

TREATIES AS BOUNDARIES OF POLICY: REVISITING THE POLICIES THAT INFORMED THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES*

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1. INTRODUCTION

The notion or phrase ‘boundaries of policy’ induces thinking about the tools of the trade: treaties. In the international society, treaties are the boundaries of policy (“the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions”).¹ Treaties and treaty obligations are the normative apex of policy regarding specific subjects, often arrived at only after protracted negotiations. They constitute boundaries of policy. Treaties are the hard edge of policy which may either be nothing but codification of already long-standing and generally accepted policies or constitute progressive development that seeks to advance well beyond so far accepted policies and practice. As legally binding boundaries of policy, treaties affect new policy. In that sense, treaties and individual treaty obligations are a two-edged sword: they finish policy debates when the final text is drafted. Upon entry into force, treaties may impede the development of new policies and consequently stifle progress; alternatively, they may prevent the development of less forthcoming policies and thus safeguard that what has earlier been achieved. Rather than discussing the phenomenon of treaties as such, the submission of treaties as boundaries of policy in the sense indicated will be illustrated and substantiated with reference to the 1951 Convention relating to the Status of Refugees (hereinafter referred to as the 1951 Convention, a reference that may be taken to include the 1967 Protocol).

2. TREATIES AS BOUNDARIES OF PAST POLICY

The 1951 Convention is the first human rights convention that was drafted and concluded after the Second World War. The shockwaves of that war made themselves felt first in the Charter of the United Nations, induced the adoption of the Genocide Convention and, a day later, the Universal Declaration of Human Rights, and influenced the 1951 Convention.

The historic setting of the drafting process left more than mere traces. Although more examples could be given, the following three examples have been selected by way of illustration. The first example concerns a preambular paragraph that does not correspond with a binding provision in the operative part of the Convention, therefore remains in the realm of mere (desired) policy. The second example concerns a provision – a normative boundary in a double sense since it concerns an exclusion clause – that is the result of conscious policy decisions, and the third has been selected on account of the fact that it appears to lack a specific policy but does proceed, albeit tacitly, from more general policy decisions regarding the protection of refugees after World War Two that preceded the actual drafting of the Convention.

The first example concerns a preambular paragraph. The preamble to a treaty is usually, at least meant to be, the summary of the substance of the treaty, of its operative part. The preamble to the

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¹ Sir Arnold McNair, *The Law of Treaties*, 1961 at 731.

1951 Convention, however, includes a paragraph the substance of which is not addressed in the Convention:²

“*Considering* that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation”.

It was inserted at the suggestion of France on the basis of its experience with an influx of half a million Spanish refugees fleeing the Spanish civil war and its desire to recognize the exceptional nature of the burdens assumed by receiving states:³ France had to be quite tenacious to have it included in the final text,⁴ even though the provision was not intended to impose on states any obligation with respect to the right of asylum or otherwise,⁵ but meant to function as a safety or safeguarding clause:⁶ how it was to function as such was not discussed though.

The second example concerns Article 1 F, more in particular Article 1 F (a): the exclusion of any person against whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity.⁷ This more than anything else had been on the minds of the drafters. Both east and west – the Cold War had already started – shared the strongly held conviction that war criminals, quislings and traitors should not be given the benefits of the 1951 Convention.⁸ The fact that those refugees who would thus be excluded would be exposed to persecution was not taken into consideration:⁹ the predominant desire was to exclude those at whose hands so many had recently suffered, possibly subconsciously feeding into *lex talionis* sentiments, and the related one of preventing escape from prosecution by means of the protection provided by the 1951 Convention.

The third example concerns Article 35 paragraph 1 which secures the cooperation of states parties to the Convention with UNHCR in the exercise of its functions in particular supervising the

² Presumably on account of the additional burdens such would signify for other states parties, as may be inferred from debates with respect to proposals of the Holy See concerning the recommendations the Conference of Plenipotentiaries would adopt in its Final Act (see UN doc. A/CONF.2/SR.34 (30 November 1951) at 6-7.

³ UN docs. E/AC.7/SR.160 (18 August 1950) (Rochefort, France) at 26; E/AC.7/SR.166 at 13. The original version of the French proposal related the incidence of heavy burdens to geographical proximity, and international cooperation was geared to “help[ing] to distribute refugees throughout the world, UN doc. E/L.81 (29 July 1950) (Rochefort, France): “But considering that the exercise of the right of asylum places an undue burden on certain countries because of their geographical situation, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international co-operation to help to distribute refugees throughout the world”. The representative of Mexico (De Alba) observed that the proposal had the merit of seeking to awaken a feeling of collective responsibility, UN doc. E/AC.7/SR.166 (22 August 1950) at 13.

⁴ The proposal was rejected (UN doc. E/AC.7/SR.166 at 9), subsequently France again proposed to insert this provision (UN doc. E/L.94) and it was adopted (ECOSOC, 11th session, 406th meeting, para. 113). At the Conference of Plenipotentiaries, the United Kingdom submitted an alternatively worded Preamble which did not contain this provision (UN doc. A/CONF.2/99), but at the request of France, it was reinserted once again, see UN doc. A/CONF.2/SR.31 (29 November 1951) at 24 *et seq.*, and adopted, UN doc. A/CONF.2/SR.33 (30 November 1951) at 10.

⁵ UN docs. E/AC.7/SR/166 at 17 (Rochefort, France); A/CONF.2/SR.31 (Rochefort, France) at 29.

⁶ UN doc. E/AC.7/SR.166 at 22 (France); ECOSOC, 11th session, 406th meeting, para. 60 (France).

⁷ “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations”.

⁸ Despite this preoccupation – see also n. 19 *infra* – which caused the exclusion of war criminals, quislings and traitors from the care of the International Refugee Organization (see Annex 1, Part II, to the Constitution of the IRO), Article 14 paragraph 2 of the 1948 Universal Declaration of Human Rights does not exclude those currently comprised in Article 1 F (a) from invoking the right to seek and enjoy asylum from persecution.

⁹ See S. Kapferer, “Article 14(2) of the Universal Declaration of Human Rights and Exclusion”, 27 *Refugee Survey Quarterly* 2008, 53-75 at 70-72.

application of the provisions of the Convention.¹⁰ The origin of this function was the recognition on the part of the Economic and Social Council of the link between the provisions of the (future) Convention and the functions of the High Commissioner.¹¹ The envisaged supervision was considered to be an innovation by comparison with earlier conventions which had operated without such external supervision.¹² What supervision of the application of the provisions of the Convention would entail was not clear. The question raised by the Australian representative at the Conference of Plenipotentiaries is illustrative for the lack of clarity in this respect: “Was it the intention that refugees should appeal to the High Commissioner against alleged contraventions of the Convention and that he should hear such appeals?”¹³ This question was left unanswered.

In summary, various policy decisions lie at the basis of what became the 1951 Convention: in that sense, the 1951 Convention comprises the boundaries of many substantively related policy areas.¹⁴ past policy.

3. REVISITING POLICIES THAT INFORMED THE 1951 CONVENTION

After more than half a century, the question is whether those past policy decisions should not be revisited. The overall tendency is to focus on gaps in recognition of the fact that the 1951 Convention cannot cope with today’s pressing problems.¹⁵ At the same time, recently emphasized in the Ministerial declaration adopted at the 50th anniversary of the 1951 Convention,¹⁶ the 1951 Convention is recognized to constitute the key instrument. Addressing needs has consequently to proceed from and build on the Convention. The question is whether the 1951 Convention should merely be taken as a normative given. A qualified affirmative answer to that question is suggested: proceeding from the Convention should not be confined to merely assessing whether or not it may accommodate present day needs but extend to revisiting the policy decisions that informed the Convention, *i.e.* those that led to the boundary of refugee policy in 1951.

This submission will be illustrated by means of the two examples, given earlier, which were taken from the operative part of the 1951 Convention, the first (Article 1 F (a)) the result of explicit policy decisions on the part of the drafters,¹⁷ and the second (the supervisory function of UNHCR) tacitly proceeding from more general policy decisions regarding the nature of the regime that was to govern the protection of refugees following the Second World War.

Article 1 F was induced by the decision not to give the benefits of the 1951 Convention to those considered not to be worthy or deserving of international protection.¹⁸ Not really surprising for it had figured prominently in the debates from the first instance the post war refugee question was

¹⁰ Article 35, entitled ‘Co-operation of the National Authorities with the United Nations’, paragraph 1 runs as follows: “1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention”.

¹¹ “Considering that the High Commissioner for Refugees will be called upon to supervise the application of this Convention, and that the effective implementation of this Convention depends on the full cooperation of States with the High Commissioner and on a wide measure of international cooperation”, UN doc. E/1818.

¹² UN Doc. A/CONF.2/SR.25 at 12 (France).

¹³ UN Doc. A/CONF.2/SR.25 at 13.

¹⁴ The consequences of certain policy decisions were feared and induced limiting the temporal (and if so desired also the geographical) scope of the 1951 Convention, see Articles 1 A (2) and 1 B (2) of the 1951 Convention.

¹⁵ This recognition induced the so-called ‘Convention Plus initiative’, on which see M.Y.A. Zieck, “Doomed to Fail from the Outset? UNHCR’s ‘Convention Plus Initiative’ Revisited”, 21 *International Journal of Refugee Law* 2009, 1-34.

¹⁶ Declaration of States Parties to the 1951 Convention and or Its Protocol Relating to the Status of Refugees, HCR/MMSP/2001/09, Preamble, paras. 2, 7.

¹⁷ For a comparable analysis of Article 1 F (b), see G. Gilbert, “Current Issues in the Application of the Exclusion Clauses”, in E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law. UNHCR’s Global Consultations on International Protection*, 2003, 425-478 at 452-454.

¹⁸ See J. Fitzpatrick, “The Post-Exclusion Phase: Extradition, Prosecution and Expulsion”, 12 *International Journal of Refugee Law* (Special Supplementary Issue) 2000, 272-292 at 275.

addressed.¹⁹ Article 1 F sub (a) provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.²⁰

UNHCR, whose opinion legally matters in view of its supervisory task which includes of necessity interpretation of the treaty provisions it is charged to supervise, observes that Article 1 F is of an exhaustive nature,²¹ which should, moreover, be interpreted restrictively.²² With respect to Article 1 F (a) UNHCR nonetheless states that it “allows for a dynamic interpretation of the relevant crimes so as to take into account developments in international law”.²³ It accordingly enumerates a host of new instruments to which recourse could be had including the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid; the two 1977 additional Protocols to the 1949 Geneva Conventions; the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment; the Statutes of the ICTY, ICTR and ICC,²⁴ regardless of inconsistencies between those instruments.²⁵ When compared to 1951, the number of crimes has become far more extensive. They now include, add rather, war crimes that are committed in internal conflicts (before 1995 it was assumed that war crimes could only be committed in international armed conflict),²⁶

¹⁹ Cf. UN doc. A/Res/8(I) of 12 February 1946 (“*The General Assembly* recognizing the problem of refugees and displaced persons of all categories is one of immediate urgency and recognizing the necessity of clearly distinguishing between genuine refugees and displaced persons on the one hand, and the war criminals, quislings and traitors [...] on the other”); A/Res/3(I) of 13 February 1946 on extradition and punishment of war criminals; UN doc. A/Res/62(I) of 15 December 1946 on the Constitution of the IRO (see n. 8 *supra*); and, of course, the early adoption of the Genocide Convention.

²⁰ A wording intended to exclude discretion on the part of states parties: exclusion is categorical, see N. Robinson, *Convention Relating to the Status of Refugees. Its History, Contents and Interpretation*, 1953 at 68.

²¹ Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 (hereinafter referred to as: UNHCR Guidelines on Exclusion), 4 September 2003, para. 3; UNHCR Background Note on the Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees (hereinafter referred to as: UNHCR Background Note on Exclusion), 4 September 2003, para. 7.

²² “Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive”, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*; HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, para. 149; similarly UNHCR Guidelines on Exclusion, para. 2 and UNHCR Background Note on Exclusion, para. 4; see also conclusion no. 82 (1997) of the Executive Committee sub d (v) which calls for a ‘scrupulous’ application of the exclusion clauses.

²³ UNHCR Background Note on Exclusion, para. 25. A highly instructive example of this form of interpretation is UNHCR’s interpretation of Article 7 (d) of its Statute, the counterpart of Article 1 F (a). Article 7 (d) defines those with respect to whom UNHCR has no competence: “In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in Article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights”. Rather than abiding by its Statute, UNHCR favours taking resort to Article 1 F (a), on legally untenable grounds, as follows: “Given that Article 1F represents a later and more specific formulation of the category of persons envisaged in paragraph 7(d) of the UNHCR Statute, the wording of Article 1F is considered more authoritative and takes precedence. UNHCR officials are therefore encouraged to apply the 1951 Convention formula in determining cases of exclusion”, UNHCR Background Note on Exclusion, para. 20; UNHCR Guidelines on Exclusion, para. 7.

²⁴ See Annexes V and VI to the UNHCR Handbook on Procedures, and in particular also UNHCR Guidelines on Exclusion; UNHCR Background Note on the Exclusion at 9-10.

²⁵ The propagated dynamic interpretation has to address this issue: when interpreting the scope of Article 1 F (a), the definitions used in other instruments than the Statute of the ICC must be given due consideration (UNHCR Background Note on Exclusion, para. 25), advice that suggests casting the net wider rather than narrower, and implies a rather expansive form of interpretation that contrasts markedly with the duty of strict interpretation and the principle of favouring the accused in case of conflicting interpretations in international criminal law (A. Cassese, *International Criminal Law*, 2003 at 152-157) that is reminiscent of the benefit of the doubt that should be given to refugees in refugee status determination procedures.

²⁶ See the dictum of the ICTY appeals chamber in the Tadić case, 2 October 1995 (Interlocutory Appeal) para. 141, a decision that confirmed customary international law in this respect, see Cassese, *op. cit. supra*, at 47, 73.

extend crimes against humanity to peacetime,²⁷ and comprise international crimes which do not partake of the categories enumerated in Article 1 F (a) such as torture (general) and genocide, some of which, moreover, did not even exist – the crime of apartheid is a case in point – when the 1951 Convention was drafted.²⁸

Article 1 F (a) refers to crimes “as defined in the international instruments drawn up to make provision in respect of such crimes” which should not automatically be taken to include any instrument drawn up after the 1951 Convention was adopted.²⁹ The dynamic interpretation advocated by UNHCR obviously serves the policy that lies at the basis of Article 1 F: those who are undeserving should not be entitled to the benefits of the 1951 Convention. The drawback of this dynamic interpretation, equally obvious, is that it is at the expense of the limitative character of Article 1 F since it extends the number of crimes – both at species and at generic level - which bar refugees from refugee status. Put differently, the negative consequence of the dynamic interpretation of Article 1 F (a) is denial of a particular form of protection to a categorically larger group of persons than arguably was and could have been envisaged in 1951.

UNHCR meanwhile proposes to mitigate Article 1 F by means of proportionality considerations it derives from human rights and humanitarian law: exclusion under Article 1 F should balance the (gravity of the) crime and the consequences of exclusion, notably the degree of persecution feared.³⁰ UNHCR makes an exception for crimes against peace, crimes against humanity and acts contrary to the purposes and principles of the United Nations,³¹ therefore the balancing act is, in final analysis, only propagated for war crimes and serious non-political crimes. The need to enter considerations of proportionality into the equation with respect to those two categories of crimes is based on the fact that they cover a wide range of behaviour. With respect to activities which fall at the lower end of the scale – for instance, isolated incidents of looting by soldiers – exclusion may be considered disproportionate if subsequent removal is likely to lead to, for instance, torture in the country of origin.³² As far as state practice is concerned: it seems the balancing approach is either rejected in the knowledge that other human rights protection mechanisms will apply to the excluded individual or adopted, albeit mainly with respect to Article 1 F (b) rather than Article 1 F (a).³³

As to the human rights protection mechanisms to which reference was made, the drafters of the 1951 Convention had no mercy with respect to those who may have committed a crime against peace, a war crime, or a crime against humanity.³⁴ Half a century later, those who are consequently excluded from the protection of the 1951 Convention are no longer unprotected persons: they are

²⁷ The London Charter confined crimes against humanity to time of war, and so does the Statute of the ICTY. Persecution as a crime against humanity as defined in Article 7 of the Rome Statute requires that the crime must be committed in connection with any of the other specific crimes against humanity enumerated in Article 7 or in connection with genocide, war crimes or aggression. One scholar simply suggests: “It is submitted that this restriction, which was included in the ICC Statute for jurisdictional purposes, should not be applied by persons involved in the refugee exclusion process”, J. Pejic, “Article 1 F (a): The Notion of International Crimes”, 12 *International Journal of Refugee Law* (Special Supplementary Issue) 2000, 11-45 at 42.

²⁸ A categorically different approach has been adopted by the EU: the Qualifications Directive – explanatory memorandum – prescribes that the crimes listed in Article 1 F (a) shall be interpreted as those defined in international instruments to which the Member States have acceded. Whereas the approach suggested by UNHCR to use international instruments by way of arriving at a uniform yardstick, the EU approach exchanges that for a relative one.

²⁹ The original draft only referred to crimes defined in the Charter of the London Military Tribunal. The text was changed to allow reference to a ‘Code of Offenses’ the ILC had started to prepare, a Code that “should govern exclusion rather than the one which was drawn up for special purposes”, Robinson, *op. cit. supra* at 66.

³⁰ UNHCR Guidelines on Exclusion, para. 24; UNHCR Background Note on Exclusion, para. 78.

³¹ UNHCR Background Note on Exclusion, para. 78.

³² *Ibid.*

³³ Cf. UNHCR Background Note on Exclusion: this observation is based on jurisprudence relating to Article 1 F (b). As to Article 1 F (a), Belgium has applied the balancing approach, see S. Kapferer, “Exclusion Clauses in Europe”, 12 *International Journal of Refugee Law* 2000 (Special Supplementary Issue), 195-221 at 217 apparently with respect to crimes against humanity rather than war crimes.

³⁴ The same applies to those who drafted Article 14 paragraph 2 of the 1948 Universal Declaration, see n. 8 *supra*.

entitled to subsidiary protection on the basis of unqualified *non-refoulement* provisions in human rights treaties.³⁵

The end result is not clear: a limitative clause is interpreted elastically and includes many more crimes than existed in 1951. Arguably, this interpretation is in accordance with the policy decision (and hence the ratio of that particular provision) that lies at the basis of Article 1 F, in particular Article 1 F sub (a). Cause for concern is that the recommended dynamic interpretation was never the subject of a principled debate (neither in 1967 when the temporal limitation – the first of January 1951 – in the definition of refugee was effectively removed by means of the 1967 Protocol nor when the generically indicated crimes proliferated at species level), which is remarkable in view of the fact that the ‘no mercy’ decision that induced inserting Article 1 F has meanwhile been made subject to inroads on the part of UNHCR by means of proportionality considerations: in case the consequences of exclusion outweigh the act that warrants exclusion, the otherwise excludable refugee should nonetheless be given the protection of the 1951 Convention. For those who are nonetheless excluded, the no mercy policy has given way to a system of subsidiary protection by virtue of human rights obligations.

Instead of blindly proceeding from the existence of Article 1 F (a), this provision should rather be reconsidered in terms of the past policy decisions that induced its insertion in the 1951 Convention: should the decision to exclude those who fall within the scope of Article 1 F (a) – no matter what the consequences are for the individuals concerned – still be upheld? If so, should it be upheld for all the crimes that presently qualify as crimes against peace, a war crime, or a crime against humanity? Is the fact that non-removal and basic human rights protection nowadays called for regarding those who are excluded not indicative for the abandonment of the no mercy policy of the drafters of the 1951 Convention? If it should not be upheld, should the interpretation of Article 1 F, corresponding with changed convictions regarding the fate of those who are excluded, not be adjusted to include only those crimes that are still considered to warrant exclusion from the benefits of the 1951 Convention? For instance, should the crimes that come within the scope of Article 1 F in the present day dynamic interpretation not be differentiated into those that warrant exclusion and those that do not but which are now made subject to a virtually impossible balancing act known as ‘proportionality’? Such a differentiation would also have the merit of transparency and consistency that is absent when exclusion is made subject to proportionality, and hence a relativity that may entail that a particular crime may or not warrant exclusion.

The second example concerns the supervisory responsibility of UNHCR. The supervisory responsibility of UNHCR should be seen in relation to the decision made in the wake of the Second World War regarding the allocation of responsibility for the protection of refugees. The decision was made that states would bear this responsibility and not (anymore) an international organization or agency whose tasks would henceforth be confined to a complementary role consisting of higher direction, liaison, control and supervision. More than half a century later, the role of the latter – UNHCR - has changed dramatically and includes many tasks originally considered to belong to the exclusive responsibility of states, exchanging the original allocation of tasks which buttressed supervision by an international agency, UNHCR, for one that affects the standing of UNHCR to actually do so. Supervision ceases to be the natural and exclusive preserve of UNHCR when it assumes responsibilities that are properly those of states and require supervision themselves.³⁶

³⁵ See Article 3 paragraph 1 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Article 7 of the 1966 Convention on Civil and Political Rights; Article 22 paragraph 8 of the 1969 American Convention on Human Rights; Article 37 (a) of the 1989 Convention on the Rights of the Child; Article 3 of the 1950 European Convention on Human Rights and Fundamental Freedoms.

³⁶ J.C. Hathaway, “Taking Oversight of Refugee Law Seriously”, speech delivered at the Global Consultation on International Protection convened by ICVA, Geneva, 11 December 2001 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294191#PaperDownload; J.C. Hathaway, “Who should watch over refugee law?”, *Forced Migration Review* 2002, 23-26 at 24-25; M.Y.A. Zieck, *UNHCR’s Worldwide Presence in the Field; Analysis of UNHCR’s Cooperation Agreements*, 2006 at 324-325 (similar conclusion based on an analysis of the consequences of the cooperation agreements UNHCR concludes); “The agency, and its partners, act in many instances as quasi-state entities and should not be left without some form of supervision”, International Council of Voluntary Agencies, “Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond, Comments on Prof. Kaelin’s Paper”, July 2001; see also “African Perspectives

UNHCR's supervisory function has been the subject of debate for a few years now on account of the fact that it, after more than half a century, remains a rather rudimentary form of oversight that falls far short of its potential. The debate should take the changed role of UNHCR into consideration for it affects the tenability of the original policy decisions that favoured a supervisory role for UNHCR.

3. TRANSFORMING BOUNDARIES OF POLICY

If treaty obligations are considered in terms of boundaries of policy, transformation of such boundaries would signify revision. The 1951 Convention allows for revision in Article 45.³⁷ The international *communis opinio* does not, however, favour revision of the Convention lest it entails that all that has been achieved will be lost forever – the idealistic post World War Two zeal has, unfortunately, long given way to a much less idealistic one. Revision is not, therefore, an option. Supplementing the Convention by means of new instruments – comparable to the 1967 Protocol – would be an option but an equally unrealistic one.

Interpretation – Article 1 F (a) – and implementation – Article 35 paragraph 1 – would seem to suggest themselves as the available tools for transforming the treaty boundaries of policies that are consciously retained. As far as Article 1 F is concerned, this suggestion is not necessarily propagating a subversive form of treaty interpretation: new developments, such as the proliferation of international crimes, had better be accommodated by means of recognition of a changed situation instead of, by way of remedy, taking recourse to complex balancing acts that unavoidably result in widely diverging interpretations and application of Article 1 F. As far as Article 35 is concerned, the tool of implementation is suggested on account of the fact that Article 35 paragraph 1 is phrased in general terms that do hardly prescribe anything specific, consequently do not stand in the way of elaborating a supervisory mechanism that would recognize the changed allocation of responsibilities between states on the one hand and UNHCR on the other.

Whatever means is selected, policy that led to past boundaries – treaty obligations – should be taken into critical consideration, that is, the original ratio of a particular provision should be identified with a view to assessing whether it is still justified and worth retaining. The 1951 Convention is the first human rights treaty adopted after the Second World War. It is not surprising that the policies that shaped the 1951 Convention have gradually evolved and given way to new policies many of which have turned into normative boundaries themselves such as the development of international criminal law, the establishment of the ICC and international criminal tribunals, a host of *non-refoulement* provisions, and the supervisory mechanisms included in human rights treaties. Instead of merely proceeding from the 1951 Convention as a normative and unchangeable boundary that merely needs to be supplemented in order to cater for new needs and in that sense be rendered (even more) relevant (than it already is), the Convention should be critically appraised on a continuous basis by taking recourse to the policies that informed its various provisions in order to assess whether these should be retained alternatively be adapted to relevant new boundaries of policy.

on Article 35 Supervision of the 1951 Convention and Complementary Monitoring Mechanisms” submitted by Waripnet/Raddho (Senegal), Africa Legal Aid (Ghana) and Lawyers for Human Rights (South Africa) to the Global Consultations, July 2001 at 2, calling, *inter alia*, for a mechanism that would not only monitor state compliance with Convention obligations but also UNHCR's supervisory, protection and humanitarian assistance tasks, *ibid.* at 3.

³⁷ Article 45 runs as follows: “1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations. 2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request”.