
An Introduction to International Protection

Protecting persons of concern to UNHCR

Self-study module 1



Note

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An Introduction to International Protection

Protecting persons of concern to UNHCR

Overview

States have the primary responsibility for protecting refugees. The Office of the United Nations High Commissioner for Refugees (UNHCR) works to ensure that governments take all actions necessary to protect refugees, asylum-seekers and other persons of concern who are on their territory or who are seeking admission to their territory. UNHCR, the sole international organization mandated to protect refugees globally, also strives to secure durable solutions for refugees so they can resume their normal lives.

Purpose

This manual aims to:

- § Foster a common understanding of international protection among all UNHCR staff;
- § Familiarize UNHCR partners, whether governmental, inter-governmental or non-governmental, with the basic principles of international protection;
- § Contribute to the realization of the goals of the Agenda for Protection, which is an initiative between States, NGOs, IGOs and UNHCR, that seeks to enhance the protection of refugees worldwide.

Contents

Each of the seven chapters of this manual contains information on one of the main aspects of international protection:

- § The development of and responsibility for international protection;
- § The legal framework for international protection and its implementation;
- § The refugee definition;
- § Other persons of concern to UNHCR;
- § Flight and access to asylum;
- § Standards of treatment;
- § Timely and durable solutions.

Each chapter begins with a set of key learning objectives and ends with a summary, which can also be used in overhead presentations for training. A list of additional reading material is provided at the close of each chapter, and a glossary of key terms is included at the end of the manual.

In addition, there are exercises for independent study. Answers to the exercises, most of which can be found in the text, are provided on separate pages at the end of each chapter.

The language used in this manual is intended to be non-legalistic and non-technical.

Information on additional training materials and programmes can be obtained from UNHCR's Department of International Protection in Geneva.

Chapter 1

The development of and responsibility for international protection



Key objectives

Understand the history of international action in support of refugees, including the adoption of the 1951 Convention relating to the Status of Refugees and the establishment of UNHCR.

Be aware of current challenges impeding the provision of protection for refugees.

Identify the various actors responsible for international protection and the importance of working in partnership with them.

This chapter outlines the development of international protection for refugees from its origins under the League of Nations, through the creation of UNHCR, to the present. It highlights current challenges to providing international protection and examines the responsibilities of States and of UNHCR for ensuring that international protection is delivered and durable solutions are found. The chapter also describes some of the other main actors involved in protection activities.

1.1 Historical overview

Throughout history, people in every corner of the world have been forced to flee the countries of their birth in search of safety from persecution, political violence and/or armed conflict. But it was only at the beginning of the twentieth century that States recognized that protecting refugees required coordinated global action.

1.1.1 The League of Nations

In the 1920s and 1930s, the League of Nations, the first global body for inter-State cooperation and the forerunner of the United Nations launched a number of unprecedented initiatives aimed at helping refugees in Europe:

1921: Office of the High Commissioner for Russian Refugees

This Office was established in the aftermath of the First World War. Initially, the task of the High Commissioner, Dr. Fridtjof Nansen, was to support people who had become refugees in the wake of the Russian revolution. He concentrated his efforts on clarifying their legal status in host countries by providing them with identity and travel documents. In addition, he sought to secure employment opportunities and to devise repatriation arrangements for them. Later on, Nansen was given responsibility for delivering aid to people displaced following the collapse of the Ottoman empire and for arranging their permanent settlement in countries other than those initially providing asylum. After Nansen's death in 1930, the **International Nansen Office for Refugees** continued his work. This Office was replaced in 1938 by the appointment of a High Commissioner for Refugees.

1933: High Commissioner for Refugees coming from Germany

As refugees began fleeing Hitler's Germany, the League of Nations appointed James McDonald as High Commissioner for Refugees coming from Germany. With immigration restrictions in force around the world, McDonald worked to find permanent homes for these refugees. In two years, he resettled over 80,000 refugees, mainly to Palestine. But in 1935, McDonald resigned in protest at the League of Nations' refusal to take stronger action on behalf of

the Jews in Germany, where the newly adopted Nuremberg laws deprived them of citizenship and other fundamental rights. The position of High Commissioner for Refugees coming from Germany was superseded in 1938 by that of the newly created High Commissioner for Refugees.

1938: High Commissioner for Refugees and Intergovernmental Committee on Refugees

As described above, the High Commissioner's office was an amalgamation of the International Nansen Office and the High Commissioner for Refugees coming from Germany. Its role was very limited and ended in 1946. In the same year, an Intergovernmental Committee was convened. Initially concerned with forced emigration from Germany and Austria, its work was extended to cover all refugee groups in Europe during the Second World War. The Committee was eventually replaced in 1947 by the International Refugee Organization.

1.1.2 The impact of the Second World War

1944: United Nations Relief and Rehabilitation Administration

The League of Nations was disbanded after it failed to prevent the Second World War. To address the plight of the millions of people displaced throughout Europe during the conflict, the Allies established, in 1944, the United Nations Relief and Rehabilitation Administration (UNRRA) to provide emergency relief to the displaced. At the end of the War, the agency organized the return of millions of refugees to their homes, but many refugees were reluctant to repatriate as their countries of origin had undergone major ideological transformations.

1947: International Refugee Organization

In 1947, two years after it was created, the United Nations founded the International Refugee Organization (IRO), the first international agency to deal comprehensively with all aspects of refugees' lives, including registration, determination of status, repatriation and resettlement. Given the political situation in Europe at the time, most refugees no longer wished to return to their own countries; instead, they were resettled elsewhere. The IRO found itself at the centre of growing East-West tensions, with many countries attacking its resettlement activities as partisan, or as providing a source of labour for the West, or as aiding subversive groups. This hostile reception, coupled with the fact that only a limited number of countries were contributing to the IRO's budget, led to its eventual demise in 1951.

1.1.3 Establishment of UNHCR

The IRO had fallen out of favour by the late 1940s, but it was clear that there remained a need for some kind of refugee agency, at least for the near future. After many heated debates at the United Nations over the form such an agency should take, the Office of the United Nations High Commissioner for Refugees (UNHCR) was established as a subsidiary organ of the General Assembly by *Resolution 319 (IV) of the United Nations General Assembly* of December 1949. The Resolution stated that UNHCR would operate for a period of three years from January 1951, reflecting the disagreement among States over the political implications of establishing a permanent body.

UNHCR's core mandate, has been originally set out in its *Statute*, annexed to *Resolution 428 (V) of the United Nations General Assembly* of 1950. It has been subsequently broadened by resolutions of the General Assembly and its Economic and Social Council (ECOSOC). UNHCR's mandate is to provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them. People who were already receiving assistance from other organs of the United Nations when the Statute was adopted were excluded from UNHCR's mandate. Thus, people displaced by the Korean war, who fell under the mandate of the United Nations Korean Reconstruction Agency (UNKRA), were not covered by UNHCR's mandate. (UNKRA is now disbanded.) Men, women and children who are the responsibility of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) are also outside UNHCR's mandate. UNRWA's responsibilities do not, however, extend to all Palestinian refugees, but only to certain categories of Palestinian refugees falling within its limited geographical area of operations. (See the section on the exclusion clauses in Chapter 3.). UNHCR's mandate has been extended through successive General Assembly resolutions until, in 2003, UNHCR was authorized to continue its work until the refugee problem is solved.

The **international protection** of refugees begins with securing their admission to a country of asylum, the grant of asylum and respect for their fundamental human rights, including the right not to be forcibly returned to a country where their safety or survival are threatened (the principle of *non-refoulement*). It ends only with the attainment of a durable solution. International protection can be defined as

all actions aimed at ensuring the equal access to and enjoyment of the rights of women, men, girls and boys of concern to UNHCR, in accordance with the relevant bodies of law (including international humanitarian, human rights and refugee law).

It includes:

- § Promoting ratification and supervising the application of international conventions for the protection of refugees at the global and, increasingly, the regional level to ensure refugees are identified and accorded appropriate status and standards of treatment in their countries of asylum;
- § Ensuring, with and through national authorities, the safety and well-being of refugees in countries of asylum;
- § Ensuring the needs of refugee children, refugee women and refugee men are met, including in particular the special needs of victims of violence, women who are single heads of household, elderly refugees, and child refugees who have been forcibly recruited as child soldiers and/or separated from their families;
- § Promoting, with governments and with other United Nations and international bodies, measures to remove the causes of refugee flight so as to establish conditions that permit refugees to return safely to their homes;
- § Facilitating, assisting and monitoring the safety and dignity of voluntary repatriation when this becomes feasible;
- § When this is not possible, promoting the other durable solutions of local integration or resettlement.

Since 1950 General Assembly and ECOSOC resolutions have **expanded UNHCR's responsibilities** to include the delivery of humanitarian assistance and protection activities to people other than refugees, such as stateless persons and on occasion, internally displaced persons. These other "persons of concern" are described briefly later in this chapter, under the subheading "persons in need of international protection", and in more detail in Chapter 4.

The **High Commissioner** is elected every five years by the General Assembly. He or she reports both to the General Assembly and to ECOSOC. The High Commissioner's work is assisted by the **Executive Committee** of the High Commissioner's Programme (ExCom), created in 1958 at the request of the General Assembly. ExCom is made up of United Nations member States, although they are not necessarily parties to the 1951 Convention and/or 1967 Protocol. ExCom's tasks include advising the High Commissioner on his or her protection functions (see Chapter 2 on ExCom Conclusions), approving his or her assistance operations, and overseeing all administrative and financial aspects of the agency. Although the main Committee is only convened once a year, its Standing Committee meets twice before the main ExCom meeting to prepare for that annual meeting.

1.1.4 Towards a universal refugee concept: The 1951 Convention

In addition to establishing UNHCR, governments also adopted the *1951 Convention relating to the Status of Refugees*. To this day, the Convention remains the foundation of international refugee law. It defines who is a refugee (see Chapter 3) and standards for the treatment for those fulfilling this definition (see Chapters 5 and 6). The Convention represents a milestone in the emergence of a global will to address problems of forced displacement.

Reflecting the political preoccupations at the time, the 1951 Convention was limited in scope to people who became refugees as a result of events occurring before 1951. States were also given the option of restricting the Convention's application to European refugees. It soon became clear, however, that refugee crises were continuing and were not confined to a single continent. In 1956, UNHCR helped to coordinate the response to the exodus following the uprising in Hungary. A year later, the organization was tasked to assist Chinese refugees in Hong Kong. At the same time, it was also involved in responding to the plight of Algerians who had fled to Morocco and Tunisia in the wake of Algeria's war for independence. UNHCR's responses to these crises marked the beginning of its involvement in large-scale refugee protection and assistance operations.

During the 1960s, the upheavals caused by decolonization triggered numerous refugee movements in Africa, creating a huge challenge for UNHCR that eventually transformed the organization. In contrast to the situation of European refugees, there were often no clear durable solutions for refugees in Africa. Many of them were fleeing to countries that were also unstable. By the end of the decade, more than two-thirds of UNHCR's budget was being spent in Africa, reflecting the massive shift in the organization's focus in just one decade. The international community responded to these changing realities by adopting a *1967 Protocol* to the 1951 Convention. The Protocol removed the limitation in the Convention's refugee definition which had restricted its applicability to refugees displaced as a result of events before 1951 and lifted the geographical limit of its applicability to events occurring in Europe (for those States that had applied it). Although the 1967 Protocol went a long way toward addressing the concerns of newly independent African countries, in 1969 the Organization of African Unity (now the African Union) adopted its own refugee convention following consultations with UNHCR. (See Chapter 2.)

During the 1970s, refugee crises erupted in Asia. Most notable were the mass exodus of millions East Pakistanis to India prior to the birth of Bangladesh, and the hundreds of thousands of Vietnamese who fled their country, often aboard small and

unseaworthy boats. During these years, the difficulty in finding solutions to these refugee situations highlighted the importance of international solidarity and burden-sharing. Among the most important developments of the period were international initiatives taken to assist southeast Asian refugees, including the Comprehensive Plan of Action (CPA) of the late 1980s. The CPA involved large-scale resettlement of refugees to countries in North America, Europe and Australasia.

By the late 1980s, many countries had become increasingly reluctant to provide asylum on the generous terms they had offered in the past. This was largely because of the dramatic rise in the number of refugees worldwide and the fact that they were no longer fleeing countries that were fighting for independence. Rather, these refugee flows were increasingly caused by inter-ethnic conflicts in now-independent States. Too often in these conflicts, targeting civilians became part of military strategy, so that even relatively “minor” conflicts could result in massive displacements. Whether in Asia, Central America or Africa, these conflicts were often fuelled by superpower rivalry and aggravated by socio-economic problems within the countries concerned, making durable solutions to refugee problems even more elusive. UNHCR became increasingly involved in protracted assistance programmes for refugees housed in camps, which were often located in insecure environments.

After the end of the Cold War, inter-ethnic violence continued to trigger refugee flows. In addition, humanitarian intervention by multinational military forces became more common. In the 1990s, as in earlier decades, the media played a large role in spurring international action, while the interests of powerful countries largely influenced the nature of the response. For example, in 1999, member States of the North Atlantic Treaty Organization (NATO), concerned about the destabilization of the neighbouring former Yugoslavia, were quick to intervene in the deteriorating situation in Kosovo. In contrast, calls for a significant United Nations peacekeeping force to be sent to Rwanda in 1994 to stop the genocide there went largely unheeded. Even where richer nations did get involved in regions of displacement, they often tended to pursue increasingly restrictive asylum policies in their own territories.

1.1.5 Current climate

In the last fifty years, the global refugee population has grown from around two million to a peak of 18 million in 1992. As of the beginning of 2004, there were around 10 million refugees around the world. The environment in which refugee protection occurs today is, in many ways, far less generous than at any other point in

UNHCR's history. The current climate is marked by a number of factors that impede effective international protection, including:

- § The political manipulation of refugee issues in countries of asylum, often exacerbated by hostile media coverage, which leads to an increase in xenophobic and racist attitudes and even violence against asylum-seekers and refugees;
- § Criticism that the changing nature of refugee situations makes the 1951 Convention outdated, and thus the fundamental basis of international refugee law, is outdated;
- § Concerns among industrialized countries about the cost of hosting refugees and the abuse of their asylum procedures, which result in increasingly restrictive national laws and practices with questionable validity in the light of international standards, including these countries' obligations under the 1951 Convention;
- § Fears among some states that the provision of international protection may provide cover for those involved in terrorist activities;
- § The growing phenomenon of refugees fleeing persecution who move alongside fellow nationals who have left their homes for other reasons in what are called "mixed flows", thus raising fears about the abuse of the international protection regime;
- § The dangers faced by people seeking safety abroad who are forced to resort to human traffickers/smugglers and the unwelcome reception they often face in the countries in which they seek refuge;
- § Protracted refugee situations where refugees remain in limbo often for many years in precarious conditions, reliant on external assistance and unable to secure durable solutions to their plight;
- § Successive displacements that result from returning refugees to their country before it has attained sufficient stability.

Those who provide international protection face significant challenges, particularly in their efforts to:

- § Ensure that regional attempts to coordinate and harmonize asylum policy and responses are consistent with obligations under international refugee law;
- § Protect refugees in insecure environments, including by maintaining the civilian and humanitarian character of asylum, especially in refugee camps;
- § Respond to massive refugee movements, particularly as the asylum countries are often those with developing economies;
- § Achieve greater international burden- and responsibility-sharing, especially when the prospects of repatriation are poor in the short term;

§ Enhance understanding and effective use of the links between protection of individuals under international refugee law and their protection under international human rights law.

Recognizing these challenges, UNHCR launched the Global Consultations on International Protection in late 2000 to consider how the international protection regime could be reinvigorated for the 21st century. One of the principal products of this process, which brought together key actors in international refugee protection, particularly States, was the *Agenda for Protection* (see Chapter 2 for a detailed discussion of the Agenda). The Global Consultations initiative also played a significant part in the process leading to the adoption of the *Ministerial Declaration by States Parties to the 1951 Convention and/or 1967 Protocol* at the Ministerial Meeting held in 2001. This Declaration

“recogniz[ed] the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope”

1.2 Responsibility for international protection

1.2.1 States

Each State is responsible for ensuring that the rights of its citizens are respected. The need for international protection therefore only arises when this national protection is denied or is otherwise unavailable. At that point, the primary responsibility for providing international protection lies with the country in which the individual has sought asylum. All States have a general duty to provide international protection as a result of obligations based on international law, including international human rights law and customary international law. States that are parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol have obligations in accordance with the provisions of these instruments. (See Chapter 2 for a detailed discussion of the legal framework for the protection of refugees and asylum-seekers.)

1.2.2 UNHCR

As mentioned above, UNHCR also has a responsibility to provide international protection to refugees. Indeed, it remains the only international organization with a specific mandate to protect refugees at the global level. Under its Statute and subsequent General Assembly and ECOSOC resolutions, and in conjunction with the 1951 Convention, the High Commissioner’s responsibilities relate primarily to several groups of people known collectively as “**persons of concern to UNHCR**”. These generally

include refugees and asylum-seekers, returnees, stateless persons and, under certain conditions, internally displaced persons. Thus, UNHCR's mandate is wider than the obligations assumed by States party to the 1951 Convention and/or its 1967 Protocol. In addition to their obligations under these treaties, States may also have responsibilities for refugees and asylum-seekers in accordance with other instruments to which they are parties, with principles of international law, or under their own national legislation.

1.3 Persons in need of international protection

1.3.1 Refugees and asylum-seekers

Under UNHCR's mandate, a refugee is any person who is outside his or her country of origin or habitual residence and is unable or unwilling to return there owing to:

- § A well-founded fear of persecution for one of the reasons set out in the 1951 Convention;
- § Serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.

An asylum-seeker is an individual who is seeking international protection whether as an individual or on a group basis. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.

Although refugees are increasingly confused with other migrants, the difference is, in principle, quite clear. Refugees do not choose to leave their countries, but are forced to do so out of a fear of persecution. By contrast, other migrants do enjoy the protection of their home countries but decide to leave of their own volition, for instance, to improve their economic situation or because of family links.

1.3.2 Returnees

Returnees are former refugees or internally displaced persons (IDPs) who return to their country or area of origin, whether spontaneously or in an organized manner. It is crucial that they return voluntarily in safety and dignity to at least minimum conditions of physical, legal and material safety.

1.3.3 Stateless persons

These are men, women and children who are not considered to be nationals by any State. As such, they are without any effective national protection and may face discrimination when it comes to accessing rights generally available to nationals.

1.3.4 Internally displaced persons (IDPs)

Internally displaced persons (IDPs) are people who have been forced to flee their homes as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters and who are within the territory of their own country. UNHCR is only involved with IDPs under certain conditions.

More details about these categories of persons of concern and UNHCR's role in relation to each of them can be found in subsequent chapters.

1.4 Working in partnership

1.4.1 States

Since protecting refugees is primarily the responsibility of States, cooperation between them and UNHCR is essential. Governments work with UNHCR in a number of ways, such as by granting asylum in accordance with their international obligations and by providing funding for UNHCR's operations throughout the world. UNHCR ensures that States uphold their commitments to protect refugees by, for example, monitoring national practices, intervening on behalf of individual refugees where necessary and helping governments to improve their capacity to provide asylum. In some countries, this may mean that UNHCR assesses individual asylum claims. UNHCR also works with regional inter-governmental organizations, such as the African Union, the European Union and the Organization of American States, to harmonize and improve the provision of international protection in their regions.

Cooperation among States is also vital for resolving refugee problems, particularly when there is a sudden and massive displacement of people across borders. International action can significantly reduce the burden faced by frontline States. Initiatives can include efforts to resolve the political crisis in the refugee-producing country, financial and material aid to help countries of asylum provide for refugees, and offers to resettle members of the refugee population. UNHCR has a critical role in mobilizing and coordinating such international responsibility- and burden-sharing initiatives.

1.4.2 United Nations bodies

The need for partnerships goes well beyond simply that between UNHCR and States. Although UNHCR is the only United Nations agency with a specific global mandate relating to refugees, it regularly works with a range of other United Nations bodies. These include, but are not limited to:

- § **United Nations Office for the Coordination of Humanitarian Affairs (OCHA)**, which coordinates United Nations assistance in humanitarian crises that go beyond the capacity and mandate of any single agency, often in returnee and IDP situations;
- § **World Food Programme (WFP)**, which supplies relief food aid, including to refugee camps;
- § **United Nations Children’s Fund (UNICEF)**, which promotes children’s rights through programmes focusing on children’s health, nutrition, education, training and social services, and whose activities often complement UNHCR’s efforts on behalf of refugee boys and girls;
- § **World Health Organization (WHO)**, which directs and coordinates international health work and is active in immunization and reproductive health campaigns;
- § **United Nations Development Programme (UNDP)**, which coordinates all United Nations development activities, including the oversight of long-term development activities following a refugee emergency and assisting in the integration of refugees into countries of asylum or their reintegration on return home;
- § **Joint United Nations Programme on HIV/AIDS (UNAIDS)**, which, as the leading advocate for global action against this epidemic, spearheads initiatives to care for and support those affected;
- § **Office of the United Nations High Commissioner for Human Rights (OHCHR)**, which coordinates United Nations action for human rights and responds to severe violations of human rights.

In recent years, greater efforts have been made to improve cooperation among United Nations agencies working in humanitarian crises, both through networks at headquarters (such as the Inter-Agency Standing Committee) and through coordination at the field level.

1.4.3 Non-governmental organizations

There are also many non-governmental organizations (NGOs) that play an invaluable role in strengthening international protection. Indeed, UNHCR’s Statute calls on the High Commissioner to establish contact with “private organizations”. NGOs vary in size, range of activities, source of funding and scope of geographical operation. More than 500 NGOs work with UNHCR as implementing partners, usually delivering material assistance to refugees or helping to establish and maintain refugee camps. As

such, they are often in a prime position to monitor and report on violations of refugee rights. Some NGOs provide legal counselling and representation for asylum-seekers and visit them in detention centres, assist resettled refugees, and lobby governments on behalf of individual refugees or for improvements in national asylum policies.

1.4.4 Other organizations

UNHCR works with the **International Committee of the Red Cross (ICRC)**, an independent agency that acts to help all victims of war, including those of internal conflicts, and to ensure respect for international humanitarian law. This body of law regulates the way in which conflicts are fought by, among other measures, providing for the protection of civilians. The organization also works with the **International Federation of Red Cross and Red Crescent Societies (IFRC)** which, through its national societies, provides humanitarian relief to people affected by emergencies and promotes international humanitarian law.

The **International Organization for Migration (IOM)**, an inter-governmental organization which provides migration services, is another important partner in UNHCR's work, often in the context of voluntary repatriation.

1.4.5 Refugees and other persons of concern to UNHCR

The beneficiaries of international protection should always also be partners in its delivery. Refugees and other persons of concern understand their communities better than anyone else. It is essential that they participate in determining the needs of their communities and in designing and implementing programmes. All sections of the refugee population, including women, children and the elderly, should be consulted and included in all aspects and phases of protection and assistance activities. If refugee men, women and children are actively involved, they are more likely to have greater confidence in those assisting them and to feel a sense of ownership regarding the programmes being implemented.

Summary

International protection

International protection can be defined as all actions aimed at ensuring the equal access to and enjoyment of the rights of women, men, girls and boys of concern to UNHCR, in accordance with the relevant bodies of law (including international humanitarian, human rights and refugee law).

The international protection of refugees begins with securing their admission to a safe country of asylum, the grant of asylum and ensuring respect for their fundamental human rights, including the right not to be forcibly returned to a country where their safety or survival are threatened (the principle of *non-refoulement*). It ends only with the attainment of a durable solution.

Responsibility for international protection

Governments have primary responsibility for providing international protection to refugees on their territory.

UNHCR also has a mandate to provide international protection to refugees and other persons of concern.

Refugees

UNHCR works with governments and other partners, such as NGOs, to ensure refugees and other persons of concern:

- § Receive international protection;
- § Obtain humanitarian assistance;
- § Secure a permanent solution to their plight.

Persons of concern

Apart from refugees and asylum-seekers, UNHCR also has a role in protecting and assisting:

- § Returnees;
- § Stateless persons;
- § Internally displaced persons.

Additional reading

The State of the World's Refugees, UNHCR, Oxford University Press, 2000.

Refugees by numbers, UNHCR, 2003.

Protecting Refugees: Questions and Answers, UNHCR, 2002.

The Convention at 50: The Way Ahead for Refugee Protection (Forced Migration Review No. 10), Erika Feller, April 2001.

Note on International Protection, produced annually by UNHCR as a review of challenges and actions in providing international protection.

Exercises

- 1 UNHCR's core mandate is found in which one of the following instruments?
 - a The 1951 Convention relating to the Status of Refugees.
 - b UNHCR Statute.
 - c The United Nations Charter.
 - d Executive Committee Conclusions.
- 2 Which one of these groups of people never falls within UNHCR's mandate?
 - a Stateless persons.
 - b Internally displaced persons.
 - c Palestinian refugees.
 - d Migrants who move to better their economic opportunities.
- 3 Which one of the following statements about the Executive Committee is true?
 - a Its members must be parties to the 1951 Convention and/or the 1967 Protocol.
 - b The Committee supervises the day-to-day work of UNHCR.
 - c It meets on a monthly basis.
 - d It advises the High Commissioner on UNHCR's protection functions.
- 4 Ensuring regional asylum initiatives are consistent with international standards is a challenge faced by those involved in delivering international protection. *True or False?*
- 5 All States have a responsibility for international protection towards refugees in their territory. *True or False?*
- 6 Persons of concern to UNHCR are which one of the following?
 - a Refugees, asylum-seekers, returnees, stateless persons and internally displaced persons.
 - b Returnees, stateless persons and internally displaced persons.
 - c Refugees only.
 - d Any person who seeks the aid of UNHCR.
- 7 People who come within UNHCR's mandate are all outside their country of nationality or habitual residence. *True or False?*
- 8 Which one of the following best describes the appropriate response to a refugee crisis?
 - a The primary actor is the government of the country of asylum, assisted by UNHCR, other United Nations bodies and NGOs, as appropriate.
 - b UNHCR is in charge of the response, consulting and involving the country of asylum as it sees fit.

- c** No government or body has a particular responsibility, any action being entirely discretionary.
 - d** The Executive Committee of UNHCR determines how to split responsibilities between various actors, including the government of the country of asylum.
- 9** UNHCR is the only United Nations agency that works directly with refugees. *True or False?*
- 10** Considering the situation in your country, which of the current global challenges to international protection do you feel will have a particular impact on your work?

Answer key to Chapter 1 exercises

- 1 **b** The Statute was the first instrument to set out UNHCR's functions and remains the source of its core mandate.
- 2 **d** UNHCR has a mandate for stateless and internally displaced persons under various General Assembly resolutions. It has a mandate for Palestinian refugees who do not fall within the responsibility of UNWRA as a result of its general mandate for refugees under its Statute.
- 3 **d** The Executive Committee is made up of United Nations member States with an interest in international protection; they do not have to be party to the 1951 Convention or 1967 Protocol. It meets in full session once a year and its role includes advising the High Commissioner on his/her protection functions, but not overseeing day-to-day operations.
- 4 **True** Attempts to improve international protection on a regional basis must meet international standards.
- 5 **True** All States have a responsibility for international protection as a result of customary international law. Additional obligations will arise if the State is Party to a treaty concerned with refugees, such as the 1951 Convention.
- 6 **a** UNHCR's Statute plus later General Assembly and ECOSOC resolutions set out persons of concern to the organization. As asylum-seekers may turn out to be refugees, they are also persons of concern.
- 7 **False** Internally displaced persons are never outside their country of nationality or habitual residence. Otherwise they would be externally, rather than internally, displaced. As for stateless persons, they may be within their country of habitual residence.
- 8 **a** Primary responsibility for a refugee crisis rests with the government of the country in whose territory the refugees are present. This is because the main responsibility for international protection rests with States, not UNHCR or any other organization.
- 9 **False** Although UNHCR is the only United Nations agency with a specific international mandate in relation to refugees, a variety of other agencies have a role to play in assisting such persons and thus work in partnership with UNHCR. For example, the World Food Programme, which supplies relief food aid, often provides food in refugee camps. Other United Nations bodies also involved in working with refugees are listed under the heading "United Nations bodies" in this chapter.
- 10 Consider which factors set out on under the heading "current climate" in this chapter apply in the country you are working in. For example:
 - § Does your country have a history of hosting large numbers of refugees?
 - § If so, does this currently pose concerns about limited resources?

- § What is the attitude of the general public and political parties to the presence of asylum-seekers and refugees?
- § Is there a tradition of refugees integrating successfully into society, or is the emphasis on encouraging them to return home as soon as possible?
- § Does your country have asylum legislation?
- § If so, to what extent is it fully in line with the 1951 Convention and any other relevant refugee instrument?
- § Does your country have institutions in place to determine refugee status?
- § If so, to what extent is their operation in line with international standards?

Chapter 2

The legal framework for international protection and its implementation



Key objectives

Understand the significance of the 1951 Convention and 1967 Protocol.

Identify the other important sources of international refugee law.

Consider how international human rights law and its enforcement mechanisms enhance the protection of refugees.

Reflect on the significance of other relevant branches of international law.

Discover how States implement their international obligations towards refugees.

Be aware of how refugee policy and practice are developed at the international level.

This chapter examines the role of international refugee law, particularly the 1951 Convention and its 1967 Protocol, in refugee protection. Other relevant areas of international law, such as human rights law, humanitarian law and criminal law, are also discussed, as are the role of United Nations Security Council resolutions and the way individual countries implement their obligations under international law. The chapter concludes with a discussion of how refugee policy and practice are developed at the international level.

2.1 Legal framework

The legal framework underpinning refugee protection is composed of international refugee law, international human rights law and, in certain circumstances, international humanitarian law and international criminal law. In turn, each of these bodies of law is made up of one or more of the following components:

- § **Treaties.** These are legally binding agreements among States that can either be open to all countries (universal) or specifically confined to a few States with a shared interest (usually regional). A treaty is not binding on a State unless the State has chosen to accede to or ratify it and has thereby become a Party to it;
- § **Customary international law.** This body of law consists of practices by States that have become so firmly established that they have become legally binding rules. All countries are considered to be bound by customary international law;
- § **General principles of law.** Where neither a treaty nor custom covers a particular issue, principles considered common to major legal systems throughout the world can also be applied;
- § **Judicial decisions**, made by States' superior courts, and the **opinions of respected academics.** These decisions and opinions assist in the interpretation of international law.

As agreed in the *Vienna Convention on the Law of Treaties* (1969), when States interpret the extent of their obligations under a treaty, they must do so in good faith, in accordance with the ordinary meaning of the terms used, and in light of the treaty's object and purpose. In arriving at their interpretations, States may examine the prevailing context in which their obligations are to be exercised, any subsequent agreements, and their own national practices.

There are also a number of instruments, conclusions, and recommendations that reflect political, rather than legal, commitments by States, but that, nonetheless, influence the overall legal framework for refugee protection. These are known collectively as "soft law". In some specific situations, legally binding resolutions adopted by the United Nations Security Council under Chapter VII of the *United Nations Charter* may also form part of the legal framework for international protection.

2.2 International refugee law

The core of international refugee law is the 1951 Convention and its 1967 Protocol, the only universal treaties that define a specific legal regime for those in need of international protection. These instruments have proved extremely resilient and adaptable in the face of great changes in refugee movements during the past half century.

2.2.1 Universal treaties

2.2.1.1 The 1951 Convention relating to the Status of Refugees

The 1951 Convention is the starting point for any discussion about international refugee law. It is one of only two universal refugee instruments; the second is the 1967 Protocol to the 1951 Convention. The Convention was a groundbreaking instrument in several ways, most significantly because, for the first time in international law, it provided a general definition of a refugee.

The **principle of non-refoulement**, which prohibits the return of refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion, is the cornerstone of international protection. It is embodied in Article 33(1) of the 1951 Convention. The only permissible exceptions to the principle of *non-refoulement* are those set out in Article 33(2) of the Convention, which may be applied if a refugee constitutes a threat to the national security of the country where he/she is living or, having been convicted of a particularly serious crime, is a danger to that community. In accordance with human rights law, discussed below, *refoulement* is *never* permitted if it would expose the individual concerned to a risk of torture, inhuman or degrading treatment or punishment. Article 33 of the 1951 Convention also applies to asylum-seekers at the border or in the country of asylum until their status has been determined.

The 1951 Convention also declares that:

- § Protection must be extended to all refugees without discrimination;
- § Minimum standards of treatment must be observed in relation to refugees, who, for their part, have certain duties towards the State that hosts them;
- § Expulsion of a refugee from the country of asylum is of such gravity that it should only take place in exceptional circumstances, on the basis of national security or public order risks;

- § As the provision of asylum may place an undue burden on certain States, satisfactory solutions can only be achieved through international cooperation;
- § Protecting refugees is a humanitarian gesture, and so the granting of asylum should not cause tension between States;
- § States must cooperate with UNHCR in the exercise of its functions and facilitate its task of supervising the proper implementation of the Convention.

As already mentioned in Chapter 1, the Convention was drafted in response to refugee problems that existed in post-war Europe. As such, there are two major limitations on its application. First, although the refugee definition is generic, it only concerns people who fled their countries of origin as a result of events taking place before 1951. Second, States becoming Parties to the Convention have the option of restricting its application to refugees in Europe only.

2.2.1.2 The 1967 Protocol relating to the Status of Refugees

The aim of the 1967 Protocol was to acknowledge the applicability of the 1951 Convention to contemporary refugee movements. The Protocol is an independent instrument to which States may accede without becoming Parties to the 1951 Convention, though this rarely happens. States Parties to the Protocol agree to apply the provisions of the Convention to refugees who meet the Convention's definition but without the Convention's time or geographical limitations.

When becoming Parties to the Convention and/or the Protocol, States may expressly mention that they will not apply, or will only apply with modifications, certain articles of the Convention. These reservations cannot, however, be made in relation to key provisions, including Article 1 (the refugee definition), Article 3 (non-discrimination based on race, religion or country of origin) and Article 33 (*non-refoulement*), provisions which all Parties to the Convention and/or Protocol must accept.

2.2.2 Regional treaties

2.2.2.1 The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

This Convention was adopted in 1969 by member States of the Organization of African Unity (now the African Union). This regional treaty complements the 1951 Convention by containing a broader refugee definition, a positive obligation to make the best efforts to grant asylum, provisions on durable solutions, and provisions on prohibiting subversive activities by refugees.

2.2.2.2 European Union instruments

Since the mid-1980s, the member States of the European Union (EU) have sought to harmonize their asylum policies and practices. At first, coordination took the form of legally non-binding political initiatives. Since 1999, however, EU governments have worked to establish a Common European Asylum System based on the full and inclusive application of the 1951 Convention.

By May 2004, when 10 new countries joined the EU's existing 15 member States, agreement had been reached on the major building blocks of the Common European Asylum System. These included agreements on issues such as:

- § Temporary protection;
- § Minimum standards for the reception of asylum-seekers;
- § A regulation determining the member State responsible for examining asylum requests (replacing the 1990 "Dublin Convention" on this issue);
- § A system for comparing asylum-seekers' fingerprints (known as Eurodac, which has been in operation since January 2003);
- § The "Qualification" directive, which defines the concept of refugee and subsidiary, or complementary, protection and thus determines minimum standards for those who qualify for international protection;
- § The "Procedures" directive, which defines common minimum standards for status determination procedures.

Approval of these key provisions, which establish minimum procedural norms, marks the end of the first phase of establishing a Common European Asylum System. The second phase will involve translating these principles into national legislation and harmonizing practices among member States.

2.2.3 Customary international law

The principle of *non-refoulement* is part of customary international law. Thus, *all* countries are legally bound by the prohibition on returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion. This is particularly important for States that are not Parties to the 1951 Convention or its 1967 Protocol. (See below under 2.3.3 for the scope of this concept in the context of customary international human rights law.)

2.2.4 Judicial decisions and academic opinion

As with any body of law, the provisions of the key treaties and the scope of customary law principles are open to interpretation. In trying to establish a common understanding of the legal rules in question, it is often helpful to examine the judgements of States' superior courts on related legal issues. The considered opinion of courts that have ample experience in supervising the implementation of obligations under international refugee law is therefore significant in determining the content of international refugee law. When determining States' legal obligations to refugees, courts have often referred to "soft law" instruments, such as Executive Committee Conclusions, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, and policy documents, including UNHCR protection guidelines.

The views of leading academics in the field of international refugee law, particularly those who have researched how international obligations are applied in practice, can also help clarify the legal framework for international protection.

2.2.5 "Soft law" instruments

"Soft law" instruments reflect political rather than legal commitments made by States. While not legally binding, they nonetheless represent the views of States and are very influential in refugee protection. They also show how the law is developing. On a universal level the most notable political declarations are:

- § The *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol* (2001), which reaffirms the central relevance of the 1951 Convention to international protection, acknowledges that the principle of *non-refoulement* is embedded in customary international law, and commits States to providing better refugee protection within the framework of international solidarity and burden-sharing;
- § The *Declaration on Territorial Asylum* (1967), adopted by the United Nations General Assembly, which reflects the international consensus that the granting of asylum is a peaceful and humanitarian act not to be regarded as unfriendly by any other State, and notes that the responsibility for evaluating claims for refugee status rests with the country in which the individual seeks safety;
- § *Executive Committee (ExCom) Conclusions on the international protection*, which are adopted annually by consensus and elaborate the standards and principles that govern international protection. The Conclusions cover a wide range of protection issues, including matters not addressed in any depth in international law, such as voluntary repatriation, responses to massive refugee crises, and maintaining the civilian and humanitarian character of

asylum. Given that ExCom Conclusions represent the views of more than 50 States, including some not Party to the 1951 Convention/1967 Protocol, they form an integral part of the international protection framework, influencing national policy as well as UNHCR's operations.

There are two particularly significant regional instruments for refugee protection:

- § *Cartagena Declaration on Refugees* (1984), adopted in the wake of the civil war-related refugee crises that affected Central America in the 1980s by government representatives, distinguished academics and lawyers from the region. Like the OAU Refugee Convention, the Declaration includes the 1951 Convention refugee definition and complements it with a wider refugee definition. It also sets out recommendations for providing humanitarian treatment and durable solutions for refugees. Although the Declaration is not legally binding, it has been repeatedly endorsed by Central and Latin American States. Its broad refugee definition has been incorporated in the legislation of all but one of the countries in the Central American and Caribbean region and in a number of Latin American countries. Indeed, its importance as a regional protection tool has been recognized in numerous resolutions of the United Nations General Assembly and of the Organization of American States;
- § *Bangkok Principles on the Status and Treatment of Refugees* (1966, updated 2001), which were adopted by certain Asian, Middle Eastern and African States. These principles are significant in that they reflect the views of many States that have had extensive experience in providing asylum, including some States that are not Party to the 1951 Convention/1967 Protocol. As do the OAU/African Union Convention and the Cartagena Declaration, the Principles incorporate a refugee definition which is broader than that found in the 1951 Convention.

2.3 International human rights law

In seeking to ensure humane treatment for a particularly vulnerable group of people, international refugee law is closely related to international human rights law, which focuses on preserving the dignity and well-being of every individual. The two bodies of law are **complementary**; increasingly, human rights principles have been applied to enhance refugee protection:

- § In terms of the **entitlements** that refugees and asylum-seekers have under international human rights law in the country of asylum;
- § In so far as international mechanisms to **monitor** the proper implementation of human rights law can be utilized by, and on behalf of, individual refugee men, women and children;

§ In how international human rights law **influences** UNHCR policy, for instance, in setting standards of due process, conditions of detention, gender equality, and children's rights.

The entire international protection framework is based on human rights concepts. It aims to help those who have been forced to flee their countries because their rights have been violated. In particular, the notion of persecution, which is at the heart of the refugee definition in the 1951 Convention/1967 Protocol, is regularly interpreted in accordance with human rights standards. An understanding of international human rights law is therefore vital for securing international protection for refugees and others of concern.

Since human rights law applies to everyone, including refugees, regardless of their legal status, it is a helpful standard to use in assessing the quality of the treatment that asylum countries offer to refugees and asylum-seekers on their territories. This is particularly important when States are not Parties to any of the refugee treaties (the 1951 Convention, its 1967 Protocol, or the OAU refugee Convention).

The prohibition under customary and treaty-based human rights law on returning a person to a territory where he/she is at risk of torture, or cruel, inhuman or degrading treatment or punishment, reinforces the principle of *non-refoulement* under refugee law. In doing so, it offers another legal avenue for securing protection for individual refugees, through recourse to an international complaints mechanism that is not available under the provisions of the 1951 Convention/1967 Protocol. The Human Rights Committee and the Committee against Torture have both, for example, prevented the expulsion of individuals facing a substantial risk of torture. Similarly, at the regional level, European Court of Human Rights can direct a country under its jurisdiction not to expel an asylum-seeker to another country where he/she might be at risk of torture or any other violation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950). The Inter-American Court of Human Rights has similar powers in relation to the prohibition on torture under the *American Convention on Human Rights* (1969).

The promotion of human rights is also relevant in securing solutions to refugee crises. Efforts to improve the human rights situation in a refugee-producing country are imperative if there is to be any real prospect of sustainable voluntary return and reintegration.

Thus, the principles of human rights are applicable to all phases of the cycle of displacement:

- § The causes of displacement;
- § Determining eligibility for international protection;

- § Ensuring adequate standards of treatment in the country of asylum;
- § Ensuring that solutions are durable.

UNHCR thus highly values the partnerships it has built with a variety of human rights actors, including the Office of the High Commissioner for Human Rights, other international and regional human rights institutions and bodies, and NGOs.

2.3.1 Universal instruments

The founding proclamation of human rights, and one of the most famous international instruments, is the *Universal Declaration of Human Rights* (1948). This historic initiative, adopted after the end of the Second World War, gave voice to the desire of the international community to promote universal respect for the dignity and fundamental freedoms of all members of the human race. Although the Declaration was adopted as a statement of political intent rather than as a legally binding treaty, it is nevertheless enormously significant as the sole expression of the rights to which every individual is entitled. Since the Declaration was adopted, many of its principles have been reiterated in legally binding treaties while some have gained the status of customary international law.

Some of the Declaration's key provisions include:

"All human beings are born free and equal in dignity and rights."

(from Article 1)

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

(from Article 2)

"Everyone has the right to life, liberty and security of person."

(Article 3)

Article 14(1) is of specific interest to refugees. It states:

"Everyone has the right to seek and to enjoy in other countries asylum from persecution."

In 1966, States accepted a legal, rather than a political or moral, obligation to promote and protect human rights and fundamental freedoms. This obligation was codified in two international Covenants: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Both instruments entered into force in 1976. Along with the Universal

Declaration and the two Optional Protocols to the International Covenant on Civil and Political Rights, these instruments are known collectively as the International Bill of Human Rights.

Other important universal human rights instruments include:

- § *International Convention on the Elimination of All Forms of Racial Discrimination* (1965);
- § *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (1979);
- § *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984);
- § *United Nations Convention on the Rights of the Child* (1989);
- § *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990).

Certain human rights, such as the right to life or the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, may never be legitimately restricted. These rights are listed in Article 4(2) of the International Covenant on Civil and Political Rights and must be protected at all times and under all circumstances, including during situations of public emergency. They are commonly referred to as **non-derogable rights**.

2.3.2 Regional treaties

The development of human rights law has been markedly strengthened by the creation of regional instruments and supervisory mechanisms. The first of these was the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), to which several additional protocols have been added. This was followed by the *American Convention on Human Rights* (1969) and the *African Charter on Human and Peoples' Rights* (1981). Other regional treaties include the *Inter-American Convention to Prevent and Punish Torture* (1985), the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1987), and the *African Charter on the Rights and Welfare of the Child* (1990).

2.3.3 Customary international law

Various principles of human rights law are part of customary international law. In relation to refugee protection, a key rule of customary law is the **prohibition on returning any person to the risk of torture**, or cruel, inhuman or degrading treatment or punishment. (See above under 2.2.3 for the scope of this concept in the context of international refugee law.)

2.3.4 Human rights mechanisms

Along with the adoption of the instruments described above, various bodies have been established to oversee the implementation, and to investigate alleged violations, of human rights obligations.

2.3.4.1 Universal institutions

Under the United Nations system, there is a complex collection of bodies to monitor the protection of human rights, each with a unique mandate. These bodies were created either by the United Nations' Economic and Social Council (ECOSOC) or by specific universal human rights treaties.

The two **ECOSOC bodies** are:

- § The **Commission on Human Rights**, which is composed of 53 United Nations member States elected for three-year terms. The Commission meets annually to discuss matters relating to human rights anywhere in the world. The Commission mandates Special Rapporteurs (individual experts acting independently of any government) and Working Groups to investigate particular human rights matters anywhere in the world, whether relating to a specific country or of a more general theme. When there is a threat of *refoulement*, the matter may be raised with the Special Rapporteurs on Torture or on Extrajudicial, Summary or Arbitrary Executions, or the Working Group on Enforced Disappearances, any of which may make an urgent appeal to the government in question. To assist it in its work, the Commission established a number of subsidiary bodies, including the **Sub-Commission on the Promotion and Protection of Human Rights** (previously called the Sub-Commission on the Prevention of Discrimination and Protection of Minorities). This sub-commission reviews complaints about gross human rights violations and decides whether they should be brought to the attention of a Working Group of the Commission (the so-called "1503 Procedure");
- § The **Commission on the Status of Women**, which promotes equal rights for women, is made up of representatives from 32 United Nations member States, elected for four-year terms. It meets biannually to prepare recommendations for ECOSOC.

There are seven **treaty bodies**, each relating to a particular human rights treaty. These committees are made up of experts serving in their personal capacities who are elected by States Parties (with the exception of the Committee on Economic, Social and Cultural Rights, whose constituent experts are selected by ECOSOC members). Unlike the ECOSOC Commissions mentioned above, the mandate of these Committees only covers States that are Parties to the relevant treaty. The Committees examine the periodic reports

submitted by States Parties on their efforts to comply with their treaty obligations. The Committees then issue comments and recommendations for improvement, known as Concluding Observations. The Committees can also issue General Comments on thematic issues. These bodies can also, under certain circumstances, examine allegations of human rights violations made by individuals. In doing so, they may request that the State concerned suspends any deportation measures against the complainant until the Committee has reached its final decision. The Committees are:

- § **Human Rights Committee** (*International Covenant on Civil and Political Rights*);
- § **Committee against Torture** (*United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*);
- § **Committee on Economic, Social and Cultural Rights** (*International Covenant on Economic, Social and Cultural Rights*);
- § **Committee on the Elimination of Racial Discrimination** (*International Convention on the Elimination of All Forms of Racial Discrimination*);
- § **Committee on the Elimination of Discrimination Against Women** (*United Nations Convention on the Elimination of All Forms of Discrimination against Women*);
- § **Committee on the Rights of the Child** (*United Nations Convention on the Rights of the Child*);
- § **Committee on the Protection of the Rights of All Migrant Workers and Members of their Families** (*International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*).

2.3.4.2 Regional institutions

The regional human rights treaties mentioned above also have specially established bodies to monitor their implementation and to investigate human rights violations. The first such body to be created was the **European Court of Human Rights**, which relates to the European Convention on Human Rights. Other regional mechanisms include:

- § The Inter-American Commission and Court of Human Rights;
- § The African Commission and Court on Human and Peoples' Rights;
- § The European Committee for the Prevention of Torture.

Each of these courts has the power to request States to refrain from taking action, for instance, to expel a refugee or asylum-seeker, if this would cause irreparable harm to the person concerned.

2.4 International humanitarian law

This branch of international law, which predates both human rights and refugee law, aims, during armed conflict, to both protect persons who do not or no longer take part in the hostilities, and regulate or, rather, restrict the means and methods of warfare. It is of clear significance in the protection of refugees as refugees are becoming increasingly targeted in wars. The core instruments are the four *Geneva Conventions* (1949) and their two *Additional Protocols* (1977). The Geneva Conventions all concern international armed conflicts, except that Article 3 which is common to all four Conventions relates to non-international armed conflicts, i.e. civil wars. Additional Protocol I is concerned solely with international conflicts; Additional Protocol II focuses on non-international armed conflicts. Most of the conflicts in the world today occur within the borders of a country and, as such, are subject to fewer legal restrictions than those that occur between countries.

In principle, refugees caught up in an international armed conflict fall within the category of “protected persons”, which means that they are covered by all the provisions of the Fourth Geneva Convention and Additional Protocol I. During non-international armed conflicts, refugees are automatically protected since they are, by definition, “civilians not taking an active part in the hostilities”. Refugees benefit in particular from the following provisions:

- § *Article 3 common to the four Geneva Conventions* spells out the minimum protection which the parties to a conflict must afford to persons who are not, or are no longer, taking active part in hostilities in a non-international armed conflict. This includes protection against acts of violence, in particular murder, mutilation, torture, cruel humiliating and degrading treatment, a prohibition on hostage-taking and the requirement of a fair trial before the imposition of any punishment;
- § *The Fourth Geneva Convention on the Protection of Civilians in Times of Armed Conflict* concerns in particular the general protection of civilians against certain consequences of war. Among its key provisions are ones prohibiting the use of civilians as human shields, the collective punishment of civilians, measures aimed at intimidating or terrorizing the civilian population, pillage and reprisals against civilians. Other provisions concern the establishment of neutralized zones, which could be a refugee settlement, and the reuniting of dispersed families, as well as a prohibition on treating refugees as enemy aliens solely on the basis that they have the nationality of the enemy power;
- § *Additional Protocol I* declares that wars of national liberation must be treated as conflicts of an international character and reinforces the rule that belligerents must distinguish between military objectives, on the one hand, and civilians and civilians

objects, on the other. It strengthens protections under the Geneva Conventions further, by directing, for instance, that civilians shall not be the intentional target of military action or of indiscriminate attack and that civilians should be provided with impartial assistance by humanitarian agencies, subject to the agreement of the Parties concerned;

§ *Additional Protocol II* extends to non-international armed conflicts the principal rules of Protocol I relating to the protection of civilians against the effects of hostilities. It therefore expands protections beyond those provided by common Article 3. Displacement of the civilian population may only be ordered if its safety or imperative military reasons require it and if all possible measures have been taken to ensure it will be received under satisfactory conditions.

As has been mentioned above, certain human rights are non-derogable. International human rights law recognizes that there are circumstances that may justify restrictions on certain rights and freedoms. Thus, many (but not all) of the entitlements under international human rights law can be suspended during a period of armed conflict. If that happens, international humanitarian law, which only applies in situations of armed conflict, is intended to ensure that human dignity is respected. Once a person flees the conflict and reaches a neutral country, then refugee and human rights law again apply in its integrity (Article 9 of the 1951 Refugee Convention confirms that refugee law continues to apply, though with some possible derogations, during armed conflict).

2.5 International criminal law

Developments in international criminal law increasingly have an impact on the protection of the girls, boys, women and men of concern to UNHCR. The judgements made by the International Criminal Tribunals for the former Yugoslavia and Rwanda, which focused on individual liability for offences such as war crimes and crimes against humanity, have helped to determine when people should be excluded from refugee status because of their behaviour. The International Criminal Court (ICC) will undoubtedly exert a similar influence when it starts to hear cases. The *Statute of the ICC* (1998), which has been in force since July 2002, is, in itself, significant as it provides the first comprehensive codification of crimes against humanity and classifies as war crimes certain acts in non-international armed conflict that did not previously carry criminal liabilities under any treaty.

Another significant development related to both criminal law and refugees has been international action to combat human trafficking and smuggling. Increasing numbers of refugees are forced to rely on smugglers in their attempts to reach safety. In doing so, not only do they put their lives at risk, but they often also jeopardize the

outcome of their claims for asylum in the destination State. Two international agreements on this issue – the *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air* (2000), in force since January 2004, and the *United Nations Protocol to Prevent, Suppress and Punish the Trafficking of Persons* (2000), in force since December 2003 – focus on the traffickers and smugglers and make it clear that their victims should not be punished merely for having been subject to smuggling or trafficking. Both Protocols stipulate that nothing in their provisions affects the rights of individuals and the obligations of States under the 1951 Convention/1967 Protocol or the principle of *non-refoulement*. These Protocols supplement the *United Nations Convention against Transnational Organized Crime* (2000), which entered into force in September 2003 and provides for greater cooperation among governments in tackling cross-border criminal activity.

2.6 United Nations Security Council resolutions

The Security Council, entrusted under the United Nations Charter with maintaining international peace and security, is made up of representatives of 15 United Nations member States, five of which are permanent members (China, France, the Russian Federation, the United Kingdom, and the United States of America). The other 10 member States are elected to the Security Council for two-year terms. Unlike resolutions of the United Nations General Assembly, Security Council resolutions adopted under Chapter VII of the United Nations Charter are legally, rather than just politically, binding on all United Nations States. Under Article 39 of Chapter VII, the Council

“shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security”.

The measures that may be taken include military action to end a conflict, which may be followed by the creation of a United Nations civilian and/or military authority to administer the territory in question until a freely elected government can take over. During the Cold War era, the Security Council’s powers under Chapter VII were rarely used, as such resolutions require the agreement of all five permanent members, two of which were opposing superpowers at the time. But since the early 1990s, the Security Council has become more active, particularly in acknowledging that violence against civilians may constitute a threat to international peace and security. For example, following military action by NATO members against the then Federal Republic of Yugoslavia to halt the repression of Kosovo Albanians, the Security Council passed Resolution 1244 (1999), which established the United Nations Mission in Kosovo (UNMIK). UNMIK was tasked with

administering the province until democratic self-governance was established. UNHCR formed the humanitarian pillar of that mission. Thus, Chapter VII resolutions may establish the legal basis and environment in which international protection is provided and UNHCR can operate.

2.7 Implementation of the 1951 Convention / 1967 Protocol at the national level

The 1951 Convention and its 1967 Protocol do not prescribe the way in which States should implement their obligations under these instruments. States Parties thus have a degree of discretion in determining what procedures and institutions they will use for that purpose. The most effective method of implementing international obligations for refugee protection is to pass national asylum legislation that incorporates the provisions of these treaties. The exact form of such legislation will vary among countries, depending on their legal traditions and existing provisions relating to refugees. UNHCR has an important role in advising States on the international refugee protection standards to be upheld when drafting legislation. Simply failing to adopt any asylum legislation does not relieve a country of its obligations under treaties to which it is Party or, indeed, under customary international law.

States are free to adopt a broader refugee definition than that found in the international instruments to which they are Party, particularly the 1951 Convention/1967 Protocol. But States cannot use national legislation to reduce their obligations to fewer than those contained in the treaties to which they have acceded or by which they are bound under customary international law. By doing so, they may be in breach of their international obligations. The international refugee protection instruments do not, however, prescribe exactly how States should meet these standards or how they should determine refugee status. In practice, States have taken different approaches, both in drafting their legislation and in the decisions of their judicial authorities. In fact, these can vary quite dramatically. This is partly due to the absence of any binding enforcement mechanism under the 1951 Convention/1967 Protocol which could be triggered by individual refugees or asylum-seekers. That is why UNHCR's supervisory role, in which it works with States Parties to ensure that these treaties are implemented, is so important.

UNHCR's views on the interpretation and application of the treaties' provisions carry considerable weight. UNHCR's position can be made clear in a number of ways: through written comments on draft asylum legislation, opinions submitted to appellate proceedings in individual asylum cases and, more generally, through the publication of guidelines on the interpretation of various aspects of the 1951 Convention. In particular, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* is

often referred to as an authoritative guide by States' courts when interpreting national legislation in accordance with the 1951 Convention. The decisions of superior courts in States with advanced asylum systems also contribute to the interpretation of international refugee law.

On the national level, UNHCR helps individual countries to improve their ability to provide international protection on their territory. **Capacity-building** can involve strengthening reception arrangements for those arriving and seeking asylum, establishing and improving the processing of asylum claims, improving treatment of those recognized as refugees, and promoting durable solutions. These activities help to develop national refugee policies and practices in accordance with the international legal framework. They also strengthen the skills and knowledge of immigration authorities and help to promote greater awareness and more positive attitudes about refugees in the communities hosting them or living alongside them following repatriation.

Capacity-building takes different forms depending on the financial resources of the concerned State and on its experiences in dealing with refugees. In States with sophisticated asylum procedures, initiatives might include educational programmes in schools and public information campaigns about refugees and asylum-seekers to promote understanding of their plight among the wider community. In countries just beginning to put in place a policy for responding to the arrival of refugees, accession to the 1951 Convention and 1967 Protocol and the adoption of national asylum legislation are usually encouraged. Capacity building is a long-term endeavour requiring the participation of the authorities of the host State, UNHCR, NGOs and refugees themselves.

2.8 Developing policy and practice

As discussed in Chapter 1, the most significant UNHCR initiative on promoting protection in recent years was the Global Consultations on International Protection, a series of meetings held among States, UNHCR, NGOs and academics during 2001 and 2002. The Consultations were convened partly in response to questions arising from many quarters about the relevance of the 1951 Convention. As a result of the Consultations, States, in their 2001 Ministerial Declaration, reaffirmed that the 1951 Convention remains central to the international refugee protection regime.

The Consultations also led to the development of the **Agenda for Protection**, which was adopted by States participating in the Consultations and endorsed by ExCom. The Agenda represents the first comprehensive framework for global refugee policy since UNHCR was created. It sets out clear goals for strengthening international protection and suggests practical ways to achieve

them. Thus, the Agenda provides a useful framework for cooperation among States, NGOs and UNHCR on refugee matters and helps UNHCR to identify its own priorities globally and on a country-by-country basis. The Agenda's goals are:

- § To strengthen implementation of the 1951 Convention and 1967 Protocol;
- § To protect refugees within broader migration movements;
- § To share burdens and responsibilities more equitably and build capacities to receive and protect refugees;
- § To address security-related concerns more effectively;
- § To redouble efforts to find durable solutions;
- § To meet the protection needs of refugee women and refugee children.

The Agenda encourages the development of new tools to ensure that effective protection is provided to refugees and other persons of concern. The High Commissioner has thus proposed the use of multilateral "special agreements" among States to complement the *1951 Convention*. Such agreements – known as **Convention Plus** – could be concluded on a general theme or when a group of States shares an interest in cooperating on a specific refugee situation or issue. Related initiatives are being pursued in a consultation process known as the Forum, which was launched in 2003. One of the first concrete outcomes of this process has been the Multi-annual Framework of Understandings on Resettlement agreed in 2004.

In line with its mandate, UNHCR issues **Guidelines** on topics related to international protection. These may concern legal matters related to the interpretation of provisions in the Convention, such as the refugee definition, or policy and operational concerns, such as the appropriate responses to the special protection needs of refugee children. UNHCR's Guidelines have often been referred to by courts and other national bodies adjudicating on asylum issues.

Summary

International refugee law

Sets out the **main principles behind the international protection** of refugees.

The key instruments are the 1951 Convention and its **1967 Protocol**. Their provisions include:

- § A prohibition on returning refugees and asylum-seekers to a risk of persecution (the principle of *non-refoulement*);
- § A requirement to treat all refugees in a non-discriminatory manner;
- § Standards for treatment of refugees;
- § Obligations of refugees towards the country of asylum;
- § A duty, on the part of States, to cooperate with UNHCR in the exercise of its functions.

The **principle of non-refoulement**:

- § Prohibits the return of refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion;
- § An exception can only be made if a refugee constitutes a threat to national security or, having been convicted of a particularly serious crime, is a danger to the community, but not if this would expose the individual concerned to a risk of torture or cruel, inhumane or degrading treatment or punishment;
- § As part of customary and treaty law, this fundamental principle is binding on **all** States.

Complementary areas of law

International human rights law:

- § Generally applies to all people in a State, whether citizens or not;
- § Is central to the concept of international protection and asylum, as refugees seek safety from human rights violations;
- § Helps to define how refugees and asylum-seekers should be treated in countries where they seek asylum;
- § Is supervised by various international bodies which can be called on to help individual refugees by, for example, preventing a return to the risk of torture;
- § If applied properly, can prevent situations that lead to refugee movements and contribute to the safe return of refugees.

International humanitarian law:

- § Applies during armed conflicts, whether international or internal;
- § Requires that refugees, along with other civilians, are to be treated humanely, and, in particular, to be protected from acts of violence.

Other relevant areas of law are:

- § International criminal law;
- § Binding United Nations Security Council resolutions.

Additional reading

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Note on International Protection (A/AC.96/930), UNHCR, July 2000.

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Human Rights and Refugee Protection, Training Module RLD5, UNHCR, 1995 (Part I) and 1996 (Part II).

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International Humanitarian Law: Answers to Your Questions, ICRC, 2002.

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An Overview of the Global Consultations on International Protection, Refugee Survey Quarterly, vol. 22, no. 2/3, 2003, (pp. 3–13), Volker Türk, José Riera, Walpurga Englbrecht.

Agenda for Protection, UNHCR, October 2003 (3rd edition).

Strengthening Protection Capacities in Host Countries (EC/GC/01/19), UNHCR, April 2002.

Exercises

- 1 Which one of the following statements is true? The legal framework for international protection is:
 - a Entirely dependent on the national legislation of each State.
 - b Derived from various areas of international law.
 - c Based exclusively on human rights treaties.
 - d Consists of international refugee law.
- 2 Which one of these is not a source of international law?
 - a Regional treaties.
 - b Customary international law.
 - c National legislation.
 - d General principles of law.
- 3 Which one of the following statements about the 1951 Convention, as amended by its 1967 Protocol, is true?
 - a It only applies to refugees who left their countries because of events taking place before 1951.
 - b It applies to refugees irrespective of when they fled.
 - c It can only apply to refugees from Europe.
 - d It automatically applies to refugees from any country.
- 4 The prohibition on *refoulement* of refugees is binding on only those countries which are party to the 1951 Convention. *True or False?*
- 5 Which one of the following is not a feature of the 1951 Convention?
 - a It sets out a general definition of a refugee.
 - b It prohibits States Party to it from discriminating between refugees.
 - c It does not apply to people covered by regional refugee instruments.
 - d It outlines the duties refugees have to the country of asylum.
- 6 Which one of these is a legally binding instrument?
 - a The Declaration of States Parties to the 1951 Convention.
 - b A Security Council Resolution under Chapter VII of the United Nations Charter.
 - c The Cartagena Declaration.
 - d An Executive Committee Conclusion on International Protection.

- 7** Which one of these United Nations bodies has a mandate which covers all States?
- a** Committee on the Elimination of Racial Discrimination.
 - b** Human Rights Committee.
 - c** Committee against Torture.
 - d** Commission on Human Rights.
- 8** If a State is not Party to any refugee or human rights treaties, its government still has an obligation not to return an individual to a place where he or she is at risk of torture. *True or False?*
- 9** Which one of these statements is true?
- a** International humanitarian law only applies where there is a state of war between two countries.
 - b** Some provisions of international human rights law can be suspended during armed conflicts.
 - c** The principle of *non-refoulement* of refugees does not apply during times of war.
 - d** International refugee law is part of international humanitarian law.
- 10** Which one of these statements is true? Refugees are aliens in the country of asylum, so
- a** They have forfeited in large part their human rights.
 - b** They are, nevertheless, entitled generally to the same standard of treatment under international human rights law as nationals.
 - c** Their only rights are secured by international refugee law.
 - d** International human rights law no longer applies to them.
- 11** Which one of the following instruments on human rights is applicable to all States?
- a** International Covenant on Civil and Political Rights.
 - b** International Covenant on Economic, Social and Cultural Rights.
 - c** Universal Declaration on Human Rights.
 - d** United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.
- 12** International human rights law complements international refugee law. In which of these ways is this not so?
- a** As a guide to identifying instances of persecution.
 - b** By strengthening the principle of *non-refoulement*.
 - c** By providing a supplementary refugee definition.
 - d** As an indicator of when the situation in the country of origin is conducive to the return of refugees.

- 13** A refugee fleeing armed conflict is always protected by international humanitarian law when in a country of asylum. *True or False?*
- 14** Which one of these instruments does not apply in internal armed conflict situations?
- a 1951 Refugee Convention.
 - b Additional Protocol II to the four Geneva Conventions.
 - c The four Geneva Conventions.
 - d Additional Protocol I to the four Geneva Conventions.
- 15** Complete this sentence with one of the following. With regard to international protection, the International Criminal Court is significant because:
- a It decides which people should be excluded from refugee status.
 - b Its Statute contains a complementary refugee definition to that found in the 1951 Convention.
 - c Its Statute and, in due course, judgements will provide guidance on certain concepts found in the exclusion clauses of the 1951 Convention.
 - d Those unfairly refused refugee status will be able to seek protection from the Court from *refoulement*.
- 16** The European Court of Human Rights and the Inter-American Court of Human Rights both have the power to request States under their jurisdiction to refrain from sending back individuals who have been denied refugee status on the grounds that return would expose the person concerned to the risk of torture or another violation of the relevant regional human rights treaty. *True or False?*
- 17** Which one of these statements about how a State implements its international obligations with respect to refugees is incorrect?
- a Any refugee definition in national law must not be narrower than the refugee definition(s) in international instrument(s) to which that State is party.
 - b If the State chooses not to adopt asylum legislation, it is excused from its obligations under international law.
 - c The State has a measure of discretion in exactly how it implements its international obligations, although it must respect the substance of its commitments.
 - d The State should pay due regard to points raised by UNHCR about the compatibility of its asylum policy and practice with its international obligations towards refugees.
- 18** Which one of the following sets out a comprehensive and contemporary framework for international protection of refugees?
- a Agenda for Protection.
 - b Executive Committee Conclusions.
 - c Convention Plus.
 - d Global Consultations on International Protection.

Case A

Roger was a member of the Democratic Alliance (DA), a political organization which promoted democracy, free speech and freedom of the press in his country, Novoland. As a member of the DA, he engaged in non-violent protest against the repressive policies of the government that had been ruling Novoland under an authoritarian one-party system for over twenty years. As a result, he was arrested and imprisoned without a trial.

Roger was locked inside a 2 x 2.5 metre prison cell with three other prisoners that contained no toilet, chair, table or bed. There were no windows or lights in the cell. He was not allowed to utter a single sound and was never allowed to leave the cell, not for exercise or even to use the bathroom. The guards brought him food and water only once a day, but the food often consisted of only one can of sardines. The cell was infested with rats and cockroaches. Roger was beaten daily by the guards and other prisoners. After six weeks, a cousin of Roger's who worked for the government helped him to escape prison and reach the neighbouring country of Beauland, where he claimed asylum.

Shortly after claiming asylum, Roger learned that his father had been murdered on the orders of the President of Novoland. Prior to his murder, Roger's father had been under surveillance for several years because of his leadership in the democracy movement and outspokenness against the governing regime. He had actually been an appointee in that government early in his career, but joined the opposition DA after witnessing the corruption of the regime.

- a Read Articles 1–27 of the *International Covenant on Civil and Political Rights* (which can be found on the *Refworld* search on UNHCR's website). Several violations by the Novoland authorities of obligations under this treaty are described in Roger's testimony. In the table below, list three more Articles which have been violated in his case, and the nature of the violation in addition to that on freedom of expression.

Article of ICCPR	Violation
Article 19 – freedom of expression.	Roger's arrest and imprisonment simply for expressing his non-violent political views.

b Fortunately, Roger's claim for asylum was accepted by the authorities in Beauland.

If this had not been the case, it might have been necessary to apply to international human rights monitoring mechanisms in order to prevent Roger's *refoulement* to Novoland. Given the violations identified above, consider the treatment Roger would have been likely to face if sent back home. With this in mind, decide which of the bodies listed below could, in principle, have been approached to prevent his *refoulement*. For the purposes of this exercise, it can be taken that Novoland is party to all of the instruments establishing the treaty bodies mentioned below and that it has accepted the right of individuals to petition these bodies.

Human Rights body	Possible means of preventing refoulement
Special Rapporteur on Torture (Commission on Human Rights).	ü
Committee on the Elimination of Racial Discrimination.	
Committee against Torture.	
Human Rights Committee.	

Answer key to Chapter 2 exercises

- 1 b Although international refugee law is the main component of the legal framework for international protection, other areas of international law, such as human rights law, are also relevant. National legislation should be used to implement the international protection obligations under international law; it does not set the standards for international protection.
- 2 c The sources of international law are treaties, both universal and regional, customary international law and general principles of law.
- 3 b The 1967 Protocol removed the time limitation contained in the 1951 Convention, making it applicable to refugees whenever they fled, but it did not automatically remove any geographical limitation restricting its application to Europe alone, which a State might have imposed when becoming Party to the Convention. Parties to the 1951 Convention as amended by the 1967 Protocol may therefore have obligations in relation to refugees from all over the world or only from Europe.
- 4 **False** The prohibition on *refoulement* is part of customary international law and is therefore binding on all States, irrespective of whether they are party to the 1951 Convention or any other refugee instrument or indeed any human rights instrument.
- 5 c Regional refugee instruments complement the 1951 Convention. There is nothing in the Convention excluding the application of its provisions to those refugees who are also covered by regional instruments.
- 6 b Although the Declaration of States Parties, the Cartagena Declaration, and Executive Committee Conclusions are important instruments and may be referred to as “soft law”, they remain political, rather than legal, commitments. In contrast, the United Nations Charter states that all Security Council resolutions passed under Chapter VII of the Charter are binding on all United Nations member States.
- 7 d The Committees mentioned in A, B and C have a mandate only in respect of States which are Parties to the human rights treaty that established them. For example, the Committee against Torture only has a mandate in respect of States Parties to the *United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*. In contrast, the Commission on Human Rights is empowered to look at human rights issues anywhere in the world.
- 8 **True** Under customary international human rights law, all States are prohibited from returning individuals to a place where they are at risk of torture. This is an important complement to the prohibition on *refoulement* under international refugee law in relation to refugees.
- 9 b During armed conflict, some provisions of international human rights law can be suspended, hence the importance of the guarantees found in international humanitarian law. Those human rights that cannot be suspended are described as non-derogable rights.

International humanitarian law applies in both internal (within a State) and international (between States) armed conflicts, but its exact provisions differ depending on the type of conflict.

The principle of *non-refoulement* of refugees cannot be suspended during armed conflict; and the limited exceptions to this principle do not include situations of armed conflict.

Although international refugee law is humanitarian in nature, it is not part of the distinct body of international humanitarian law which was developed to regulate the conduct of armed conflict. Rather, refugee law is concerned with the status and treatment of a particular group of persons, refugees, irrespective of whether they have fled armed conflict or are currently caught up in a situation of armed conflict.

- 10 b** International human rights law applies generally to all persons within a State, whether they are nationals or aliens. Thus, it applies to refugees and complements the rights they have under international refugee law.
- 11 c** The Universal Declaration is the only human rights instrument adopted by all States. Thus it is of enormous significance, even though it was adopted as a statement of political intent. Many of its provisions have now become part of international human rights law, whether by way of treaty or as part of customary international law.
- In contrast, the treaties listed only apply in those States which are Parties to them.
- 12 c** International human rights law does not provide a refugee definition, though its concepts are important in determining whether a person is at risk of persecution, a key element of the refugee definition in the 1951 Convention. International human rights law does, however, enhance the principle of *non-refoulement* as it contains a prohibition on return to torture. It also acts as an indicator of whether conditions are conducive to return. How well its provisions are being respected by the country of origin indicates the kind of treatment returnees will face.
- 13 False** International humanitarian law only applies in situations of armed conflict. Thus, a refugee from a conflict zone who has found shelter in a country which is not at war is not covered by this branch of international law.
- 14 d** Additional Protocol I specifically applies only to international armed conflicts; additional Protocol II applies only to internal armed conflicts (civil wars). Article 3 of all four Geneva Conventions (but not the rest of these Conventions) applies in internal armed conflicts, whereas the 1951 Convention applies in situations of peace or armed conflict of any kind.
- 15 c** Given the nature of the offences under the jurisdiction of the International Criminal Court, the ICC's Statute and judgements will aid in the interpretation of the exclusion clauses under the 1951 Convention. The Court will not, however, examine individual claims to refugee status, therefore its judgements will not directly determine whether an individual should be excluded from refugee status or should be protected from *refoulement*. No refugee definition is provided in the Court's Statute.

- 16 True** Denial of refugee status does not prevent these courts from investigating whether the individual’s rights under the relevant regional treaty are at risk of being breached by return to the country of origin. Both courts, together with the African Court on Human and People’s Rights, have the power to request States to refrain from sending back individuals to the risk of torture or another violation of the relevant human rights treaty.
- 17 b** A State cannot use national legislation, or the lack of it, as an excuse for not living up to its obligations under international law. Such obligations take priority over national legislation and practice. Any refugee definition in national law must not place the State at risk of being in breach of its obligations under international refugee instruments to which it is Party. National definitions should therefore be no narrower than the refugee definition found in the applicable international instrument.
- However, each State has a measure of discretion in implementing its obligations under international refugee law, as long as it respects the substance of these obligations. UNHCR’s supervisory role in relation to the 1951 Convention means that States should consider UNHCR’s views on whether they are properly implementing their obligations under international refugee law, particularly under the 1951 Convention.
- 18 a** The Agenda for Protection is the first comprehensive framework for international protection since the adoption of the 1951 Convention. It was a result of discussions held during the Global Consultations process. Although Executive Committee Conclusions set out important guidance and standards, they do not form a comprehensive framework for refugee protection. Convention Plus refers to special agreements that may be adopted in the future to deal with specific refugee issues or situations. Thus they do not provide a comprehensive framework for international protection.

Case A

a

Article of ICCPR	Violation
Article 7 – prohibition of torture.	Regular beatings by prison guards.
Article 9 – right to liberty and security of person.	Imprisonment with no right for a court to determine the lawfulness of his detention.
Article 10 – respect for dignity of people deprived of their liberty.	Inhumane conditions in prison e.g., not allowed to leave cell, barred from talking, insufficient food, unsanitary as well as unlit accommodation.
Article 14 – right to fair trial.	Imprisonment without trial.
Article 19 – freedom of expression.	Roger’s arrest and imprisonment simply for expressing his non-violent political views.
Article 25 – right to take part in free elections.	Authoritarian single-party regime.

b

Human Rights Body	Possible means of preventing refoulement
Special Rapporteur on Torture (Commission on Human Rights)	ü
Committee on the Elimination of Racial Discrimination	x
Committee against Torture	ü
Human Rights Committee	ü

Chapter 3

The refugee definition



Key objectives

Understand the basic elements of the refugee definition found in the 1951 Convention.

Be aware of complementary refugee definitions in other international instruments.

Know who is responsible for deciding whether someone is a refugee.

This chapter examines the definition of a refugee set out in the 1951 Convention and the criteria that apply, including the concept of persecution. Complementary definitions found in regional refugee instruments and in UNHCR's Statute are also discussed, as is the relationship between refugee definitions in international and national law. The chapter also explains who is responsible for deciding whether an individual is a refugee, based on the applicable definition.

3.1 Refugee definitions in international instruments and national legislation

The principal definition of a refugee is that contained in the 1951 Convention.

3.1.1 1951 Convention

The refugee definition found in the 1951 Convention consists of:

- § *Inclusion clauses*, which set out the criteria used to determine whether an individual is considered a refugee. These clauses form the positive basis on which a person's eligibility for refugee status is determined;
- § *Exclusion clauses*, which deny refugee status to a person who satisfies the criteria found in the inclusion clauses on the grounds that he/she is not in need, or not deserving, of international protection;
- § *Cessation Clauses*, which describe the conditions under which refugee status comes to an end because it is no longer necessary or justified.

3.1.1.1 Inclusion clauses

Article 1A(2) of the 1951 Convention states that a refugee is any 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."

This provision identifies the five criteria that must all be met for a person to qualify as a refugee:

- § Well-founded fear;
- § Persecution;

- § Reasons of race, religion, nationality, membership in a particular social group or political opinion;
- § Outside country of nationality/former habitual residence;
- § Unable or unwilling, for fear of persecution, to seek that country's protection or to return there.

Well-founded fear

The person concerned must have good reason for fearing return to his/her home country. There are both a **subjective element** (the person's fear) and an **objective element** (external evidence "justifying" this fear) to the well-founded fear. Generally, the former is deduced by examining an individual's statements and behaviour. The latter requires an assessment of the conditions in the country of origin, among other factors. In some cases, when a person has left a country in which human rights violations are widespread and severe, the objective evidence may be sufficient on its own to establish a well-founded fear.

Some countries deny refugee status to asylum-seekers on the grounds that they could have found safety in another region of their home country. This so-called "**internal flight or relocation alternative**" may only be applied in certain limited circumstances where the risk of persecution appears to be at the hands of "non-State" actors, such as guerrilla groups controlling only part of the country. In such circumstances, it may be that there is a specific area of the country where there is no risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him or herself and could live a normal life without undue hardship.

Persecution

The core concept of **persecution** was deliberately not defined in the 1951 Convention, suggesting that the drafters intended interpretations of the term to be sufficiently flexible to encompass various and changing forms of persecution. Persecution is understood to comprise serious human rights abuses or other serious harm often, but not always, perpetrated in a systematic or repetitive way. Thus, death, torture, physical assault, unjustified imprisonment, and illegitimate restrictions on political or religious activities are all examples of persecution. Discrimination will not normally amount to persecution in itself, but particularly severe discrimination will usually qualify as persecution on cumulative grounds. In contrast, neither natural disasters nor poor economic conditions are considered to be persecution.

The act of persecution will often be at the hands of government officials or others under government control. Under the 1951 Convention, persecution can also be carried out by others perpetrators whom are generally referred to as "**non-State agents**".

When a government facilitates, encourages, or tolerates acts of persecution by a non-State agent, such as a paramilitary organization, such persecution is covered by the Convention's definition. Similarly, when a government is unable or unwilling to offer protection against persecution threatened by a non-State agent on one or more of the five Convention grounds, such persecution is also covered by the Convention.

Reasons of race, religion, nationality, membership of a particular social group or political opinion

To be a Convention refugee, a person must have a well-founded fear of persecution for one of these reasons. In reality, these "Convention grounds" often overlap. They can also be imputed to the individual by the persecutor.

Race is understood to cover all ethnic groupings often referred to as races.

Religion comprises any belief system held by an individual. The right to freedom of religion under human rights instruments includes the freedom to change religion and to manifest it in public or private, whether through teaching, practice, worship or observance, as well as the right not to have any religion.

Nationality is not confined only to citizenship but refers also to membership of any ethnic, religious, cultural or linguistic community.

A **particular social group** is a group of persons who either share a common characteristic, other than the risk of persecution, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of fundamental rights. In certain circumstances, for example, women and homosexuals have been considered particular social groups.

Political opinion covers the holding or expression of views on any matter regarding the State, government or public policy.

Outside the country of nationality/former habitual residence

A person cannot be a refugee if he/she is still within the territory of his/her home country. This does not, however, mean that the fear of persecution must have arisen because of events that took place while the person was still in that country. Although a refugee will usually have fled persecution or the threat of it, the Convention definition centres on the individual's unwillingness or inability to return because of a well-founded fear of persecution. Someone may therefore become a refugee after moving abroad for reasons unrelated to the Convention, if subsequent changes in the political situation of the country of origin or in his/her personal

circumstances create a risk of persecution on return. Such individuals are often referred to as “sur place refugees”.

The 1951 Convention provides for people without a nationality, or stateless persons, to be considered refugees by referring to their “country of former habitual residence”, rather than to their country of nationality.

Unable or unwilling to avail him- or herself of that country’s protection

Persecution by the authorities of the home country is often the reason why a refugee is unable to avail himself/herself of national protection. Circumstances beyond his/her control, such as an ongoing civil war, may also prevent him/her from seeking that country’s protection. A person who refuses to seek the protection of his/her country of nationality or habitual residence is only a refugee if this unwillingness is related to a well-founded fear of persecution.

3.1.1.2 Exclusion clauses

Persons not in need of international protection

Articles 1D and 1E of the 1951 Convention define the circumstances under which persons who otherwise qualify for refugee status under the inclusion clauses are nevertheless denied such status because they **do not need international protection**. These provisions apply to:

- § Individuals receiving United Nations protection or assistance other than from UNHCR. At present, this applies to Palestinian refugees. Those who are inside the area of operations of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and are receiving protection or assistance from UNRWA are excluded from the benefits of the 1951 Convention. Palestinian refugees who are outside UNRWA’s area of operation and thus do not enjoy UNRWA’s protection or assistance would, however, be entitled to the benefits of the Convention;
- § Individuals who are not considered to be in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the same rights and obligations as nationals in that country.

Persons undeserving of international protection

Article 1F of the Convention is intended to exclude from refugee status those who **do not deserve** such status because of their responsibility for certain serious acts. This provision applies if there are serious reasons for believing that an individual has:

- § Committed a crime against peace, a war crime, or a crime against humanity;
- § Committed a serious non-political crime outside the country of refuge prior to being admitted to that country as a refugee;
- § Been guilty of acts contrary to the purposes and principles of the United Nations.

The reasoning behind the exclusion clauses is that certain acts are so grave that those who commit them should not be protected by the Convention. The grounds for excluding someone because of his/her activities are exhaustively stated in Article 1F; no other criteria can be applied. By their very nature, cases invoking Article 1F tend to raise complex issues and require careful attention and assessment. Considering the serious consequences of exclusion for the individual concerned, Article 1F must be applied restrictively. Dependents should not be automatically excluded simply because the head of the family is determined to fall within the provisions of Article 1F. Each member of the family is entitled to individual consideration of his/her eligibility for refugee status.

The integrity of the international protection systems depends on the proper application of Article 1F. One of the difficulties encountered in providing protection to Rwandans fleeing the genocide in the 1990s, for example, was that a significant number of individuals among this population were suspected of having been involved in violent acts during the genocide, acts that may have justified exclusion from refugee status.

3.1.1.3 Cessation clauses

Under Article 1C of the 1951 Convention, refugee status comes to an end when the person concerned:

- § Voluntarily accepts the protection of his/her country of nationality;
- § Voluntarily re-acquires his/her nationality after losing it;
- § Acquires a new nationality and enjoys the protection of that country;
- § Has voluntarily re-established himself/herself in the country he/she fled because of fear of persecution;
- § Can no longer refuse to accept the protection of this country because the circumstances that led to recognition as a refugee have ceased to exist;

§ Has no nationality but can no longer refuse to accept the protection of his/her country of habitual residence because the circumstances that led to recognition as a refugee have ceased to exist.

By its very nature, cessation only takes place after someone has been recognized as a refugee. The cessation clauses apply if international protection is no longer necessary or justified. They differ from the exclusion clauses in that the exclusion clauses preclude a person from being recognized as a refugee because of acts that make him/her undeserving of international protection.

The grounds listed in Article 1C are exhaustive. The first four relate to voluntary behaviour on the part of a refugee; the last two grounds concern the conditions in the country of origin. The latter are often referred to as the “ceased circumstances” or “general cessation” clauses. The ending of refugee status on this basis flows from a change in the situation in the country of origin that is fundamental, durable and effective. Changes are considered to be effective only if they remove the basis of the fear of persecution.

There are exceptions to the general application of cessation under the “ceased circumstances” clauses. Individual refugees must therefore be able to ask for their cases to be reconsidered on the grounds of compelling reasons arising out of previous persecution. For example, it may be inappropriate to expect survivors of severe torture to return to their home country because of the psychological scars that remain, even if they are no longer at risk of persecution.

The “ceased circumstances” cessation clauses can be applied in relation to a whole group of refugees, as it is likely that a number of people will be affected by any fundamental change in the country of origin. This was the case when the conflict in Mozambique ended and after there were changes of regime and the beginnings of democratization in Malawi, Bulgaria and Romania in the late 1990s.

3.1.2 OAU Refugee Convention

In addition to incorporating the refugee definition contained in the 1951 Convention, the OAU Convention declares that a refugee is also anyone compelled to leave his/her country

“owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality”.

This definition came out of the experience in Africa of wars of independence. It represents an important extension of the refugee concept as it means people fleeing the indiscriminate effects of a civil war, for example, qualify as refugees under the OAU Refugee Convention even though the element of persecution on one of the 1951 Convention grounds might be missing.

3.1.3 Cartagena Declaration

As the OAU Refugee Convention, the Cartagena Declaration adopts the 1951 Convention refugee definition and then goes on to define a broader category of people as refugees, if they have fled their country

“because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.”

This part of the definition was clearly influenced by the OAU Refugee Convention and reflects the history of mass displacements because of civil wars in the nations of the Americas. While the Declaration is not legally binding, its principles, including its refugee definition, have been incorporated into the national legislation and practice of many Central and Latin American States.

3.1.4 UNHCR’s international protection mandate for refugees

Under UNHCR’s mandate, as defined by its 1950 Statute and subsequent General Assembly and ECOSOC resolutions, and in conjunction with the 1951 Convention, a refugee is any person who falls within the refugee definition as contained in Article 1A(2) of the 1951 Convention or who is outside his/her country of origin or habitual residence and is unable to return there because of serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.

3.1.5 National legislation

Many States simply adopt the refugee definition found in the relevant international instrument(s) to which they are Parties. There is, however, nothing to prevent a country adopting a refugee definition that is wider than that required under its international obligations. In many States, legislation provides protection for other categories of people besides refugees. (See Chapter 5 for a discussion of such complementary protection.)

3.2 Who determines whether a person falls within the definition of a refugee?

In order for a State to fulfil its obligations towards refugees, it must first identify who is a refugee. It is primarily the responsibility of the government of a country to determine whether someone falls within the applicable refugee definition within its jurisdiction.

Convention refugees are individuals determined to be refugees by the authorities of States that have acceded to the 1951 Convention and/or 1967 Protocol. As such, they are entitled to claim the rights and benefits that those States have agreed to accord refugees.

UNHCR is also mandated to carry out refugee status determination. In some instances, States may ask UNHCR to do so if the State has yet to establish suitable procedures. In other circumstances, UNHCR conducts status determination in countries that are not Party to any of the international refugee instruments. UNHCR may also decide to determine the status of individuals in other circumstances when needed. **Mandate refugees** – that is, refugees of concern to the Office – are individuals considered by UNHCR to be refugees within the definition of its Statute and the 1951 Convention, or under the broader mandate subsequently bestowed by General Assembly and ECOSOC resolutions. The responsibility for treating Mandate Refugees in accordance with international obligations lies with the country of asylum, even if UNHCR has determined status instead of the State. UNHCR's role is to advocate that these individuals be treated appropriately and according to international standards.

A person may be recognized as a Convention or Mandate refugee after an individualized assessment of his/her claim by a State or by UNHCR, respectively. In instances when asylum-seekers arrive rapidly in large numbers – a situation commonly referred to as a “mass influx” – the authorities or UNHCR, as appropriate, may decide to determine eligibility for refugee status on a group basis. Such Convention or mandate refugees are known as **prima facie refugees** (see Chapter 5 for more details). Depending on the circumstances, determination of refugee status may also be postponed during a mass influx, and those arriving may instead be provided with **temporary protection**. The granting of temporary protection in these instances does not preclude eventual individual status determination.

3.3 Common questions that arise in relation to the refugee definition in the 1951 Convention

Can a soldier or guerrilla fighter be a refugee?

No, if he/she continues to take an active part in hostilities. Anyone who continues to pursue armed activities cannot be considered a refugee given the humanitarian and civilian nature of such status. A person who has taken part in hostilities in the past may, however, qualify for refugee status if it can be established that he/she has genuinely made the transition to being a civilian, meets the inclusion criteria, and does not fall within the scope of an exclusion clause. The assessment of his/her asylum claim will require a careful examination of whether the ex-fighter's participation in the hostilities was in keeping with the applicable rules of conduct under international humanitarian law and whether or not the exclusion clauses of the 1951 Convention may apply.

Is a woman a refugee if she fears attack because she refuses to comply with social restrictions placed on females in her community?

Like men, women can be persecuted for political, ethnic, racial or religious reasons. In certain circumstances, women may be considered members of a particular social group. For example, in societies with strict social codes for female behaviour, women who fail to conform to the prevailing social codes by choosing their own husband or by refusing to wear traditional restrictive clothing may be considered as members of a particular social group. Someone who flees severe discrimination or inhumane treatment amounting to persecution because of her membership in that group may be entitled to refugee status. Thus, gender-related persecution may, depending on the individual circumstances, meet the criteria contained in the refugee definition while gender is not one of the five stated grounds for persecution in the 1951 Convention.

Can a criminal be a refugee?

If someone is simply trying to evade criminal investigation, prosecution or punishment in accordance with national laws and international standards on the administration of justice, he/she does not face persecution and therefore cannot be a refugee. In contrast, if the motivation for the criminal proceedings is to harass or punish the person because of his/her religion, race, nationality, membership of a particular social group or political opinion, that may amount to persecution and a claim to refugee status may therefore be justified. If, however, there is clear and credible information that a person who meets the criteria found in the inclusion clauses has committed a crime within the scope of Article 1F of the 1951 Convention, he/she may be excluded from refugee status.

Can a draft-evader be a refugee?

Every country has the right to call on its citizens to bear arms in periods of national emergency, but citizens should have an equal right to conscientious objection. In cases where the option of conscientious objection is not provided, or where military service would involve military action which is condemned by the international community as contrary to basic rules of human conduct, draft evaders who fear persecution – for example, on the basis of political opinions that the authorities might believe they hold – may be eligible for refugee status.

Can a terrorist be a refugee?

The 1951 Convention does not specifically address the issue of terrorism, as such, but it still has adequate mechanisms for dealing with people who take part in activities generally thought of as terrorist in nature. Many terrorists will not be able to establish that they are fleeing persecution, as they will simply be evading a legitimate prosecution in line with international standards. Even when persecution is evident, the individual's conduct may fall within an exclusion clause under Article 1F. Article 1F(b), which relates to serious non-political crimes, is particularly relevant.

Summary

Article 1 of the 1951 Convention

This is the **principal refugee definition**.

Inclusion

To be eligible for refugee status a person must:

- § Have a well-founded fear of persecution on the grounds of his or her race, religion, nationality, membership of a social group or political opinion;
- § Be outside his or her country of nationality or habitual residence;
- § Be unable or, owing to that fear, unwilling to seek that country's protection or to return there.

Exclusion

Even if these criteria are met, refugee status will be denied if the person concerned:

- § Is receiving protection or assistance from United Nations bodies other than UNHCR;
- § Is treated like a citizen by his/her country of residence;
- § Has committed a serious act which renders him/her undeserving of refugee status.

Cessation

The Convention also sets out the circumstances in which refugee status ceases because it is no longer necessary or justified, either as a result of:

- § Certain voluntary acts on the part of an individual;
- § A fundamental change in circumstances in the country of origin.

Other definitions

The refugee definitions found in the **regional instruments**, the *OAU Refugee Convention* and the *Cartagena Declaration*, are **complementary** to the definition in the *1951 Convention*.

These two instruments both include within the concept of a refugee:

- § Anyone compelled to leave his/her own country "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality." (OAU Refugee Convention);
- § People who flee their countries "because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order." (Cartagena Declaration).

Under UNHCR's mandate, a refugee is anyone:

- § Who comes within the refugee definition of the 1951 Convention;
- § Who is outside his/her country of origin or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.

Determining who is a refugee

States:

- § Have primary **responsibility** for determining which individuals within their jurisdiction are refugees;
- § Must ensure that refugee definitions in national legislation take account of their obligations under relevant international refugee instruments.

UNHCR may determine refugee status under its mandate when a State is unable or unwilling to do so. This is often the case in countries that are not Parties to any of the key refugee instruments.

Additional reading

The Handbook and supplementary Guidelines on International Protection

Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, 1979, reedited 1992.

Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, 2002.

Guidelines on International Protection No. 2: “Membership of a Particular Social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, 2002.

Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “ceased circumstances clauses”), UNHCR, 2003.

Guidelines on International Protection No. 4: “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, UNHCR, 2003.

Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, and accompanying Background Note, UNHCR, 2003.

Guidelines on International Protection No. 6: Religion-based refugee claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UNHCR, 2004.

Other material on the refugee definition

Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection, eds Erika Feller, Volker Türk, Frances Nicholson, Cambridge University Press, 2003.

Determination of Refugee Status (Training Module RLD 2), UNHCR.

Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, UNHCR, 2001.

The Cessation Clauses: Guidelines on their Application, UNHCR, 1999.

Note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees, UNHCR, 2002.

Eligibility Criteria for Draft Evaders and Military Deserters, UNHCR, 1991.

Exercises

- 1 The key refugee definition is found in which one of the following instruments?
 - a UNHCR's Statute.
 - b The 1951 Convention.
 - c 1969 OAU Refugee Convention.
 - d 1984 Cartagena Declaration.
- 2 Which one of these following statements is true?
 - a A person who satisfies the inclusion clauses of the 1951 Convention is always a refugee.
 - b All Palestinian refugees are excluded from refugee status under the 1951 Convention as a result of the exclusion clauses.
 - c The exclusion clauses do not solely deal with people undeserving of refugee status.
 - d The reasons for persecution set out in the 1951 Convention are mutually exclusive.
- 3 Which one of these statements about the concept of persecution found in the 1951 Convention is true?
 - a Persecution is defined in international human rights treaties.
 - b Persecution can only take place at the hands of people acting on the orders of the government.
 - c Being discriminated against in relation to employment opportunities can never amount to persecution.
 - d Suffering from poor economic conditions is not persecution in itself.
- 4 To qualify for refugee status, a person must have left his/her country of origin for fear of persecution. *True or False?*
- 5 Complete the sentence with one of the following statements: Cessation of refugee status under the 1951 Convention:
 - a Is not dependent on a person having been recognized as a refugee.
 - b Is always the result of behaviour on the part of the individual refugee.
 - c Can not be applied on a group basis.
 - d Is inappropriate when there is a continuing need for international protection.
- 6 Which one of the following is not a characteristic shared by the OAU Refugee Convention and the Cartagena Declaration?
 - a They both contain complementary refugee definitions to that found in the 1951 Convention.
 - b They are both legally binding instruments.
 - c Their refugee definitions go wider than people fearing persecution to include individuals who leave their countries because of general violence.
 - d They are both confined to specific regions of the world.

- 7** Complete the sentence with one of the following statements: For the purposes of UNHCR's mandate, a refugee is defined:
- a** Along identical lines to the 1951 Convention.
 - b** Comprehensively in its Statute.
 - c** So as to include people fleeing indiscriminate violence as well as those fearing persecution.
 - d** By reference to the refugee definition applicable in the State receiving attention from UNHCR.
- 8** The determination of refugee status is primarily the responsibility of governments and not UNHCR. *True or False?*
- 9** The treatment of refugees recognized under UNHCR's mandate is the sole responsibility of UNHCR. *True or False?*
- 10** Which one of the following is incompatible with refugee status under the 1951 Convention?
- a** Having a criminal record.
 - b** Being a soldier on temporary relief from active duty.
 - c** Evading military service.
 - d** Having breached the moral or religious codes of the country of origin.

Case B

Louis, a farmer with no political opinions in Alphastan, belonged to an ethnic minority, many of whose members were in favour of greater autonomy from the central government, which was controlled by members of the majority ethnic group. A guerrilla group, which used violent tactics against the government, were formed by some elements of Louis's ethnic group. Each time this guerrilla groups took action, Louis found himself threatened by his neighbours, who belonged to the ethnic majority. He went to the police for assistance, but they were so overwhelmed by the political disturbances that they were unable to investigate, or protect him from, these threats. In addition, Louis received threats from members of the guerrilla group who were angry that he had not actively supported them.

Tensions rose in Alphastan, leading to many deaths. Three of Louis's relatives, who lived in the same village, were murdered, but the perpetrators of these crimes were not even identified, let alone brought to justice. In light of this, Louis bought a plane ticket and flew to Betastan where he claimed asylum on the grounds that his life was in danger.

Betastan is a Party to the 1951 Convention and 1967 Protocol, but not to any regional refugee instrument. Alphastan is not Party to any international refugee instruments.

As Protection Officer, you have been asked by the authorities of Betastan for your views on Louis's asylum claim. Use the table below to determine your recommendation.

Which international instrument contains the applicable refugee definition?	
List the required elements for inclusion below and consider if each one is satisfied:	
a	
b	
c	
d	
e	
Are the inclusion clauses satisfied?	Yes/No

If yes, are there any grounds for denying refugee status, or for concluding such status has ceased?	
Is Louis a refugee?	Yes/No

Case C

Maya, a member of a banned political group opposed to the un-elected regime governing her country, Lusitania, secretly distributed pamphlets in the factory where she worked. These pamphlets called for a peaceful uprising of the people to demand democracy and other basic rights, and relayed the demands of the international community that the Lusitanian government improve its woeful human rights record. Maya was caught by police while handing out these leaflets and condemned to five years imprisonment without a trial. After two years, she managed to escape, but during her escape, she wounded one of the prison guards who tried to apprehend her. This guard will now be seriously handicapped for the rest of his life. Maya eventually made it to Suritania where she claimed asylum.

Suritania is not Party to any of the international refugee instruments, nor does it have any asylum legislation. Instead, it provides international protection to persons determined to be refugees by UNHCR under its mandate. As the Protection Officer, you have been asked to look into Maya’s case.

Which instrument contains the applicable refugee definition?	
List the required elements for inclusion below and consider if each one is satisfied:	
a	
b	
c	

Case E

Paul has been a member of a banned political party for several years. His party believes that the country is run by corrupt leaders who do not respect the religious laws and customs of its citizens. Paul has been arrested on numerous occasions for being a member of this party, even though he has not been particularly active. After his last arrest he was sentenced to one year in jail following a summary trial. During imprisonment he was tortured on several occasions in an attempt to force him to name other members of his political party. He was later released.

Following unsuccessful efforts to have their party legitimized, its members decided to take violent action to publicize their cause and to weaken the government. Paul agreed to take part in these campaigns and planted a bomb in the airport's capital. The bomb exploded, killing 20 passengers waiting in the departure lounge. With the help of his associates, Paul was smuggled across the border where he has claimed asylum. He fears that the authorities will not give him a fair trial if he is returned and that he will be subjected to torture again.

What is the key issue in relation to eligibility for refugee status under the 1951 Convention in this case?

Case F

Lia's marriage was arranged by her family in accordance with the customs of her country. Immediately after the wedding, her husband began to abuse her verbally and physically. When she suggested that she would like to get a job, he told her that her duty was to stay in the home and that he would not give her the opportunity of flirting with other men and having affairs. Increasingly, he criticized her for not being an obedient wife and eventually began to hit her. When she became pregnant with their son, her husband continued to abuse her physically and verbally, including raping her on several occasions.

Lia confided in her parents but they told her that she must not enrage her husband or she would bring shame on their family. After a particularly severe beating, Lia went to the police, but they rebuked her for being so disrespectful of her husband and were not prepared to assist her in any way. Shortly after that, her husband was recruited for a senior government job, making Lia even less confident in seeking help from the authorities.

As part of his official duties, Lia's husband had to visit the neighbouring country. Lia and her son accompanied him as he said he did not trust her to behave in his absence. While on this visit, and after a particularly brutal beating during which her husband threatened their infant son, Lia fled to a local police station and claimed asylum.

As Protection Officer you have been asked to advise the panel deciding on Lia's claim in relation to these two points:

- a** If returned to her country of origin, Lia fears further beatings and sexual assault from her husband. Can such acts constitute persecution for the purposes of the refugee definition in the 1951 Convention? Please give reasons for your answer.
- b** Does it matter that the violence she faces is at the hands of a private individual not acting on the orders of the government? Please give reasons for your answer.
- c** If it is persecution, is it related to any of the specified grounds in the 1951 Convention?

Answer key to Chapter 3 exercises

- 1 **b** The definition of a refugee in the 1951 Convention was the first generic refugee definition that could be adopted by States throughout the world. As such, it remains the principal refugee definition. The definitions in regional instruments (the OAU Refugee Convention and the Cartagena Declaration) are complementary, including, as part of their refugee definition, the wording of the 1951 Convention definition, but are only applicable in States within a specific region. The definition in UNHCR's Statute sets UNHCR's mandate but, unlike the 1951 Convention definition, it is not directly binding on States.
- 2 **c** The exclusion clauses also cover people not in need of international protection, such as those who are receiving assistance from another United Nations body. Thus, many Palestinian refugees will fall within the exclusion clauses because they come within the ambit of UNRWA. Those Palestinian refugees who fall outside the geographical area of UNRWA's operations are not, however, excluded from refugee status under the 1951 Convention (hence B is incorrect).

Option A is incorrect because the exclusion and cessation clauses can render ineligible for refugee status an individual who satisfies the inclusion clauses.

Option D is incorrect because the reasons for persecution (race, religion, etc.) are not mutually exclusive and often overlap. At least one of them must be satisfied for a person to meet the requirements of the inclusion clauses.
- 3 **d** Persecution covers any act that seriously violates a human right. Severe discrimination in employment opportunities can amount to persecution in certain circumstances, but simply living in a poor economic climate will not. Persecution is not defined in the 1951 Convention, but the provisions contained in human rights treaties provide a guide in evaluating whether a particular act constitutes persecution. Persecution need not be carried out by people acting on government orders. When a government is unable or unwilling to prevent persecution by private individuals, or when it tolerates or condones such behaviour, that behaviour can also be considered persecution; it is known as persecution by non-State agents.
- 4 **False** Although in many cases refugees will have fled their home country for fear of persecution, it is also possible for the fear of persecution to arise after someone has left his/her home country for other reasons. For example, a person may move abroad to study and afterwards find that political changes in the country of origin mean that he/she is now at risk of persecution on return. Such persons are referred to as refugees *sur place*.
- 5 **d** Cessation can only take place when the individual is no longer in need of international protection. For cessation to apply, the individual must first have been recognized as a refugee, otherwise refugee status cannot cease. Cessation may come about because of the behaviour of a refugee and/or because of a change of circumstances in the country of origin. In the latter case, it can therefore be applied to a large number of refugees, i.e., on a group basis. Cessation is inappropriate, however, if there is a continuing need for protection.

- 6 **b** Only the OAU Refugee Convention is legally binding. Both instruments contain a refugee definition that is complementary to that found in the 1951 Convention and that covers people fleeing generalized violence. They are also both regional instruments.
- 7 **c** UNHCR's mandate for refugees is derived from its Statute and later General Assembly and ECOSOC resolutions. While the Statute contains a refugee definition similar to that found in the 1951 Convention, subsequent resolutions have extended the definition to include people fleeing indiscriminate violence, such as those who would fall within the broad definitions found in the regional refugee instruments. The Statute does not, therefore, contain a comprehensive refugee definition for the purposes of UNHCR's mandate. In addition, UNHCR's mandate is not dependent on the refugee definitions applicable in any particular country.
- 8 **True** As part of their primary responsibility for international protection, States are chiefly responsible for identifying those in their territory in need of such protection.
- 9 **False** Even when UNHCR must, as a matter of necessity, conduct refugee status determination, responsibility for treating those recognized in accordance with international protection standards falls to the State in which they are present. UNHCR's role is to urge the State concerned to live up to its obligations towards refugees and support its efforts to provide protection and assistance to them.
- 10 **b** A soldier who is temporarily resting from active duty is not a civilian and therefore cannot be a refugee. In contrast, having a criminal record does not necessarily disqualify a person from refugee status if the individual in question is fleeing persecution rather than punishment and he/she has not committed an excludable act.

Case B

Which international instrument contains the applicable refugee definition?	The 1951 Convention, since Betastan is a Party to it. Alphastan's obligations, if any, under refugee instruments are irrelevant.
List the required elements for inclusion below and consider if each one is satisfied:	
a Well-founded fear	<p>To assess whether the subjective element, fear, is present, Louis would need to undergo an interview; but on the facts given he does seem to be in fear.</p> <p>It is well-founded given the murder of his family members against the backdrop of inter-ethnic/political strife and the threats he had received. There are objective reasons why he fears for his safety.</p>

<p>b Persecution</p>	<p>Given the circumstances, the fear is of being killed or physically assaulted. Although there is no formal definition of persecution, it consists of serious human rights abuses or other serious harm. The acts feared here would fall within these concepts.</p> <p>The persecution feared is not necessarily at the hands of people under the control of the government. It could be from pro-government neighbours or anti-government guerrillas. Nevertheless, since the authorities seem unable to protect against the acts of such non-State agents, this is still persecution.</p>
<p>c One of the five Convention grounds (e.g. race, religion, etc.)</p>	<p>The reason for persecution could be more than one Convention ground.</p> <p>Louis's membership in the ethnic minority is relevant.</p> <p>Although he has no political opinions, pro- and anti-government political opinions could be erroneously attributed to him. In addition, having no political opinion can be taken as a political stance.</p>
<p>d Outside country of nationality/habitual residence</p>	<p>Louis is outside his country of nationality.</p>
<p>e Unable or unwilling to avail himself/herself of that State's protection or to return there</p>	<p>He was unable to secure protection from the authorities and his reasons for not returning are based on fear of persecution.</p>
<p>Are the inclusion clauses satisfied?</p>	<p>Yes</p>
<p>If yes, are there any grounds for denying refugee status, or for concluding such status has ceased?</p>	<p>None of the exclusion clauses is relevant, nor is cessation applicable.</p>
<p>Is Louis a refugee?</p>	<p>Yes</p>

Case C

Which instrument contains the applicable refugee definition?	In the absence of any international instrument to which Suritania is Party or of a national refugee definition, the definition under UNHCR's mandate is relevant. This is contained in the Statute and later General Assembly and ECOSOC resolutions. The definition in the Statute, which is similar to that in the 1951 Convention, seems applicable here rather than the extended definition in the later resolutions, which address the circumstances of civil war, etc.
List the required elements for inclusion below and consider if each one is satisfied:	
a Well-founded fear	Maya is clearly in fear of what might happen on her return. This would appear to be well-founded, given the circumstances of her flight, the way she was treated because of her political activities, and the general human rights climate in Lusitania.
b Persecution	Her period of imprisonment amounted to persecution rather than legitimate prosecution/punishment because it was not the result of a fair criminal process and the act condemned was probably in breach of Maya's human rights.
c One of the five Convention grounds	Political opinion is relevant here.
d Outside country of nationality/habitual residence	Satisfied.
e Unable or unwilling to avail him/herself of that State's protection or to return there	Satisfied.
Are the inclusion clauses satisfied?	Yes
If yes, are there any grounds for denying refugee status, or for concluding such status has ceased?	The violent struggle during her escape raises the issue of whether the exclusion clause in Article 1F might apply. Of the three grounds, the most relevant is Article 1F(b) – responsibility for a serious non-political crime. This provision, like all exclusion clauses, must be interpreted restrictively.

	<p>Further guidance can be found in the <i>Guidelines on International Protection No. 5</i>. The factors to be considered include:</p> <ul style="list-style-type: none"> § Is the crime political or non-political? § Is it serious in nature? § Do the consequences of exclusion outweigh the gravity of the offence? <p>In this case, it would appear to be a serious crime as it involved violence against a person resulting in permanent injury. As for the political nature of the crime, it is necessary to look at the motivation for, and context of, Maya's actions, as well as their proportionality to any political goal. Wounding a guard to escape imprisonment, even when the punishment is unjustified, would not seem to be a political crime.</p> <p>To ensure that the exclusion clauses are interpreted in keeping with the humanitarian aims of the <i>Statute</i>, they should be applied in a manner proportionate to their objectives. Therefore, an assessment will have to be made as to whether the consequences of exclusion in this case outweigh the gravity of the serious, non-political crime committed. Thus, the nature of any persecution Maya might face on return should be considered, as well as the fact that the violence she committed was not gratuitous, but rather an act meant to facilitate her escape from unjust imprisonment.</p>
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Case D

- a** Whether Yusuf's fear is of persecution. In other words, on return would he face legitimate prosecution for draft evasion or persecution because of his political beliefs?
- b** First, the practice of the authorities in Kamibia with regard to conscientious objection. Did/does Yusuf have the opportunity to carry out some form of non-military service, thus protecting his rights and the legitimate expectation of the State that he performs certain services for the public good? Or would he have faced criminal punishment automatically?

Second, is the conflict in which Yusuf was supposed to participate being fought in accordance with international humanitarian law, e.g., are civilians protected from violence?

Case E

The key question raised by this case is exclusion. If the inclusion clauses are satisfied, there will still be the question of whether Article 1F of the 1951 Convention applies in these circumstances. The airport bombing, for which Paul was responsible, would be considered by many to be a “terrorist” act, although there is no internationally accepted definition of terrorism, nor is it explicitly mentioned in the 1951 Convention. However, the bombing might well qualify as a “serious non-political crime” under Article 1F(b) of the 1951 Convention.

Case F

- a** Yes, physical and sexual assault can amount to persecution. The motivation for, and form of, violence feared in this case characterizes it as gender-related persecution.
- b** The acts of private individuals not under the control of the authorities can qualify as persecution if it can be shown that the State either condones or tolerates such behaviour, or is unwilling or unable to prevent it. In this case, it is clear that the police in Lia’s country do not consider domestic violence to be a crime, and so the authorities either condone or tolerate such behaviour. This view is supported by the attitude of her parents, which implies that this society, in general, believes wives must be subservient to their husbands, even to the point of accepting physical and sexual violence. Therefore, in this case, the acts of Lia’s husband can amount to persecution for the purposes of meeting the criteria contained in the refugee definition in the 1951 Convention.
- c** Lia is a member of a social group composed of women who reject their society’s strict views of the subordinate role of women. Political opinion is also possibly relevant, as Lia may be seen to hold political beliefs regarding the rights of women that are contrary to that of her husband and the society in which she lives.

Chapter 4

Other persons of concern to UNHCR



Key objectives

Understand who a returnee is and UNHCR's role in relation to returnees.

Recognize what statelessness is, including its causes and links to displacement.

Understand how the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness aim to help affected persons.

Understand UNHCR's specific mandate with regard to statelessness.

Understand who internally displaced persons are and how they differ from refugees.

Be familiar with the range of international actors concerned with internal displacement and the conditions under which UNHCR becomes involved.

Be aware of the Guiding Principles on Internal Displacement.

This chapter looks at the other groups for whom UNHCR also has responsibilities under its mandate: returnees, stateless persons, and internally displaced persons. The principles that govern the treatment of these individuals, who are collectively referred to as “persons of concern”, and UNHCR’s mandate in relation to each of these groups are also discussed.

4.1 Returnees

Returnees are **former refugees who return voluntarily to their countries of origin**, whether spontaneously or in an organized fashion. Although most refugees would prefer to return to their countries of origin, there are often huge obstacles to achieving this durable solution, including insecure conditions in the country of origin. Responsibility for improving conditions in the country of origin rests primarily with the authorities of that country, who may also look to the international community for support.

Countries of asylum are usually eager to facilitate voluntary repatriation as soon as possible in an effort to reduce the strain on their resources and society. However, such considerations should not lead to premature returns (see Chapter 7). Reliable information about the situation in the country of origin should be made available to all refugees so they can make a free and informed decision whether or not to return.

4.1.1 Legal framework

The 1951 Convention does not expressly address the issue of voluntary repatriation or returnees, although the OAU Refugee Convention and the Cartagena Declaration both set out certain considerations concerning voluntary repatriation. One basic legal consideration is the right of every person under international human rights law to return to his/her country. This guarantee is embodied in Article 12 of the *International Covenant on Civil and Political Rights*. International human rights law defines the standard of treatment that returnees should receive once they have returned to their homes. (See Chapter 7 for more information on the legal framework of voluntary repatriation.)

4.1.2 UNHCR’s role

Although UNHCR’s Statute gives the organization responsibility for promoting and facilitating voluntary repatriation, its involvement with refugees was traditionally thought to end once refugees crossed over the border into their countries of origin. However, *ExCom Conclusions numbers 18 (XXXI) 1980, 40 (XXXVI) 1985, 74 (XLV) 1994, and 85 (XLIX) 1998* confirm that, in seeking to find durable solutions for refugees, UNHCR has a legitimate interest in

the consequences of return, and so activities such as returnee monitoring are justified. UNHCR's role in working with returnees was made explicit in agreements covering specific refugee situations. For example, Annex 7 of the *General Framework Agreement for Peace in Bosnia and Herzegovina* (1995) designates UNHCR as the lead agency for voluntary repatriation and gives it responsibility for monitoring conditions on return. (See Chapter 7 for more details on UNHCR's involvement in activities aimed at assisting returnees.)

4.2 Stateless persons

A stateless person is someone who is not considered to be a national or citizen of any State. Nationality or citizenship is the legal bond between a person and a State through which an individual's human rights are protected by the concerned State. A person without a nationality may be denied political rights or access to housing or education even though he/she was born and raised in the country in question.

Statelessness can occur for a number of reasons, including:

- § The break-up of States into smaller countries;
- § Governments arbitrarily depriving people of their nationality;
- § A person voluntarily renouncing his/her nationality without acquiring another one first;
- § Marriage, or its dissolution, in situations where this automatically affects one party's nationality;
- § Failure or inability to register children at birth so that the child has no means of proving his/her entitlement to nationality;
- § Being the child of a stateless person;
- § Discriminatory practices based on ethnicity, religion or race in determining nationality status.

Statelessness may not always be the intended consequence of a government's policy. It may arise as a result of laws that are in place (*de jure*) or because citizenship rights are not recognized in practice (*de facto*).

Children are particularly at risk of statelessness, especially if their parents are of mixed origin or if they are born in countries where their parents are foreigners.

Women are also especially at risk of statelessness because some legal systems make their status dependent on that of their husband. For example, certain States automatically deprive women of their nationality when they marry a foreigner, while in many countries a woman cannot extend her nationality to her stateless husband, even if the couple is living in her country of origin. Although there are

no firm statistics on statelessness, experts estimate there may be as many as nine million stateless persons around the world.

A stateless person may be a refugee if he/she is forced to flee the country where he/she usually lives because of a well-founded fear of persecution. This is clearly acknowledged by the wording of the refugee definition in the 1951 Convention. Indeed, statelessness may cause displacement, as those persons disenfranchised by their own State may feel forced to leave because of the discrimination they face.

4.2.1 Legal framework

The *Convention relating to the Status of Stateless Persons* (1954) and the *Convention on the Reduction of Statelessness* (1961) aim to reduce the incidence of statelessness and to ensure that all stateless persons have a legal identity and are treated humanely. Although relatively few States are Parties to these treaties, the principles contained within them provide useful guidance to all countries and form the core of UNHCR's work on behalf of stateless people. Both of these treaties were inspired by Article 15 of the *Universal Declaration of Human Rights*, which states: "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

The 1954 Statelessness Convention **defines a stateless person** as "... a person who is not considered as a national by any State under the operation of its law" but does not include persons receiving protection or assistance from UNHCR. The 1954 Convention sets out the rights to which stateless people are entitled in their country of residence, much as the 1951 Convention sets out the rights and obligations of refugees. The Statelessness Convention addresses issues of property rights, access to courts, public relief, employment, and public education. In some cases, the standard of treatment is equivalent to that of nationals; for other provisions, the standard of treatment is similar to that of aliens in the same circumstances. The Convention seeks to improve the quality of life for those who are stateless, giving them a far greater degree of stability than they might otherwise have.

The 1961 Convention seeks to reduce future cases of statelessness. Under the Convention, a State Party agrees to grant nationality to individuals who would otherwise be stateless if they have a significant link with that country, for example, if they were born in the country or are descended from a citizen. The 1961 Convention builds on the concept of the "genuine and effective link" used by many States in their legislation and practice to determine criteria governing nationality.

4.2.2 UNHCR's role

Although UNHCR has always had a responsibility for stateless refugees, its involvement with other stateless persons stems from United Nations General Assembly resolutions in the 1970s, which entrusted the organization with specific duties under the 1961 Convention. As a result of *ExCom Conclusion No. 78 (XLVI)* and United Nations *General Assembly Resolution 50/152* in 1995, UNHCR now has a broad, global mandate regarding statelessness. Indeed, it is the only international agency with specific functions that target stateless persons. Its tasks include:

- § Promoting accession to the 1954 and 1961 Conventions;
- § Providing legal advice on the preparation and implementation of nationality laws to all interested States;
- § Cooperating with States and other partners to facilitate speedy identification and resolution of statelessness problems;
- § Training government officials and UNHCR staff on statelessness issues;
- § Gathering and sharing information on the problem of statelessness worldwide;
- § Reporting regularly to the Executive Committee on its activities in this field.

4.3 Internally displaced persons

Like refugees, internally displaced persons have been forced to flee their homes; but rather than crossing into another country, they seek protection elsewhere within their country of origin or residence. The movement of both refugees and internally displaced persons is often caused by a poor human rights situation or a conflict in a particular part of the country. Persons can also become displaced within their countries because of ecological or natural disasters, such as drought or hurricanes. The number of internally displaced persons around the world has risen sharply in the last decade, and is now estimated to be more than 25 million.

There is, in fact, no international treaty that defines an internally displaced person or that governs the treatment of internally displaced persons, largely because they are nationals or other residents who remain within the territory of their country of origin. On occasion in the past, UNHCR has been authorized by the General Assembly to give assistance to a specific group of internally displaced persons, on an exceptional basis. The Office also was authorized to provide assistance to IDPs who were in areas to which returnees had repatriated. Unlike with respect to stateless persons, however, UNHCR was not given a broad mandate for IDPs.

Traditionally, internally displaced persons have been considered the responsibility of the government of the country concerned; indeed, any involvement by other States or organizations has been seen as unjustified interference in the affairs of the concerned country. Given that internal displacement is often the result of repressive government policies, this has meant that the human rights of millions of internally displaced persons are unprotected. In recent years, the growing recognition of this humanitarian problem and a changing attitude towards the concept of State sovereignty has led to an acknowledgment of the need for greater international action on behalf of internally displaced persons.

At the request of the Office of the United Nations High Commissioner for Human Rights, a Special Representative of the United Nations Secretary-General on Internally Displaced Persons, Dr. Francis Deng, was appointed in 1992. The Special Representative focuses on four main areas: the development of a normative framework; the promotion of effective institutional frameworks at the international, regional and national levels; country missions; and on-going research into specific issues of concern. He stepped down in 2004 and Walter Kälin was appointed as Representative of the Secretary-General on the Human Rights of Internally Displaced Persons.

4.3.1 Legal framework

Drawing on relevant principles of international human rights law, humanitarian law, and refugee law, the Special Representative headed the process that led to the formulation of the *Guiding Principles on Internal Displacement* (1998). These **define the internally displaced** as

“... persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”

Although the *Guiding Principles* are not legally binding, many of the principles reflect States’ obligations under international treaties and customary law. They are therefore the most authoritative statement that sets out the standards to be applied by governments and other relevant actors, such as UNHCR, in responding to the plight of internally displaced persons.

4.3.2 Inter-agency cooperation

Although the Special Representative is responsible for identifying the needs of internally displaced persons and the principles governing their treatment, he does not have any operational mandate. Primary responsibility for their protection remains with the government of the country affected. Rather than creating a new United Nations organization to work on behalf of internally displaced persons, or giving such a mandate to an existing body, a broad range of humanitarian, human rights and development actors now respond to the needs of internally displaced persons, in accordance with their mandates and expertise. This collaborative approach has been put into operation both at United Nations Headquarters and in the field:

- § The Secretary-General of the United Nations requested that the Emergency Relief Coordinator, who is also the head of OCHA, provide field support in situations concerning internally displaced persons (including negotiating access to such populations, advocating for protection and assistance on their behalf, mobilizing resources, and operating a global information system on internally displaced persons);
- § The Working Group of the United Nations Inter-Agency Standing Committee, chaired by the Emergency Relief Coordinator, held consultations on the division of responsibilities among the various actors involved and agreed common policies to be adopted in humanitarian efforts for internally displaced persons;
- § The Emergency Relief Coordinator established an inter-agency Internal Displacement Unit within OCHA to promote system-wide improvements in the international response to internal displacement and to provide targeted support to country-specific situations;
- § Regular consultations are held among focal points on internal displacement within the framework of the Senior Inter-Agency Network on Internal Displacement, which functions as an advisory and consultative body on related issues;
- § Responsibility for the coordination of protection and assistance activities was given to the United Nations Resident Coordinator and/or Humanitarian Coordinator, who closely consults with inter-agency country teams.

4.3.3 UNHCR's role

Although UNHCR's involvement with internally displaced persons has varied over the years, the organization participates in the inter-agency efforts described above. Its policy, based on the inter-agency collaborative approach and conditions set by the United

Nations General Assembly in various resolutions, is to protect and assist internally displaced persons only where:

- § That assistance has been requested/authorized by the United Nations Secretary-General;
- § There is consent/acquiescence on the part of the national authorities in the State where the displaced persons are located;
- § Adequate resources are available;
- § Policy considerations, such as the impact on protection operations for refugees, the degree to which other agencies can carry out necessary functions, and the importance of the situation to the international community, have been adequately considered;
- § Operational considerations, such as staff security and access to the displaced persons, have been addressed.

4.4 Other individuals

On occasion UNHCR has, for humanitarian reasons and on the basis of its mandate, become involved with individuals other than refugees or other persons of concern, particularly when it has been impractical to differentiate between such persons and those falling under the organization's mandate. For example, UNHCR has assisted local residents who were never displaced but who live alongside returnees and people returning to areas where they are members of a minority who are threatened again with displacement.

Summary

Returnees

Returnees are **former refugees who have returned to their home country voluntarily.**

Human rights law:

§ Guarantees the right of return to a person's home country;

§ Sets the standard of treatment on return.

UNHCR's legitimate concern for the consequences of return, and therefore its role in monitoring and assisting returnees, is confirmed by the Executive Committee and in ExCom Conclusions.

Statelessness

A stateless person:

§ Is someone who is **not considered to be a national or citizen of any State**;

§ Is not, therefore, entitled to the rights normally associated with nationality/citizenship;

§ May also be a refugee, depending on his/her circumstances.

The key international instruments concerned with stateless persons are:

§ *The Convention relating to the Status of Stateless Persons* (1954);

§ *The Convention on the Reduction of Statelessness* (1961).

UNHCR is the only international agency with a general mandate, derived principally from General Assembly resolutions, to help stateless persons. Guided by the above treaties, it works:

§ To ensure that the rights of stateless persons are respected;

§ To prevent statelessness by, for example, encouraging States to grant nationality to those with a significant link to their territory who might otherwise be stateless.

Internally displaced persons

Internally displaced persons are **people who have fled their homes for another part of the country in which they normally live** as a result of armed conflict, situations of generalized violence, violations of human rights, or natural or human-made disasters.

Often the same situation creates both internally displaced persons and refugees. The difference between the two groups is that refugees flee to another country.

The *United Nations Guiding Principles on Internal Displacement* (1998) set the standards for international action on behalf of internally displaced persons.

UNHCR participates in inter-agency collaboration on issues concerning internally displaced persons and, under certain conditions, in inter-agency efforts, particularly to protect and assist internally displaced persons under the lead of the United Nations Emergency Relief Coordinator.

Additional reading

Returns

ExCom Conclusions No. 18 (XXXI) 1980 and No. 40 (XXXVI) 1985 on Voluntary Repatriation.

ExCom Conclusions No. 74 (XLV) 1994 and No. 85 (XLIX) 1998 on International Protection of Refugees.

Statelessness

Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons, (Volume I), UNHCR, 1995.

ExCom Conclusion No. 78 (XLVI) 1995 on the Prevention and Reduction of Stateless Persons.

UNHCR's Activities in the Field of Statelessness: Progress Report (EC/53/SC/CRP.11), UNHCR, June 2003.

What would life be like if you had no nationality?, UNHCR, 1998.

Internally displaced persons

The Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), United Nations, 1998.

ExCom Conclusion No.75 (XLV) 1994 on Internally Displaced Persons.

No Refuge: The Challenge of Internal Displacement, United Nations, 2003.

Operational Guidelines for UNHCR's Involvement with IDPs, UNHCR, 2001.

Exercises

- 1 Which one of the following statements about returnees is incorrect?
 - a Their repatriation does not always take place under an organized programme.
 - b The opportunity for return depends on the conditions in the country of origin.
 - c Primary responsibility for ensuring conditions conducive to their return rests with UNHCR.
 - d Their return takes place on a voluntary basis.
- 2 The legal framework for returnees has various elements, underpinned by the right of every citizen under international human rights law to return home. *True or False?*
- 3 Complete the sentence with one of the following phrases: A stateless person is:
 - a An individual who is currently living outside of his or her country of nationality.
 - b Someone who is not acknowledged as a citizen of any State although he/she may have a nationality.
 - c An individual not considered to be a national or citizen of any State.
 - d A person who is facing severe discrimination in the country where he/she is a national or a citizen.
- 4 Which one of the following statements is true?
 - a Statelessness is defined by the 1951 Convention relating to the Status of Refugees.
 - b Statelessness is always the result of discriminatory or persecutory behaviour on the part of a State.
 - c Neither the Convention relating to the Status of Stateless Persons nor the Convention on the Reduction of Statelessness defines a stateless person.
 - d The 1951 Convention acknowledges that in certain circumstances stateless people can also be refugees.
- 5 Which one of the following is not regulated by one or the other of the two Conventions dealing with statelessness?
 - a The rights of stateless men and women in their country of residence.
 - b The treatment of stateless persons who are also refugees.
 - c The definition of a stateless person.
 - d Which country should grant nationality to a person who would otherwise be stateless.
- 6 Identify which one of the statements below correctly describes UNHCR's responsibilities in relation to stateless persons:
 - a UNHCR is the only international organization with specific functions in relation to this group of people.
 - b Its mandate only covers stateless people who are in countries that are Party to one or both of the two Conventions dealing with statelessness.
 - c Its mandate for stateless people is derived exclusively from its Statute.
 - d UNHCR only has a mandate with respect to stateless refugees.

- 7** Which one of the following is not one of UNHCR's tasks on behalf of stateless people?
- a** Promoting accessions to the two Conventions dealing with statelessness.
 - b** Formally conferring nationality on stateless persons where no State is willing to do this.
 - c** Providing legal advice on preparation of nationality legislation to interested States.
 - d** Cooperating with States on the identification and resolution of statelessness problems.
- 8** Of the circumstances listed below, which one is not a cause of statelessness?
- a** The disintegration of a country into smaller States.
 - b** Legislation which automatically deprives a woman of her nationality if she marries a foreigner.
 - c** Discrimination on the grounds of nationality.
 - d** Being born to a stateless person.
- 9** Which one of the following is not true of internally displaced persons?
- a** They escape danger by fleeing to another part of the country in which they live or by moving abroad.
 - b** The cause of their displacement may also trigger refugee flows.
 - c** They must have been forced to leave their homes.
 - d** Unlike refugees, the cause of their displacement may be a natural disaster.
- 10** Complete the sentence with one of the following phrases: The *Guiding Principles on Internal Displacement*:
- a** Are relevant to the activities of States, but not organizations such as UNHCR, on behalf of internally displaced persons.
 - b** Are not legally binding, but nevertheless many of its principles exist independently as obligations under international treaties.
 - c** Are contained in a treaty adopted under a United Nations-led process.
 - d** Draw solely on relevant principles of international humanitarian law.
- 11** Which one of the following statements correctly reflects the international community's approach to situations involving internally displaced persons?
- a** Only the country in which the displacement has taken place has a legitimate interest and role in helping internally displaced persons.
 - b** UNHCR is the lead international agency in tackling such situations.
 - c** Primary responsibility lies with the country of displacement, with international support given by a variety of humanitarian and development actors working in cooperation.
 - d** The Representative of the Secretary-General on the Human Rights of Internally Displaced Persons takes the operational lead in relief efforts for those persons.
- 12** UNHCR only has a role in relation to internally displaced persons under certain circumstances. *True or False?*

Case G

The State of Bantana has suffered from civil war for the last two years, leading to the displacement of around 25 per cent of the population from their homes to other parts of the country. Although the government passed a law a year ago which sets out the rights of internally displaced persons and appointed an independent ombudsman to lobby on their behalf, in practice, many of these rights are not respected. The latest update from UNHCR colleagues in the field reads:

“Intensified fighting between the army and rebel forces in the north led to the displacement of 10,000 people last month from villages around the Red River region. It appears that the rebels are concentrating on this area as the land concerned is fertile and has recently been harvested. The rebels have been targeting those villages thought to be sympathetic to the government, expelling their inhabitants and then taking their harvested crops as food supplies.

These villagers have ended up in existing settlements for internally displaced persons in the east of the country where food is already in short supply. Humanitarian aid intended for these settlements has been diverted on several occasions by government soldiers for their own use and to reward loyal villages. The population of these settlements has been subjected to “inspections” by government soldiers ostensibly looking for deserters but in reality aimed at extorting money and possessions from civilians there. In addition, there have been armed attacks by rebel forces on these settlements aimed at killing members of the displaced population. In the most recent attack 50 internally displaced persons died.

On a more positive note, UNICEF has recently been allowed to carry out an assessment mission in the camps to look at the education needs of children there. UNICEF reported that although the state-run local schools near the settlements are obliged by law to enrol internally displaced children, they regularly refuse to do this, citing limited resources. Alternatively, they charge a monthly fee which is not levied on local children. UNICEF has a limited role running feeding programmes for infants in some of the settlements for internally displaced persons, although they have had problems gaining access to other camps. OCHA has also recently opened an office in the capital in reaction to the worsening situation for internally displaced persons.”

The government recently approached the UNHCR office in Bantana to ask for its support in activities aimed at helping internally displaced persons. This office is relatively small as there are very few asylum-seekers and refugees in Bantana. As the Senior Desk Officer in headquarters responsible for Bantana, you have been asked for advice on how to respond to the government’s request.

- a** The report indicates several violations of the *Guiding Principles on Internal Displacement*. After reading this instrument (which can be found at the following web address:

http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html

Use the table below to identify four principles, other than Principle No. 6, that you think are being violated in Bantana and the nature of each violation.

Principle	Violation
No. 6. Right to protection from arbitrary displacement.	Rebel-instigated fighting in the northern region aimed in part at forcing out certain members of the civilian population.

- b** What factors do you think need to be considered before deciding whether UNHCR should accede to the government's request to play an active role in supporting its activities aimed at helping internally displaced persons?

Answer key to Chapter 4 exercises

- 1 c** Primary responsibility for ensuring conditions conducive to return lies with the government of the country of origin, not UNHCR, as the government can best influence improvements in the political, economic and security situation in its territory. Repatriation can take place in a spontaneous, and not just organized, manner (A), the opportunity to return depends on the conditions in the country of origin (B), and returnees move voluntarily (D).
- 2 True** The legal framework for returnees is based on the right to return and is supplemented by human rights provisions governing the treatment they should receive on return.
- 3 c** A person who is stateless has no citizenship or nationality anywhere in the world. As citizenship and nationality are interchangeable concepts, Option B is incorrect, since a person with a nationality cannot be stateless. Option A is incorrect, since a stateless person, by definition, does not have a State of nationality. Similarly, Option D is incorrect since, although a stateless person may face severe discrimination, this cannot take place in a State where he/she is a national or citizen, as a stateless person does not have any nationality or citizenship.
- 4 d** The refugee definition in the 1951 Convention explicitly recognizes that people without a country of nationality may be refugees. (See the reference to “country of habitual residence” as an alternative to “country of nationality” in Article 1A of the 1951 Convention). With regard to Options A and C, statelessness is not defined by the 1951 Convention, but rather by the Convention relating to the Status of Stateless Persons (1954). There are a variety of causes for statelessness, and these are not always the result of hostile behaviour on the part of a State (B).
- 5 b** The definition of a stateless person in the Convention relating to the Status of Stateless Persons (1954) excludes individuals who fall within the scope of the 1951 Convention relating to refugees. As this definition determines the scope of both the 1954 Convention and that of the Convention on the Reduction of Statelessness (1961), neither of the two international instruments on statelessness applies to refugees who are also stateless. The 1954 Convention defines these rights and the 1961 Convention sets out the principles for identifying the country most appropriate for granting nationality to a stateless individual (A).
- 6 a** UNHCR has been given a general mandate for stateless persons in accordance with General Assembly resolutions, not under its Statute. Indeed, it is the only international organization with such a function. Its responsibilities are not confined to individuals in States Parties to one or both of the statelessness treaties, nor to stateless persons who are also refugees.

- 7 **b** The granting of nationality lies with the discretion of States; UNHCR has no power to award an individual a particular nationality. UNHCR's functions are to assist States in a variety of ways in order to prevent the instances of statelessness and improve the situation for those who are already stateless.
- 8 **c** A person who is facing discrimination because of his/her nationality cannot, by definition, be stateless, as he/she possesses a nationality. In contrast, all the other options listed can be causes of statelessness.
- 9 **a** Internally displaced persons have moved within their own country; they do not flee to another State. (See the definition found in the *Guiding Principles on Internal Displacement*). However, the events leading to their flight may also result in fellow nationals seeking safety across the border and, in the process, becoming refugees. Like refugees, internally displaced persons are forced to leave their homes; unlike refugees, they may have fled because of a natural disaster.
- 10 **b** Although the *Guiding Principles* are not legally binding, many of the principles exist independently as obligations in international human rights and international humanitarian law treaties. However, given their non-legal status, the Principles are not contained in a treaty. The *Guiding Principles* are derived from relevant areas of international law, including international human rights and humanitarian law. The Principles are relevant to the actions of all parties, including States and international organizations, on behalf of internally displaced persons.
- 11 **c** As with any humanitarian situation, the primary responsibility lies with the government of the State in whose territory the internal displacement has occurred. However, this does not mean that other actors, such as other States and UNHCR, do not have a legitimate interest in helping internally displaced persons; they can play a supporting role. UNHCR will only assist internally displaced persons under certain circumstances. It is not the lead agency for efforts on behalf of such persons. Although the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons has an important function in relation to internally displaced persons, this does not cover operational matters. Those are carried out through an inter-agency mechanism led at headquarters level by the United Nations Emergency Resident Coordinator.
- 12 **True** As mentioned in relation to the answer above, UNHCR only assists internally displaced persons if certain criteria, set out in various General Assembly resolutions, are met. For example, there must be a request or authorization from the United Nations Secretary-General.

Case G

a

Principle	Violation
No. 6. Right to protection from arbitrary displacement.	Rebel-instigated fighting in the northern region aimed in part at forcing out certain members of the civilian population.
No. 10. Right to life and protection from attack.	Violent attacks by rebel forces on internally displaced persons in the east of the country.
No. 18. Right to an adequate standard of living (e.g., food and shelter).	Lack of adequate food supplies for internally displaced persons.
No. 21. Protection from arbitrary deprivation of property and possessions.	Theft of crops from villages abandoned by rebel forces. Unjustified confiscation of money and other personal possessions by government soldiers “inspecting” settlements of internally displaced persons.
No. 23. Right to free primary education.	Refusal of local schools to accept all internally displaced children without a fee.
No. 24. Humanitarian assistance is to be provided impartially, in particular without diversion for military or political purposes.	Government troops divert food relief intended for internally displaced persons for their own benefit and pro-government villages.

b The criteria for UNHCR’s involvement with internally displaced persons are set out on page 86. In this particular situation, the following will be relevant in assessing these criteria:

- § No request from the Secretary-General;
- § Approach by the government;
- § Other United Nations agencies are also present, including OCHA;
- § UNICEF already has an operational involvement with some of the internally displaced persons;
- § Which United Nations agency is currently the Resident/Humanitarian Coordinator for Bantana.

Case H

- a** Yasmin is stateless. She lost her Nordland nationality on marriage and now has lost her Estland nationality because of divorce.
- b** Andre is stateless, too. Although he was born in Nordland, as neither of his parents was a citizen of this country at the time, he did not acquire citizenship there. He also fails to qualify automatically for citizenship in Estland: he was not born there and his parents failed to register his birth in time.
- c** As UNHCR has a general mandate in relation to identifying and resolving statelessness problems, it will have an interest in the plight of Yasmin and Andre.

Chapter 5

The cycle of displacement

Part I: Flight and access to asylum



Key objectives

Understand what forces a person to flee his/her country and seek asylum.

Consider the conditions under which such journeys are made and the obstacles asylum-seekers face in gaining access to safety in another country.

Understand the obligations on countries to admit asylum-seekers and to provide for their security and their material and psychosocial needs.

Appreciate the function of, the various approaches to, UNHCR's role in, and minimum standards of status determination procedures.

This chapter examines why refugees flee their homes, what their journeys might be like, and how they seek asylum in another country. Seeking asylum often requires overcoming physical barriers to entry, gaining access to a refugee status determination procedure, and being able to meet daily living needs while waiting for a decision on the asylum application. The standards that States must uphold in relation to each of these elements are also discussed. In addition, the chapter focuses on the purpose of status determination procedures and the different approaches that are used, including in refugee emergencies.

5.1 Why and how do refugees flee?

What compels someone to leave his/her home, and often his/her family, to seek safety abroad? **Persecution**, which can include torture, harassment, sexual violence, arbitrary or prolonged detention, other serious violations of human rights, or threats, is the driving force behind such desperate action. Persecution can take place in times of peace or it can arise during a conflict, whether internal or international. Generally, the persecutor will be someone connected with the governing authorities, but in certain situations the persecutors may be non-State agents, such as rebel groups. Massive displacement is likely to occur when there is large-scale persecution, for example when civilians of a particular ethnic background are targeted as part of a clampdown on a secessionist movement or on political opposition groups, or when there is indiscriminate and generalized violence.

The **trauma of flight** should never be underestimated. A person contemplating leaving his/her home must weigh the risks of flight, with its attendant physical dangers and the possibility of being severely punished if caught, against the terror of what may lie ahead if he/she makes no attempt to escape. Those forced to leave behind family members and close friends are often wracked with guilt and fear. Then the journey, itself, is fraught with insecurity. The fleeing person may not be able to leave the country by crossing a border in a normal manner for fear of being discovered by the authorities. Instead, he/she may have to resort to travelling through difficult or dangerous terrain and/or using clandestine means of transport. In these cases, the individual may then be vulnerable to exploitation by those unscrupulous enough to profit from their misery and desperation.

It is therefore essential to treat all asylum-seekers and refugees with sensitivity and understanding. Apart from the suffering they have already endured, they face constant uncertainty about their future and that of any family members left behind. The impact of flight on children, especially those who may have had to travel alone, unaccompanied by any adult carer, should never be underestimated.

Unaccompanied children seeking asylum not only face physical dangers, but they must also find food, water and shelter for themselves and are at risk of abuse by strangers, including military groups that may attempt, by force, to recruit them. Women may also be at particular risk during flight, especially if they have lost the traditional protection afforded to them by the presence of male relatives. Women fleeing civil war may be subjected to sexual violence, including rape, by soldiers or guerrillas. Elderly asylum-seekers are also vulnerable during flight, especially if they are forced to flee on their own.

While refugees are forced to leave their countries of origin because of a fear of persecution, other migrants may be moving for different reasons, such as the chance to escape poverty. Increasingly, refugees are caught up in larger **mixed population movements**. Those seeking refuge may have to resort to the same mode of travel as other migrants, using, for example, false documents or the services of human smugglers or traffickers.

5.2 Admission into a country of asylum

In general, countries are not required to admit foreigners to their territories. Refugees are the exception to this rule. Indeed, UNHCR's efforts are based upon the obligation of States to admit to their territories individuals claiming asylum, at least on a temporary basis. As described earlier, the **principle of non-refoulement**, provided for in all the refugee treaties and in customary international law, prohibits States from returning a refugee, in any manner whatsoever, to the frontiers of territories where his/her life or freedom would be threatened on the grounds of race, religion, nationality, membership of a particular social group or political opinion. Implicit in this concept is the principle that asylum-seekers must not be turned away at the border. In fact, this principle is stated categorically in the *United Nations Declaration on Territorial Asylum*. The **right to seek and enjoy asylum** is enshrined in the *Universal Declaration of Human Rights* which, while not legally binding, carries considerable moral suasion. Asylum involves protection on the territory of a State other than one's own and encompasses *non-refoulement*, permission to remain and humane standards of treatment.

States have a right, subject to their obligations under international refugee law, human rights law, and customary international law, to control the entry, residence and expulsion of non-nationals (aliens). Over the years, in response to a growing number of asylum-seekers and economic migrants, they have intensified their efforts to manage migration into their territories, partly through restricting physical access. In efforts to reduce irregular migration, governments impose visa requirements, prescribe sanctions for airlines and shipping companies that transport undocumented or

inadequately documented aliens, and/or intercept individuals to prevent them reaching their country's borders. Unfortunately, however, these efforts can also prevent those in need of international protection from reaching safety. Although UNHCR does not have a mandate regarding migration, it works with governments and other bodies, such as the International Organization for Migration (IOM), to ensure that refugee protection is not jeopardized by otherwise legitimate attempts to control the movement of people across borders.

Restrictive measures aimed at controlling migration must not, however, result in *refoulement*. *ExCom Conclusion No. 97 (LIV) 2003* makes this clear. When a State intercepts and boards a ship that is en route to its territory, for example, the State must ensure that its officials take care to identify anyone on board who may be in need of international protection. The fact that an individual arrives at an air or sea port without the necessary immigration documentation, such as a valid visa, does not justify refusing entry if he/she claims asylum. Generally, only more developed States have the financial resources to implement sophisticated interception measures. In fact, most refugees, including those arriving en masse, are found in developing countries that do not have the capacity to impose such measures.

The issue of physical access to a country of asylum also arises when asylum-seekers are rescued at sea by government ships or private vessels, and when stowaways have secretly boarded ships. Although there is a duty under international law to rescue those in danger at sea, there is no clear legal framework for addressing the protection needs of those individuals. In UNHCR's view, those persons should be allowed to disembark at the ship's next port of call. If disembarkation is denied and the asylum-seekers consequently land in a country where they are at risk of persecution, this amounts to *refoulement* by the State of first call. If the latter country is uncooperative, UNHCR staff will attempt to interview the individuals on board ship and, if they are determined to be in need of international protection, UNHCR will try to find a suitable solution, normally resettlement to a third country.

5.3 Reception of asylum-seekers

Once admitted into the territory, asylum-seekers are entitled to be treated in accordance with international refugee law and international human rights law. Human rights, including the right to adequate accommodation, apply to everyone. The 1951 Convention does not explicitly mention asylum-seekers, but the fact that some asylum-seekers will be refugees means that key provisions of the Convention on standards of treatment also apply to asylum-seekers.

The treatment asylum-seekers receive differs from country to country, depending on the financial resources available, the existing legal system, and social attitudes. *ExCom Conclusion No. 93 (LIII) 2002* on the reception of asylum-seekers in individual countries, confirms that basic standards of treatment must be upheld for all asylum-seekers, and the particular needs of women and children must be taken into account. Although difficulties may arise when asylum-seekers arrive en masse, minimum standards of treatment must still be respected (see *ExCom Conclusion No. 22 (XXXII) 1981* on protecting asylum-seekers during large-scale influxes and *ExCom Conclusion No. 100 (LV) 2004* on international cooperation and burden and responsibility sharing in mass influx situations). These situations usually require greater cooperation among the concerned States. Indeed, improved burden- and responsibility-sharing, including the development of more predictable responses to mass influxes, is one of the goals of the *Agenda for Protection*.

After arriving in a new country, often with very few possessions, asylum-seekers will need help in securing the basic necessities of life. Most will not have been able to bring with them sufficient funds to pay for accommodation. Thus, the country of asylum, with the help of the international community and UNHCR, when appropriate, is responsible for providing **adequate accommodation, food and clothing**. Accommodation can take many forms, including reception centres, public housing, and tented camps. In some instances, asylum-seekers will be able to find accommodation with friends, relatives, or others from their ethnic group also living in the country of asylum. Another essential need for asylum-seekers is **access to medical treatment**, not least because they may have suffered physical and mental trauma during their journey, if not before departure.

Dependence on the social services of the country of asylum can be significantly reduced if asylum-seekers are allowed to look for work or engage in their own income-generating activities. Encouraging **self-reliance** among asylum-seekers helps to restore dignity and hope to people who have been torn from their normal lives; it also greatly enhances their prospects of finding a durable solution to their plight. In many States, asylum-seekers are issued with temporary work permits or, in rural areas, are allowed to farm unused plots of land.

In an increasing number of countries, limits are placed on asylum-seekers' **freedom of movement**. They are placed in detention or are subject to other restrictive measures pending resolution of their claims. They are sometimes detained simply because they arrived by illegal means. Detention is not just incarceration in a jail or prison. Detention occurs whenever an individual's movements are restricted to a small, closed environment, such as a camp, a hotel

room, or an airport transit zone, and the only way to secure release is to leave the country.

The detention of asylum-seekers is, in UNHCR's view, inherently undesirable. States should not resort to detention automatically or as a way of deterring other asylum-seekers. Detention should be used only if prescribed by law and if it is deemed necessary, in accordance with the four circumstances set out in *ExCom Conclusion No. 44 (XXXVII) 1986*:

- § To verify identity when this is disputed or unknown;
- § To conduct a preliminary interview to find out the basic elements of the asylum claim;
- § When the individual has acted in bad faith by destroying travel or identity documents or by using fraudulent documents to mislead the authorities;
- § When the person in question poses a risk to national security or public order.

Even if detention is deemed necessary for the above reasons, it should be used for the shortest possible time. The 1951 Convention is clear that criminal penalties for illegal entry into an asylum country should not be imposed on asylum-seekers who had good reasons for using such means to gain access to the territory and who have promptly contacted the authorities.

While awaiting the outcome of their claims, asylum-seekers need to be assured of a legal status for the foreseeable period of their stay. They should be issued with some kind of **identity documentation**, even if it is temporary and rudimentary. **Registration** – a process whereby basic personal details are obtained from each asylum-seeker – is also an effective means of ensuring legal protection. It facilitates the distribution of material assistance to asylum-seekers and helps to identify those with special protection needs. The main considerations for any registration process, such as ensuring all data collected remain confidential, are found in *ExCom Conclusion No. 91 (LII) 2001*. The importance of registration as a protection tool is also recognized in the *Agenda for Protection*.

Reception policies must take into account the special needs of women, girls and boys. In general, women must have the same access to basic assistance, including food, water and shelter, as men. Women should not have to rely on male relatives to gain access to services and necessities; if they do, they may be vulnerable to exploitation. For many women seeking asylum, this may be the first time they are outside of their normal social structures and, in some cases, unaccompanied by any family members. Accommodation provided to them must therefore be safe and secure. Any medical treatment required must be provided with sensitivity to the women's social and cultural backgrounds, and it is

important that expert staff members are present when assisting women who have suffered sexual violence.

When working with children who are asylum-seekers, their “best interests”, whether individually or collectively, must be of paramount concern. This principle is stipulated in the *Convention on the Rights of the Child* (1989), which defines a child as every human being below the age of eighteen years. When making decisions regarding an individual child, determining his/her best interests requires examining both objective and subjective standards, including the child’s views. When establishing a child’s best interests, the specific facts of his/her case, including the child’s age, sex, cultural background, and past experiences, and the general environment must be considered.

Detention of child asylum-seekers should be avoided at all costs, given the extremely harmful effects it can have on the young. Efforts should be made to help create a sense of normalcy and to meet children’s developmental needs. The rights to **education** and to rest, leisure and play are particularly important. When designing reception policies for boys and girls, it is important to keep in mind the risks they face: exploitation, physical and sexual abuse, trafficking, and forced recruitment into the military or armed groups.

It is crucial that those children who are not accompanied by an adult carer (unaccompanied) or who are being looked after by other adults in the absence of their parents or usual guardian (separated) are identified as soon as possible so that appropriate care arrangements can be put in place. Community-based arrangements, such as fostering by another refugee family from a similar background, should be encouraged instead of resorting to institutions such as orphanages. Whenever possible, and as early as possible, efforts must be made to trace the relatives of these children so they can be reunited with family members.

Often, elderly asylum-seekers have been separated from their usual caregivers. They may also suffer from health problems and/or have difficulty adjusting to their new environment and knowing where to seek assistance. Reception policies should also be sensitive to their particular needs.

5.4 Access to procedures for determining refugee status

A person is a refugee from the moment he/she fulfils the criteria set out in the 1951 Convention/1967 Protocol (or relevant regional or national instrument). When the authorities recognize someone as a refugee, they are not *making* him/her a refugee, but are simply *declaring* that he/she is a refugee. In order for a government to protect refugees effectively, it must identify them and be able to

distinguish them from other foreigners seeking to stay on its territory. How a government does this depends largely on its legal traditions and on whether it is practical to examine each claim for asylum individually or whether the number of asylum-seekers arriving is so large that a group approach is more appropriate. Neither the 1951 Convention nor its Protocol addresses these procedural matters.

As discussed in Chapter 3, it is the responsibility of States to conduct status determination procedures. However, if the State is unable or unwilling to identify refugees on its territory, UNHCR may conduct those procedures under its mandate. UNHCR, like individual States, will determine its approach to status determination based on whether or not it is feasible to review each asylum claim individually.

5.4.1 Individualized determination procedures

The methods used to identify refugees individually vary from country to country, depending on local legal traditions, resources, and circumstances. In many countries, the initial decision is made by a specialized committee or officials, following interviews with asylum-seekers. These may later be reexamined on appeal by a review body or administrative courts. Sometimes, UNHCR will have access to case files and will give its opinion on individual cases to State authorities. In some countries, UNHCR may be part of the appeals body that listens to the cases of individuals who have been refused refugee status.

Whatever the details of any national system, *ExCom Conclusion No. 8 (XXVII) 1977*, on determination of refugee status, confirms that certain basic standards must always be upheld to ensure **fair and efficient procedures**. Among these are:

- § All officials dealing with asylum claims should have adequate training, including a proper understanding of the principle of *non-refoulement*;
- § Asylum-seekers should be clearly informed about the procedures involved and should have all necessary assistance, such as interpreters, to present their case;
- § Asylum-seekers should be given access to UNHCR upon request;
- § There should be a right to an independent appeal or review of a negative decision on a claim for asylum;
- § Asylum-seekers should be allowed to remain in the territory until their case is resolved, including during any appeal/review process, unless the claim is clearly abusive.

The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, which has been cited by courts around the world,

offers guidance on certain issues and on the substantive aspects of examining claims.

In reaction to the growing number of asylum applications, many governments have made attempts to streamline their asylum procedures. These include:

- § Admissibility procedures, through which the authorities of the State in which the individual claims asylum first determine (i) whether they are responsible for assessing a particular claim or whether another State is responsible. (ii) Sometimes States will try to determine whether an asylum applicant has already found protection in another State, assuming the protection required by the individual is available and can be accessed (known as a “first country of asylum”), or (iii) whether he/she can be returned to a third country that is willing to examine the substance of his/her claim in a fair procedure, that respects the principle of *non-refoulement*, and that will provide effective protection if the application is successful (known as the “safe third country” concept);
- § Time limits for making an asylum application;
- § Accelerated procedures, for claims considered to be manifestly unfounded or abusive (as defined in *ExCom Conclusion No. 30 (XXXIV) 1983*), or for applications from nationals of countries deemed to be safe countries of origin, that is, the applicant is presumed to be at no risk of persecution.

However, any initiative aimed at making the system more efficient must not undermine the principle of *non-refoulement*. Moreover some of these procedural measures have raised other protection concerns, including about access.

In making status determinations, **at-risk asylum-seekers**, such as children, victims of torture or sexual violence, women in certain circumstances, the elderly, and people who are psychologically troubled, need special consideration. UNHCR has welcomed the specially-designed procedures and/or guidelines for handling such cases which some States have introduced for such individuals. Female asylum-seekers who are accompanied by a male relative should be confidentially informed of their right to make an independent asylum application at any stage, and to get legal advice before making such a claim. If possible, women should be interviewed by skilled female interviewers and interpreters who are sensitive to issues such as sexual violence. If a woman’s husband is refused asylum, the woman must still be given the chance to demonstrate her own entitlement to refugee status.

Unaccompanied or separated children should not be subjected to detailed questioning as soon as they arrive in the country. Once such a child is identified, a suitably qualified guardian or adviser should be appointed to assist him/her at all stages of the

determination procedure, and specially trained personnel should conduct interviews with him/her.

Persons found not to be in need of international protection

If an individual's claim to be a refugee is finally rejected after a fair process, the government is entitled to remove him/her from its territory, unless it has other obligations under international human rights law (see "Complementary protection" below), for example the prohibition against return to torture. As noted in *ExCom Conclusion No. 96 (LIV) 2003*, any removals should be undertaken humanely, with respect for human rights, and the best interests of children must still be paramount in these circumstances.

UNHCR does not, in principle, get involved in returns of rejected asylum-seekers, as such persons are no longer of concern to UNHCR. However, the way they are removed from a territory may affect the integrity of the international protection regime. UNHCR has, on occasion, assisted States, at their request, in returning rejected asylum-seekers, but only when it was consistent with the organization's humanitarian mandate to protect refugees.

Complementary protection

People who flee situations of generalized violence or events seriously disrupting public order may not always be targeted on the grounds set out in the 1951 Convention. As such, they would not be eligible for refugee status under the 1951 Convention or its 1967 Protocol, although they could be covered by the broader refugee definition contained in the OAU Refugee Convention or the Cartagena Declaration. States that do not apply a broader refugee definition generally agree that it would be inhumane to send such people back to a situation of grave insecurity where their lives would be at risk. Thus, **States that are not bound by a broader refugee definition** generally give permission for people fleeing generalized violence to stay on their territory until conditions have improved in the country of origin.

In these cases, the prohibition on returning persons to the risk of torture, inhuman or degrading treatment or punishment, under international human rights law, may also apply. Some countries grant a specific humanitarian or subsidiary status under national law; others grant status as a matter of administrative discretion. Whatever the particular name given to this status, it is generically known as **complementary protection**, as it complements refugee protection under the 1951 Convention.

Complementary protection is usually granted in the context of individual refugee status determination procedures following examination of an asylum-seeker's particular circumstances. It should therefore be distinguished from the protection that a person

might receive as part of a group-based response to a mass influx, such as temporary protection (discussed below).

5.4.2 Group determination procedures

When large numbers of asylum-seekers arrive at once, it is often not possible to conduct individual status determinations. In these situations, the cause of the mass influx, such as a violent escalation of an inter-ethnic civil war, is usually evident. If reliable evidence about recent events in the country of origin, obtained from a variety of sources, including the media and diplomatic reports, shows that the majority of those arriving will be entitled to refugee status, the country of asylum should recognize those arriving *en masse* as refugees. Each member of the group is then regarded as a *prima facie* (that is, in the absence of evidence to the contrary) refugee and recognized by the government as such. (In some situations, UNHCR may also recognize refugees on a *prima facie* basis under its mandate.) Such recognition would be based on the applicable refugee instrument. If, after *prima facie* refugee status is granted, information comes to light that raises doubts about the eligibility, for refugee status, of an individual within this group, an examination of the individual's case should be conducted to determine whether his/her *prima facie* status should be cancelled.

5.4.3 Temporary protection

Some governments, mainly in industrialized States, offer **temporary protection** in mass-influx situations. This is a short-term, emergency response that postpones a determination of eligibility for refugee status. Instead, the group is received on a temporary basis according to minimum protection standards based on the principles of the 1951 Convention. Once the situation in the country of origin has improved to the extent that most of those seeking asylum can return safely, temporary protection is lifted. If the situation in the country of origin does not improve sufficiently after a few years, another form of international protection must be found. Otherwise, it would be unfair to leave people with only a limited form of international protection when they may well be entitled to more generous treatment and greater stability as recognized refugees.

Summary

Physical access to a country of asylum

The principle of *non-refoulement*:

- § Places States under an **obligation to admit asylum-seekers** into their territories;
- § Has to be taken into account when designing and implementing migration-control measures, such as visa requirements and the interception of illegal migrants.

Reception of asylum-seekers

Asylum-seekers are **entitled to human rights** such as:

- § Adequate shelter and food;
- § Medical assistance;
- § Freedom of movement;
- § Education for children.

The particular needs of elderly asylum-seekers, women at risk, survivors of torture, and children must be addressed.

Refugee status determination procedures

Such procedures:

- § Allow States to identify which asylum-seekers are refugees and, therefore, are in need of international protection;
- § Can vary greatly among countries as no method is prescribed in the *1951 Convention* or the *1967 Protocol*;
- § Are conducted on an individualized or group basis.

Individualized determination procedures:

- § Require a case-by-case assessment of asylum claims;
- § Must respect certain **procedural standards**, such as a right of appeal;
- § Should allow people found not to be Convention refugees to obtain **complementary protection** if returning them to their country of origin would be inhumane because of a risk of ill-treatment falling short of persecution.

Group-based protection responses:

- § May be appropriate in situations of mass influx, when individual refugee status determination is not practical but when there is objective evidence for considering that the majority of the group are refugees;
- § Can take the form of **prima facie recognition** or **temporary protection**.

UNHCR's role:

- § Can take a variety of forms when in support of procedures operated by States;
- § May involve carrying out refugee status determination itself under the organization's mandate, in the absence of government action.

Additional reading

Physical access

ExCom Conclusion No. 97 (LIV) 2003 on Protection Safeguards in Interception Measures.

Reception

ExCom Conclusion No. 93 (LIII) 2002 on Reception of Asylum-Seekers in the Context of Individual Asylum Systems.

ExCom Conclusion No. 22 (XXXII) 1981 on Protection of Asylum-Seekers in Situations of Large-Scale Influx.

ExCom Conclusion No. 44 (XXXVII) 1986 on Detention of Refugees and Asylum-Seekers.

ExCom Conclusion No. 91 (LII) 2001 on Registration of Refugees and Asylum-Seekers.

ExCom Conclusion No. 100 (LV) on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations.

Handbook for Emergencies, UNHCR, 2000 (second edition).

Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, UNHCR, 1999

Status determination procedures

ExCom Conclusion No. 8 (XXVIII) 1977 on the Determination of Refugee Status.

ExCom Conclusion No. 96 (LIV) 2003 on the Return of Persons Found Not to be in Need of International Protection.

Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR, 1979, reedited 1992.

Asylum Processes (Fair and Efficient Asylum Procedures) (EC/GC/01/12), UNHCR, 2001.

Complementary Forms of Protection (EC/GC/01/18), UNHCR, 2001.

Exercises

Case I

This case study examines the development of a particular refugee situation, from its origins through to the search for permanent solutions to the displacement. As such, the narrative continues in the exercises at the end of Chapters 6 and 7 (Cases K and L).

Since independence in the 1960s, Xanadu has been governed by the majority ethnic group, the Xanians. Since the late 1980s, however, the minority ethnic group, the Arcadians, have been campaigning for greater political power and respect for their human rights. Although attempts were made to provide a degree of autonomy to the southern province of Arcadia, where the Arcadians predominantly live, these were short-lived. Matters were exacerbated by the discovery of valuable oil reserves in 1994 in Arcadia. The Arcadians argued that they should receive a significant proportion of the revenue from these reserves because the reserves were found on what has traditionally been their land. However, the government was unsympathetic and very little of the profits made from selling the oil were invested in Arcadia.

In an attempt to crack down on increasing Arcadian political agitation spurred on by the oil issue, the government suspended the Arcadian provincial parliament in 2003 and imposed control of the province from the capital. Among the measures introduced was a change in the language of instruction used in Arcadian schools, from the Arcadian tongue to that spoken by Xanians. In addition, all political parties pushing for the greater autonomy or secession for Arcadia were banned. Hundreds of young Arcadians were arrested on suspicion of having separatist tendencies; they were held without trial. Demonstrations against the government became a daily occurrence in the autumn of 2003. At one such march in November, the army was called in and a violent confrontation between them and unarmed protestors ensued.

Following this, even more Arcadians were arbitrarily detained and tortured. Hundreds of others, especially young men, fled to the neighbouring State of Elysium. At the same time, an organization called the Arcadian Liberation Front (ALF) made itself known by bombing government targets in the province, including police stations and military barracks. In response, the government ordered its forces to crush what it denounced as a terrorist movement. Large numbers of troops were sent in to Arcadia at the end of 2003. The ALF became engaged in guerrilla-style confrontation with the armed forces, provoking the army into a furious attack on innocent Arcadians. The first two weeks of January 2004 saw the murder, rape and torture of hundreds of Arcadian men and women. Whole villages in Arcadia were set on fire by troops, with the apparent aim of forcing their residents to leave the country.

As a result of this campaign of terror against the Arcadians, thousands fled to the neighbouring State of Elysium. It is estimated that in the month of January alone 200,000 refugees crossed the border. The unexpected nature of this crisis meant that very few humanitarian organizations were present on the ground and that the Elysium government was equally unprepared. Indeed, Elysium is a developing country with barely functioning public services (particularly in the judicial, health and education fields) and underpaid, and often corrupt, government officials.

Case J

The Republic of Atlantis became a Party to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees in 1978. Shortly after this, it established a Refugee Determination Board (RDB). UNHCR attended all RDB meetings as an observer/adviser, and negative decisions of the RDB were reviewed by the Central Court of Appeal (CCA).

Given the increasing number of asylum applications, the government of Atlantis has proposed streamlining its asylum procedures. The key suggestions are as follows:

- a** All people who claim asylum at the border will be immediately placed in detention, with the aim of deterring other potential asylum-seekers.
- b** All asylum-seekers will be interviewed in detail as soon as they claim asylum.
- c** If an asylum-seeker is married, he/she cannot make a separate asylum application from that of his/her spouse.
- d** Applications rejected by the RDB will be reviewed by an immigration official and the right of appeal to the CCA will be withdrawn.
- e** Asylum-seekers awaiting the outcome of such a review can be deported back to their country of origin, on the basis that they will be given permission to re-enter Atlantis if their appeal is successful.

You have been asked to comment on these proposals on behalf of UNHCR.

Answer key to Chapter 5 exercises

Case I

- a** Given the numbers that have arrived in such a short time, refugee status determination on a group, rather than individual, basis would seem appropriate. The preferred option would be *prima facie* recognition of the group as Convention refugees; temporary protection could also be considered.
- b Yes** First, if the military are turning away Arcadians at the border this will amount to *refoulement*, if these people are in need of asylum. Second, the government's remark that the refugees can only stay in the short term raises the prospect of forced returns before conditions in Xanadu have improved, in other words, *refoulement*.
- c** Concerns would include:
- § Ensuring documentation;
 - § Insufficient food, drinking water and material for shelter;
 - § Lack of an organized system for distributing food and shelter materials, meaning some refugees, particularly those in vulnerable situations, will be unfairly disadvantaged;
 - § Lack of adequate medical facilities;
 - § Presence of separated and unaccompanied children.

Case J

UNHCR's comments on each element would be:

- a** Automatic detention or detention as a deterrent is never justified. Thus, the detention of all those claiming asylum at the border is inappropriate and incompatible with ExCom Conclusion No. 44 (XXXVII) 1986.
- b** This requirement should not apply to unaccompanied or separated children who have just arrived in the country, given their vulnerability.
- c** Women who wish to make a separate claim to asylum from their husband's have a right to do so, and vice versa.
- d** There should be a review by an independent and superior body. An immigration officer would not appear to satisfy either of these requirements in relation to the RDB.
- e** In general, asylum-seekers should be allowed to remain in the country of asylum until the appeal/review process is finalized. Guaranteeing return if the appeal is successful is not sufficient.

Chapter 6

The cycle of displacement

Part II: Standards of treatment



Key objectives

Learn about the standards of treatment to which refugees are entitled in the country of asylum.

Understand UNHCR's role in ensuring that these standards are met.

Appreciate the protection issues that arise in relation to women, children, and other groups with special needs.

This chapter examines the needs of refugees living in the country of asylum. Refugees will often be dependent upon the government hosting them and on international assistance, especially during the early phases of their lives as refugees. However, the goal of self-reliance is vitally important, particularly in the context of finding durable solutions. The chapter shows how UNHCR's assistance activities, such as providing food, shelter and medical assistance, support protection aims. Special protection issues related to women and children who, together, usually represent the majority of any refugee population, are also discussed, as are a few key methods to be used when planning protection programmes. The problem of refugees moving from country to country in search of effective protection is also considered.

6.1 Standards of treatment

The standards of treatment a refugee can expect from the country of asylum are drawn from a combination of international refugee and human rights laws. The paragraphs below outline what these involve in a country party to the 1951 Convention/1967 Protocol. Since many of the rights concerned flow from international human rights instruments and, indeed, from customary law, similar standards should be upheld by countries that are not Parties to the 1951 Convention and its 1967 Protocol. The main exception is the obligation to provide travel documents, which is a provision unique to the 1951 Convention.

Under the 1951 Convention, the government concerned must apply its provisions to refugees on its soil **without discrimination** as to race, religion, or country of origin, even in times of emergency.

Physical security, meaning both protection from *refoulement* and safety from violence in the country of asylum is a priority. Refugees must be located away from the border if there is ongoing conflict in their home country so that they are not at risk of cross-border raids or infiltration by armed elements. More generally, the country of asylum should make sure adequate arrangements are in place to protect refugees from criminal violence, particularly that motivated by racism or xenophobia, including torture, inhuman, or degrading treatment by officials.

Exceptions to the principle of *non-refoulement*, both under treaty and customary law, are very narrowly defined. They are applicable as a last resort only when the individual concerned clearly poses a risk to the national security of the country in which he/she resides or, after having been finally convicted of a particularly serious crime, poses a danger to the community. In certain cases, there might be the possibility of expulsion to a third State. In either scenario, the prohibition on returning an individual to the risk of torture, inhuman, or degrading treatment or punishment still applies.

Security is of little use, however, unless a refugee is able to meet his/her basic physical and **material needs**. The country of asylum will often need assistance to feed, clothe, shelter, and provide medical care for the refugees. Often the government will have to rely on help from the international community. In these cases, UNHCR delivers essential commodities and services to the refugees. Tents made from blue plastic sheeting bearing the UNHCR logo have become a symbol of protection in refugee emergencies throughout the world. Since women and children together make up the majority of most refugee populations, one of UNHCR's goals, as detailed in the *Agenda for Protection*, is to improve protection for them. One way of doing so is to ensure that refugee women and children participate, on an equal basis to men, in making decisions that will affect their daily lives.

If dependence on support from others is inevitable for most refugees, especially during the initial stages of their stay in the country of asylum, this does not mean that they cannot increasingly rely on their own skills to meet their own and their families' material needs. It is in the interests of the host State to facilitate **self-reliance** by allowing access to job markets and self-employment initiatives. Such initiatives will ultimately help refugees to realize durable solutions to their plight, whether through voluntary repatriation, local integration or resettlement. There are often understandable concerns about nationals losing scarce economic opportunities to refugees. However, refugees can help to foster a country's development by providing skills and labour in under-resourced sectors, contributing to infrastructure projects, and farming otherwise unused land.

An important factor in achieving self-reliance, and one which has a great impact on the quality of protection in general, is the **freedom of movement** that refugees enjoy. Unless an individual poses a specific threat to public order or health, he/she should have as much right to move freely about the country as any national. Of course, there may be areas of the country that are off-limits to all because of security concerns (for example, where there are border skirmishes); in these instances, refugees would be covered by such restrictions.

The ability of refugees to enjoy many of the rights described above, especially freedom of movement and protection from *refoulement*, is much greater if they possess **identity documents**. The country of asylum has an obligation to issue such papers to each refugee, unless he/she has a travel document. When governments do not meet these obligations, UNHCR often works with them to strengthen registration processes and jointly issue identity documentation. Sometimes, UNHCR supplies a letter stating that the individual is a person of concern to the organization. This can reduce refugees' vulnerability to deportation and arbitrary

detention and provides some safeguard against the denial of other rights.

The 1951 Convention describes the **form of travel documents** so that they are recognized by other States Parties to the Convention. In some countries, travel documents are issued as a matter of course once refugee status has been granted; but given the administrative costs involved, many States only provide this document upon request.

The special needs of child refugees include access to adequate **education**, at least at primary level, and recreational opportunities. In some cases, child refugees will go to schools also attended by local children. This is often not possible in camp situations and so other provisions must be made. Deciding on the curriculum and language of instruction requires careful consideration. As much as possible, children's education while they are refugees should be a continuation of their education prior to becoming refugees. At the same time, their education should prepare them for the future, which may or may not involve returning home.

Family unity is another key issue affecting children who become separated from their families during flight. It is vital that close family members (at a minimum, spouses and dependent children) are reunited in the country of asylum as soon as possible.

The relationship between countries of asylum and refugees is not just one way: refugees have an **obligation to abide by the laws** of the country in which they are living, including legitimate regulations to maintain public order. Refugees are also subject to the asylum country's criminal law in the same way as are a country's citizens. Refugees should have unhindered access to the courts in the country of asylum, as is their fundamental civil right.

Mass influx situations present considerable challenges to providing acceptable standards of treatment for the refugees concerned. The country involved will suddenly face a huge demand on its resources; poorer countries might struggle to deliver adequate material support, especially when the situation is protracted. *ExCom Conclusion No. 22 (XXXII) 1981*, which was adopted in light of the southeast Asian refugee crisis, affirms that minimum humanitarian standards, essentially those outlined above, must always be upheld. Thus, international cooperation is crucial during mass influxes.

6.1.1 Special protection issues

The trauma of flight and the strain of living in exile inevitably lead to a **breakdown in the refugees' normal social structures**. This can affect refugees living dispersed among a local community or residing in specially-designated centres or camps. Related pressures within families may result in domestic violence or child abuse. Violence may erupt within the refugee community because the country of asylum's law enforcement system may be weak, particularly in camp settings. It is important to build trust with the refugee community so that concerns about violence and harassment can be raised. Effective systems should be put in place to monitor progress in tackling these problems.

Practical measures to improve refugees' safety and confidence include increased police patrols or special security wardens in camps. It is vital for refugees to be able to participate and initiate measures to address the social problems they face. When refugees are housed in collective accommodations, overall security can be enhanced by providing adequate lighting and locating sanitary facilities in safe and well-lit areas. Initiatives aimed at building self-reliance can help to reduce the incidence of domestic violence and other anti-social behaviour that often results from the despair and frustration felt by disempowered male refugees.

The proximity of refugee settlements to the home country is a critical protection issue. In the last few decades, armed elements have infiltrated refugee camps, thus compromising the **civilian and humanitarian character of asylum**. Not only does the presence of such armed groups risk provoking military attacks and police action against refugees, it can also lead to severe intimidation within the camp itself. In the Rwanda crisis of 1994–96, for example, many of the refugee camps were effectively run by armed members of the former government who controlled the distribution of humanitarian assistance, levied "taxes", and posed a security threat to the authorities in the country of origin.

As *ExCom Conclusion No. 94 (LIII) 2002* recognizes, it is primarily the responsibility of the country of asylum to make sure armed elements are kept out of refugee camps. But many countries simply do not have the financial and human resources needed to undertake such a difficult task; substantial support from the international community is often required. In the absence of any United Nations agency with a specific mandate for identifying and separating armed elements from refugees, UNHCR, in collaboration with the International Committee of the Red Cross, works with States to find practical means to tackle this difficult task. One approach is to set up screening activities at borders to distinguish between people in need of international protection and those fleeing who are involved in military activities, or who are looking to rest from, and

then relaunch, military activities. The *Agenda for Protection* sets out a number of measures that can be pursued to improve the safety of refugees, including partnerships among countries of asylum, UNHCR and donor States.

Another problem for refugees who are living close to armed conflict is the **risk of recruitment into the military**. Girls and boys are particularly at risk, especially if there are not sufficient educational or recreational activities for adolescents. Since recruitment in these situations is often forced, it is critical to maintain the civilian nature of refugee camps, bolster community cohesion, and monitor the activities of young refugees. For child soldiers who have escaped, it is important to ease their transition back into civilian life and help them to deal with the terrible experiences they have endured. The term “child soldiers” doesn’t only refer to those who have carried or used weapons; it also applies to any child who has served in an armed group in any capacity, including girls recruited for sexual purposes or forced marriage.

Domestic violence is one form of **sexual and gender-based violence** (SGBV) that may affect refugees. SGBV is a human rights violation that perpetuates stereotypes about the differing roles of men and women in society. Given that in most societies women and girls have traditionally been less powerful than males, they are also most likely to be the victims of SGBV. SGBV can take the form of physical or sexual abuse, including rape, human trafficking, and female genital mutilation. When sexual assault is used as a weapon of war, SGBV can be a cause of flight. It can also be perpetrated during flight and during asylum, such as when girl refugees are forced into prostitution to obtain extra food for their family.

UNHCR has produced comprehensive guidelines on preventing and responding to SGBV which have been endorsed by the *Agenda for Protection*. The causes of SGBV are complex and stem from basic social structures. Designing and implementing measures to address and prevent SGBV should therefore involve a variety of actors, including the refugee community and all those involved in assisting them. *UNHCR’s Code of Conduct* also makes it clear that the organization’s staff members must never abuse their positions of power in relation to refugees by obtaining sexual favours in exchange for protection or assistance. *ExCom Conclusion No. 98 (LIV) 2003* emphasizes the need for countries of asylum to put in place measures to prevent the sexual abuse and exploitation of refugees within their territories.

6.1.2 Protection methodologies

To ensure that protection activities are undertaken systematically and with accountability, it is important to **mainstream gender and age, encourage a community-development approach, and ensure a rights-based approach** to those activities.

Mainstreaming gender and age involves assessing the implications for women, men, girls and boys of any planned action, including legislation, policies and programmes in every area and at all levels. It is a strategy for ensuring that the concerns of all women, men, girls and boys are taken into account when designing, implementing, monitoring, and evaluating policies and programmes in all political, economic, and social spheres, so that inequality is not perpetuated. The ultimate goal of this strategy is to achieve gender and age equality.

There is often a misconception that gender refers only to women, and that gender mainstreaming largely refers to creating special projects for women. Mainstreaming gender and age is an operational priority that includes men and women of all ages, including children.

Through a **community-development approach**, the refugee community, represented by all groups (women, men, children, the elderly, minorities, etc.) is involved in assessing, implementing, monitoring and evaluating all the programmes that affect them. Strengthening the refugees' participation in these decision-making activities helps to restore their dignity and self-esteem and to encourage self-reliance.

A **rights-based approach** to protection is based on international human rights standards. It integrates the norms, standards, and principles of the international human rights system into the plans, policies, and processes related to protecting refugees. These rights are enumerated in the international treaties and declarations that address civil, cultural, economic, political, and social rights. The principles that apply include equality and equity, accountability, empowerment, and participation.

It is often difficult for UNHCR staff members to verify that they are mainstreaming gender and age and incorporating a community-development and rights-based approach to their work. It is therefore essential to analyse how humanitarian interventions affect men, women, the elderly, and children differently. Conducting a comprehensive *situational analysis* is also often necessary to help assess the condition of women, men, girls, and boys in a camp, and to plan strategies and programmes for them. In a situation analysis, information on the main problems and needs within a refugee population is gathered and the principal resources contained within

that population are identified. Once all this information is analysed, programmes can be planned more effectively and efficiently.

6.1.3 Secondary movements

When refugees are not able to enjoy effective protection in the country in which they first seek asylum, they may search for safety elsewhere. This onward journey is called secondary movement and may occur if a refugee has been denied access to status determination procedures, if he/she has been unable to regularize his/her status, if he/she has not received adequate assistance, even after he/she has been recognized as a refugee, if he/she has been in physical danger in the country of asylum, or if he/she lacks access to durable solutions. To prevent refugees from having to move on in search of asylum, it is important to build the protection capacities in the countries of first asylum, particularly their status determination procedures and standards of treatment. Secondary movement may also occur in prolonged refugee situations when refugees see no end to their plight (see Chapter 7).

Summary

Standards of treatment

The rights of recognized refugees are:

- § Derived from both international refugee and human rights law;
- § Similar in every country, whether or not the country of asylum is Party to the 1951 Convention/1967 Protocol;
- § Complemented by refugees' obligations to the country in which they are staying, particularly to abide by its laws.

Humanitarian assistance

International cooperation among States is essential for ensuring that conditions for refugees meet international standards, particularly when the country of asylum has limited resources.

UNHCR frequently provides material assistance and essential services to refugees:

- § Such assistance can help to secure protection objectives, particularly since women and children make up the majority of most refugee populations;
- § UNHCR staff members are obliged not to abuse the power they have from being in charge of scarce resources.

Special protection issues

Governments, humanitarian actors, including UNHCR, and refugees need to work together to address:

- § The violence that may arise within the refugee community as a result of the breakdown in normal social structures;
- § The risk of infiltration by armed groups when the refugee community has fled a conflict;
- § The vulnerability of child refugees to military recruitment;
- § Sexual and gender-based violence, which predominantly affects women and girl refugees.

Additional reading

Mass influx situations

Handbook for Emergencies, UNHCR, 2000 (second edition).

Civilian and humanitarian character of asylum

ExCom Conclusion No. 94 (LIII) 2002 on the Civilian and Humanitarian Character of Asylum.

ExCom Conclusion No. 48 (XXXVIII) 1987 on Military or Armed Attacks on Refugee Camps and Settlements.

ExCom Conclusion No. 45 (XXXVII) 1986 on Military or Armed Attacks on Refugee Camps and Settlements.

Children

ExCom Conclusion No. 84 (XLVIII) 1997 on Refugee Children and Adolescents.

Action for the Rights of the Child, Save the Children/OHCHR/UNHCR/UNICEF, 2002 (CD-ROM).

Refugee Children: Guidelines on Protection and Care, UNHCR, 1994.

Sexual and gender-based violence

ExCom Conclusion No. 98 (LIV) 2003 on Protection from Sexual Abuse and Exploitation.

ExCom Conclusion No. 73 (XLIV) 1993 on Refugee Protection and Sexual Violence.

Sexual and Gender-based Violence against Refugees, Returnees and Internally Displaced Persons, UNHCR, 2003.

Code of Conduct, UNHCR, 2002.

Exercises

Case K

This case continues from Case I in Chapter 5.

By the middle of 2004, the living conditions in the refugee camps in Elysium had improved somewhat. There was plastic sheeting for making tents and improved access to drinking water. However, the security of the camps had become a major problem. Since the camps are located near the border, members of the ALF had been using them as resting points. Not only had this resulted in a diversion of humanitarian assistance to those who are not refugees, it had also led to an air of intimidation in the camps. Humanitarian personnel, including UNHCR staff, did their best, but up to that point, the government of Elysium had not deployed security personnel to root out the armed elements. Instead, recent raids by Elysium armed police, ostensibly to arrest armed ALF members, had led only to the arbitrary arrest and detention of young refugee men.

In addition, the authorities had banned the refugees from leaving the camps unless they received specific permission from the camp governor, who was a member of the senior police force. The governor was rarely present in the camp, so it was extremely difficult for such permission to be obtained. Some refugees had left the camp nonetheless, as there was unused land nearby which they tried to farm in order to supplement the food aid they received. Periodically, one of them was arrested for unauthorized exit from the camp and placed in detention for a few days. While detained, these refugees were beaten by prison guards and were given little to eat. Some women refugees had also been secretly leaving the camp in order to collect firewood, which was in short supply. Recently, three of these women were raped by a gang of local men. They reported the attack to local police but up to this point, no action has been taken.

On your visits to the camps, you have been looking into the situation of Jules, a ten-year-old boy who is being cared for by his nineteen-year-old sister, Camille. They fled Arcadia after their parents were killed by soldiers. Camille has been having trouble getting the correct rations of food aid for herself and Jules. Distribution is carried out by local employees of an NGO that is one of UNHCR's implementing partners. The distribution points tend to become very crowded, with people jostling for supplies. As a result, women on their own are pushed to the back. On a recent visit, Jules mentioned to you that they had been getting deliveries of food from his sister's new Elysian friend, Pedro. According to Jules, Camille and Pedro would go off for an hour or so to talk, after which Pedro would drop off some food items. Jules has noticed that his sister would return from these talks in an agitated state, often looking as though she had been crying. Jules has seen Pedro working for the NGO distributing food in the camp.

Jules also mentioned to you that he is really happy to have found an old school friend, Cesar, in the refugee camp. He is not sure what has happened to Cesar's family, but he remembers them because the father, an Arcadian, had married a Xanian woman. At the moment, Cesar is living with another refugee family that has been feeding him in exchange for him doing certain chores. Cesar has confided in Jules that he does not like this family very much, especially since the father beats him if he does not perform his tasks well. He has heard from older boys that the ALF are looking for more fighters. Cesar is tempted to join the ALF as

he thinks this will get him more respect and will be a way out of his unhappy home life.

You have also become acquainted with a neighbour of Jules, Maria. Her husband was a prominent businessman and political activist in Xanadu, but now, without work, he spends most of his days drinking and playing cards with other men in the camp. Like many of the men, he resents feeling powerless and useless. Frequently, his resentment, fuelled by his drinking, manifests itself in unpleasant rows with Maria. Nonetheless, Maria continues to do her best to feed and clothe her family, and to make their basic accommodation as comfortable as possible.

A few weeks ago, during a particularly heated argument, Maria was physically attacked by her husband and required medical treatment. She was left badly bruised, with a severe cut to her right eye. Worried for her children as well as herself, Maria complained about the attack to the camp's "Council of Leaders". The council is made up of the traditional leaders of the Arcadian ethnic group. The council cleared her husband of any misconduct, stating that according to their customs, disputes between husband and wife were private matters in which the community could not intervene.

To help you prioritize your work, draw up a list of protection concerns about the situation in the camp, generally, or in relation to individuals.

Answer key to Chapter 6 exercises

Case K

General protection issues:

- § Infiltration of refugee camps by ALF, compromising the civilian and humanitarian nature of asylum. This places the refugee community in danger of attacks by the military forces of Xanadu and jeopardizes their stay in Elysium if the authorities there think they are armed groups rather than refugees;
- § Intimidation of refugees by ALF members;
- § Diversion of assistance meant for refugees to non-refugees, i.e., ALF members;
- § Arbitrary arrest and detention of refugees by Elysian police;
- § Inability of Elysian authorities to secure camps adequately, including separating out armed elements;
- § Restriction on refugees' freedom of movement;
- § No promotion of self-reliance by Elysian authorities, i.e., they do not encourage refugees to farm unused land;
- § Possibly unjustified detention of refugees who have been exercising their right to move freely;
- § Unacceptable conditions of detention, i.e., lack of food, beatings (see Case Study A in Chapter 2 regarding international human rights standards for detention);
- § Rape of women refugees by local men and lack of action by local police;
- § Failure to address instances of sexual and gender-based violence against women refugees, by fellow refugees or by locals;
- § Material assistance not being distributed in a way that ensures that women have equal access as men;
- § Inadequate efforts to trace and reunite unaccompanied and separated children;
- § Inadequacies in monitoring the welfare of unaccompanied and separated children.

Protection concern(s) relating to Jules:

- § As an orphan and a separated child (his parents were his usual carers), are his best interests being served by the current arrangement in which his sister looks after him?

Protection concern(s) relating to Camille:

- § From Jules's account, the circumstances under which Camille is getting extra food supplies are suspicious. There's a possibility that she may be being sexually exploited by Pedro.

Protection concern(s) relating to Cesar:

- § The family that has taken in him may be exploiting him as a source of unpaid labour, and he may not be getting the care he needs;
- § There is a risk that he may volunteer to be an ALF member, putting himself in grave danger;
- § Tracing activities need to be put in place to locate his parents with the aim of reunification.

Protection concern(s) relating to Maria:

- § She has suffered, and is at continuing risk of, violence at the hands of her husband;
- § Her community's attitude towards domestic violence leaves her and other women at risk. The traditional justice system does not provide any effective redress or protection. There appears to be no effective mechanism for dealing with sexual and gender-based violence in the camp (see the 2003 SGBV Guidelines).

Chapter 7

The cycle of displacement

Part III: Timely and durable solutions



Key objectives

Understand what is involved in the three durable solutions: voluntary repatriation, resettlement, and local integration.

Learn how to determine which durable solution is suitable in a particular case.

Appreciate the complementary nature of the three durable solutions and UNHCR's role in relation to each of them.

This chapter describes each of the three traditional durable solutions. It explains how self-reliance among refugees can improve the chances of finding successful solutions to their plight. UNHCR's mandate and activities related to the three durable solutions are also discussed.

7.1 Overview

A durable solution for refugees is one that ends the cycle of displacement by resolving their plight so that they can lead normal lives. Traditionally, one of three durable solutions are pursued:

- § **Voluntary repatriation**, in which refugees return in safety and with dignity to their country of origin;
- § **Local integration**, in which the country of asylum provides residency;
- § **Resettlement**, in which refugees are transferred from the country of asylum to a third State willing to admit them on a permanent basis.

While there is no formal hierarchy among the durable solutions, voluntary repatriation is the solution sought and attained by most refugees. Numerous documents, including notably the *Agenda for Protection* and ExCom Conclusions, have recognized it as the preferred solution in the majority of refugee situations. Nonetheless, the three alternative solutions are complementary in nature and when applied together can form a viable and comprehensive strategy for resolving a refugee situation. The age and gender of refugees must be considered when searching for and implementing any durable solution.

Although UNHCR has a role in relation to each of the durable solutions, the success of any of them is dependent on the various interested parties, including affected countries, working in **partnership**.

Until a suitable durable solution is found, it is important to encourage **self-reliance** among refugees as it:

- § Reduces the burden on the country of asylum by decreasing refugees' dependence on its assistance;
- § Boosts refugees' dignity and confidence by giving them more control over their daily lives and hope for the future;
- § Helps make any long-term solution more sustainable as refugees who have been actively supporting themselves are best placed to take on the challenges of voluntary repatriation, resettlement, or local integration.

Promoting self-reliance strengthens refugees' skills and can enhance their own well-being as well as that of the local

community. Self-reliance is equally helpful in achieving any of the three durable solutions. The **Agenda for Protection** stresses that making use of refugee skills is particularly important in protracted refugee situations. In those circumstances, a swift transition from emergency relief to development assistance can create greater opportunities for self-reliance and, in the long term, benefit both the refugee population and the country of asylum.

As a tool in promoting self-reliance and suitable durable solutions, UNHCR has developed, in close cooperation with its partners, the *Framework for Durable Solutions for Refugees and Persons of Concern* which includes:

- § The promotion of **Development Assistance for Refugees (DAR)** through better targeting of such assistance to countries and areas hosting large numbers of refugees over protracted periods (to share the burden) and to equip refugees for eventual durable solutions (local integration, repatriation and resettlement);
- § The promotion of a strategy of **Development through Local Integration (DLI)** where local integration of refugees is a viable solution. Central to the success of this strategy is the attitude of the host government and the local authorities. DLI, therefore, is an option and not an obligation of a refugee hosting country and it builds on DAR.

The DAR as well as the DLI programming approach envision broad-based partnerships between governments, humanitarian and both multi- and bilateral development agencies. The mix of partnerships may vary from country to country, but an invariable and essential component will be the commitment of the relevant host government and the related central and local authorities.

7.2 Voluntary repatriation

As mentioned above, voluntary repatriation is the preferred solution, but it is not always easy to achieve. Often the basic requirements for return – **safety and the restoration of national protection** – are not in place. Without these conditions, return may not be sustainable and the refugees concerned may move back to the country of asylum. Creating conditions conducive to voluntary repatriation is a major challenge, primarily for the country of origin but also for the international community, whose support is often crucial. This is particularly true in post-conflict situations, where the expense, effort, and time required to establish peace, ensure respect for human rights, rebuild infrastructure, restore normal political, economic and social life, rehabilitate the judicial system, and foster long-term stability is daunting, to say the least.

This difficult reality is weighed against the desire of many countries of asylum for voluntary repatriation to take place as soon as possible, particularly when they have been hosting refugees for a

long time. The States concerned may have seen a decline in international support for their protection efforts, raising fears about a long-term strain on their resources. With its mandate for identifying durable solutions, UNHCR must often work to temper unrealistically high expectations from States about the potential for voluntary repatriation when the necessary conditions do not appear to be in place. Unfortunately, refugees often find themselves in a precarious position, caught between inadequate protection and assistance in the country of asylum and continuing insecurity in their country of origin.

Key elements of the **legal framework** for voluntary repatriation include:

- § The right, under international human rights law, for a person to return to his/her own country;
- § Refugees, in exercising their right of return to their country, should in principle have the possibility to return to their place of origin, or to a place of residence of their choice, subject only to restrictions as permitted by international human rights law;
- § The indicators of whether national protection has been restored in a country of origin being based on standards set by international human rights law;
- § Regional refugee instruments that set out principles for voluntary repatriation;
- § Various ExCom Conclusions identifying standards for the voluntary repatriation process;
- § In specific situations, bilateral or tripartite agreements among the country of origin, the country of asylum, and UNHCR defining the parties' respective responsibilities and guarantees for those repatriating. Increasingly, peace agreements also include provisions on voluntary repatriation.

The *1951 Convention* does not explicitly address the issue of voluntary repatriation, although the cessation clauses (see Chapter 3) are indirectly related:

- § Article 1C(4) of the *1951 Convention* stipulates that refugee status ceases if a refugee voluntarily re-establishes him- or herself in the country or origin;
- § in relation to the “ceased circumstances” cessation clauses in Articles 1C(5) and 1C(6), the successful completion of a voluntary repatriation programme can indicate that the circumstances that initially caused flight no longer exist.

Therefore, voluntary repatriation ultimately leads to the cessation of refugee status, whether on an individual or group basis.

Drawing on the above legal framework, UNHCR considers that the **core components** of voluntary repatriation are **return in safety and**

with dignity. This involves the return in and to conditions of **physical, legal, and material safety**, with full restoration of national protection as the end result. Aspects of physical safety include:

- § The overall security situation and assurances from the authorities about the safety of returnees;
- § Specific safety issues, such as the presence of mines and unexploded ordnance.

Aspects of legal safety include:

- § The adoption and implementation of amnesty laws to protect returnees from discrimination or punishment on the sole ground of having fled the country;
- § Legislation to ensure a returnee's citizenship status, plus access to documentation related to personal status;
- § Measures in place to ensure recovery of property or, if this is not possible, entitlement to adequate compensation.

Aspects of material safety include:

- § Access to means of survival and basic services, such as drinking water, health services, and education;
- § Income-generating opportunities.

UNHCR's responsibilities in relation to voluntary repatriation derive from its *Statute*. States are obliged to cooperate with the organization's voluntary repatriation activities under the provision on general cooperation in the *1951 Convention*. The degree of **UNHCR's involvement** in repatriation movements depends on the extent to which the core components outlined above have been satisfied. Thus UNHCR may:

- § Promote large-scale voluntary repatriation when the conditions are considered conducive to return in safety and with dignity;
- § Facilitate the voluntary repatriation of individuals upon the specific and fully informed request of refugees, even when conditions are not fully conducive for most refugees to return;
- § Provide assistance in the country of origin to those who have returned in an organized manner and to those who return spontaneously, if UNHCR has access to them.

UNHCR's **activities** in relation to voluntary repatriation include:

- § Dissemination of information about conditions in the country of origin and conducting interviews to ensure the men and women returning have made a free and informed decision to do so;
- § Concluding tripartite repatriation agreements with the country of origin and the country of asylum, setting out the modalities for repatriation, including the guarantee of admission for returnees;
- § Supplying, when necessary, documentation for returnees and facilitating transport to take them home;

- § Providing immediate material or financial support, as necessary, to enable return and reestablishment during the initial stage;
- § Monitoring returnees to ensure that they enjoy the full protection of their government;
- § Participating in efforts aimed at ensuring successful reintegration.

Most reintegration activities implemented by UNHCR and other humanitarian actors have been in the form of emergency relief provided during the initial stages of return. Few activities had any connection with longer-term development efforts to ensure the sustainability of return. UNHCR now works with other United Nations agencies and bilateral development agencies to create a smoother transition from repatriation, to reintegration, rehabilitation, and reconstruction (known as the “4Rs”). UNHCR takes the lead on repatriation activities, while other United Nations agencies and the World Bank are more closely involved from the beginning so their subsequent development tasks will be more successful. This strategy aims to incorporate the needs of returnees into national development plans so their economic opportunities will be increased in the medium and long term.

Sometimes an ongoing civil war can leave various provinces unscathed and under the control of a relatively effective local administration, even while other parts of the country remain in turmoil. Although repatriation to these calmer regions may seem desirable to countries of asylum and, perhaps, to some individual refugees, this option should be pursued with extreme caution. Stability in these areas is unlikely to be sustained for long if there is no improvement across the country. In addition, a sudden influx of returnees into a fragile, localized peace may, in fact, trigger instability. The return of large numbers of people to parts of the country other than their original place of residence may cause tensions with the local population and may result in more displacement.

7.3 Local integration

In local integration, the country of asylum offers refugees **permanent residence** with the possibility of eventual citizenship. Its potential as a durable solution is recognized in both the *1951 Convention* and UNHCR’s *Statute*. Although in certain countries naturalization of recognized refugees after a period of time is standard practice, many States have concerns about allowing refugees to stay indefinitely on their soil. They fear the impact on scarce resources, the risk of security problems, and potential antagonism towards refugees. They may also be concerned about controlling migration.

Yet voluntary repatriation cannot, by itself, answer all refugee problems. Local integration can be a permanent solution for many refugees; it can also provide some benefits to the host country:

- § Refugees may bring with them skills that can be of assistance to the country of asylum;
- § Their presence may attract resources from the international community that might not otherwise be available to the local population;
- § Ethnic, cultural, or linguistic links with the local community can increase the chances of successful local integration;
- § There are numerous situations, in industrialized countries but also in developing countries, in which large numbers of refugees have settled peacefully in the country of asylum and are able to support themselves.

Local integration is a **gradual process** that takes place on three levels:

- § **Legal:** refugees are granted a progressively wider range of rights, similar to those enjoyed by citizens, leading eventually to permanent residence and perhaps citizenship;
- § **Economic:** refugees become gradually less dependent on aid from the country of asylum or on humanitarian assistance and are increasingly self-reliant so that they can support themselves and contribute to the local economy;
- § **Social and cultural:** interaction between refugees and the local community allows refugees to participate in the social life of their new country without fear of discrimination or hostility.

Even when local integration is not being pursued as a durable solution, promoting self-reliance among refugees can help to achieve the other two durable solutions.

The commitment to local integration comes from the government of the country of asylum. UNHCR can facilitate the process and bring together a range of actors, including donor States and other United Nations agencies, to design and implement coordinated programmes to assist the refugees' integration.

7.4 Resettlement

Resettlement involves the **permanent movement of refugees to a third country**. Although comparatively small numbers of refugees benefit from resettlement, as acknowledged in *ExCom Conclusion No. 90 (LII) 2001*, it nevertheless serves three equally important **functions**.

Resettlement is:

- § A protection tool for individual refugees whose life, liberty, safety, health, or other fundamental rights are at risk in the country of asylum;
- § A durable solution for larger numbers or groups of refugees;
- § A mechanism for burden- and responsibility-sharing among States.

As a **protection tool**, precedence is given to resettling those individuals with specific and immediate protection problems, such as people at risk of *refoulement* or physical attack, including sexual violence. Individuals who have been tortured or who have a pressing need for medical or psychological care are also considered for resettlement if they are not in a country with adequate facilities to assist them. For the large numbers of refugees whose protection needs stem from the lack of a long-term solution in the country of asylum or origin, however, resettlement often takes lower priority and, given the limited number of places, may not always be achievable.

The traditional focus on the protection function of resettlement, which concentrates on the needs of an individual, has tended to mask its **strategic use as a durable solution**. Resettlement of groups or categories of people can be part of a comprehensive response to a refugee situation. For example, when voluntary repatriation or local integration is not an option for a particular ethnic group because of a continuing risk of persecution that applies only to them and not to their compatriots, collective resettlement of that group may be appropriate. Not only would resettlement address the long-term protection needs of the individuals concerned, it could also improve the integration prospects of those allowed to stay permanently in the country of asylum, thus facilitating a sustainable solution for all those in the refugee population.

By its very nature, resettlement is a form of **burden- and responsibility-sharing**, whereby the strain on the country of asylum is eased by other States offering permanent sanctuary for some of the refugee population. One of the goals of the *Agenda for Protection* is to increase the number of resettlement countries and to improve the ability of resettlement programmes to deal with unexpected refugee emergencies.

To qualify for resettlement, an individual must meet the **resettlement criteria** of both UNHCR and the potential country of destination. UNHCR's criteria reflect the function of resettlement as a protection tool. In order to improve its efficiency, UNHCR works with resettlement States to refine and harmonize resettlement criteria and processes. Given that resettlement is often highly prized by refugees, it is important that its **management** is transparent, to prevent corruption and to reduce the risk of resettlement becoming a pull-factor for new arrivals. UNHCR staff members with resettlement responsibilities thus have obligations as individuals to act accountably and professionally.

Summary

Durable solutions:

- § Bring to an end the cycle of displacement by giving the individual a permanent means of having a normal life;
- § Can take the form of voluntary repatriation, local integration or resettlement;
- § Are more likely to succeed when refugees have been given the opportunity to become self-reliant.

Voluntary repatriation:

- § Is the preferred solution for the majority of refugees;
- § Involves **voluntary return in safety and with dignity to the country of origin**;
- § Depends primarily on the efforts of the country of origin to create conditions of physical, legal, and material safety conducive to return, with restoration of full national protection as the end result;
- § Involves UNHCR in differing roles – promotion, facilitation, or assistance – depending on the extent to which the basic conditions for return have been satisfied;
- § Requires, for sustainability, the cooperation of UNHCR, the governments of the country of asylum and origin, and other United Nations agencies, to ensure a seamless transition between repatriation, reintegration, rehabilitation, and reconstruction.

Local integration:

- § Involves the **country of asylum providing permanent residence**;
- § Sees a gradual increase in the economic, legal, social, and cultural integration of the refugee into the local community;
- § Depends on the initiative of the country of asylum, with UNHCR bringing together the government and other actors, such as donor countries and United Nations agencies.

Resettlement:

- § Is the transfer of a refugee from the country of asylum to a third State willing to admit him/her on a permanent basis and resettle him/her there;
- § Is primarily a protection tool, with priority given to those with immediate and serious protection problems;
- § Also contributes to international burden- and responsibility-sharing in relation to refugees;
- § Can play a strategic role as a durable solution in resolving refugee situations, particularly through the use of group resettlement;
- § Must be administered by UNHCR and governments transparently and fairly, taking into account UNHCR's resettlement criteria.

Additional reading

Voluntary repatriation

ExCom Conclusion No. 18 (XXXI) 1980 and No. 40 (XXXVI) 1985 on Voluntary Repatriation.

Voluntary Repatriation (EC/GC/02/5), UNHCR, 2002.

UNHCR Handbook: Voluntary Repatriation: International Protection, UNHCR, 1996.

Local integration

Local Integration, (EC/GC/02/6), UNHCR, 2002.

Resettlement

ExCom Conclusion No. 90 (LII) 2001 on International Protection.

ExCom Conclusion No. 101 (LV) 2004 on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees.

Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities (EC/GC/02/7), UNHCR, 2002.

UNHCR Resettlement Handbook, UNHCR, 2002.

Exercises

Case L

This case study continues from Cases I and K. You may wish to re-read these cases in Chapters 5 and 6, but to recap briefly: ethnic and political unrest in Xanadu led to civil war and the exodus of about 250,000 people of Arcadian ethnicity to Elysium. Following intervention from UNHCR, the Elysium authorities eventually recognized these people as Convention refugees on a *prima facie* basis. Three years on from the mass influx, the refugees are still living in camps, although many of these have been relocated away from the border.

A year ago, following diplomatic efforts by the regional inter-governmental organization and the United Nations, the government of Xanadu and the ALF agreed a ceasefire. After six months of intense negotiations, a peace agreement was signed, which guaranteed a large degree of autonomy for the province of Arcadia plus general elections later in the year. Since then the ALF has disarmed, the violence has ceased, and a degree of normalcy has returned to the country. In particular, respect for the human rights of the Arcadian minority has improved dramatically.

The capital and surrounding areas were largely untouched by the fighting, which took place mainly in the province of Arcadia. Arcadia will need a great deal of reconstruction work, particularly on damaged government buildings, such as police stations and schools, and villages that were destroyed. However, a large amount of reconstruction aid has already been received and put to use, thus a reasonable number of essential public facilities, such as schools and hospitals, are now functioning.

The government of Xanadu has told UNHCR and the Elysium authorities that it is keen for the refugees to return home. It has outlined the basic elements of a tripartite voluntary repatriation agreement:

- i** Right of return of refugees to Xanadu, but it is up to the authorities there to decide where exactly they can settle;
- ii** Immunity from prosecution for those returning from Elysium;
- iii** Best efforts will be made to restore property to returning refugees, but compensation will not be paid if this is not possible;
- iv** The authorities will recognize the legal status of returnees;
- v** The phases of return will depend on the degree to which national protection is available, but after six months from the signing of the Agreement UNHCR will promote voluntary repatriation even if conditions of physical, legal, and material security are not yet fully satisfied;
- vi** As far as possible, refugees will be provided with accurate information about the situation in the country of origin, but consent to return is not dependent on the receipt of such information;
- vii** UNHCR will have unhindered access to refugees contemplating return, but access to returnees in Xanadu will be at the discretion of the government there.

- a You have been asked to consider whether these elements are acceptable to UNHCR. Identify the five elements that cause concern and explain why in each case.

The Xanadu government eventually considered UNHCR's concerns and a tripartite voluntary repatriation agreement was signed. As the situation has improved even further in Xanadu, UNHCR is promoting large-scale voluntary repatriation. Thus far, about 150,000 refugees have returned. Monitoring activities indicate that most returnees are reintegrating successfully, but that people in mixed marriages (Xanian/Arcadian), or the children of such couples, are facing discrimination and hostility.

As part of UNHCR's activities in promoting repatriation, you have been informing refugees in Elysium about the practicalities of return and the conditions they can expect. One family you have been talking to is that of Jules and Camille. A few years ago, you helped to put a stop to the sexual exploitation of Camille by Pedro, a locally-employed NGO worker. Since then, Camille has married an Elysian, Louis, whom she met while attending religious services in the camp organized by his local church. The Elysian authorities have allowed her to live with him rather than in the camp and they now have a young child. Jules is also living with Camille and Louis, who have managed to enrol him into the local school.

You have also recently been in contact with the family of Jules's friend, Cesar, to discuss the possibility of repatriation. Luckily, through the tracing activities of UNHCR and ICRC,

Cesar was reunited with his parents two years ago; they had ended up in a different camp in Elysium. Unfortunately, though, his mother was recently diagnosed with a rare form of leukaemia for which she is receiving only basic treatment, as the medical facilities in the camp and in Elysium, in general, are limited. From your enquiries, you have learned that the hospitals in Xanadu may also lack the expertise and resources necessary to deal with Cesar's mother's condition in the long term.

b Given the circumstances of Jules and Camille, which of the three durable solutions do you think would be most appropriate for them and why?

c Which durable solution would be best for Cesar's family and why?

Answer key to Chapter 7 exercises

Case L

a

- i** Refugees, in exercising their right of return to their country, should in principle have the possibility to return to their place of origin, or to a place of residence of their choice, subject to the restrictions as permitted by international human rights law, as indicated in ExCom Conclusion No 101 (LV) 2004 para. (b).
 - iii** Compensation should be available when restitution of property is not possible.
 - v** UNHCR will not promote voluntary repatriation until the core elements for such return have been met.
 - vi** Refugees should always have access to accurate information before making a decision on whether to return, especially if this is pursuant to an organized programme promoted by UNHCR.
 - vii** UNHCR has a mandate for monitoring returnees to ensure that they are being treated in accordance with their rights.
 - ii** Returning refugees should be granted immunity from prosecution for having left or remaining outside the country of origin; however, amnesties should not be extended to returning refugees charged with, *inter alia*, a serious violation of international humanitarian law, or genocide, or a crime against humanity, or a crime constituting a serious violation of human rights, or a serious common crime involving death or serious bodily harm, committed prior to or during exile, as stated in ExCom Conclusion No 101 (LV) 2004 para(g).
 - iv** ExCom Conclusion No 101 (LV) 2004 para. (l) recognizes the importance of providing under national law for the recognition of the civil status of returning refugees and changes thereto, including as a result of births, deaths, adoptions, marriage and divorce, as well as of documentation or registration proving that status, issued by the competent bodies in the county of asylum or elsewhere, taking into account the special situation of returning refugee women who may not have documentation proving their civil status or who may face difficulties securing recognition of documentation issued by the authorities of the country of asylum.
- b** Local integration. Camille has married a local man with whom she has a child. Both she and Jules have already integrated to a significant extent into the local community by living in Louis's village and by Jules attending the local school. If they repatriate, it may be difficult for her husband, who is not a citizen of Xanadu, to return with her, so there is a risk of the family being split up. In these circumstances, it is unlikely that Camille would volunteer to repatriate, and as Jules has been under her guardianship for so long, it would seem in his best interests to stay with her. In any case, as a child, he would not be able to repatriate on his own without suitable care arrangements for him in place back in Xanadu.

- c** Given that Cesar’s parents are from a mixed marriage, they may face difficulties reintegrating in Xanadu. Voluntary repatriation will not be suitable for them, as there is a risk that return for them will not be to conditions of legal, physical, and material safety. Local integration could be pursued instead, but Cesar’s mother’s medical condition suggests that this will not address her serious illness. Instead, the family could apply for resettlement on the grounds that she cannot obtain adequate medical treatment in the country of asylum.

Glossary

A

Agenda for Protection

A programme of action to improve the protection of refugees and asylum-seekers around the world, agreed by UNHCR and States as part of the Global Consultations process, endorsed by the Executive Committee in October 2002, and welcomed by the General Assembly.

Amnesty

A legal guarantee that exempts a person or group of people from liability for criminal or political offences. An amnesty can help promote the voluntary repatriation of refugees when it is respected and properly applied.

Assistance

Aid provided to address the physical and material needs of persons of concern. This may include food items, medical supplies, clothing, shelter, seeds and tools, as well as the provision of infrastructure, such as schools and roads. “Humanitarian assistance” refers to assistance provided by humanitarian organizations for humanitarian purposes (i.e., non-political, non-commercial, and non-military purposes). In UNHCR practice, assistance supports and complements the achievement of protection objectives.

Asylum

The grant by a State of protection on its territory to people from another State who are fleeing persecution or serious danger. Asylum encompasses a variety of elements, including non-refoulement, permission to remain on the territory of the asylum country, and humane standards of treatment.

Asylum-seeker

An asylum-seeker is an individual who is seeking international protection whether as an individual or on a group basis. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.

C

Cartagena Declaration on Refugees

A Declaration adopted at a colloquium of Central American experts in 1984. The Declaration goes beyond the 1951 Convention by including in its refugee definition “... persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”. While the Cartagena Declaration is not a treaty, its provisions are respected across Central America. Its refugee definition has been incorporated in the legislation of all but one of the Central American countries and in a number of Latin American countries.

Cessation clauses

Legal provisions that set out the conditions in which refugee status comes to an end because it is no longer needed or justified. Cessation clauses are found in Article 1(C) of the 1951 Convention, and in Article I (4) of the 1969 OAU Refugee Convention.

Children

Persons who are below the legal age of majority and are therefore not legally independent. This term includes adolescents. Under the Convention on the Rights of the Child (CRC), a “child” is a person who is below the age of eighteen, unless the applicable law sets a lower age. The CRC equates “child” with “minor”.

Citizen

See National

Complementary protection

Formal permission, under national law or practice, to reside in a country extended by that country to persons who are in need of international protection even though they do not qualify for 1951 Convention refugee status.

Convention grounds

The refugee definition in the 1951 Convention requires that the fear of persecution be linked to one or more of the following five grounds: race, religion, nationality, membership of a particular social group, or political opinion.

Convention on the Reduction of Statelessness

A treaty that provides for the acquisition of nationality by those who would otherwise be stateless and who have an appropriate link with the State through birth on the territory or through descent from a national. The Convention also provides for the retention of nationality by those who would become stateless if they were to lose the State’s nationality. UNHCR has been mandated with specific functions under Article 11 of this Convention.

Convention on the Rights of the Child (CRC)

Adopted in 1989, this treaty sets comprehensive standards for the protection of the rights of children. It is underpinned by four guiding principles, one of which is non-discrimination in the application of its standards to all children. Therefore, refugee children come fully within its scope. The other guiding principles are the “best interests” of the child, the right to life, survival and development, and the right to participation.

Convention Plus

An initiative launched by the High Commissioner to improve refugee protection worldwide and to facilitate the resolution of refugee problems through multilateral special agreements on such issues as secondary movement, resettlement, and the link between assistance and development.

Convention relating to the Status of Refugees (1951 Convention)

This treaty establishes the most widely applicable framework for the protection of refugees. Article 1 of the Convention limits its scope to “events occurring before 1 January 1951” but this restriction was removed by the 1967 Protocol relating to the Status of Refugees. As of October 2004, there are 145 States Parties to the 1951 Convention and/or the 1967 Protocol.

Convention relating to the Status of Stateless Persons

A Convention that provides the definition of a stateless person and establishes a framework for the rights to be enjoyed by stateless persons in countries where they are lawfully resident.

Convention refugees

Persons recognized as refugees by States under the eligibility criteria provided for in

Article 1 of the 1951 Convention and entitled to the enjoyment of a variety of rights under that treaty.

Customary international law

International legal norms that derive their authority from the constant and consistent practice of States, rather than from formal expression in a treaty or other legal text. In order for State practice to contribute to the formation of customary international law, that practice must be conducted with a sense of legal obligation (*opinio juris*).

D

Detention

Restriction on freedom of movement, usually by enforced confinement.

Durable solutions

Any means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to live normal lives. The three durable solutions are voluntary repatriation, local integration, and resettlement.

Duties of refugees

The obligations refugees must meet in the country of asylum. Under Article 2 of the 1951 Convention, refugees must conform to the laws and regulations of any country in which they find themselves. In particular, refugees must refrain from any acts that jeopardize the safety, security, or public order of communities or countries of asylum.

E

Exclusion clauses

Legal provisions that deny the benefits of international protection to persons who would otherwise satisfy the criteria for refugee status. In the 1951 Convention, the

exclusion clauses are found in Articles 1D, 1E and 1F. These clauses apply to the following categories: persons who are receiving protection or assistance from United Nations agencies other than UNHCR; persons who possess the rights and obligations attached to the possession of nationality of their country of residence; and persons in respect of whom there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime, or acts contrary to the purposes and principles of the United Nations.

Executive Committee of the High Commissioner's Programme (ExCom)

A Committee charged with advising the High Commissioner on the exercise of his/her functions. ExCom is composed of representatives of 64 States with a demonstrated interest in refugee issues. Other States may attend, along with NGOs, as observers.

Executive Committee Conclusions (ExCom) on International Protection

Formal texts that embody the results of ExCom's annual deliberations on questions of international protection. ExCom Conclusions contribute to the elaboration of principles and standards for the protection of refugees and other persons of concern to UNHCR.

Expulsion

Removal of a lawful resident from the territory of a State by government authorities. Under Article 32 of the 1951 Convention, national security and public order are the only permissible grounds for the expulsion of a refugee. The procedures by which a decision for expulsion is reached should be fair and just, and the refugee should be allowed a reasonable time to seek admission into another country.

F**Family reunification**

Any process by which close family members are brought together, thus respecting the family as the natural and fundamental group unit of society. It has a special application in the context of durable solutions in general, and resettlement in particular.

G**Gender-related persecution**

Persecution that targets or disproportionately affects a particular gender. Under certain factual circumstances, gender-related persecution may come within the refugee definition.

Global Consultations on International Protection

A process launched by UNHCR in late 2000 to reinvigorate the refugee protection framework by reaffirming its fundamental components, clarifying disputed notions, and developing further operational approaches to address contemporary challenges. UNHCR, States, international organizations, NGOs and refugees were all involved. Outcomes have included the 2001 Ministerial Declaration and the Agenda for Protection.

Group-based protection responses

Approaches whereby the protection and assistance needs of refugees are met without previously determining their status on an individual basis. Appropriate where asylum-seekers arrive *en masse* and individualized procedures are neither feasible nor necessary (the cause of flight often being self-evident). The two main approaches are recognition of refugee status on a *prima facie* basis and temporary protection.

Guiding Principles on Internal Displacement

A series of principles that articulate standards for protection, assistance, and solutions for internally displaced persons. The Guiding Principles were published by the United Nations Secretary-General's Special Representative on Internally Displaced Persons in 1998. They reflect human rights law, humanitarian law, and, by analogy, refugee law. The principles provide guidance to States as well as intergovernmental and non-governmental organizations that deal with issues of internal displacement.

H**Human rights law**

See International human rights law.

I**Intergovernmental organization (IGO)**

An organization made up of States. Examples include the United Nations Organization, the African Union (AU), the Organization of American States (OAS), the European Union (EU), and the Commonwealth of Independent States (CIS).

Internal displacement

Involuntary movement of people inside their own country. This movement may be due to a variety of causes, including natural or human-made disasters, armed conflict, or situations of generalized violence.

Internally displaced persons (IDPs)

People who are forced or obliged to flee from their homes, "... in particular as a result of or in order to avoid the effects of armed conflicts, situations of generalized violence, violations of human rights or natural or human-made disasters, and who

have not crossed an internationally recognized State border” (according to the *Guiding Principles on Internal Displacement*).

Internal flight or relocation alternative

A factual determination that a person fleeing persecution in one part of his or her country of origin could find protection in another part of the same country. Internal relocation will only be relevant to determining refugee status in certain limited cases.

International human rights law

The body of international instruments and customary international law that recognizes and protects human rights. The most prominent instruments make up the International Bill of Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Social Rights). Refugee and human rights law complement each other.

International humanitarian law

The body of customary international law and international instruments that governs situations of international or non-international armed conflict. The core instruments are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. Virtually every country is a party to the Geneva Conventions.

International refugee law

The body of customary international law and international instruments that establishes standards for refugee protection. The cornerstone of refugee law is the 1951 Convention relating to the Status of Refugees.

International protection

International protection can be defined as all actions aimed at ensuring the equal access to and enjoyment of the rights of women, men, girls and boys of concern to UNHCR, in accordance with the relevant bodies of law (including international humanitarian, human rights and refugee law).

It includes interventions by States or UNHCR on behalf of asylum-seekers and refugees to ensure that their rights, security, and welfare are recognized and safeguarded in accordance with international standards. Such interventions include: ensuring respect for the principle of *non-refoulement*; admission to safety; access to fair procedures for the determination of refugee status; humane standards of treatment; and the implementation of durable solutions. UNHCR is the only United Nations agency with a mandate for the protection of refugees at the global level.

L

Local integration

A durable solution to the plight of refugees that involves their permanent settlement in the country in which they sought asylum.

M

Mandate refugees

Refugees of concern to UNHCR, that is, persons who are determined to be refugees by UNHCR acting under the authority of its Statute and relevant resolutions of the United Nations General Assembly and the Economic and Social Council (ECOSOC), in conjunction with the 1951 Convention. Mandate refugee status is especially significant in States that are not Parties to the 1951 Convention or its 1967 Protocol.

Migrants

Persons who leave their countries, including refugees; however unlike other migrants, refugees do not leave out of choice. Migrants, such as those who move for economic or family reasons, who do not fall within the criteria for refugee status are not entitled to benefit from international protection.

N

National

A person recognized as having a legal bond with a country as provided for under law. Some countries use the word “nationality” to refer to this legal bond, while other countries use the word “citizenship”.

Nationality

The status of being a national of a particular country.

Non-governmental organization (NGO)

An organization that is functionally independent of, and does not represent, a country. This term is normally applied to organizations devoted to humanitarian and human rights causes, many of which implement their refugee-related programmes in partnership with UNHCR.

Non-refoulement (Principle of)

A core principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened on account of a Convention ground. The principle of *non-refoulement* is a part of customary international law and is therefore binding on all States, whether or not they are Parties to the 1951 Convention.

Non-State agents of persecution

People or organizations responsible for acts or threats of persecution who are not under the control of the government. Their activities may qualify as persecution under the 1951 Convention if they are facilitated, encouraged, or tolerated by the government, or if the government is unable or unwilling to provide effective protection against them.

O

OAU (Organization of African Unity) Convention Governing the Specific Aspects of Refugee Problems in Africa

The regional complement to the 1951 Convention, which provides for a broader refugee definition. Adopted in 1969, the OAU Refugee Convention provides that the term “refugee” also “applies to those fleeing from external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of the country of origin”. The OAU is now called the African Union.

P

Particular social group (membership of a ...)

One of five possible grounds on the basis of which persecution may be established under the 1951 Convention. A particular social group is a group of persons who either share a common characteristic (other than the risk of persecution) or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of fundamental rights.

Persecution

The core concept of persecution was deliberately not defined in the 1951 Convention, suggesting that the drafters intended it to be interpreted in a

sufficiently flexible manner so as to encompass ever-changing forms of persecution. It is understood to comprise human rights abuses or other serious harm, often, but not always, with a systematic or repetitive element.

Persons of concern to UNHCR

A generic term used to describe all persons whose protection and assistance needs are of interest to UNHCR. These include refugees under the 1951 Convention and regional instruments, returnees, stateless persons and, in some situations, internally displaced persons and persons threatened with displacement. UNHCR's authority to act on behalf of persons of concern other than refugees is based on General Assembly and ECOSOC resolutions.

Prima facie refugees

Persons recognized as refugees, by a State or UNHCR, on the basis of objective criteria related to the circumstances in their country of origin, which justify a presumption that they meet the criteria of the applicable refugee definition.

See also Group-based protection responses.

R

Refoulement

The removal of a person to a territory where he/she would be at risk of being persecuted, or of being moved to another territory where he/she would face persecution. Under international refugee law and customary international law, *refoulement* is permitted only in exceptional circumstances.

Refugee

A person who meets the eligibility criteria under the applicable refugee definition, as provided for in international or regional

refugee instruments, under UNHCR's mandate, and/or in national legislation.

Refugee law

See International refugee law

Refugee status determination procedures

Legal and administrative procedures undertaken by States and/or UNHCR to determine whether an individual should be recognized as a refugee in accordance with national and international law.

Refugees *sur place*

Persons who were not refugees when they left their countries of origin but who became refugees at a later date, owing to intervening events. Refugees *sur place* may owe their fear of persecution to a change in the country of origin, such as a *coup d'état*, or to activities undertaken by them in the country of asylum.

Regional refugee instruments

International legal documents relating to refugees that are adopted by States or intergovernmental organizations within a geographical region or sub-region. Such instruments normally complement the 1951 Convention and reflect the particular character of refugee issues within the specific geographical area. Notable examples of regional instruments are the OAU Refugee Convention and the Cartagena Declaration.

Reintegration

A process which enables returnees to regain their physical, social, legal and material security needed to maintain life, livelihood and dignity and which eventually leads to the disappearance of any observable distinctions vis-à-vis their compatriots.

Rejection at the border

In the refugee context, the refusal to allow an asylum-seeker entry into a prospective country of asylum. Rejection at the border may result in a violation of the principle of *non-refoulement*.

Resettlement

The transfer of refugees from the country in which they have sought asylum to another State that has agreed to admit them. The refugees will usually be granted asylum or some other form of long-term resident rights and, in many cases, will have the opportunity to become naturalized citizens. For this reason, resettlement is a durable solution as well as a tool for the protection of refugees. It is also a practical example of international burden- and responsibility-sharing.

Resettlement country

A country that offers opportunities for the permanent settlement of refugees. This would be a country other than the country of origin or the country in which refugee status was first recognized.

S

Separated children

Children being looked after by adults in the absence of their parents or usual adult carer.

Sexual and gender-based violence (SGBV)

A particular form of human rights violation that perpetuates stereotypes about the differing roles of men and women in society.

Self-reliance

In the refugee context, the ability of an asylum-seeker or refugee to provide for

his/her own living needs and those of his/her dependents.

Social group

See Particular social group

Standards of treatment

Standards derived from the 1951 Refugee Convention and other international instruments that set the parameters for the treatment of refugees. The 1951 Convention provides for various standards of treatment, depending on the particular rights in question. These are: treatment not less favourable than that generally accorded to aliens in similar circumstances; the most favourable treatment accorded to nationals of a foreign country in the same circumstances; the same treatment as is granted to nationals; and treatment as favourable as possible.

Stateless person

A person who is not considered a national by any State under the operation of its law.

Statelessness

The condition of not being considered as a national by any State under the operation of its law.

Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR Statute)

The document, adopted by the General Assembly in 1950, that first established UNHCR's mandate, functions and structure, and defines a refugee for the purposes of UNHCR's work. Later, UNHCR's responsibilities were extended by General Assembly and ECOSOC resolutions, in conjunction with the 1951 Convention.

T

Temporary protection

An arrangement or device developed by States to offer protection of a temporary nature to persons arriving *en masse* from situations of conflict or generalized violence, without defining the status of those concerned. Temporary protection has been mostly used in industrialized States.

See Group-based protection responses.

Tracing

In the refugee context, efforts to ascertain the whereabouts of family members or close associates of persons of concern to UNHCR. Tracing may be conducted for the purposes of family reunification, in the context of durable solutions, or simply to facilitate contacts between family members. The International Committee of the Red Cross (ICRC) runs a Central Tracing Agency that has special competence in this area.

Treaty

A formal agreement, principally among States, that creates binding legal obligations among its parties. Treaties are one of the main sources of international law.

U

Unaccompanied children

Children who are not in the company of parents or another adult carer.

UNHCR

United Nations High Commissioner for Refugees

UNHCR mandate

The role and functions of UNHCR as set forth in its Statute and subsequent

resolutions of the United Nations General Assembly and ECOSOC, in conjunction with the 1951 Convention.

V

Voluntary repatriation

Return to the country of origin based on the refugees' free and informed decision.

Voluntary repatriation is one of the three durable solutions and may be organized (i.e., when it takes place under the auspices of the concerned governments and UNHCR), or spontaneous (i.e., the refugees return by their own means with little involvement of UNHCR and governments).

W

Well-founded fear of persecution

One of the elements of the 1951 Convention definition of a refugee. This phrase contains a subjective element (fear of persecution) as well as an objective element (the fear must have an objectively justifiable basis). According to the 1951 Convention, persecution must be linked to one or more of the five specified grounds: race, religion, nationality, membership of a particular social group, and political opinion.