Non-refoulement* (Article 33 of the 1951 Convention)

- 2.1 The scope and content of the principle of *non-refoulement*:  
Opinion 87  
**SIR ELIHU LAUTERPACHT QC AND DANIEL BETHLEHEM**
- 2.2 Summary Conclusions: the principle of *non-refoulement*, expert  
roundtable, Cambridge, July 2001 178
- 2.3 List of participants 180

**Part 3 Illegal entry (Article 31)**

- 3.1 Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection 185  
**GUY S. GOODWIN-GILL**
- 3.2 Summary Conclusions: Article 31 of the 1951 Convention, expert roundtable, Geneva, November 2001 253
- 3.3 List of participants 259

**Part 4 Membership of a particular social group (Article 1A(2))**

- 4.1 Protected characteristics and social perceptions: an analysis of the meaning of "membership of a particular social group" 263  
**T. ALEXANDER ALEINIKOFF**
- 4.2 Summary Conclusions: membership of a particular social group, expert roundtable, San Remo, September 2001 312
- 4.3 List of participants 314

**Part 5 Gender-related persecution (Article 1A(2))**

- 5.1 Gender-related persecution 319  
**RODGER HAINES QC**
- 5.2 Summary Conclusions: gender-related persecution, expert roundtable, San Remo, September 2001 351
- 5.3 List of participants 353

**Part 6 Internal protection/relocation/flight alternative**

- 6.1 Internal protection/relocation/flight alternative as an aspect of refugee status determination 357  
**JAMES C. HATHAWAY AND MICHELLE FOSTER**
- 6.2 Summary Conclusions: internal protection/relocation/flight alternative, expert roundtable, San Remo, September 2001 418
- 6.3 List of participants 420

**Part 7 Exclusion (Article 1F)**

- 7.1 Current issues in the application of the exclusion clauses 425  
**GEOFF GILBERT**

- 7.2 Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001 479
- 7.3 List of participants 486

***Part 8 Cessation (Article 1C)***

- 8.1 Cessation of refugee protection 491  
**JOAN FITZPATRICK AND RAFAEL BONOAN**
- 8.2 Summary Conclusions: cessation of refugee status, expert roundtable, Lisbon, May 2001 545
- 8.3 List of participants 551

***Part 9 Family unity (Final Act, 1951 UN Conference)***

- 9.1 Family unity and refugee protection 555  
**KATE JASTRAM AND KATHLEEN NEWLAND**
- 9.2 Summary Conclusions: family unity, expert roundtable, Geneva, November 2001 604
- 9.3 List of participants 609

***Part 10 Supervisory responsibility (Article 35)***

- 10.1 Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond 613  
**WALTER KALIN**
- 10.2 Summary Conclusions: supervisory responsibility, expert roundtable, Cambridge, July 2001 667
- 10.3 List of participants 672

*Index* 674

## **Annexes**

- 2.1 Status of ratifications of key international instruments which include a *non-refoulement* component page 164
- 2.2 Constitutional and legislative provisions importing the principle of *non-refoulement* into municipal law 171
- 3.1 Incorporation of Article 31 of the 1951 Convention into municipal law: selected legislation 234

## Notes on contributors and editors

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Daniel Bethlehem was called to the Bar in 1988, practising in international law from chambers at 20 Essex Street, London. He was a lecturer in international law at the London School of Economics from 1992 to 1998. In 1998, he took up the post of Deputy Director of the Lauterpacht Research Centre for International Law and a fellowship of Clare Hall at the University of Cambridge. He appears regularly as counsel before the International Court of Justice and other international and domestic tribunals.

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## xii Notes on contributors and editors

Osgoode Hall Law School, Toronto, Canada, and has been a visiting professor at the Universities of Tokyo and California. His publications include *The Law of Refugee Status* (Butterworths, Toronto, 1991), editorship of *Reconceiving International Refugee Law* (Martinus Nijhoff, The Hague, 1997), and more than forty journal articles. He is on the editorial boards of *the Journal of Refugee Studies* and the *Immigration and Nationality Law Reports*, and directs the Refugee Caselaw Site, a website that collects, indexes, and publishes selected recent court decisions on refugee law. He has recently been appointed to direct the first advanced course on refugee law for the International Association of Refugee Law Judges and is completing work on his next book, *The Rights of Refugees under International Law*.

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Elihu Lauterpacht was called to the Bar in 1950, was appointed a QC in 1970, and was knighted in 1996. He practises from chambers at 20 Essex Street, London. He became a Fellow of Trinity College at the University of Cambridge, United Kingdom, in 1953. The founder of the Research Centre for International Law in 1983, he was its first Director until 1995 since when he has been its Emeritus Director.

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**xiv Notes on contributors and editors**

He has also had brief temporary assignments in central Asia and in the Democratic Republic of Congo. Before that, he worked as a university assistant at the Institute of International Law at the University of Vienna, where he finished his doctoral thesis on UNHCR and its mandate (published in German by Duncker & Humblot, Berlin, 1992). From 1985 to 1988, he was research assistant at the Institute of Criminal Law at the University of Linz, Austria. He has published widely on international refugee law.

## Foreword

At the start of the twenty-first century, fifty years after the drafting of the 1951 Convention Relating to the Status of Refugees, international refugee protection is at a crossroads. In a globalizing world and a rapidly changing political environment, the Convention faces many challenges. These include new forms of persecution and conflict, complex mixed migration movements, the reluctance of many states to accept refugees, and restrictive interpretation of the Convention.

The papers and the conclusions contained in this volume are one outcome of the Global Consultations on International Protection, organized by UNHCR in 2000-2 to reinvigorate the international refugee protection regime. They address key questions relating to the 1951 Convention, where it was considered that greater clarity and coherence of interpretation was needed. They are the result of a series of expert roundtables which were held in 2001 as part of the Global Consultations.

This book examines some of the legal issues that are part of the system of governance for refugees. The cornerstone of this system remains the 1951 Convention and its 1967 Protocol. The aim is to ensure that this system can function more effectively, equitably, and efficiently, enabling refugees to obtain the protection to which they are entitled.

Refugee protection problems cannot be addressed in isolation. All stakeholders, whether they be international organizations, governments, judiciaries, civil society, non-governmental organizations, or academia, need to strengthen their partnerships and clarify their roles. Clearer understanding and more consistent implementation are an integral part of ensuring that refugee protection burdens and responsibilities are shared more equally, and that some of the world's most vulnerable individuals are able to find durable solutions to their plight and to enjoy the respect that they deserve.

The Declaration agreed by delegates at the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol in December 2001 called on States to 'strengthen asylum and render protection more effective'. I hope this volume will serve as a tool to assist those involved in refugee protection in this endeavour.

Ruud Lubbers

*United Nations High Commissioner for Refugees*

xv





## Preface

The world has changed radically since the establishment of UNHCR and the coming into force of the Convention Relating to the Status of Refugees some fifty years ago. The modern regime of international refugee protection has been built on these beginnings in the aftermath of the Second World War and is now a complex structure affording vital protection to millions of forcibly displaced people. Within this structure, the Convention and its 1967 Protocol are widely acknowledged as enduring instruments with a 'central place in the international refugee protection regime', as States Parties to the Convention and/or Protocol declared in December 2001.

Conclusions have, however, sometimes been drawn which put in question the ongoing relevance of the Convention or which seem to call for its complete overhaul, or even abandonment. Such conclusions are misguided, even dangerous. They contribute to the waning quality of asylum, as State commitment to protection using the available instruments starts to falter. UNHCR does of course recognize that the challenges today are many and various and that there are gaps in the protection framework, even while, at the core, the Convention regime's fundamental principles are as sound and necessary as ever.

The Global Consultations on International Protection have been UNHCR's effort 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, which nevertheless respect the concerns and constraints of States and other actors. The process was designed to promote better understanding of today's protection dilemmas, from the perspective both of the providers and of the beneficiaries of international protection. State interests and refugee needs have not been always easy to reconcile, but certainly the first step in this direction can only be taken when the possibilities and limitations are properly appreciated.

The Consultations were also conceptualized so as to realize better cooperation among all concerned. Best practices, or at least baselines, for making asylum systems work more justly and efficiently, coupled with a firming up of political will to improve the 'doing' of protection, not on an ad hoc and discretionary basis, but more predictably and consistently within the internationally agreed parameters, were likewise an objective. So too was a more reasoned approach to responsibility

## xviii Preface

sharing, in order to rationalize the assumption of responsibilities and balance the burdens in a more equitable manner. Finally, the Consultations had the goal of contributing to improved implementation of important framework principles, including by clarifying their meaning in a modern context.

The various issues raised in the course of the Global Consultations were organized along three 'tracks'. The first culminated in an unprecedented Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol in Geneva in December 2001. The Declaration from that meeting - the first ever adopted by all States Parties - is reproduced in Part 1.3 of this book. That Declaration stands as an important measure of political commitment to better refugee protection within a strengthened Convention framework. The 'second track' of the Consultations involved a series of expert roundtables held during 2001 on specific issues in the interpretation of the 1951 Convention on which greater clarity is required, as set out in the table on p. xxi. A more harmonized understanding of how the Convention is to be applied in today's world will, it is hoped, be one enduring outcome. The 'third track' brought together States and other actors, within the framework of the Executive Committee of the High Commissioner's Programme, to examine various specific or thematic refugee protection concerns not directly, or not adequately, covered by the Convention and Protocol.

Overall the Global Consultations process has encouraged a cooperative spirit in tackling refugee issues. It has aroused an interest in multilateral dialogue to find solutions to an increasingly internationalized set of problems. The process has confirmed a willingness to pool concerns and jointly point the way forward to the durable resolution of problems whose solution is within our collective reach. Together, UNHCR and States have drafted an Agenda for Protection, which should help both to inform and to shape debate and policy formation. The Agenda comprises a comprehensive programme of action to tackle the various issues besetting refugee protection in today's complex environment.

This book represents a key outcome very particularly of the second track roundtable meetings and the Summary Conclusions resulting from them. It focuses in a detailed manner on discrete legal issues of interpretation of the 1951 Convention, bringing together the expert papers presented to the participants at the roundtable meetings and their conclusions. The authors were asked to make proposals to establish common understandings on key issues of Convention interpretation in order to promote greater consistency in the application of the Convention in the different jurisdictions of the world. They were also asked to factor into their analysis subsequent developments in international law of relevance to forced displacement.

The book is introduced by an overview of refugee protection in international law, followed by a paper on the age- and gender-sensitive interpretation of the 1951 Convention and the text of the 2001 Declaration of the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol. The book then comprises nine

parts, each containing a paper by different leading international refugee experts on key issues of interpretation of the 1951 Convention. These concern *non-refoulement*, illegal entry, membership of a particular social group, gender-related persecution, internal flight, relocation or protection alternatives, exclusion, cessation, family unity and reunification, and UNHCR's supervisory responsibility under its Statute. Each of these issues was debated at an expert roundtable meeting in 2001 and the Summary Conclusions of those meetings follow the relevant paper.

I trust this book will offer a valuable resource for judges, adjudicators, legal practitioners, government officers, humanitarian workers, non-governmental refugee advocates, and academics alike in their various efforts towards the common goal of strengthening refugee protection worldwide. For its part, UNHCR will be drawing on these various contributions to refine its own guidelines, which it makes available pursuant to its responsibility under paragraph 8 of its Statute and Article 35 of the 1951 Convention itself.

Erika Feller  
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*Office of the United Nations High Commissioner for Refugees*

## Acknowledgments

UNHCR would like to thank the co-organizers of the expert roundtables held as part of the 'second track' of the Global Consultations on International Protection for their important substantive and financial contribution in making these events possible. The co-organizers involved were the International Migration Policy Institute of the Carnegie Endowment for International Peace, New York, United States; the Luso-American Foundation for Development, Lisbon, Portugal; the Lauterpacht Research Centre for International Law, University of Cambridge, United Kingdom; the International Institute of Humanitarian Law, San Remo, Italy; and the Graduate Institute of International Studies, Geneva, Switzerland. Other significant financial contributors to the overall Global Consultations process, who also therefore helped to make these roundtables happen, were Australia, Canada, the European Commission, Japan, Luxembourg, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States. In addition, the governments of Canada, China, Costa Rica, Egypt, France, Hungary, Norway, and South Africa each hosted regional meetings in the context of the 'third track' of the Consultations which likewise made an important contribution to the process.

The editors would especially like to thank Kate Jastram and Alice Edwards, who provided valuable substantive and organizational input as consecutive focal points for the second track of the Global Consultations, as well as Eve Lester, the non-governmental organization (NGO) liaison officer for the Consultations.

In addition, the editors are most grateful for the input and comments of colleagues Nicholas Arons, Alexander Beck, Walter Brill, Walpurga Englbrecht, Diane Goodman, Nathalie Karsenty, Irene Khan, Janice Marshall, Hugh Massey, Sophie Muller, Shahrzad Tadjbakhsh, Mignon van der Liet, and Wilbert van Hovell. Thanks also go to Finola O'Sullivan, Treena Hall, Jennie Rubio, Caro Drake, and Martin Gleeson at Cambridge University Press, as well as Lesley Dingle at the Squire Law Library in Cambridge, for their kind support in seeing this project through to publication.

The publisher has used its best endeavours to ensure that the URLs for external websites referred to in this book are correct and active at the time of going to press. However, the publisher has no responsibility for the websites and can make no guarantee that a site will remain live or that the content is or will remain appropriate.

## Expert roundtables and topics under the ‘second track’ of the Global Consultations

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Roundtables	Topics
<b>1st Roundtable</b> Date: 3-4 May 2001 Venue: Lisbon Co-organizer: Carnegie Endowment for International Peace, Washington DC Hosted by: Fundaao Luso-Americana para o Desenvolvimento	<ul style="list-style-type: none"><li>• Cessation (Article 1C)</li><li>• Exclusion (Article IF)</li></ul>
<b>2nd Roundtable</b> Date: 9-10 July 2001 Venue: Cambridge Co-organizer: Lauterpacht Research Centre for International Law, Cambridge, UK	<ul style="list-style-type: none"><li>• Principle of <i>non-refoulement</i> (Article 33)</li><li>• Supervisory responsibility (Article 35)</li></ul>
<b>3rd Roundtable</b> Date: 6-8 September 2001 Venue: San Remo Co-organizer: International Institute of Humanitarian Law, San Remo, Italy	<ul style="list-style-type: none"><li>• Membership of a particular social group (Article 1 A(2))</li><li>• Gender-related persecution (Article 1A(2))</li><li>• Internal protection/relocation/flight alternative</li></ul>
<b>4th Roundtable</b> Date: 8-9 November 2001 Venue: Geneva Co-organizer: Graduate Institute of International Studies, Geneva, Switzerland	<ul style="list-style-type: none"><li>• Illegal entry (Article 31)</li><li>• Family unity (Final Act of the 1951 UN Conference)</li></ul>

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## Table of cases

Many of the cases cited in this volume are available on the UNHCR website, [www.unhcr.ch](http://www.unhcr.ch), and on UNHCR's Refworld CD-ROM, available from the Protection Information Section, Office of the UN High Commissioner for Refugees, Case Postale 2500, CH-1211 Geneve 2 Depot, Switzerland, e-mail [HQPR11@unhcr.ch](mailto:HQPR11@unhcr.ch). Other useful websites, all of which are freely accessible, are given below.

### Permanent Court of International Justice

*Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Series A/B, No. 65, 1935 page 438n  
*Mavrommatis Palestine Concessions*, Series A, No. 2, 30 Aug. 1924 376n

### International Court of Justice

Judgments are available on <http://www.icj-cij.org/icjwww/idecisions.htm>.

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, p. 595 636n  
*Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*, ICJ Reports 1970, p. 4 431n  
*Fast Timor (Portugal v. Australia)*, ICJ Reports 1995, p. 90 636n  
*Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7 105  
*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65 636n  
*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16 104-5, 113  
*Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 329; and Merits, Judgment, ICJ Reports 1986, p. 14 141, 142, 147, 460n, 473n

- North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3 142-3, 148  
*Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*,  
 Advisory Opinion, ICJ Reports 1951, p. 15 104  
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 on Jurisdiction before the Appeals Chamber of ICTY, Case No. IT-94-1-AR72,  
 1995 434n, 435n, 437n, 438n

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 445n

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 9 Dec. 1994 157n  
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#### **xxiv Table of cases**

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- E.A. v. Switzerland*, Communication No. 28/1995, 10 Nov. 1997 162n
- Elmi v. Australia*, Communication No. 120/1998, 14 May 1999 162n
- G.R.B. v. Sweden*, Communication No. 83/1997, 15 May 1998 162n
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- IA.O. v. Sweden*, Communication No. 65/1997, 6 May 1998 162n
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## xxvi Table of cases

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*Minister for Immigration and Multicultural Affairs v. Ibrahim*, [2000] HCA 55, 26 Oct. 2000 59n  
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**Federal Court of Australia**

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- Betkoshabeh v. Minister for Immigration and Multicultural Affairs*, (1998) 157 ALR 95 450n
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- Minister for Immigration and Multicultural Affairs v. Sarrazola*, [1999] FCA 1134 306n
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- Omar v. Minister for Immigration and Multicultural Affairs*, (Full Court) [2000] FCA 1430 385n
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xxviii Table of cases

**Refugee Review Tribunal**

Decisions can be found at <http://www.rrt.gov.au/>.

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Decision No. V95/03188, 12 Oct. 1995	66n
Decision No. V96/04931, 25 Nov. 1996	394n
Decision No. V96/04189, 26 Feb. 1997	413n
Decision No. V96/05239, 11 March 1997	388n
Decision No. V98/08482, 31 March 1999	370n

**Austria**

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**Verwaltungsgerichtshof (Administrative Court)**

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Decision No. 95/20/0295, 18 April 1996 415n  
Decision No. 99/20/0497-6, 31 Jan. 2002 54n, 61n  
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**Austrian Independent Federal Asylum Senate**

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**Belgium**

**Cour d' Assises Bruxelles (Court of Assizes Brussels)**

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*Attorney-General of Canada v. Cain*, [1906] AC 542 222n

**Supreme Court of Canada**

Judgments can be found at <http://www.lexum.umontreal.ca/csc-scc/en/index.html>.

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*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 450n, 451, 455, 456-7

*Suresh v. Canada (Minister of Citizenship and Immigration)*, 11 Jan. 2002 12, 13n, 30, 443n, 454n, 460n, 463n, 476n, 478n

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**Federal Court of Canada**

In this listing (TD) refers to the Trial Division and (CA) to the Court of Appeal Division within the Federal Court of Canada.

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**xxx Table of cases**

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- Dykon v. Canada (MEI)*, (1994) 87 FTR 98 (TD), Sept. 1994 69n
- Elmi v. Canada (MCI)*, Decision No. IMM-580-98 (TD), (1999) Fed. Ct. Trial Lexis 220, 12 March 1999 73, 405n
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- Pathmakanthan v. Canada (MEI)*, [1993] FCJ 1158 (TD) 413n
- Penate v. Canada (MEI)*, [1994] 3 FC 79 (TD) 382n
- Periyathamby v. Canada (MCI)*, (1995) 26 Imm LR (2d) 179 (TD) 387n
- Rabbani v. Canada (MCI)*, Decision No. IMM-236-96 (1997) (TD), 1997 Fed. Ct. Trial Lexis 681 415n
- Ramanathan v. Canada (MCI)*, Decision No. IMM-5091-97 (1998) (TD); 1998 Fed. Ct. Trial Lexis 1017 387-8n
- Ramirez v. Canada (MEI)*, [1992] 2 FC 306 (CA) 464n, 471
- Rasaratnam v. Canada (MEI)*, [1992] 1 FCJ 706 (CA), 1991 23n, 363n
- Saidi v. Canada (MEI)*, [1993] FCJ 932 (TD) 410n
- Sathanathan v. Canada (MCI)*, Decision No. IMM-5152-98 (1999) (TD); 1999 Fed. Ct. Trial Lexis 1149 391
- Singh v. Canada (MEI)*, (1993) FCJ 630 (TD), 23 June 1993 386n

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*Soosaipillai v. Canada (MCI)*, Decision No. IMM-4846-98 (1999) (TD); 1999 Fed. Ct. Trial Lexis 834 409  
*Manickavasagam Suresh v. MCI and the Attorney-General of Canada*, [2000] 2 FC 592 (CA), A-415-99, 18 Jan. 2000 453n, 456n, 460n, 463, 471, 476n, 478n  
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 G. (*B.B.*) (*Re*), CRDD No. 397, 1994 63n  
 H.Z.G. (*Re*), 1999, CRDD No. 226 (Quicklaw) 571n  
 I.P.A. (*Re*), 1999, CRDD No. 286 (Quicklaw) 571n  
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 R.O.I. (*Re*), CRDD No. 235, 1996 63n  
 U.C.R. (*Re*), CRDD No. 94, 2001 63-4n  
 W. (*Z.D.*) (*Re*), CRDD No. 3, No. U92-06668, 19 Feb. 1993 57n  
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 Decision No. T-91-04459, *Jorge Alberto Inaudi*, 4 April 1992 69n  
 Decisions Nos. U95-00646, U95-00647, U95-00648, 15 Jan. 1997, 67 *Reflex*, 26 May 1997 57n  
 Decision No. V95-02904, 26 Nov. 1997 62n  
 Decision No. V95-01655 *et al.*, *Lalonde*, 6 May 1998 571n  
 Decision No. A98-00594 *et al.*, *Kagedan, Showler*, 9 Dec. 1998 571n  
 Decision No. T98-06186, CRDD No. 298, 2 Nov. 1999 54n, 62n  
 Decision No. M99-04586 *et al.*, *Moss*, 21 Dec. 1999 571n  
 Decision No. TA0-05472, 30 May 2001 57n

xxxii Table of cases

**France**

**Conseil d'Etat (Council of State)**

Selected decisions from 1999 onwards can be found at <http://www.conseil-etat.fr/ce/home/index.shtml>. The French government legal site <http://legifrance.gouv.fr/> is also useful.

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*Ourbih*, *Conseil d'Etat* SSR, Decision No. 171858, 23 June 1997 281-2, 296

*Pham*, *Conseil d'Etat* SSR, Decision No. 148997, 21 May 1997 459n

*Rajkumar*, *Conseil d'Etat* SSR, 28 Sept. 1998 454n

**Cour de Cassation (Court of Cassation)**

*Federation Nationale des Deportes et Internes Resistants et Patriotes et al. v. Barbie*, 78 ILR 125, 1985 437n

**Commission des recours des refugies (CRR, Refugee Appeal Commission)**

Decision No. 369776, 7 Dec. 2001 282n

*A.*, 18 Sept. 1991 54n

*Ahmed*, 30 Nov. 2000 53n, 72n

*Albu*, Decision No. 347330, 3 April 2000 282n

*AminataDiop*, DecisionNo. 164078, 18 Sept. 1991 281n

*Aourai*, Decision No. 343157, 22 Feb. 2000 54n, 282n

*Avetisan*, Decision No. 303164, 4 April 1997 456n

*Benarbia*, Decision No. 364301, 1 June 2001 282n

*Benedir*, Decision No. 364663, 18 April 2001 282n

*Berang*, Decision No. 334606, 6 May 1999 282n

*Brahim*, Decision No. 228601, 29 Oct. 1993 456n

*Daghi*, Decision No. 330627, 4 Oct. 2000 282n

*Djellal*, CRR sections reunis (SR), Decision No. 328310, 12 May 1999 54n, 282n

*Elkebir*, CRR (SR), Decision No. 237939, 22 July 1994 53n, 281n

*Elnov*, Decision No. 318610, 23 July 1999 282n

*Kinda*, Decision No. 366892, 19 March 2001 282n

*Krouar*, Decision No. 364839, 2 May 2001 282n

*Kulik*, Decision No. 367645, 29 June 2001 282n

*Meguenine*, 12 July 2001 54n

*Muntumusi Mpemba*, Decision No. 238444, 29 Oct. 1993 456n  
*Ourbih*, CRR SR, Decision No. 269875, 15 May 1998 54n, 281  
*Sahraoui*, 8 Feb. 1995 53n  
*Sissoko*, CRR SR, Decisions Nos. 361050 and 373077, 7 Dec. 2001 282n  
*Soumah*, 7 Dec. 2001 54n  
*Soumahoro*, 17 July 1995 54n  
*Tsypouchkine*, Decision No. 318611, 23 July 1999 282n  
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Decision of 15 March 1988, 9 C 378.86, 79 BVerwGE 143 283n  
Decision of 14 Dec. 1993, BVerwG C 45.92 402n  
Decision of 18 Jan. 1994, 9 C 48.92, 95 BVerwGE 42 283n  
Decision of 8 Dec. 1998, BVerwG 9 C 17.98 410n  
Decision of 30 March 1999, BVerwG 9 C 22.98, 23.98, 31.98 458n

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### **Oberverwaltungsgericht/Verwaltungsgerichtshof (Higher Administrative Court)**

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- Bavarian Higher Administrative Court (BayVGH), Decision of 23 March 2000, 23 B 99.32990 391n
- Hessen Higher Administrative Court (Hess VGH), Decision of 14 Nov. 1988, 13 TH 1094/87, InfAusLR 1998, 17 283n
- Hessen Higher Administrative Court (HessVGH), Decision of 2 May 1990, UE 1568/84 392n
- Schleswig-Holstein Higher Administrative Court (NiedersOVG), Decisions of 18 Feb. 1998, 2 L166/96 and 2 L 41/96 410n

### **Verwaltungsgerichte (Administrative Courts)**

- Bavarian Administrative Court (VG Ansbach), Decision of 30 May 1990, AN 12 K 89.39598 386n
- Frankfurt Administrative Court (VG Frankfurt/M), Decision of 23 Oct. 1996, 5 E 33532/94.A(3), NVwZ-Beilage 6/1997, p. 46 284n
- Frankfurt Administrative Court (VG Frankfurt/M), Decision of 7 Sept. 2001, 1E 31666/97.A(1) 52n
- Wiesbaden Administrative Court (VG Wiesbaden), Decision of 26 April 1983, IV/1 E 06244/81 66n, 67n, 283n

### **Oberstes Landesgericht (Supreme State Court)**

- The internet address of the Bavarian Supreme Court is <http://www.justiz.bayern.de/bayoblg/index.html>.
- Decision No. 1 Ss 545/86, Oberlandesgericht Celle, NvwZ 1987,533 (ZaoRW) 48 [1988], 741, 13 Jan. 1987 202
- Decision No. 20/96, *Public Prosecutor v. Djajic*, Bavarian Supreme Court (Bayerisches Oberstes Landesgericht), 23 May 1997, excerpted in 1998 *Neue Deutsche Wochenschrift* 392 430n
- Decision No. 230/99, Bayerisches Oberstes Landesgericht, 14 Jan. 2000 202n

**Landesgericht (State Court)**

Decision No. 39 Js 688/86 (108/88), Regional Superior Court (Landesgericht) Munster, 20 Dec. 1988 (appeal by Public Prosecutor rejected by Appeals Court (Oberlandesgericht) in Hamm, 3 May 1989) 201n

**Greece****Court of First Instance (Criminal Cases)**

Decision No. 585/1993, *Shimon Akram and Others*, Court of First Instance (Criminal Cases), Mytilini (*Aftoforo Trimeles Plimeliodykeio Mytilinis*), 1993 202

Decision No. 233/1993, Court of First Instance (Criminal Cases), Chios (*Aftoforo Trimeles Plimeliodykeio Chiou*), 1993 202n

**The Netherlands****Hoge Raad der Nederlanden (Supreme Court of the Netherlands)**

Decision of 11 Nov. 1997, (Criminal Division), No. 3717 AB 430n

Decision of 9 Dec. 1988, *Shokuh v. The Netherlands*, *Revue du droit des étrangers* (RDDE), No. 52, Jan.-Feb. 1989, p. 16 220n

**Raad van State (Council of State)**

Decision No. A-2.0273, 1980 386n

*A.R.R. v. 5.*, 1982, and *A.R.R. v. 5.*, 1988 395n

*R.V.*, 1982, and *R.V.*, 1994 395n

Decision No. 6 GV 18d-21, Afdeling Bestuursrechtspraak van de Raad van State (Administrative Law Division of the Council of State), 7 Nov. 1996, RV 1996, (China) 284n

**Rechtseenheidskamer (REK, Law Unity Chamber)**

AWB 98/3068 VRWET, *Osman Egal v. State Secretary for Justice*, The Hague District Court (Administrative Law Sector/Unity of Law Division for Aliens' Affairs), 27 Aug. 1998 626n

AWB 99/73, 3 June 1999 410n

AWB 99/104, 3 June 1999 410n

AWB 99/3380, 13 Sept. 1999 412n



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