

COMPLEMENTARY FORMS OF PROTECTION:
THEIR NATURE AND RELATIONSHIP TO THE INTERNATIONAL
REFUGEE PROTECTION REGIME

I. INTRODUCTION

1. A number of asylum countries have in place administrative or legislative mechanisms for regularizing the stay of persons who are not formally recognized as refugees, but for whom return is not possible or advisable for a variety of reasons. It is a positive way of responding pragmatically to certain international protection needs.

2. In the absence of any harmonization, individual responses by States have led, however, to a proliferation of statuses granted to a wide range of persons for various reasons. Examples of these different types of status include "B-status," "subsidiary protection," "de facto status" and "humanitarian status." Varying standards of treatment, with corresponding consequences for the beneficiary, are attached to these statuses.

3. The purpose of this paper is to identify the beneficiaries of these complementary forms of protection; to provide some analysis of the legal framework applicable to them and the nature of protection provided by States; and to suggest the appropriate standards of treatment which, from UNHCR's perspective, should be in place. The paper also relates this discussion to the issue of protection in situations of mass influx.

II. PERMISSION TO STAY: A DIVERSE GROUP OF BENEFICIARIES

4. A review of the categories of persons who benefit from permission to stay for a prolonged period reveals that it is granted by States for a whole range of reasons, of which only some are related to a need for international protection. The reasons can be roughly categorised as follows: a) those which are purely compassionate, or based on practical considerations, and b) those which are related to international protection needs and may thus qualify as complementary forms of protection. The focus, for the purpose of this paper, will be on the latter category.

A. Stay not related to protection needs: compassionate grounds/practical reasons

5. States may decide to allow prolonged stay solely for compassionate reasons, such as age, medical condition, or family connections.¹ In cases where removal is not possible, either because transportation is not feasible, or if travel documents are unavailable or cannot be obtained, continued presence may be allowed for practical reasons. The persons concerned are normally not asylum-seekers or, having sought asylum, have had their applications properly rejected and were found not to be in need of international protection. These cases must be clearly distinguished from cases where international protection needs and an obligation to respect the fundamental principle of *non-refoulement* are present, and which are thus of direct concern to UNHCR. This paper does not cover those persons who have been excluded from refugee status in application of the exclusion clauses contained in the 1951

¹ This refers to family connections which are unrelated to any protection need. Such family reasons for granting prolonged stay are different from those in the context of family reunification for refugees and their families which fall within the ambit of UNHCR.

Convention, but cannot, under relevant human rights law, be returned to a country where they would face a risk of torture.

B. Stay on account of international protection needs:

6. Various considerations apply to cases where permission to stay is on grounds related to an international protection need. Even within the group of beneficiaries with acknowledged protection needs, there is diversity. In UNHCR's experience, beneficiaries include:

(a) Persons who should fall within the terms of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, but who may not be so recognized by a State as a result of varying interpretations;

(b) Persons who have valid reasons for claiming protection, but who are not necessarily covered by the terms of the 1951 Convention.

Underpinning the discussion which follows is UNHCR's understanding that whenever refugees - in the broadest sense of the term - are involved, UNHCR will have an interest and indeed a duty to ensure adequate treatment, as well as an expertise to contribute to the debate on measures relating to their stay and treatment.

Beneficiaries who could meet the 1951 Convention/1967 Protocol criteria

7. Varying interpretations by States of the inclusion criteria set out in Article 1 of the 1951 Convention have resulted in significant differences in recognition rates between States for persons in similar circumstances. Some persons who are recognized as refugees in one State may be denied such status in another. It is important to acknowledge, however, that even in those cases where refugee status is denied, States provide an alternative form of prolonged stay in recognition of the international protection need.²

8. At least three groups can be identified on whom divergent views concerning the interpretation of the refugee definition criteria have emerged:

(a) One important group consists of those who fear persecution by non-State agents for 1951 Convention reasons. Although in most countries they are recognized as refugees under the Convention, in a few countries they are denied refugee status and provided with an alternative status;

(b) Another group comprises refugees who flee persecution in areas of on-going conflict. In a number of countries, they are treated as 'victims of indiscriminate violence' and provided with complementary protection. This is the case even when the conflict they flee is rooted in ethnic, religious or political differences which specifically victimize those fleeing. In other States, this may well be the basis for their recognition as Convention refugees;

(c) A third group consists of persons who fear or suffer gender-related persecution, and who otherwise fulfil the criteria under the Convention. In a significant number of States, they are provided only a complementary or subsidiary status, often on a legislative basis, instead of being recognized as refugees. In other jurisdictions, such persons are recognized as fulfilling the Convention criteria.

9. It is UNHCR's understanding, based not least on relevant State practice, that the above categories should be covered by the 1951 Convention and 1967 Protocol. That there is a recognized

² In some cases States have obligations under applicable human rights instruments prohibiting torture, not to return persons to their countries of origin where such a risk is present. The 1984 UN Convention against Torture is the prime universal example, but there are other international, regional and domestic provisions of a similar nature. Persons covered by these provisions may fall into one or the other of the identified protection groups.

need for international protection in such cases has been amply demonstrated by the fact that States provide some form of protection. To achieve overall consistency and to ensure a full and inclusive interpretation of the Convention refugee definition, a harmonized approach within the Convention regime is desirable.

Beneficiaries who might not meet the 1951 Convention/1967 Protocol criteria

10. Persons who may not necessarily be 1951 Convention refugees but who nevertheless need international protection are commonly referred to as refugees falling under UNHCR's wider competence. This competence is generally understood also to cover persons outside their countries who are in need of international protection because of a serious threat to life, liberty or security of person in the country of origin, as a result of armed conflict or serious public disorder.³ For example, persons fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no specific element of persecution, might not fall under a strict interpretation of the 1951 Convention refugee definition, but may still require international protection, and be within UNHCR's competence.

11. The regional refugee instruments in Africa and Latin America⁴ specifically state that refugee protection should also encompass this 'broader' category of refugees. In other regions, in the absence of such instruments, States have provided for prolonged stay under their domestic legislation. As regards this category of refugees, in UNHCR's experience, there is a need for greater harmonization of complementary forms of protection, based on human rights and refugee law standards.

III. STANDARDS OF TREATMENT FOR COMPLEMENTARY FORMS OF PROTECTION

12. In the absence of a harmonized approach, in those States or regions where the international or regional refugee instruments are not applicable, a variety of statuses may bring into play different regimes of rights. In some instances, these rights are much less expansive than in others. The following paragraphs propose standards of treatment consistent with international human rights and refugee law considerations,⁵ which could assist or guide States in their harmonization efforts.

13. Universal human rights principles argue for persons permitted to remain for protection reasons being afforded a status that allows them to continue their lives with human dignity. Given the disruption they have suffered, a suitable degree of certainty and stability is necessary. A mere withholding of deportation is, in UNHCR's view, not sufficient.

14. Beneficiaries of complementary forms of protection should enjoy a formal legal status with defined rights and obligations, and should be issued with documents certifying that status. The status should extend for a period of time which is long enough to allow the beneficiaries to regain a sense of normalcy in their lives. It should last for as long as protection is required.

15. The status afforded to beneficiaries should provide for the recognition and protection of basic rights as defined in relevant international and regional instruments.⁶ In some States or regions, domestic

³ The competence of the Office has been enlarged by successive General Assembly resolutions since the elaboration of the mandate in the Statute in 1950.

⁴ The 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees.

⁵ Executive Committee Conclusion No. 22 (1981) (A/AC.96/601,para.57(2)), concerning treatment in situations of large-scale influx, offers some helpful guidance, on the basis of the refugee standards in the 1951 Convention, for minimum rights which should be guaranteed under complementary protection.

⁶ The International Bill of Rights (consisting of the Universal Declaration of Human Rights and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights) sets out fundamental human rights. Regional instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights ("Pact of San Jose") also provide useful guidance regarding fundamental human rights.

or regional human rights provisions may require standards of treatment which are higher than those of other States or regions, but the standards to be respected should not fall below a certain minimal level.

16. In the area of civil and political rights, beneficiaries should, in particular:

- be protected from *refoulement* and expulsion;
- not be subjected to discrimination on the basis of race, religion, political opinion, nationality, country of origin, gender, physical incapacity or any other such basis;
- never be subjected to torture or cruel, inhuman or degrading treatment or punishment;
- enjoy basic freedom of movement, and in any case, not be subject to restrictions to their freedom of movement, other than those which are necessary in the interest of public health and public order;
- have access to the courts of justice and administrative authorities.

17. Their protection should, moreover, include basic social and economic rights comparable to those generally available in the host country, including, in particular:

- access to adequate housing;
- access to assistance or employment;
- access to health care as needed;
- access to primary and secondary education.

18. The importance of putting in place measures which ensure respect for the unity of the refugee family has been highlighted by the Executive Committee on a number of occasions.⁷ The family is acknowledged in human rights instruments as the natural and fundamental group unit of society: maintaining or reinstating family unity is one of the most important ways in which persons in need of international protection can enjoy the stability they require to continue their lives. Accordingly, any complementary protection regime should build in appropriate provisions for close family members to be reunited, over time, in the host country.

19. Complementary forms of protection, like protection under the 1951 Convention, are not necessarily permanent in nature. The cessation provisions of the Convention envisage an end to refugee status when international protection is no longer necessary. Ending of complementary status should likewise be based on objective criteria set out in writing, preferably in legislation, and should never be arbitrary. On account of its particular expertise, a consultative role should preferably be envisaged for UNHCR, when deciding whether it is appropriate to end complementary protection measures for refugees.

IV. THE SCOPE OF PROTECTION IN SITUATIONS OF MASS INFLUX

20. In both Africa and Latin America, situations of large-scale arrival are broadly provided for in regional refugee instruments. The concept of temporary protection has evolved in Europe and other regions as a provisional protection response to situations of large-scale displacement generated, to a significant extent, by compelling reasons including or akin to those in the refugee definition. The purpose of temporary protection is to ensure immediate access to safety and protection of basic human rights, including protection from *refoulement*, in those countries directly affected by a large-scale influx. Temporary protection may also serve to enhance prospects for a coherent regional response, beyond the immediately affected areas.

21. Temporary protection is an exceptional emergency device to respond to an overwhelming situation, where there are self-evident protection needs, and little or no possibility to determine such needs on an individual basis in the short term. It is distinct from complementary protection, which is a legal status offered after recognition of individual protection needs, and a determination of their nature. Temporary protection, by definition, involves a group assessment of international protection needs based

⁷ Most recently in Conclusions No. 85 (1998) (A/AC.96/911,para.21) and 88 (1999) (A/AC/96/928,para.21)

on the circumstances in the country of origin, whereas complementary protection measures apply to individuals whose protection needs have been specifically examined. While both temporary and complementary protection should ensure adequate standards of treatment for the beneficiaries, the provisional nature of temporary protection, and especially its use with large groups, warrants an incremental improvement of standards of treatment over time, should its continuation prove necessary. Complementary protection measures, on the other hand, provide a definitive treatment immediately upon recognition of the individual's protection need.

22. Due to these, and other significant differences in the two concepts, the provisional device of temporary protection should be clearly distinguished from forms of complementary protection provided in individual cases.

V. CONCLUDING OBSERVATIONS

23. While some States have used the mechanism of a 'broadened' definition in a regional instrument to provide for the protection of refugees falling within UNHCR's broader competence, other States have utilised legislative arrangements to grant permission to remain for a prolonged period of time. In the latter case, the proliferation of standards for various categories of beneficiaries has tended to obscure the refugee nature of some of them, and led to confusion over the considerations which should govern their treatment.

24. In these circumstances, harmonizing the standards of treatment of those in need of international protection but not recognized as refugees in asylum States, would be beneficial, and help to ensure that these standards are in accordance with refugee protection principles. The 1951 Convention, though not directly applicable to a number of the beneficiaries, provides a useful guide for this harmonization.

25. The Executive Committee may wish to consider the following elements for conclusions on this subject:

(a) Complementary forms of protection adopted by States to ensure that persons in need of international protection actually receive it, are a positive way of responding pragmatically to certain international protection needs;

(b) Beneficiaries of complementary protection should be identified according to their international protection needs, and treated in conformity with those needs and their human rights. The criteria for refugee status in the 1951 Convention should be interpreted in such a manner that individuals who fulfil the criteria are so recognized and protected under that instrument, rather than being treated under complementary protection schemes;

(c) Measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing global refugee protection regime;

(d) The standards of treatment of beneficiaries of complementary protection should provide for the protection of basic civil, political, social and economic rights. States should, as far as possible, strive to devise harmonized approaches to the treatment provided. They should implement complementary protection measures in such a way as to ensure the highest degree of stability and certainty possible in the circumstances, including through appropriate measures to ensure respect for other important principles, such as the fundamental principle of family unity;

(e) Temporary protection, which is a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from complementary forms of protection, which are offered after a status determination, providing a defined status;

(f) The 1951 Convention and its 1967 Protocol form the cornerstone of the international protection of refugees and provide the basic framework for such protection. The standards elaborated in the Convention, together with developments in international human rights law, provide an important guide with respect to the treatment that should be afforded to persons in need of international protection;

(g) States that have not yet done so should accede to these instruments and to other applicable regional refugee protection instruments, in order to ensure the widest possible, and most closely harmonized, application of the basic principles of refugee protection.