



# NATIONAL COUNCIL OF CHURCHES IN AUSTRALIA

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31 October 2005

Senate Legal and Constitutional References Committee  
C/- Mr Owen Walsh

By Email: [LegCon.Sen@aph.gov.au](mailto:LegCon.Sen@aph.gov.au)

Dear Committee,

***Inquiry into the Administration and Operation of the Migration Act 1958 – answers to questions on notice***

Thank you for the recent questions on notice from Senator Ludwig following our oral submission to the Committee on 27 September 2005. The National Council of Churches in Australia ('NCCA') sets out its response below.

*Question 1. The Justice for Asylum Seekers network has developed an alternative system for the management of asylum seekers in Australia, which the network has called the Reception and Transitional Processing (RTP) System. The RTP system is detailed in submission 163 to the inquiry (a copy of which is available on the committee's website)...*

***Do you have a view on the model or system?***

The NCCA fully endorses the RTP system (also known as 'The Better Way') and has been involved in its development and promotion.

***How does it compare to or fit with the Complementary Protection model developed by the Refugee Council, Amnesty International and the National Council of Churches?***

The RTP system and the Complementary Protection Model are not in opposition or contradictory. Each aims to achieve very different purposes.

The RTP system is an alternative to the current system of mandatory, indefinite and non-judicially reviewable *detention* that proposes an alternate mix of community management, hostel accommodation and high security detention.

The Complementary Protection Model offers an alternative to using the Minister's discretionary powers to process non-refugee *protection applications* (such as Australia's protection obligations under the Convention Against Torture). In essence, the Complementary Protection Model proposes shifting the Minister's powers to decide on whether or not a person meets Australia's international non-refugee protection obligations from the Minister (where it is a last instance decision) to the

Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), where it would be a first instance decision. As submitted previously, this would increase transparency and accountability in meeting Australia's international non-refugee protection obligations, decrease processing times and thereby decrease processing and detention costs.

Currently, protection visa applicants with grounds for complementary protection (as opposed to refugee protection) must first apply as a refugee to the DIMIA, and be refused, then appeal to the RRT, and be refused, before they can appeal to the Minister on the relevant complementary protection grounds.

The question of how these models fit together can also be explained by looking at the chart on page 8 of the JAS document, "*Alternative approaches to asylum seekers: Reception and Transitional Processing System*", June 2002. The Complementary Protection model relates **only** to the box on the top left hand side of the page, entitled "*Determination of asylum claim. DIMIA, RRT, Courts and Ministerial Discretion*"

***Which model or system would you prefer?***

As above, the NCCA supports both and sees no conflict between them.

*Question 2. The Committee understands that there is a proposal before the United Nations High Commissioner for Refugees Executive in Geneva that governments adopt a UNHCR complementary protection model...*

***Are you able to advise the committee how your preferred model or system fits with or reflects the proposed UNHCR model?***

On 7 October 2005, the Executive Committee of the UNHCR ('ExCom'), which is comprised of over 50 member states including Australia, adopted by consensus the *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection* ('the Complimentary Conclusion'). The text of the Conclusion is Annexure 1 to this letter and can also be found at: <http://www.unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&id=43576e292#1>. Australia was present during the drafting process and adoption of the Conclusion.

The NCCA believes that the *Complementary Protection Model* (developed by the NCCA, the Refugee Council and Amnesty International) fits perfectly with the Conclusion and reflects the principles set out in the Conclusion. In particular, the *Complementary Protection Model* would address one of the key problems with the current system in Australia - the fact that it is not a first instance decision by the DIMIA along with refugee status. This issues is addressed in paragraph q) of the Conclusion where it says that the Executive Committee:

*q) Encourages States to consider whether it may be appropriate to establish a **comprehensive procedure before a central expert authority making a single decision** which allows the assessment of refugee status followed by other international protection needs, as a means of assessing all international protection needs without undermining refugee protection and while recognizing the need for a flexible approach to the procedures applied; (emphasis added)*

The *Complementary Protection Model* also recommends that the Minister retain discretionary powers to grant visas for reasons of national interest or for humanitarian reasons, which would allow for a clear distinction between such cases and cases relating to international protection needs. This is referred to in paragraph (j) of the Conclusion:

*j) Realizes that States may decide to allow prolonged stay for compassionate or practical reasons; and recognizes that such cases must be clearly distinguished from cases where there are international protection needs;*

There is a growing body of research regarding complimentary protection, much of which is available on the UNHCR's website: [www.unhcr.ch](http://www.unhcr.ch). So that the Committee is aware of recent developments in this area of relevance to Australia, we have attached 3 key documents:

1. *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, June 2005 Legal and Protection Policy Research Series, Department of International Protection, UNHCR;
2. *UNHCR Discussion Paper on Complimentary Protection*, by Jane McAdam, 2005; and
3. *Complementary Protection and Judicial Review (supplementary paper)* May 2005 by the Refugee Council.

We are happy to address any further questions which the Committee may have.

Yours sincerely,



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## Annexure 1

### Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection

(No. 103 (LVI) - 2005)

The Executive Committee,

*Reaffirming* that the 1951 Convention relating to the Status of Refugees together with its 1967 Protocol continue to serve as the cornerstone of the international refugee protection regime; and *noting in this regard* the fundamental importance of their full application by State Parties, including that of the fundamental principle of *non-refoulement*,

*Recognizing* that, in different contexts, there may be a need for international protection in cases not addressed by the 1951 Convention and its 1967 Protocol; and *recalling in this regard* paragraph (I) of its Conclusion No. 74 (XLV),

*Reaffirming* the principle that all human beings shall enjoy human rights and fundamental freedoms without discrimination, including the right to seek and enjoy asylum,

*Underlining* the value of regional instruments, as and where applicable, including notably the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, as well as the 1984 Cartagena Declaration on Refugees, which include among refugees persons who cannot return to their countries due to indiscriminate threats resulting from situations such as generalized violence, armed conflict or events seriously disturbing public order, and the asylum legislation adopted by the European Union, which recognizes certain international protection needs beyond the 1951 Convention and its 1967 Protocol,

*Recalling* that international and regional instruments to address the problem of statelessness, such as the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, where applicable, are important tools for State Parties to use, in particular to avoid and resolve situations of statelessness and, where necessary, to further the protection of stateless persons,

*Acknowledging* that in many countries a number of administrative or legislative mechanisms are in place for regularizing, on a variety of grounds, the stay of persons, including those who may not be eligible for refugee protection but who may be in need of international protection,

*Noting* the value of establishing general principles upon which complementary forms of protection for those in need of international protection may be based, on the persons who might benefit from it, and on the compatibility of these forms of protection with the 1951 Convention and its 1967 Protocol and other relevant international and regional instruments,

- a) *Urges* State Parties to implement their obligations under the 1951 Convention and/or its 1967 Protocol fully and effectively in accordance with the object and purpose of these instruments;

- b) *Calls upon* State Parties to interpret the criteria for refugee status in the 1951 Convention and/or its 1967 Protocol in such a manner that all persons who fulfil these criteria are duly recognized and protected under those instruments, rather than being accorded a complementary form of protection;
- c) *Recognizes* that refugee law is a dynamic body of law based on the obligations of State Parties to the 1951 Convention and its 1967 Protocol and, where applicable, on regional refugee protection instruments, and which is informed by the object and purpose of these instruments and by developments in related areas of international law, such as human rights and international humanitarian law bearing directly on refugee protection;
- d) *Reiterates* the need to ensure that the integrity of the asylum system is not abused by the extension of refugee protection to those who are not entitled to it and to apply scrupulously the exclusion clauses stipulated in Article 1F of the 1951 Convention and in other relevant international instruments;
- e) *Calls on* the State Parties to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness to apply these instruments in good faith, bearing in mind their protection objectives; and *requests* UNHCR actively to promote accession to these instruments;
- f) *Calls on* States to make maximum use of existing protection instruments when addressing international protection needs; and *encourages* States that have not already done so to consider accession to the 1951 Convention and the 1967 Protocol and to relevant, applicable regional instruments and/or to consider lifting existing limitations or withdrawing reservations in order to ensure the widest possible application of the protection principles they contain;
- g) *Calls upon* all State Parties, as applicable, to adopt the necessary national legislation or procedures to give effect to regional refugee instruments;
- h) *Acknowledges* that complementary forms of protection provided by States to ensure that persons in need of international protection actually receive it are a positive way of responding pragmatically to certain international protection needs;
- i) *Encourages* the use of complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol;
- j) *Realizes* that States may decide to allow prolonged stay for compassionate or practical reasons; and *recognizes* that such cases must be clearly distinguished from cases where there are international protection needs;
- k) *Affirms* that measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing international refugee protection regime;
- l) *Notes* that temporary protection, without formally according refugee status, as a specific provisional protection response to situations of mass influx providing immediate emergency

protection from *refoulement*, should be clearly distinguished from other forms of international protection;

- m) *Affirms* that relevant international treaty obligations, where applicable, prohibiting *refoulement* represent important protection tools to address the protection needs of persons who are outside their country of origin and who may be of concern to UNHCR but who may not fulfil the refugee definition under the 1951 Convention and/or its 1967 Protocol; and *calls upon* States to respect the fundamental principle of *non-refoulement*;
- n) *Encourages* States, in granting complementary forms of protection to those persons in need of it, to provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of such persons without discrimination, taking into account the relevant international instruments and giving due regard to the best interest of the child and family unity principles;
- o) *Recommends* that, where it is appropriate to consider the ending of complementary forms of protection, States adopt criteria which are objective and clearly and publicly enunciated; and *notes* that the doctrine and procedural standards developed in relation to the cessation clauses of Article 1C of the 1951 Convention may offer helpful guidance in this regard;
- p) *Notes* that States may choose to consult with UNHCR, if appropriate, in view of its particular expertise and mandate, when they are considering granting or ending a form of complementary protection to persons who fall within the competence of the Office;
- q) *Encourages* States to consider whether it may be appropriate to establish a comprehensive procedure before a central expert authority making a single decision which allows the assessment of refugee status followed by other international protection needs, as a means of assessing all international protection needs without undermining refugee protection and while recognizing the need for a flexible approach to the procedures applied;
- r) *Notes* that, where applicable, in considering a comprehensive procedure, the applicable procedure should be fair and efficient;
- s) *Underlines* the importance of applying and developing the international refugee protection system in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.



**UNHCR**

**United Nations High Commissioner for Refugees**  
Haut Commissariat des Nations Unies pour les réfugiés

**LEGAL AND PROTECTION POLICY**

**RESEARCH SERIES**

**Protection Mechanisms Outside of the 1951  
Convention (“Complementary Protection”)**

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**DEPARTMENT OF INTERNATIONAL PROTECTION**

**PPLA/2005/02**

**June 2005**

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# Executive Summary

## I. INTRODUCTION

During the recent Global Consultations aimed at revitalising refugee protection worldwide, participating countries noted the importance of various mechanisms used by states to regularise the stay of individuals who, despite not falling within the scope of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, nevertheless cannot be returned to their country of origin for various reasons. Concern about divergent state practice resulted in the adoption of Objective 3 of Goal 1 of the Agenda for Protection:

Within the framework of its mandate, ExCom to work on a Conclusion containing guidance on general principles upon which complementary forms of protection should be based, on the persons who might benefit from it, and on the compatibility of these protections with the 1951 Convention and other relevant international and regional instrument.

States to consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.

This study explores the variety of ways in which states have provided protection from removal for individuals falling outside the scope of the 1951 Convention and/or its 1967 Protocol and the international legal framework behind this. The aim is to inform UNHCR's recommendations on the principles to be articulated in the proposed ExCom conclusion.

From the outset, the study recognises that 'complementary protection' is not a term of art defined in any international instrument. Rather this phrase has emerged over the last decade or so as a description of the increasingly-apparent phenomenon in industrialised countries of relief from removal/deportation being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. It is essentially a generic phrase, with the actual terminology used by states to describe such forms of protection in their territory, including any attached immigration status, varying enormously: 'subsidiary protection', 'humanitarian protection' and 'temporary asylum' to name but a few examples.

What all these initiatives have in common is their complementary relationship with the protection regime established for refugees under the 1951 Convention/1967 Protocol. They are intended to provide protection for persons who cannot benefit from the latter instruments even though they, like Convention refugees, may have sound reasons for not wishing to return to their home country. Despite this common element, the actual criteria adopted by states to delineate the scope of complementary protection in their jurisdictions varies significantly, influenced it would seem by:

- the particular interpretation of the refugee definition in the 1951 Convention adopted by a country;

- appreciation of the protection needs of refugees who fall within UNHCR's mandate even though they are not refugees in the sense of the 1951 Convention;
- prohibitions under customary international or applicable treaty law (other than those found in refugee law) on the return of persons to their countries of origin;
- moral/political considerations in relation to people with a genuine humanitarian need, including those reluctant to repatriate because of natural disaster in their country of origin, health problems or age-related vulnerability;
- the practical need to deal with individuals who cannot be removed for logistical reasons such as lack of transport connections or proof of nationality.

Given that this study has been commissioned by UNHCR, it focuses on how complementary protection can assist in bridging the gap between the mandate given to UNHCR and the obligations binding on states with regard to the protection of refugees. UNHCR's mandate for refugees has been developed through successive General Assembly Resolutions which have elaborated on the criteria set out in its founding Statute. Although the language of these resolutions has not been very consistent, helpful guidance can be found in UNHCR's use of the term:

“refugee” in the broader sense, to denote persons outside their countries who are in need of international protection because of a serious threat to their life, liberty or security of person in their country of origin as a result of persecution or armed conflict, or serious public disorder

Before moving on to the substance of the study, it is important to clarify some of the terminology used throughout the paper. As noted above, the phrase ‘complementary protection’ is essentially associated with practices that have evolved in industrialised states to provide protection from return for individuals considered outside the scope of the 1951 Convention. However, other states have chosen to provide protection from removal for persons other than refugees covered by the 1951 Convention as currently interpreted through the application of a regional refugee definition. Therefore, the term ‘non-Convention protection’ is used in this study to encompass both of these methods (i.e. complementary protection and regional refugee definitions) for delivering protection from return for individuals who may fall outside of the 1951 Convention. In doing so, it is important to note that the regional refugee definitions in question actually cover Convention refugees, as well as individuals who may fail to satisfy the 1951 Convention refugee criteria. Hence, in relation to these regional refugee definitions, non-Convention protection only refers to those eligibility criteria which differ from the 1951 Convention's refugee definition.

Throughout this paper, the phrase ‘non-Convention refugee’ is intended to denote individuals who may not satisfy the 1951 Convention refugee definition as currently interpreted but who nevertheless fall within UNHCR's mandate – in other words, the main subjects of this study. Accordingly, depending on their location, such persons may benefit in practice from either complementary protection or protection under the African or Latin American regional refugee definitions. By contrast, not all beneficiaries of complementary protection regimes will be non-Convention refugees.

## II. LEGAL FRAMEWORK UNDER INTERNATIONAL LAW

In determining which provisions of international law have a bearing on the position of non-Convention refugees, a preliminary issue is clarifying the extent of the protection gap between the 1951 Convention regime and the range of persons in need of international protection. This requires a proper understanding of the scope of the refugee definition in the 1951 Convention. Although no consensus has yet arisen amongst states that the Convention's eligibility criteria have evolved in line with UNHCR's mandate, this does not rule out a more progressive interpretation in the future. In recent years, however, the trend has rather been towards a more conservative interpretation of the Convention's refugee definition, resulting in a significant number of Convention refugees actually being dealt with under complementary protection regimes.

A particular case in point is the position of 'war refugees'. For a variety of reasons, some states mistakenly consider such individuals to be incapable of satisfying the 1951 Convention refugee definition. Nevertheless, it is possible to envisage circumstances in which UNHCR's mandate would be triggered but a state may be justified in concluding that the 1951 Convention is inapplicable. A pertinent illustration is the position of civilians who are the unintended victims of cross-fire or bombing campaigns. The indiscriminate nature of the physical threat would place such individuals outside of the 1951 Convention refugee definition. However, the clear danger to life and limb from a situation of armed conflict may well bring such persons within the scope of UNHCR's mandate for refugees.

The elaboration of UNHCR's mandate for refugees has not yet been accompanied by a concurrent development in the interpretation of the 1951 Convention or the customary law prohibition on *refoulement* of refugees, or by the creation of a correspondent treaty obligation on a universal (rather than regional) level. Nevertheless, in various ExCom conclusions the international community has stressed its willingness to support UNHCR's functions in relation to refugees falling within the organisation's competence. Moreover, various provisions of international human rights law may offer some non-Convention refugees protection from *refoulement*. In particular, the prohibitions on torture and related ill-treatment stand out. International human rights law also contains principles which are relevant to the standard of treatment non-Convention refugees should receive in a country of asylum (for example, core civil and political rights), as well as some guidance on procedural standards for determining whether they are entitled to protection from return in the first place.

In terms of regional refugee instruments, the 1969 OAU Convention and 1984 Cartagena Declaration provide, in principle, a framework in countries applying them for protection of all refugees under UNHCR's mandate. The European Union, on the other hand, has taken a different approach in its Qualification Directive of 29 April 2004. The Directive sets out a system of 'subsidiary protection' for certain individuals who do not satisfy the 1951 Convention refugee definition, rather than bringing such persons into an elaborated refugee definition.

## III. OVERVIEW OF STATE PRACTICE

In order to present a global picture of current arrangements that may benefit non-Convention refugees, a **survey of state practice** was undertaken. The countries selected

for investigation were Australia, Brazil, Canada, Ecuador, France, Germany, Russia, South Africa, Tanzania, the UK and USA. A very brief summary of the survey's findings are set out in the following paragraphs. Fuller descriptions of these countries' practices are found in the Annex to the study. The states were chosen to reflect regional arrangements which involve an elaborated refugee definition (Brazil, Ecuador, South Africa, Tanzania) as well as common and civil law countries where complementary protection mechanisms operate. In terms of geographical spread, the omission of states from the Middle East and Asia reflects the very limited accession to the 1951 Convention/1967 Protocol in these regions and thus the absence there of the phenomenon of complementary protection. These regions also do not apply any regional refugee definition.

In all of the states surveyed, non-Convention protection is effected pursuant to legislative provision. Grant of such protection is often mandatory, even in countries not bound by the OAU or Cartagena Declaration refugee definitions. It is difficult to summarise the **eligibility criteria** used in those countries investigated which operate some form of complementary protection regime. This is partly due to the diversity of the factors referred to in their respective legislation, jurisprudence and/or administrative guidelines. Nevertheless, the following broad categories seem to underpin the range of criteria in use: armed conflict in the country of origin; human rights concerns; compassionate circumstances, including ill-health; children's interests; and logistical barriers to return. However, there is clearly significant overlap between these categories.

One notable feature of the eligibility criteria adopted by the states with complementary protection mechanisms is the absence of language reminiscent to that found in the OAU and Cartagena Declaration refugee definitions or in UNHCR's description of its own mandate. The exception is France where legislation specifically provides protection from removal if the individual faces a threat to life or person resulting from an internal or international armed conflict in his country of origin. Admittedly, related concepts are found in criteria in other states which deal with the risk on return of unlawful death or torture and related forms of ill-treatment. Most of the countries surveyed seem to apply some form of exclusion criteria to their grounds for eligibility to complementary protection, though this often results in lesser status rather than denial of any protection from removal.

As for the relative use of complementary protection compared to the grant of Convention refugee status, this varied significantly in the states surveyed. Interestingly, in Canada, where the Convention refugee definition is applied in a progressive manner and the beneficiaries of 'person in need of protection' status enjoy the same treatment as Convention refugees, refugee recognition vastly outweighs the bestowal of complementary protection.

In terms of determination mechanisms, in the OAU and Cartagena states all aspects of the regional refugee definition are dealt with in the refugee status determination procedures. In the other states, there is also a preference to consider non-Convention criteria for protection alongside the 1951 Convention refugee definition in a **single asylum procedure**. Often a right of appeal is provided against denial of Convention refugee status even where some form of complementary protection has been granted.

As for **standard of treatment**, Ecuador, Brazil, South Africa and Tanzania do not distinguish between refugees recognised under the 1951 Convention-inspired criteria and

those qualifying under the other elements in their national refugee definitions. Whilst this is required as a result of obligations under the OAU Convention in South Africa and Tanzania, a similar international obligation does not exist in the case of Ecuador and Brazil. Nevertheless they acknowledge the similar needs of all recognised refugees (as advocated by the Cartagena Declaration). In the other countries surveyed, Australia and Canada are notable in that they provide equal benefits to both Convention refugees and those recognised under their complementary protection regimes. As for the other states, Convention refugees are generally entitled to superior treatment compared to persons afforded protection from return on other grounds, although the gap appears to be narrowing in a number of these countries. Where there are differences in entitlements, these tend to concern duration of residence permit, family reunion and travel documents.

In terms of **ending non-Convention protection**, the legislative provisions in Brazil, Ecuador, South Africa and Tanzania which deal with cessation of refugee status incorporate the criteria found in the cessation clauses of the 1951 Convention or the OAU Convention. In the other countries studied, a variety of approaches emerge. In some states, there appears to be a presumption that complementary protection should continue unless specific evidence arises to the contrary. In other jurisdictions, the beneficiary of complementary protection seems to be under an obligation to justify his continued need for protection on the expiry of his initial period of authorised residence.

As for **durable solutions**, all the OAU and Cartagena states surveyed take the same approach in regard to refugees recognised under the 1951 Convention-based criteria as they do for those recognised under the other elements in their national definition. In particular, Brazil and Ecuador seem to have an integrationist policy. In the industrialised countries surveyed, although attitudes differ, in general there appears to be less of a willingness to promote local integration for persons benefiting from complementary protection than for Convention refugees.

#### IV. OBSERVATIONS

The observations below are intended to assist UNHCR in suggesting principles for inclusion in the proposed ExCom conclusion on complementary protection. In making suggestions on how states can better ensure that non-Convention refugees in their territory receive international protection, note has been taken of the implications of the international legal framework as well as the findings on state practice. In addition, attention has been paid to the observations made by UNHCR in its discussion paper for the Global Consultations on complementary protection as these received support from participating states.

It is suggested that, in seeking to ensure international protection for refugees within UNHCR's mandate who are not 1951 Convention refugees, states who do not apply the OAU or Cartagena refugee definitions could usefully adopt the following **eligibility criteria**: a non-Convention refugee is a person whose life, liberty or security is threatened by return to armed conflict, serious public disorder or massive violations of human rights in the country of origin, but who fails to satisfy the refugee definition in the 1951 Convention. If a state uses such eligibility criteria in a manner that clearly recognises their connection with UNHCR's mandate for refugees, then as a matter of principle it would be appropriate to apply exclusion criteria identical to those in Article 1F of the 1951 Convention. This is because the concept of exclusion on the grounds of an individual not

deserving international protection is inherent in international refugee law. Moreover, it is proposed that protection from removal and any other attendant rights should be mandatory if an individual satisfies the suggested eligibility criteria for non-Convention refugee protection.

In terms of **status determination procedures**, under the 1951 Convention and customary international law, states are obliged to ensure that asylum seekers at their borders are not *refouled*. Given the difficulties of making a sound determination as to whether an individual is actually a Convention refugee at the point of entry, this obligation will generally entail admitting asylum seekers into the territory in order for their claims to be examined in a fair and efficient refugee status determination procedure. In this way, the *non-refoulement* obligations in respect of Convention refugees indirectly secure admission to such procedures for non-Convention refugees.

It is suggested that states employ a single asylum procedure which will look at both the 1951 Convention refugee definition as well as the criteria suggested above for non-Convention refugees. Preferably in each case determination officers should examine the 1951 criteria first before moving on to the grounds for non-Convention refugee protection. Any status determination procedure should be accompanied by adequate safeguards, such as a right of appeal. Moreover, there is no sound basis for adopting different standards of proof – the test should be ‘serious possibility’ in relation to establishing Convention refugee status or non-Convention refugee protection. The eligibility criteria for the latter include scenarios which may potentially affect a large section, if not all, of the population in the country of origin. However, in determining whether the standard of proof has been met the focus should be less on whether a particular individual is disproportionately in danger and more on whether the widespread nature of the violence/ill-treatment is such that there is a real and immediate threat to that asylum seeker.

International protection for non-Convention refugees goes beyond merely preventing their *refoulement*. They are arguably entitled to benefit from minimum human rights standards which under various international instruments are applicable to all aliens in a territory. These provide for a **standard of treatment** reminiscent to that set out for Convention refugees in the 1951 Convention. Indeed, non-Convention and Convention refugees have similar, if not identical, needs. They are both without the support of their national government or authorities, generally in a poor financial/material position, often psychologically and physically scarred by the events that have forced them to flee their homes and fearful for their future. Moreover, there is no obvious reason why non-Convention refugees will be in need of international protection for a shorter period than their Convention counterparts. As such, there are persuasive arguments for actually affording non-Convention refugees the same standard of treatment as enjoyed by Convention refugees.

**Ending of non-Convention refugee protection** should only take place where specific factors arise. Regular reviews of the continuing need for non-Convention refugee protection create a level of uncertainty which is not justifiable, especially when considering the approach generally taken to cessation of Convention refugee status. It is suggested that the factors relevant to the ending of non-Convention refugee protection can be found in Article 1C(3), (4), (5) and (6) of the 1951 Convention.

In terms of **durable solutions**, it is recommended that countries of asylum facilitate opportunities for local integration of non-Convention refugees where opportunities for voluntary repatriation are not likely to arise in the near future. Thus, non-Convention refugees should be given the same opportunity as Convention refugees to obtain permanent residence and eventually citizenship. This is not to rule out the possibility of voluntary repatriation should suitable conditions arise, but rather to prevent insecurity for such refugees stemming from misplaced confidence on the part of the authorities in their ability to return home in the short term

Looking generally at the protection framework suggested above, clearly there are some similarities between the criteria currently used by many states to provide complementary protection and those being recommended with regard to non-Convention refugee protection. Therefore, from a practical point of view, it is conceivable that some countries may be able to implement a protection regime for non-Convention refugees along the lines suggested through **existing legislative powers**. This would be dependent, though, on the standard of treatment currently prescribed and whether the relevant legislative provisions are mandatory rather than discretionary. That being said, there is also merit in states marrying the two concepts of Convention refugee and non-Convention refugee into a **single refugee status** under national law.

As for the **need for an ExCom conclusion**, this is apparent in the lack of a clear and comprehensive international legal framework for refugees falling outside the scope of the 1951 Convention. Although there are numerous overlaps between categories of refugees falling within UNHCR's mandate and obligations arising under international human rights law in relation to *non-refoulement* and consequent standards of treatment, it is unclear whether all non-Convention refugees are adequately covered by international human rights law as currently interpreted. Therefore, an ExCom conclusion will be vital in providing guidance to states on the protection of such refugees.

Moreover, as in the case of Convention refugees, various issues (such as the detail of procedural requirements and durable solutions) are not really dealt with at all under existing international treaties. Here, the contribution of an ExCom conclusion is self-evident. At the same time, it is also worth reflecting on the importance of continuing efforts to ensure a coherent, consistent and inclusive application of the 1951 Convention. Without such initiatives, any national regime intended to provide protection for non-Convention refugees may end up detrimental to the institution of the 1951 Convention.

# PROTECTION MECHANISMS OUTSIDE OF THE 1951 CONVENTION (“COMPLEMENTARY PROTECTION”)

## I. INTRODUCTION

### A. Background and Methodology

1. During the recent Global Consultations aimed at revitalising refugee protection worldwide, participating countries noted the importance of various mechanisms used by states to regularise the stay of individuals who, despite not falling within the scope of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, nevertheless cannot be returned to their country of origin for various reasons. Concern about divergent state practice resulted in the adoption of Objective 3 of Goal 1 of the Agenda for Protection:<sup>1</sup>

Within the framework of its mandate, ExCom to work on a Conclusion containing guidance on general principles upon which complementary forms of protection should be based, on the persons who might benefit from it, and on the compatibility of these protections with the 1951 Convention and other relevant international and regional instruments.

States to consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.

2. This study explores the variety of ways in which states have provided protection from removal for individuals falling outside the scope of the 1951 Convention and/or its 1967 Protocol and the international legal framework behind this. The aim is to inform UNHCR’s recommendations on the principles to be articulated in the proposed ExCom conclusion. In researching this paper, advantage has been taken of the substantial amount of literature which has arisen in relation to complementary protection over the past few years. Thus, a wide range of publicly-available material has been scrutinised, including academic literature as well as reports by UNHCR, governments, NGOs and international organisations. Relevant legal instruments, as well as jurisprudence on international, regional and national levels, have been examined. The study also contains the findings of a survey of current practice in a sample of representative countries. In compiling its observations, the study has also benefited from access to internal UNHCR documents as well as the input of staff with professional experience in a diverse range of protection settings. Finally, this paper takes due account of the conclusions set out in UNHCR’s

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<sup>1</sup> *Agenda for Protection*, UNHCR, 3<sup>rd</sup> edition, October 2004.

discussion paper *Complementary Forms of Protection*<sup>2</sup> prepared for the Global Consultations, given that these were broadly endorsed by participating states.<sup>3</sup>

3. In terms of the arrangement of the study, the remainder of this opening chapter will concentrate on preliminary issues. These include the meaning of the term ‘complementary protection’, its relationship with the 1951 Convention/1967 Protocol regime and the conceptual focus of this study given UNHCR’s mandate. Chapter II will outline the legal framework which informs both the criteria for eligibility to protection outside of the 1951 Convention as well as procedural requirements and standards of treatment for beneficiaries of such protection. Chapter III provides an overview of state practice, including a summary of the results of the country survey. Chapter IV, drawing on the analysis found in the preceding chapters, sets out observations on the principles that might be incorporated in the planned ExCom Conclusion on Complementary Protection.

## **B. Scope of the Study**

### *1. Lack of a Definition of ‘Complementary Protection’*

4. As the phrase ‘complementary protection’ is not a term of art defined in any international instrument, it seems prudent at the outset to understand the nature of the protection regimes that this study aims to examine. The term ‘complementary protection’ has emerged over the last decade or so as a description of the increasingly-apparent phenomenon in industrialised countries of relief from removal being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. It is essentially a generic phrase, with the actual terminology used by states to describe such forms of protection in their territory, including any attached immigration status, varying enormously: ‘subsidiary protection’, ‘humanitarian protection’ and ‘temporary asylum’ to name but a few examples.

5. What all these initiatives have in common is their complementary relationship with the protection regime established for refugees under the 1951 Convention/1967 Protocol. They are intended to provide protection for persons who cannot benefit from the latter instruments even though they, like Convention refugees, may have sound reasons for not wishing to return to their home country. Despite this common element, the actual criteria adopted by states to delineate the scope of complementary protection in their jurisdictions varies significantly. Even the most rudimentary glance at the practice in Europe, North America and Australia highlights eligibility criteria ranging from those related to non-*refoulement* obligations under international law (e.g. risk of torture) to purely compassionate reasons (e.g. infirmity in old age) and practical obstacles to removal.<sup>4</sup> Thus it appears that several factors influence the exact scope of complementary protection provided by a particular country:

- its interpretation of the refugee definition in the 1951 Convention/1967 Protocol;

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<sup>2</sup> See paragraph 11 of *Complementary Forms of Protection*, (EC/GC/01/18), UNHCR, 4 September 2001.

<sup>3</sup> See paragraph 18 of *Global Consultations on International Protection: Report of the Third Meeting in the Third Track (27-28 September 2001)*, (EC/GC/02/2), UNHCR, 16 April 2003.

<sup>4</sup> See paragraph 4 of *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, (EC/50/SC/CRP.18), UNHCR, 9 June 2000.

- an appreciation of the protection needs of refugees who fall within UNHCR's mandate even though they are not refugees in the sense of the 1951 Convention/1967 Protocol;
- prohibitions under customary international or applicable treaty law (other than those found in refugee law) on the return of persons to their countries of origin;
- moral/political considerations in relation to people with a genuine humanitarian need, including those reluctant to repatriate because of health problems, age-related vulnerability or natural disaster in their country of origin;
- practicalities of dealing with individuals who cannot be removed for logistical reasons such as lack of transport connections or proof of nationality.

6. The lack of a universally-accepted definition of 'complementary protection' can lead to its confusion with the concept of temporary protection.<sup>5</sup> The latter concept is generally used to describe a short-term emergency response to a significant influx of asylum seekers. By contrast, complementary protection is not an emergency or provisional device. It is, rather, a basis for states to provide protection from return as an alternative to refugee recognition under the 1951 Convention/1967 Protocol. Thus, persons eligible for complementary protection may in an emergency situation receive temporary protection instead alongside Convention refugees.

## 2. *The Conceptual Focus: The 'Protection Gap' and UNHCR's Mandate*

7. Given that this study has been commissioned by UNHCR, it will focus on how complementary protection can assist in bridging the gap between the mandate given to UNHCR and the obligations binding on states with regard to the protection of refugees.<sup>6</sup> Since its establishment, UNHCR has been entrusted by the UN General Assembly with responsibilities for a wider group of people than that covered by the universal refugee instruments.<sup>7</sup> Unlike the 1951 Convention, UNHCR's statute has never contained any temporal or geographical restrictions. The transformation of the 1951 Convention into an instrument of truly universal coverage, through the adoption of the 1967 Protocol, did not lead to a symmetry between UNHCR's responsibilities for refugees and that of states. Instead, significant categories of people covered by UNHCR's mandate continue to be considered as ineligible for recognition under the 1951 Convention/1967 Protocol.

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<sup>5</sup> The distinction between complementary and temporary protection was highlighted by states participating in the Global Consultations meeting on complementary protection: see *Global Consultations on International Protection: Report of the Third Meeting in the Third Track*, (EC/GC/02/2), UNHCR, 16 April 2003 at paragraph 15.

<sup>6</sup> UNHCR's mandate in relation to 'persons of concern' other than refugees is not relevant to this study. In the case of the internally displaced and returnees, such individuals are not seeking protection from return to their country of origin. As for persons seeking a remedy for their statelessness, a specific international legal regime exists. Moreover, their preoccupation is not so much protection against removal (as deportation is unlikely given the absence of any willing receiving state) but rather the standard of treatment they receive in their country of residence. Thus, unless otherwise mentioned, references throughout this study to UNHCR's mandate relate to its responsibilities for refugees only rather than to other persons of concern.

<sup>7</sup> Even on the adoption of the 1951 Convention, states acknowledged that there would be persons outside its scope (because of the geographical and temporal restrictions) who might still be in need of international protection. See Recommendation E of the Final Act of the 1951 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

8. As for the scope of UNHCR's mandate, numerous resolutions of the UN General Assembly have elaborated upon the framework originally set out in UNHCR's 1950 Statute.<sup>8</sup> However, the terminology used by the General Assembly has been far from consistent, ranging from 'refugees for whom the [High Commissioner] lends his good offices' to 'refugees and displaced persons' or 'victims of man-made disasters'. In 1992 a Working Group of ExCom:<sup>9</sup>

...confirmed the widely recognised understanding that UNHCR's competence for refugees extends to persons forced to leave their countries due to armed conflict, or serious and generalised disorder or violence [even though] these persons may or may not fall within the terms of the 1951 Convention relation to the Status of Refugees (1951 Convention) or its 1967 Protocol. From the examination of the common needs of the various groups for which the UNHCR is competent, it is clear that, with protection at the core of UNHCR's mandate, displacement, coupled with the need for protection, is the basis of UNHCR's competence for the groups. The character of the displacement, together with the protection need, must also determine the content of UNHCR's involvement.

9. Thus states have indicated that 'the Convention definition of a refugee does not cover the protection needs of all persons. Those who may not necessarily come within the ambit of the Convention refugee definition as formulated in 1951 but who nevertheless need international protection are commonly referred to as refugees falling under UNHCR's wider competence.'<sup>10</sup> In discussing those situations which create such victims of 'man-made disasters',<sup>11</sup> the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees listed:

...wars, armed conflict, acts of aggression, alien domination, foreign armed intervention, occupation, colonialism, oppressive segregationist and racially supremacist regimes practising policies of discrimination or persecution, apartheid, violations of human rights and fundamental freedoms, mass forcible expulsions, economic and social factors threatening the physical integrity and survival, structural problems of development; man-made ecological disturbances and severe environmental damages.<sup>12</sup>

10. Given the range of language used in the relevant General Assembly resolutions, UNHCR has sought to provide clarity about its responsibilities for refugees through drawing on terminology found in the regional refugee definitions of the 1969 OAU

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<sup>8</sup> See, for example, GA resolutions 1673 (VXI) of 18 December 1961, 2294 (XXII) of 11 December 1967, 3143 (XXVIII) of 14 December 1973, 31/55 of 30 November 1976, 36/125 of 14 December 1988, 48/118 of 20 December 1993 and 50/152 of 21 December 1995.

<sup>9</sup> See paragraph 15 of the *Note on International Protection*, A/AC.96/799, UNHCR, August 1992. The Working Group's findings were endorsed by the Executive Committee in ExCom Conclusion no. 68 (1992).

<sup>10</sup> See paragraph 40 of *Reconciling Migration Control and Refugee Protection in the European Union: A UNHCR Perspective*, UNHCR, 2000.

<sup>11</sup> ECOSOC Resolution 2011 (LXI), endorsed by the General Assembly, described refugees falling within UNHCR's wider competence as 'victims of man-made disasters'. See page 8 of *The Refugee in International Law*, Guy S. Goodwin-Gill, Oxford, 1996 (2<sup>nd</sup> edition) and page 156 of 'The Developing Role of UNHCR', Volker Türk in *Refugee Rights and Realities*, F. Nicholson and P. Twomey (eds.), Cambridge, 1999.

<sup>12</sup> See UN Doc. A/41/324, paragraphs 30-40, endorsed by UNGA Resolutions 41/70, 41/124 and 42/109.

Convention Relating to the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration.<sup>13</sup> Thus, in describing its mandate, UNHCR uses:

...the term “refugee” in the broader sense, to denote persons outside their countries who are in need of international protection because of a serious threat to their life, liberty or security of person in their country of origin as a result of persecution or armed conflict, or serious public disorder.<sup>14</sup>

11. In this respect it is interesting to note the adoption by states of language found in the OAU’s refugee definition in ExCom Conclusion no.22 (1981) to describe the kinds of people who fall under UNHCR’s mandate.<sup>15</sup> This is despite the fact that this ExCom conclusion is not confined to refugee issues in Africa.<sup>16</sup> Rather, terminology from the OAU refugee definition is included in paragraph 1 of the conclusion to define asylum seekers who need to be ‘fully protected in large-scale influx situations’ wherever these occur.<sup>17</sup> In addition, ExCom Conclusion no.74 (1994) specifically affirms that UNHCR has responsibilities for persons displaced from their countries of origin by conflict, even if they do not qualify for protection under the 1951 Convention/1967 Protocol.<sup>18</sup>

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<sup>13</sup> See paragraph 32 of *Note on International Protection*, (A/AC.96/830), UNHCR, 7 September 1994 explicitly acknowledging the relationship between UNHCR’s competence for refugees and the scope of these regional instruments. Throughout this study, these instruments are referred to respectively as the ‘OAU Convention’ and the ‘Cartagena Declaration’. Their refugee definitions are discussed in detail in Chapter II.

<sup>14</sup> *Ibid.*, and see also paragraph 10 of *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, (EC/50/SC/CRP.18), UNHCR, 9 June 2000.

<sup>15</sup> Paragraph I(1) reads:

The asylum seekers forming part of these large-scale influxes include persons who are refugees within the meaning of the 1951 United Nations Convention and 1967 Protocol relating to the Status of Refugees or who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country.

UNHCR’s role in relation to such persons is confirmed in paragraph III:

...UNHCR shall also be given the possibility of exercising (sic) its function of international protection and shall be allowed to supervise the well-being of persons entering reception or other refugee centres.

<sup>16</sup> The conclusion, which sets out principles of a universal nature, was actually inspired by the South East Asian asylum crises of the 1970s.

<sup>17</sup> Paragraph I(3) reads:

It is therefore imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment pending arrangements for a durable solution, ...

<sup>18</sup> The Conclusion:

(k) *Notes* that a large number of those persons in need of international protection have been forced to flee or to remain outside their countries of origin as a result of danger to their life or freedom owing to situations of conflict;

(l) *Recognizes* that, while such persons who are unable to return in safety to their countries of origin as a result of situations of conflict may or may not be considered refugees within the terms of the 1951 Convention and 1967 Protocol, depending on the particular circumstances, they nonetheless are often in need of international protection, humanitarian assistance and a solution to their plight.

(m) *Recalls* that UNHCR has often been requested by the United Nations General Assembly to extend protection and assistance to persons who have been forced to seek refuge outside their countries of origin as a result of situations of conflict, and encourages the High Commissioner to continue to provide international protection to such persons, and to seek solutions to the problems arising from their forced displacement, in accordance with relevant General Assembly resolutions,...

12. In looking at how the ‘protection gap’ between UNHCR’s mandate and the obligations on states under the universal refugee instruments can be bridged through the institution of complementary protection, the study’s focus departs somewhat from much of the existing literature on complementary protection. The latter tends to derive its conceptual framework from obligations on states under international law (other than refugee law) to prevent the removal of aliens. In particular, much of the academic writing is understandably concerned with tracing the development of *non-refoulement* obligations in human rights law since the adoption of the universal refugee instruments.<sup>19</sup> NGO commentary is in a similar vein.<sup>20</sup> Given the dynamic interaction of refugee and human rights law, this study will of course touch on human rights and other relevant international obligations in so far as they affect persons falling under UNHCR’s mandate for refugees. However, its aim is not to identify all categories of persons for whom there may be sound legal, political, moral or practical grounds for allowing their continued presence in a country in which they seek asylum.

13. Accordingly, in terms of state practice,<sup>21</sup> the study concentrates on those aspects of national complementary protection regimes which appear to benefit persons who fall within UNHCR’s mandate. However, in many cases the treatment of such persons is inextricably linked with other categories of aliens and so a broader overview may be necessary. Moreover, the study acknowledges that in many countries the protection of refugees falling outside the 1951 Convention but within UNHCR’s mandate is achieved through the application of a regional refugee definition (derived from the OAU or Cartagena refugee instruments). Therefore, it seems appropriate also to examine the legal framework in Africa and Latin America as well as examples of state practice from these parts of the world.

14. Finally, in discussing the conceptual framework for this paper it is worth mentioning that, on occasion, UNHCR has provided assistance to people who do not appear to fall within its mandate for refugees (or indeed other persons of concern). A recent example is the provision of humanitarian aid to victims of the Asian tsunami disaster. However, there is little evidence for suggesting that these instances constitute further extensions of UNHCR’s mandate, whether in relation to refugees or other persons of concern. Rather, these instances simply seem to reflect situations of exceptional humanitarian need where UNHCR’s involvement can actually also impact on persons of concern to it.

15. This might be the case, for example, where the population in question is of such a mixed nature that it is neither practical nor humane in the prevailing circumstances to

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<sup>19</sup> See, for example, *Subsidiary Protection and Primary Rights*, Ryszard Piotrowicz and Carina van Eck, 53 *International and Comparative Law Quarterly* 107; page 5 of *Complementary or Subsidiary Protection (Working Paper No.52)*, Jan Vedsted-Hansen (for UNHCR Series of New Issues in Refugee Research), 2002; chapters 3, 4 and 5 of ‘Seeking Refuge in Human Rights: Complementary Protection in International Refugee Law’, Jane McAdam, DPhil thesis submitted University of Oxford 2004.

<sup>20</sup> Examples include, *Complementary Protection: The Way Ahead*, Australian Refugee Council, 2004 and *Position on Complementary Protection*, European Council on Refugees and Exile, 2000.

<sup>21</sup> Given the study’s preoccupation with protection mechanisms used by states to complement the 1951 Convention/1967 Protocol, the situation in states which have not acceded to the universal refugee instruments is not considered.

identify and treat preferentially those individuals in the group who fall within UNHCR's mandate.<sup>22</sup> Another scenario is where assistance activities can prevent refugee-producing displacements. In such circumstances, UNHCR is not honouring its protection responsibilities, such as preventing *refoulement*, but rather carrying out assistance activities aimed at providing the basic necessities for life, for example food and shelter. Thus, in so far as this study is concerned with the provision by states of international protection for all refugees under UNHCR's mandate, these 'exceptional' assistance activities are of no real relevance.

### 3. Terminology

16. As noted above, the phrase 'complementary protection' is essentially associated with practices that have evolved in industrialised states to provide protection from return for individuals considered outside the scope of the 1951 Convention. However, other states have chosen to provide protection from removal for persons other than refugees covered by the 1951 Convention as currently interpreted through the application of a regional refugee definition. Therefore, the term 'non-Convention protection' is used in this study to encompass both of these methods (i.e. complementary protection and regional refugee definitions) for delivering protection from return for individuals who may fall outside of the 1951 Convention. In doing so, it is important to note that the regional refugee definitions in question actually cover Convention refugees, as well as individuals who may fail to satisfy the 1951 Convention refugee criteria. Hence, in relation to these regional refugee definitions, non-Convention protection only refers to those eligibility criteria which differ from the 1951 Convention's refugee definition.

17. In order to find a shorthand way of referring to the main subjects of this study, i.e. individuals who may not satisfy the 1951 Convention refugee definition but who nevertheless fall within UNHCR's mandate, consideration has been given to UNHCR's practice of using the term 'refugee' to describe persons other than just those individuals embraced by the 1951 Convention as currently interpreted.<sup>23</sup> Hence the phrase 'non-Convention refugee' is deployed throughout this paper to refer to those refugees within UNHCR's mandate who may be outside the scope of the 1951 Convention regime. Depending on their location, such persons may benefit in practice from either complementary protection or the OAU/Cartagena regional refugee arrangements. By contrast, beneficiaries of complementary protection may not necessarily be non-Convention refugees.

## II. LEGAL FRAMEWORK UNDER INTERNATIONAL LAW

18. This chapter investigates the international legal framework surrounding the operation of complementary protection mechanisms. Given the objective of this study, the

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<sup>22</sup> See paragraph 17 of *Note on International Protection*, (A/AC.96/799), UNHCR, 1992. This would appear to be the case with UNHCR's activities in relation to the Asian tsunami victims as the assistance efforts in question are taking place in countries where the organisation is already providing humanitarian relief for persons of concern to it such as the internally displaced.

<sup>23</sup> This does not necessarily reflect state practice with regard to the term 'refugee'. See paragraph 8 above on the varied language used by states in the General Assembly resolutions dealing with UNHCR's mandate in contrast to UNHCR's description of a 'refugee' for the purposes of its mandate.

focus will be on identifying those provisions of international law which regulate the position in countries of asylum of non-Convention refugees. As such, a preliminary issue is the clarification of the scope of the ‘protection gap’ between the 1951 Convention regime and the range of persons ‘in need of international protection’.<sup>24</sup> Only once this is done is it possible to evaluate with any precision at all those elements of international law which ‘complement’ the 1951 Convention by providing grounds for protection from removal for non-Convention refugees. Thus section A below attempts to shed some light on the distinction between Convention refugees and other refugees under UNHCR’s mandate. Section B then goes on to investigate *non-refoulement* obligations under international law (including human rights treaties and regional refugee instruments) that may benefit non-Convention refugees. Sections C and D examine those aspects of international law that may have an impact on the procedures adopted by States for identifying persons other than Convention refugees who may be protected from removal and the appropriate standard of treatment of such individuals.

## **A. The 1951 Convention and 1967 Protocol**

### *1. Proper Scope of the Refugee Definition Contained in the Universal Refugee Instruments*

19. Consideration of the ‘protection gap’ raises fundamental questions about whether complementary protection mechanisms are necessary at all if the 1951 Convention is interpreted and applied in an inclusive and progressive fashion. In common with all treaties dealing with complex socio-political issues, the 1951 Convention is an evolving and dynamic instrument. Thus its definition of a refugee is open to flexible interpretation in the light of changing international circumstances. That being said, as indicated in paragraph 7 above, no consensus has yet arisen amongst states that the Convention’s eligibility criteria have evolved in line with UNHCR’s mandate. This does not rule out a more progressive interpretation in the future whereby all refugees within UNHCR’s mandate will be seen to benefit from the 1951 Convention. In recent years, however, the trend has rather been towards a more conservative interpretation of the Convention’s refugee definition, influenced by concerns surrounding increasing numbers of asylum seekers. Whilst the language of the 1951 Convention allows some room for states to hold differing interpretations on certain aspects of its provisions, some national practices are arguably unsupportable as a matter of law given the normal canons of treaty interpretation.

20. Restrictive interpretations of this kind, coupled with onerous admissibility criteria adopted in certain jurisdictions, have resulted in individuals eligible for refugee status under the 1951 Convention receiving protection on a different, and often inferior, basis.<sup>25</sup> For example, in certain states the 1951 Convention has often been construed as

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<sup>24</sup> References to ‘international protection’ in this paper are intended to evoke its traditional meaning, that is those activities undertaken by the international community to ensure refugees are treated in line with the relevant international standards. This traditional reading is based on the origins of this concept in the UN resolutions establishing UNHCR (ECOSOC Resolution 248(IX) of 6 August 1949 and GA Resolution 319(IV)A of 3 December 1949) as well as the language of UNHCR’s Statute. However, more recently, the concept of ‘international protection’ has been used by some to cover international efforts on behalf of externally displaced persons who are protected from removal by provisions of international human rights law.

<sup>25</sup> See paragraph 7 of *Complementary Forms of Protection: Their Nature and Relationship to the International Protection Regime*, (EC/50/SC/CRP.8), UNHCR, 9 June 2000.

inapplicable to victims of civil war even though such persons comprise a significant proportion of displaced persons around the world. This narrow approach is based on a number of misconceptions:

- civilians in internal armed conflicts are by nature only victims of indiscriminate violence rather than targets of persecution based on Convention grounds;
- persecution requires an individual to be at greater risk of ill-treatment than any other member of his ethnic, religious or political community;
- acts of anti-government forces, i.e. non-state agents, cannot amount to persecution for the purposes of the Convention;
- persecution cannot take place where (as a result of conflict) there is no longer any governmental authority exercising control over the country;
- an internal flight alternative is available in the particular conflict situation;
- as many victims of civil wars tend to receive temporary protection rather than refugee status in countries of asylum they cannot be eligible for recognition as refugees under the Convention.

21. In fact, as ExCom conclusions have clearly acknowledged, individuals may well face persecution for Convention reasons in conflict situations. Indeed, the targeting of civilian groups on the basis of their ethnic, religious or political identity can be an intentional military tactic.<sup>26</sup> As for individualised harm, where there are widespread human rights violations, such as murder and assault of civilians, there will potentially be many persons at risk of persecution. Indeed, the Convention was negotiated with the victims of the Second World War firmly in mind, where entire communities were the subject of appalling abuse and violence. Thus, a person clearly need not be at any greater risk than others in his neighbourhood or community to satisfy the Convention's criteria. Indeed, UNHCR's Handbook expressly recognises that an individual's well-founded fear may itself be based on knowledge of what has befallen other members of his 'racial or social group'.<sup>27</sup> Therefore, a well-founded fear of persecution may arise where it is evident that a particular ethnic, religious or political group is at risk of attack because of the sectarian or communal nature of the surrounding conflict.

22. As for the identity of the agents of persecution, the majority of states recognise that the source of persecution is of little relevance to the Convention's aim of protecting refugees. Rather, the issues to be explored are the nature and severity of the ill-treatment feared as well as the inability to obtain protection from national authorities. This lack of national protection may be due to the fact that the government is directly behind, condones or encourages the persecutory acts or because it is unable to prevent them. In a conflict situation the latter may arise where the government has lost control over part of its territory and therefore cannot reign in the behaviour of rebel forces in those areas. The physical fracturing of a country during conflict has also led to misunderstandings about the possibility of asylum seekers internally relocating to find protection. However, this underestimates the fragility of localised power bases that arise during a conflict. Moreover, where a country is in a state of upheaval, with resources severely stretched, it is unrealistic to expect individuals to be able to re-establish their lives safely elsewhere within the territory.

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<sup>26</sup> See ExCom Conclusions No. 74 (1994) and No. 85 (1998).

<sup>27</sup> See paragraph 43 of the *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, 1992. Further discussion of this point is found in paragraphs 20 and 21 of *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, UNHCR, April 2001.

23. The fact that those fleeing conflict situations have often ended up with temporary protection is a reflection of the type of protection mechanism that governments (particularly in western Europe) saw fit to introduce in such circumstances for political reasons rather than any fundamental inability of asylum seekers in large scale displacements to qualify for protection under the 1951 Convention. As UNHCR has noted, the 1951 Convention can still provide the legal framework for protection responses in situations where individualised asylum mechanisms may not be appropriate.<sup>28</sup>

24. Therefore, for the reasons indicated above, it seems that a significant number of people who currently are dealt with under complementary protection regimes could actually qualify for recognition as refugees under the 1951 Convention. Nevertheless, it is possible to envisage circumstances in which UNHCR's mandate would be triggered but a state may be justified in concluding that the 1951 Convention is inapplicable. A pertinent illustration is the position of civilians who are the unintended victims of cross-fire or bombing campaigns. If the facts demonstrate that the violence is truly indiscriminate, then the 1951 Convention, as generally interpreted, would not be applicable.<sup>29</sup> Still, the clear danger to life and limb from a situation of armed conflict may well bring such persons within the scope of UNHCR's mandate.

## 2. *Indirect Impact of the Non-Refoulement Obligation in the 1951 Convention on Non-Convention Refugees*

25. It is important to recognise that the *non-refoulement* principle in Article 33(1) of the 1951 Convention and under customary international law extends to all asylum seekers until their claim to Convention refugee status has been rejected following a fair and efficient status determination exercise. Thus, refugees falling within UNHCR's mandate but outside of the Convention's scope will benefit from the Convention/customary law *non-refoulement* obligation in so far as it requires non-rejection at the frontier.<sup>30</sup>

## **B. Non-Refoulement Obligations Outside of the 1951 Convention/1967 Protocol**

### 1. *ExCom Conclusions Concerning Refugees Falling Within UNHCR's Mandate*

26. As indicated in Chapter I, in extending UNHCR's mandate the international community has acknowledged that persons facing return to situations other than those

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<sup>28</sup> See Part B of *Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations: Advanced Summary Findings of the Study Commissioned by UNHCR*, (EC/54/SC/CRP.11), UNHCR, June 2004. ExCom Conclusion No. 100 (2004) on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations also refers specifically to the relevance of international refugee law and in particular the 1951 Convention/1967 Protocol. See also, *The Refugee Concept in Group Situations*, Ivor Jackson, Martinus Nijhoff Publishers, 1999 at page 2 where he argues that the 1951 Convention was recognised by its drafters as applicable in situations leading to the flight of large numbers of people.

<sup>29</sup> This point is discussed in *Note on International Protection* (A/AC.96/830), UNHCR, 7 September 1994 at paragraph 30.

<sup>30</sup> See paragraph (1) of the recent ExCom Conclusion no. 94 (2004) which calls on states to ensure "...full respect for the fundamental principle of *non-refoulement*, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs."

envisaged by the 1951 Convention may nevertheless be in need of international protection. However, this acknowledgement has not yet been accompanied by a concurrent development in the interpretation of the 1951 Convention or the customary law prohibition on *refoulement* of refugees, or by the creation of a correspondent treaty obligation on a universal (rather than regional) level.<sup>31</sup> Nevertheless, in various ExCom conclusions the international community has stressed its willingness to support UNHCR's functions in relation to refugees falling within the organisation's competence and, in particular, has explicitly asked states to provide some form of protection to persons fleeing from armed conflict. Though such conclusions are not legally binding, they do reflect firm political commitments ('soft law').

27. For example, in paragraph (m) of ExCom Conclusion no. 74 (1994) states recalled that:

...UNHCR has often been requested by the United Nations General Assembly to extend protection and assistance to persons who have been forced to seek refuge outside their countries of origin as a result of situations of conflict, and encourages the High Commissioner to continue to provide international protection to such persons, and to seek solutions to the problems arising from their forced displacement, in accordance with relevant General Assembly resolutions, and calls upon all States to assist and support the High Commissioner's efforts in this regard.

28. In addition, ExCom Conclusion No. 22 (1981) notes that 'the fundamental principle of *non-refoulement* – including non-rejection at the frontier- must be scrupulously observed' in relation to asylum seekers described in terms of the 1951 Convention and the 1969 OAU Convention.<sup>32</sup> Significantly, the refugee situation which triggered the adoption of this ExCom conclusion took place in Asia where the OAU Convention is, obviously, not applicable.

29. Although the ExCom conclusions provide important guidance, it is not surprising that much attention has been given to the impact of international human rights law in providing parallel and additional *non-refoulement* obligations to that under the universal refugee instruments and customary international refugee law. The extent to which human rights, and indeed other areas of public international law, impose an obligation on states to

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<sup>31</sup> See page 171 of *The Refugee in International Law*, Guy S. Goodwin-Gill, Oxford, 1996.

'...practice reveals a significant level of general agreement not to return to danger those fleeing severe internal upheavals or armed conflict in their own countries...nearly four decades of practice contain ample recognition of a humanitarian response to refugees falling outside the 1951 Convention. Whether practice has been sufficiently consistent over time and accompanied by the *opinion juris* essential to the emergence of a customary rule of refuge, is possibly less certain, even at the regional level.'

Although written almost a decade ago, the view expressed is still relevant. For example, no consensus emerged from the Global Consultations that the scope of non-refoulement in customary international law had extended to encompass refugees other than those falling within the definition of the 1951 Convention/1967 Protocol. Moreover, in relation to the EU's moves towards harmonising subsidiary protection, K. Hailbronner has argued that 'the assumption of an international legal obligation to grant protection to victims of war, civil war and general violence must still be considered as "wishful legal thinking"'; see page 13 of *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?*, D Bouteillet-Paquet (ed.), Bruylant, 2002. See also page 287 of *Broadening the Edges: Refugee Definition and International Protection Revisited*, Pirrko Kourula, Martinus Nijhoff, 1997.

<sup>32</sup> See paragraph I(1).

refrain from returning some, if not all, non-Convention refugees is discussed in paragraphs 54 to 70 of this chapter.

## 2. *Regional Refugee Instruments*

### a. Africa

30. As mentioned in Chapter I above, apart from its impact on states party to it, the 1969 OAU Convention has exerted a more general influence through informing the scope of UNHCR's mandate and the concept of persons in need of international protection. Specifically adopted as the regional complement to the universal refugee instruments,<sup>33</sup> the OAU Convention remains the only treaty to include an elaboration of the refugee definition found in Article 1 of the 1951 Convention.<sup>34</sup> After incorporating Article 1A(2) of the 1951 Convention,<sup>35</sup> Article I(2) of the OAU Convention goes on to state that:

The term refugee shall also apply to every person who, 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 is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Article I(5) sets out exclusion criteria similar to those found in Article 1F of the 1951 Convention.

31. The very existence of the OAU Convention has been used by some to justify a conservative reading of the 1951 Convention. However, there is no persuasive evidence that the drafters of the OAU Convention thought the 1951 Convention refugee definition inadequate to deal with issues such as mass displacement or flight from civil war situations. Rather, a dearth of primary materials<sup>36</sup> documenting the OAU Convention's drafting history has allowed misunderstandings about the scope of its refugee definition to flourish. Indeed, the question of an appropriate refugee definition for this regional instrument did not seem to be of major concern until fairly late on in its negotiation.<sup>37</sup> Initially, the OAU Convention was conceived as a stand-alone instrument given the temporal and geographical limitations of the 1951 Convention as originally adopted. However, with the introduction of the 1967 Protocol and the removal of the dateline, the 1951 Convention became of potential application to African states.<sup>38</sup> Nevertheless,

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<sup>33</sup> See Article VIII of the OAU Convention.

<sup>34</sup> See below for discussion of other regional instruments (rather than treaties) which have built on the 1951 Convention definition.

<sup>35</sup> Article I(1) of the OAU Convention.

<sup>36</sup> See paragraph 16 of *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa*, George Okoth-Obbo, 20(1) *Refugee Studies Quarterly* 79. This suggests that the only detailed account of the negotiations is given in Ivor Jackson's study of group recognition of refugees (see note 39 below).

<sup>37</sup> *Ibid.*, and page 4 of *Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on*, Micah Bond Rankin (for UNHCR's series of Working Papers on New Issues in Refugee Research), April 2005.

<sup>38</sup> Indeed, the OAU expressed appreciation of the efforts of UNHCR in pursuing a universal character for the 1951 Convention. See the Resolution on the Adoption of a Draft Convention on

concerns remained that the 1951 Convention did not adequately address two features of the African refugee context: the struggle against colonialism and apartheid, as well as relations between African states including the control of subversive activities.<sup>39</sup> Hence the language of Article I(2) of the OAU Convention seems to have been primarily intended to address the situation of persons actively engaged in armed struggle against racist or colonial regimes<sup>40</sup> and concerns about the term ‘persecution’ when used to describe the behaviour of governments in fellow, newly-independent states.<sup>41</sup>

32. Although the refugee definition in Article I(1) and (2) of the OAU Convention has been incorporated into the legislation of many African states, gaining an understanding of how this definition is actually interpreted is rather problematic given the paucity of functioning individualised refugee status determination procedures in the region. Nevertheless, it is clear that Article I(2) requires neither the elements of deliberateness nor discrimination inherent in the 1951 Convention definition.<sup>42</sup> In addition, Article I(2) does not prescribe a particular type of harm that the individual must have suffered or be at risk of.

33. Hence, so long as an asylum seeker has been forced to leave his country of origin for one of the reasons enunciated in Article I(2) of the OAU Convention he is a refugee for its purposes. Of the grounds listed, ‘external aggression’, ‘occupation’ and ‘foreign domination’, while drafted with the struggle against colonialism in mind, are still unfortunately of relevance today in the context of international armed conflicts, including border skirmishes and aiding rebel movements in a neighbouring state. As for ‘events seriously disturbing public order’, this concerns situations where peace and security are undermined to such an extent that the normal mechanisms for preventing, investigating and punishing crime are so ineffective as to leave individuals unprotected by the state. Civil war would be a clear example. However riots or internal upheavals (including violent acts from paramilitary or localised anti-government groups) may also constitute such events where the authorities are unable to maintain law and order.

34. Although, it is possible to envisage a breakdown in public order caused by extreme mismanagement of the economy or a severe environmental disaster (whether man-made or natural), Article I(2) of the OAU Convention does not explicitly cover individuals fleeing

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the Status of Refugees in Africa, OAU Council of Ministers Seventh Ordinary Session, Addis Adaba, 31 October to 4 November 1966.

<sup>39</sup> See page 191 of *The Refugee Concept in Group Situations*, Ivor Jackson, Martinus Nijhoff Publishers, 1999.

<sup>40</sup> See page 112 of *Thirty Years On*, G. Okoth-Obbo at note 36 above; page 455 of *Human Rights, the OAU Convention and the Refugee Crisis*, J. Oloka-Ongango, 3 International Journal of Refugee Law 453 and page 195 of *Refugee Definitions in Africa and Latin America: The Lessons of Pragmatism*, E. Arboleda, 3 IJRL 185. This issue was problematic given the OAU Convention’s complementary relationship to the 1951 Convention. The latter is an avowedly non-political and humanitarian instrument and thus refugee status is considered incompatible with any ongoing military activity. However, such contradictions are arguably less relevant now given that the colonial and apartheid era has come to an end.

<sup>41</sup> ‘...the notion of “persecution” may itself have given rise to objections in view of its possible political implications’; see *The Refugee Concept in Group Situations*, Ivor Jackson, 1999 at page 193.

<sup>42</sup> See *The Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, E. Arbodela, 3 IJRL 185 at page 192.

poor economic or ecological conditions.<sup>43</sup> Moreover, there is scant evidence of this refugee definition being applied in such circumstances and the inclusion of natural disasters sits uneasily with the preceding criteria that relate to man-made events such as foreign aggression.<sup>44</sup> However, where a natural disaster is manipulated by the government or other actors to the detriment of the population this may well constitute ‘events seriously disturbing public order’.

35. There is also a question as to whether the public order criterion is relevant in situations where the rule of law has essentially disintegrated in response to massive violations of human rights. Given the nature of public order, for it to be seriously disrupted by human rights violations these would arguably have to be on a scale capable of affecting the very fabric of society.<sup>45</sup> However, such egregious disrespect for human rights standards by a government (or indeed another actor) would generally be accompanied by a discriminatory motive, for example intimidation of a pro-democracy movement. In such circumstances, individuals may well be eligible for recognition under the 1951 Convention definition anyway. Indeed, this highlights the importance of remembering that amongst those who may potentially be covered by the Article I(2) definition are individuals who are actually refugees in terms of the 1951 Convention/Article I(1) OAU definition.<sup>46</sup> For example, individuals fleeing an internal armed conflict where civilians are being targeted on the grounds of their ethnicity.

36. Although, as mentioned above, the Article I(2) refugee definition came out of a specific political context – the movement to end colonial domination – the actual scenarios covered lend themselves to universal application. Although situations of ‘foreign domination’ and ‘occupation’ may arguably be less frequent in Africa or elsewhere these days, they are by no means (unfortunately) entirely redundant. As for ‘events seriously disturbing public order’, this has taken on greater significance, given that many displacements in Africa stem, for example, from internal conflict. Such situations are also prevalent elsewhere in the world, thus the approach of Article I(2) in defining persons in need of international protection is arguably of universal relevance.<sup>47</sup> Concrete evidence of this is found in the recourse by non-African states and UNHCR alike to the Article I(2) concepts in elaborating UNHCR’s mandate and other regional refugee instruments. As for Africa itself, the continuing contribution of the OAU Convention has been affirmed in, for example, the Conakry Plan of Action (adopted at a joint UNHCR/African Union

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<sup>43</sup> See *Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa*, M. Rwelamira, 1 IJRL 557 at 558 which argues that an element of flexibility exists in the OAU Convention to deal with victims of ecological changes in certain circumstances.

<sup>44</sup> See page 21 of *Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on*, Micah Bond Rankin (for UNHCR’s series of Working Papers on New Issues in Refugee Research), April 2005 which argues, *inter alia*, that the *ejusdem generis* maxim of interpretation would require that the criterion of ‘events seriously disturbing public order’ be read in the context of the types of situations preceding it.

<sup>45</sup> An interesting exploration of this aspect of the OAU Convention’s definition is found in *Extending the limits or narrowing the scope?*, *ibid.* at page 18.

<sup>46</sup> As Ivor Jackson has noted:

The various elements specified in Article I Paragraph 2 of the OAU Refugee Convention, i.e. external aggression, occupation, foreign domination or events seriously disturbing public order, will normally have a clear political background. In view of this, it is very possible that in many group situations, the application of either definition would led (sic) to very much the same result.

(page 193 of *The Refugee Concept in Groups Situations*, Martinus Nijhof Publishers, 1999).

<sup>47</sup> This point is strongly made at page 115 of *Thirty Years On*, G. Okoth-Obbo, (see note 36 above).

symposium to mark the thirtieth anniversary of this treaty) and in UNGA resolution 54/147 of 22 February 2000 on assistance to refugees, returnees and displaced persons in Africa.

37. In terms of the OAU Convention's *non-refoulement* provision, this is contained in Article II(3):

No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I paragraphs 1 and 2.

The terms of this provision are absolute and therefore more generous than that found in Article 33 of the 1951 Convention.<sup>48</sup> Moreover Article II(3) of the OAU Convention explicitly prohibits rejection at the border, a matter that is only implicit in the 1951 Convention.

38. As for the duration of protection from return, cessation clauses are found in Article I(4) of the OAU Convention. Beyond the circumstances envisaged in Article 1(C) of the 1951 Convention, this provision includes the commission prior to admission of a serious non-political crime and culpability for serious infringements of the OAU Convention's purposes. In this context, Article III prohibiting 'subversive activities' by refugees should be borne in mind.

b. Central and South America

39. In light of the considerable refugee movements that took place in the 1970's and 1980's as a result of conflict throughout Central America, the 1984 Cartagena Declaration on Refugees was adopted at a conference attended by regional states, UNHCR, UNDP and local NGOs. Its preamble confirms that the instrument is a regional complement to the universal refugee instruments. Conclusion 3 of the Declaration recommends that:

...the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees 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.

The Declaration goes on to affirm in Conclusion 5 the customary nature of the principle of *non-refoulement* in relation to refugees, expressly mentioning the prohibition on rejection at the border. No reference is made to any exceptions to the principle of *non-refoulement*.

40. Although the Declaration is not legally binding, subsequent practice by states, in terms of their legislation and policies, indicates its acceptance as a fundamental element of the refugee protection framework in Latin America. Indeed it has been endorsed by the

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<sup>48</sup> See *Thirty Years On*, G. Okoth-Obbo.

Organisation of American States (OAS), by UNHCR's Executive Committee and by states party to the universal refugee treaties.<sup>49</sup>

41. The Declaration expressly refers to Article I(2) of the OAU Convention as inspiring the language in its refugee definition. However, there are some differences. Firstly, the Cartagena text requires particular harm to be demonstrated (i.e. threats to life, safety or freedom). Although these are referred to in the past tense ('have fled because'), the definition has nevertheless been interpreted as also covering refugees 'sur place'. This is in line with the aim of the Declaration to benefit all those with similar protection needs to Convention refugees. As for the nature of the rights protected, these relate essentially to a person's physical integrity (e.g. acts of torture) as well as universally-recognised freedoms (e.g. freedom from arbitrary detention, right to hold opinions and religious beliefs, freedom of movement, peaceful assembly and association). Given the stated intention of the Declaration's drafters to define refugees as broadly as possible, states have traditionally shied away from a rigid interpretation of these protected rights.<sup>50</sup>

42. The other major difference between the 'extended' definition in the Cartagena Declaration and Article I(2) of the OAU definition is the range of objective circumstances included. The reference to 'foreign aggression' in the Declaration would seem to cover similar ground to the concepts of 'external aggression', 'occupation' and 'foreign domination' found in the OAU Convention. The specific mention of 'internal conflicts' is not surprising given the historical context in which the Declaration was adopted, numerous civil wars in Central America, in contrast to the backdrop to the OAU Convention, liberation struggles against foreign rule. Of the other grounds listed, 'generalised violence' and 'other circumstances which have seriously disturbed public order' would seem to cover much of the same territory as the concept of 'other events seriously disturbing public order' in the OAU Convention; for example, rioting and violence by insurgents not amounting to civil war. However, the reference to 'massive violations of human rights' is a distinct point of departure from the OAU approach. Arguably this concept involves two factors, the frequency with which violations are being carried out and the severity of the infringements themselves.<sup>51</sup> Some guidance can be found in resolutions of the international community condemning specific situations involving massive violations of human rights (or similar concepts, for example 'gross violations').<sup>52</sup> As with Article I(2) of the OAU

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<sup>49</sup> See OAS General Assembly Resolution 1273 (XXIV-0/94) of 10 June 1994, ExCom Conclusion No. 77 (1995) and the 2001 Ministerial Declaration of States Parties to the 1951 Convention and/or 1967 Protocol.

<sup>50</sup> See page 95 of *The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention – A Comparative Perspective*, Eduardo Arboleda, IJRL, Special Issue Summer 1995

<sup>51</sup> See *Principles and Criteria for the Protection of and Assistance to Central American Refugees and Displaced Persons in Latin America*, H. Gros Espiell, S. Picado and L. Vallandares Lanza, 2 IJRL 83 at page 96.

<sup>52</sup> For example, (a) Chile after the 1973 military coup (UN Commission on Human Rights resolutions 8 (XXXI) of 1975; 3(XXXII) of 1976; 9(XXXIII) of 1977; 12(XXXIV) of 1978; 11(XXXV) of 1979; 9 (XXXVII) of 1981; 1985/47; 1986/63; 1987/60; 1988/78 and 1989/62); (b) Guatemala during its internal conflict in the 1970s and 1980s (UN Commission on Human Rights resolutions 1983/37 and 1985/36); in other regions, (c) Iraq during the 1990s repression against the Kurds in the North and the Assyrian, Shiites and Turkmen community in the south (UN Commission on Human Rights resolutions 1992/71, 1993/74, 1994/74, 1995/76, 1996/72 and 1997/60); and (d) Myanmar under the military dictatorship headed by the State, Peace and Development Council which took power in 1988 (UN Commission on Human Rights resolutions 2000/23, 2001/15, 2002/67 and 2003/12).

Convention, there is undoubtedly an overlap between the 1951 Convention criteria and the additional grounds in the Cartagena declaration.<sup>53</sup>

43. There are no recommendations on grounds for exclusion or cessation in the Cartagena Declaration. Nevertheless the relevant criteria in the 1951 Convention are generally considered to apply given the clear description of the Cartagena elements as ‘in addition’ to the 1951 Convention definition.

c. Europe

i. *Council of Europe Recommendations*

44. The Council of Europe has long called for a common approach to be taken in relation to persons falling outside the scope of the 1951 Convention who nevertheless need protection from return to their country of origin. Of the various recommendations made by the Parliamentary Assembly and the Committee of Ministers,<sup>54</sup> Recommendation (2001)18 of the Committee of Ministers suggests the following criteria for the granting of such protection in the case of persons ineligible for recognition under the 1951 Convention:

- risk of torture or inhuman or degrading treatment or punishment;
- forced to flee or remain outside country of origin as a result of a threat to life, security or liberty because of indiscriminate violence arising out of situations such as armed conflict; or
- other reasons recognised by legislation or practice in a member state.

Although not legally-binding these recommendations are significant in that they reflect the views of member state governments. That being said, in the case of European Union states the impact of the recommendation has been superseded by the Qualification Directive.

ii. *EU Qualification Directive*

45. In relation to the European Union’s objective of a common policy on asylum, Council Directive 2004/83/EC of 29 April 2004 sets minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and for the content of protection to be granted. In its preamble, this Qualification Directive explicitly recognises that the 1951 Convention provides the cornerstone of the international legal regime for the protection of refugees. It also acknowledges that one of the aims of the instrument is the harmonisation of ‘subsidiary’ forms of protection in EU states.<sup>55</sup> In terms of the criteria for subsidiary protection, these are drawn, according to the preamble, ‘from international obligations

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<sup>53</sup> For example, where massive violations of human rights are taking place it is likely that these will be motivated by a discriminatory intent based on matters such as ethnicity and political opinion, hence raising the possibility of persecution taking place in the sense of Article 1 of the 1951 Convention.

<sup>54</sup> See for example, Parliamentary Assembly Recommendations 773 (1976) on the Situation of De Facto Refugees, 817 (1977) on Certain Aspects of the Right to Asylum, 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe and 1525 (2001) on the United Nations High Commissioner for Refugees and the Fiftieth Anniversary of the Geneva Convention.

<sup>55</sup> Denmark is the only EU state to have expressly opted out of the Directive’s regime.

under human rights instruments and practices existing in Members States'.<sup>56</sup> However, persons allowed to stay for discretionary humanitarian or compassionate reasons fall outside the Directive.<sup>57</sup> Thus, after setting out criteria to be used by EU states in interpreting the 1951 Convention refugee definition, the Directive stipulates in Article 2(e) that:

...a person eligible for subsidiary protection means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Article 15 describes 'serious harm' as:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

46. The first two paragraphs of Article 15 are based very much on the member states' human rights obligations. Article 15(b) reflects the requirements of Article 3 of the Convention against Torture and the European Convention on Human Rights (both discussed later in this chapter). As for Article 15(a), all EU states are party to Protocol 6 of the European Convention on Human Rights (ECHR) and the Optional 2<sup>nd</sup> Protocol to the International Covenant on Civil and Political Rights which both abolish the use of the death penalty in peace time. A significant number of EU states are also party to Protocol 13 of the ECHR which bans the death penalty even in a time of war while all EU states are bound by the restraints on returning an individual to the death row phenomenon where this constitutes a breach of Article 3 of the ECHR.<sup>58</sup> Moreover, the EU Charter of Fundamental Rights will, when it comes into force, prohibit removal of an individual to a country where there is a serious risk of him being subject to the death penalty. Therefore, Article 15(b) reflects the myriad of death-penalty related legal obligations and the EU's abolitionist policy.

47. By contrast, Article 15(c) cannot be traced to language found in a specific universal or regional human rights instrument. Instead, it has more of a link to the concepts found in the OAU Convention and the Cartagena Declaration in so far as these relate to situations of armed conflict. Article 15(c) reflects the practice in EU states of providing protection from return to individuals fleeing conflict, for example in relation to the break-up of the former

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<sup>56</sup> See Preambular Paragraph 25 of the Directive. It appears therefore that references to 'international protection' in the Directive depart from the traditional use of this term. Rather, the Directive uses the phrase 'international protection' to describe all persons protected from non-refoulement under its provisions, which in turn are based on international refugee and human rights law as well as national practices. See note 24 above for the traditional meaning of 'international protection' as used in this study.

<sup>57</sup> See Preambular Paragraph 9 of the Directive.

<sup>58</sup> See further paragraph 66 below.

Yugoslavia. As such, it also mirrors support from EU states for UNHCR's protection activities in relation to 'war refugees' even where these countries do not consider such individuals to fall within the 1951 Convention.

48. Although Article 15(c) appears to cover some of the same ground as the regional refugee definitions, unlike Article I(2) of the OAU it, in common with the other Article 15 criteria, requires proof of a particular kind of harm. It is not enough to simply show that an individual is outside of his country because of the indiscriminate violence there. Moreover, embarking on a definition of 'subsidiary protection', rather than elaborating on the definition of a 'refugee', is itself a significant departure from the approach adopted in other regions. Nevertheless, the concepts employed in defining 'subsidiary' protection are similar to those used in the OAU and Cartagena refugee instruments as they do not require an individual to be at risk because of his 'race, religion, nationality, membership of a particular social group or political opinion'.<sup>59</sup>

49. Article 17 of the Directive sets out grounds for exclusion from subsidiary protection status. These are wider than those found in Article 1F of the 1951 Convention.<sup>60</sup> No mention is made of exclusion criteria similar to those found in Article 1D or E of the 1951 Convention. Instead, the focus is on excluding those persons not deserving, rather than not in need, of protection from return. However, Article 2(e) and 18 of the Directive make it clear that subsidiary protection, like refugee status, is not available to nationals of EU countries.

50. The Directive's *non-refoulement* provision is found in Article 21. Paragraph 1 states:

Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.

Article 21(1)'s reference to obligations under international law means that the Directive recognises that individuals excluded from subsidiary protection under Article 17 may nevertheless be protected from removal. Thus, subsidiary protection, as governed by the Directive, is not intended to cover all instances where a state is prohibited under

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<sup>59</sup> See the 1951 Convention refugee definition – Article 1A(2).

<sup>60</sup> Article 17 reads:

1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:
  - (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
  - (b) he or she has committed a serious crime;
  - (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
  - (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.
2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.
3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

international law from returning an individual to his country of origin, just those where a need for international protection (as defined by the Directive)<sup>61</sup> is considered to exist.

51. In terms of the duration of subsidiary protection, Article 16 of the Directive deals with ending of such status. Under this provision, eligibility for subsidiary protection comes to an end when the circumstances which led to its granting have ceased to exist or changed to such a degree that protection is no longer required. In evaluating whether such conditions have arisen the Directive requires states to consider whether the change is of a sufficiently ‘significant and non-temporary’ nature. This would seem to follow the approach recommended by UNHCR’s Executive Committee in relation to the ‘ceased circumstances’ cessation clause in the 1951 Convention.<sup>62</sup>

52. Under Article 38 of the Directive, EU States have until 10 October 2006 to bring their national legislation and practice into line with its provisions. That being said, the Directive only sets minimum standards and so affected states have discretion to implement more generous criteria nationally for subsidiary protection.<sup>63</sup> Moreover, the Directive’s actual impact depends on the exact criteria currently used by individual states to govern their complementary protection regimes.

d. Asia

53. Although very few states in Asia are actually party to the 1951 Convention/1967 Protocol, many of them have generously responded to the protection needs of asylum seekers arriving in their territory. Moreover, in Article 1 of the Revised Bangkok Principles, adopted on 24 June 2001, the Asian-African Legal Consultative Organisation (AALCO) agreed a refugee definition which is identical in substance to Article I(1) and (2) of the OAU Convention.<sup>64</sup> Article III goes on to prohibit *refoulement* of refugees so defined. However, it is important to note that the Bangkok Principles are not legally binding and are yet, it would seem, to be formally applied by any Asian country. Nevertheless, it is interesting that AALCO has chosen to follow the strategy of an elaborated regional refugee definition in meeting the needs of all refugees under UNHCR’s competence.

3. *Instruments Not Specifically Concerned With Refugees*

a. Universal Instruments

i. *Human Rights – Prohibition on Return to Torture*

54. Under Article 3 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), there is a clear and absolute

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<sup>61</sup> See note 56.

<sup>62</sup> ExCom Conclusion no. 69 (1992), See also paragraph 8 of *Guidelines On International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, (HCR/GIP/03/03), UNHCR, 2003.

<sup>63</sup> See Article 3 of the Directive.

<sup>64</sup> The Principles are therefore of little significance in terms of the legal obligations on African states, the vast majority of whom are parties to the OAU Convention.

prohibition on returning an individual to a country where he is at risk of being tortured.<sup>65</sup> In addition, Article 7 of the 1969 International Covenant on Civil and Political Rights (ICCPR) has been interpreted as absolutely prohibiting the removal of an individual to a place where he is at real risk of torture or to ‘cruel or inhuman or degrading treatment or punishment’.<sup>66</sup> A similar obligation can be read into Article 37(a) of the 1989 Convention on the Rights of the Child in relation to minors. Moreover, the prohibition on return to torture, cruel or inhuman or degrading treatment or punishment is considered part of customary international law.<sup>67</sup>

55. The guidance in Article 1 of CAT on the meaning of ‘torture’ has been supplemented by the jurisprudence of its monitoring body, the UN Committee Against Torture. Accordingly, torture comprises the following elements: (a) the intentional infliction of severe pain or suffering, whether physical or mental; (b) by, or with the acquiescence, of a public official or person acting in an official capacity; (c) for the purposes of obtaining a confession, punishing or intimidating the victim or a third party (except in relation to a lawful sanction) or for any discriminatory reason. In deciding whether return to a particular country will breach Article 1 of CAT, the Committee examines whether the individual is at personal risk of being subjected to torture. The standard of proof is higher than mere suspicion but lower than highly probable.<sup>68</sup> In considering the facts of an individual’s case, his personal profile, (e.g. ethnic/political background) will be taken into account as well as the general human rights conditions in the country of origin, but not any internal flight argument.<sup>69</sup> Moreover, the Committee has stated that acts of a non-governmental entity will generally not meet the ‘public official’ criterion of the Article 1 torture definition.<sup>70</sup> However, in exceptional situations, where there is an absence of a central government, acts by groups holding quasi-governmental authority over specific parts of the state may fall within Article 3 of CAT.<sup>71</sup>

56. As for the concept ‘cruel or inhuman or degrading treatment or punishment’, despite its incorporation in many instruments apart from the ICCPR, none of them provide

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<sup>65</sup> ‘1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’.

<sup>66</sup> See *General Comment Nos. 31 (2004) and 20 (1992)* of the UN Human Rights Committee as well as *Chitat Ng v Canada* (View of the Human Rights Committee of 5 November 1993).

<sup>67</sup> See, for example, paragraph 9 of *General Comment No. 20 (1992)* and *General Comment No. 24 (1994)* of the UN Human Rights Committee.

<sup>68</sup> See *General Comment 1997 on Article 3 in the context of Article 22*, UN Committee Against Torture, 1987.

<sup>69</sup> See B. Gorlick, *The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees*, 11 IJRL 479 at page 481.

<sup>70</sup> See *G.R.B. v Sweden* (83/1997), decision of 15 May 1998, where the Committee considered a risk of ill-treatment by the ‘Shining Path’ to fall outside of the CAT’s ambit as the latter were not a government entity.

<sup>71</sup> See *Elmi v Australia* (120/1998), decision of 14 May 1999, in relation to the acts of Somali clan members. The Committee noted that these clans had been involved in negotiations with the international community and that some had set up public institutions such as health services and taxation regimes. Hence, the Committee found that there would be a violation of Article 3 CAT if the applicant was returned to Mogadishu as he was at risk of torture by the governing clan in that area. However, in more recent decisions in relation to Somalia the Committee has concluded that the presence of a transitional government means that central authority has been restored and thus the acts of individual clans can no longer constitute torture for the purposes of CAT. See, for example, *HMHI v Australia* (177/2001), decision of 1 May 2002.

a definition. The Human Rights Committee has ruled out any sharp distinction between acts of torture as opposed to cruel or inhuman or degrading treatment or punishment. Rather, it has indicated that these concepts are to be differentiated by the ‘nature, purpose and severity of the treatment applied’.<sup>72</sup> In particular it has held that the following amount to ‘cruel and inhuman treatment’: implementation of the death penalty through gas asphyxiation, exceptionally severe conditions of detention (e.g. complete isolation, food deprivation) and abduction.<sup>73</sup> The more developed interpretation of ‘inhuman or degrading treatment or punishment’ by the European Court of Human Rights has often influenced the decisions of the Human Rights Committee in this sphere.<sup>74</sup>

57. The prohibition on return to torture or cruel, inhuman or degrading treatment or punishment does not require the host state to grant asylum. Rather, like the non-*refoulement* provision in relation to refugees in the 1951 Convention and in customary law, the individual in question can be removed to a third state so long as there is no risk of the specified ill-treatment in that territory or in a country to which he might be subsequently removed.<sup>75</sup> On the other hand, it is clear that states are under a duty to admit an individual if rejection at the border might lead to him suffering torture or cruel, inhuman or degrading treatment or punishment. This flows from the general principle of international law that the responsibility of the state will be engaged whenever acts or omissions can be attributed to it, irrespective of where these take place.<sup>76</sup>

58. Given the nature of torture and related ill-treatment, there is a significant overlap between refugee protection in the 1951 Convention and Article 3 of CAT as well as Article 7 of the ICCPR. However, in a number of ways the torture provisions go further than the 1951 Convention. Apart from there being no basis for exclusion from protection, the harmful act in question need not be related to the specific grounds set out in the 1951 Convention (e.g. race, religion). The latter means that the prohibition on return to torture under international law may be relevant to refugees who fall outside of the 1951 Convention.<sup>77</sup> In practical terms, protection under CAT or the ICCPR may be accessed on an international level if the state in question has accepted the individual complaints procedure set up under the relevant treaty and if the complainant has exhausted all domestic remedies. In terms of the jurisprudence developed at international level, the majority of the decisions by the Committee Against Torture in relation to expulsion seem to be concerned with individuals who were wrongly denied refugee status under the 1951 Convention, for example because of credibility assessments.<sup>78</sup> It is more difficult to discern

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<sup>72</sup> See paragraph 4 of *General Comment No. 20 (1992)*, Human Rights Committee.

<sup>73</sup> See *The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases*, Alberta Fabricotti, 10 *IJRL* 637 at page 649.

<sup>74</sup> See, for example, page 30 of *Fleeing Poverty and Violence: Non-refoulement obligations under the European Convention on Human Rights*, Katharina Röhl (for UNHCR’s Series of working papers on New Issues in Refugee Research), 2005. Article 3 of the European Convention of Human Rights is discussed in paragraphs 65 to 68 below.

<sup>75</sup> See page 160 of ‘Non-refoulement: Scope and Content of the Principle’, E. Lauterpacht and D. Bethlehem in *Refugee Protection in International Law*, E. Feller, V. Türk, and F. Nicholson (eds. for UNHCR), Cambridge, 2003.

<sup>76</sup> *Ibid.*

<sup>77</sup> The impact of these international obligations on national law and practice in relation to complementary protection is touched on in Part III.

<sup>78</sup> For an analysis of how the decisions of the Committee against Torture have ‘moved the law on refugee protection in a positive direction’ see page 33 onwards of *Human rights and refugees:*

a pattern of reasoning in relation to circumstances justifying refugee protection outside of the 1951 Convention, for example on the grounds of a risk of torture arising from indiscriminate violence. However, the reasoning of the Committee Against Torture so far seems to leave open the possibility of non-Convention refugees obtaining protection from return under the CAT in certain circumstances. As for the Human Rights Committee, its jurisprudence is less developed and caselaw directly relating to the situation of refugees falling outside of the 1951 Convention does not appear to have arisen yet.<sup>79</sup>

ii. *Other Aspects of International Human Rights Law*

59. Article 3 of CAT is the only express prohibition on return found under the universal human rights instruments. However, the Human Rights Committee has noted that Article 2 of the ICCPR, governing the general obligation of states parties, requires countries to refrain from removing an individual from their territory ‘where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.’<sup>80</sup> The implications of Article 7 ICCPR have been discussed above. As for Article 6, this prohibits the arbitrary deprivation of life, arguably including civilian deaths in armed conflict.<sup>81</sup> The wording of the Committee’s comment leaves open the possibility that in certain cases removal of an individual to another state may breach other provisions of the ICCPR. Indeed, the Committee has hinted that uncertainty about the permanency of residence of foreign husbands, and thus the risk of their deportation, could constitute a violation of the Covenant’s provision on right to family life.<sup>82</sup>

60. The ‘best interests’ principle introduced by Article 1 of the 1989 Convention on the Rights of the Child (CRC) is extremely relevant in assessing any prohibition on return in relation to child asylum seekers. The authorities are under an obligation to look at the child’s best interests as ‘a primary consideration’, and thus significant weight must be placed on this factor compared to other legitimate interests, such as immigration control. For example, in the case of unaccompanied children who have no supportive family network in the country of origin, Article 1 CRC may well prohibit their repatriation.

61. Although not legally-binding, the UN Declarations dealing with enforced disappearances and extra-legal executions deserve a mention as they expressly rule out the removal of individuals by states to another country when there are substantial grounds for

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*enhancing protection through international human rights law*, B. Gorlick (for UNHCR’s series of Working Papers on New Issues in Refugee Research), 2000.

<sup>79</sup> See page 119 of *Subsidiary Protection and Primary Rights*, Ryszard Piotrowicz and Carina van Eck, 53 *International and Comparative Law Quarterly*, which notes that the Human Rights Committee is not comprised of lawyers and that its decisions in individual cases are not binding on the parties; also page 50 of *Human rights and refugees: enhancing protection through international human rights law*, B. Gorlick (*ibid.*) which comments on the limited recourse made to this individual complaints procedure in relation to risk of refoulement.

<sup>80</sup> See paragraph 12 of *General Comment No. 31* (2004) of the UN Human Rights Committee on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant.

<sup>81</sup> Paragraph 2 of the UN Human Rights Committee’s *General Comment No.6* (1982) describes warfare as a major threat to ensuring the right to life.

<sup>82</sup> See *Aumeeruddy-Cziffra and 19 other Mauritian Women v Mauritius* (R.9/35), views of the Human Rights Committee dated 9 April 1981.

believing this would place the individual in danger of enforced disappearance or extrajudicial execution.<sup>83</sup> In this respect, the declarations would seem to build on Article 7 ICCPR and Article 3 of CAT as, for example, abduction has been recognised by the Committee against Torture as a form of torture.

iii. *International Humanitarian Law*

62. International humanitarian law contains a number of provisions prohibiting the expulsion of individuals from the territory of a country. Article 45 of the Fourth Geneva Convention, (that is, the 1949 Convention Relative to the Protection of Civilian Persons in Time of War), deals with the transfer of civilians<sup>84</sup> between states engaged in an international armed conflict. Paragraph 4 of this provision prohibits the transfer of a civilian ‘where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.’ The only exception to this is in relation to individuals who are engaged in activities against the security interests of the state.<sup>85</sup> As Article 45 is only concerned with religious or political persecution, the protection it affords is clearly narrower than that under Article 33 of the 1951 Convention or the customary law principle of *non-refoulement* of refugees. As such, it does not provide a legal basis for protection from return for individuals who fall outside of the 1951 Convention. By contrast, Article 49 of the Fourth Geneva Convention contains an absolute prohibition on the deportation of civilians in occupied territory to any other country. In addition, Article 17 of Additional Protocol II to the 1949 Geneva Conventions prohibits displacement of civilian populations in internal armed conflict for ‘reasons related to the conflict’. However, all of these prohibitions are of limited relevance to the question of non-Convention refugee protection as they apply only to parties to the conflict and generally to the situation of individuals in their country of origin.

63. On the other hand, several key provisions of international humanitarian law, while not amounting to prohibitions on return, may influence the attitude of states in deciding whether an individual can be removed from their territory. A prime example is Article 3 of the Fourth Geneva Convention, applicable in all types of armed conflict, which contains similar prohibitions to those found in Articles 6 and 7 of the ICCPR.<sup>86</sup> Although, there is little evidence that an implied prohibition on return to the specified forms of ill-treatment can be read into Article 3, states will no doubt consider the risk of the receiving state

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<sup>83</sup> See Article 8 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance and Principle 5 of the 1989 UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

<sup>84</sup> The Convention actually refers to ‘protected persons’, a term which also covers wounded, sick, shipwrecked and captured soldiers. However, the emphasis of the Fourth Convention is on the welfare of civilians, the treatment of the other groups being dealt with by the First, Second and Third Geneva Conventions of 1949.

<sup>85</sup> See article 5 of the Fourth Geneva Convention.

<sup>86</sup> Article 3 places an obligation on the warring parties to refrain from committing the following acts in relation to civilians:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Taking of hostages;
- Outrages upon personal dignity, in particular humiliation and degrading treatment;
- The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized populations.

committing Article 3 violations when deciding on return.<sup>87</sup> The same could also be said in relation to other ‘war crimes’, that is those breaches of international humanitarian law which give rise to individual criminal responsibility.<sup>88</sup> Nevertheless, the relevance of international humanitarian law in protecting the fundamental rights of civilian victims of war falls away once such persons flee to a country that is not party to the conflict. At that point, other provisions of international law, such as refugee and human rights law, will take over as the tools for continuing to protect these individuals from the effects of the conflict in their home country.

iv. *Extradition Treaties*

64. Extradition treaties often include a discrimination clause which prevents the surrender of an individual to another state in order to stand trial or complete a sentence of punishment where the motivation for such criminal proceedings or sentence is discriminatory. As such, these clauses have features in common with Article 33 of the 1951 Convention, the aim being to prevent individuals suffering a breach of their human rights as a result of extradition.<sup>89</sup> Moreover, many extradition treaties also include a political offence clause which bars extradition for crimes considered to be of a political nature. Although these provisions provide protection from return, they are applicable only in the most specific circumstances – requests for surrender of fugitives. Accordingly, these provisions do not in practice provide widely-applicable grounds for non-removal additional to those found in the 1951 Convention.

b. Regional Instruments

i. *European Convention on Human Rights (ECHR)*

65. The European Court of Human Rights has consistently held that returning an individual, directly or indirectly, to a country where there are substantial grounds for believing he is at real risk of being subjected to torture or inhuman or degrading treatment or punishment amounts to a violation of Article 3 of the ECHR.<sup>90</sup> As with other provisions of international law that ban torture, there are no exceptions to this prohibition. The jurisprudence of the European Court on the question of when removal amounts to torture or inhuman or degrading treatment or punishment is perhaps the most developed of all the international institutions concerned with these concepts.

66. An Article 3 violation, whether based on removal from the territory or not, is dependent on the treatment concerned reaching a ‘minimum level’ of severity.<sup>91</sup> All the

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<sup>87</sup> See page 134 of *Subsidiary Protection and Primary Rights*, Ryszard Piotrowicz and Carina van Eck, 53 *International and Comparative Law Quarterly*, 107 at page 133

<sup>88</sup> Annex B of the *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, 2003 provides a summary of ‘war crimes’ and their sources, e.g. the 1949 Geneva Conventions and the Statute of the International Criminal Court.

<sup>89</sup> For a full discussion of the relationship between extradition and asylum see *The Interface between Extradition and Asylum*, Sibylle Kapferer (for UNHCR’s Legal and Protection Policy Research Series), November 2003.

<sup>90</sup> See, for example, *Chahal v UK* (judgment of 25 October 1996) and *T.I. v UK* (admissibility decision of 7 March 2000). The language of Article 3 does not expressly refer to non-refoulement.

<sup>91</sup> See, *Ireland v UK* (judgment of 18 January 1978) and *Tyler v UK* (judgment of 25 April 1978).

circumstances need to be taken into account, including the nature and context of the threatened treatment, the manner of its execution, its likely duration, its physical or mental effects and the sex, age and state of health of the victim. ‘Torture’, ‘inhuman treatment or punishment’ and ‘degrading treatment or punishment’ are autonomous but not necessarily mutually exclusive concepts, with generally a descending order of severity. Treatment or punishment is ‘degrading’ where it arouses in the victim ‘feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.’<sup>92</sup> As for inhuman treatment, this generally involves the infliction of severe pain or suffering whether physical or mental.<sup>93</sup> However, the Court has also found that returning a critically-ill AIDS sufferer to St Kitts where the medical treatment and moral support would be infinitely inferior to that he had been receiving in the UK did, exceptionally, amount to inhuman treatment because there was a real risk he would die under the most distressing circumstances.<sup>94</sup> Torture is generally an aggravated form of inhuman treatment often with a specific purpose, for example obtaining a confession.<sup>95</sup>

67. Aside from Article 3 cases, the European Court of Human Rights has also ruled that removal of an alien may, in certain circumstances, constitute a breach of the right to private or family life under Article 8 ECHR. As this right is not absolute, the court assesses whether such interference with the family relationship is justified by a pressing social need and proportionate to the legitimate aim pursued.<sup>96</sup> Given this balancing act, Article 8 issues will generally only arise in the case of aliens who have been established for a significant period in the host state rather than in the context of recently-arrived asylum seekers. As for other provisions of the ECHR, it is possible that the Court may in the future find situations where these may be breached through removal of an individual from a state party’s territory.<sup>97</sup>

68. The European Court of Human Rights’ jurisprudence has had a significant impact on refugee protection in the countries under its jurisdiction. For example, the Court’s

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<sup>92</sup> See *Ireland v UK*, *ibid.* Examples of treatment the Court has found degrading include birching as a disciplinary measure and failure to facilitate basic hygiene for detainees; see *The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases*, Alberta Fabricotti, 10 IJRL 637 at page 650.

<sup>93</sup> Examples of treatment considered by the Court to fall into this category include exposure to the ‘death row phenomenon’, bodily injury during police custody and the combination of sleep deprivation, subjection to noise, wall-standing, hooding and deprivation of food and drink as an interrogation technique. It is also worth noting that although the recent Protocol 13 to the ECHR provides for an absolute ban on the use of the death penalty, it does not have an explicit non-refoulement provision. By contrast, Article 19(2) of the Charter of Fundamental Rights of the EU will, when in force, expressly forbid removal where there is a serious risk of being subject to the death penalty.

<sup>94</sup> *D v UK* (judgment of 2 May 1997). Similar reasoning has yet to be successful in establishing a violation of Article 3 in respect of return to harsh social and economic conditions.

<sup>95</sup> See *The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases*, A. Fabricotti, at pages 648-650.

<sup>96</sup> See *Moustaquim v Belgium* (judgment of 26 January 1991).

<sup>97</sup> For example, in *Soering v UK* (judgment of 7 July 1989) the Court hinted that in exceptional circumstances removing an individual to a state where he would receive an unfair trial might be considered a breach of the Article 6 fair trial guarantees of the ECHR. See pages 7-9 of *Fleeing Poverty and Violence: Non-refoulement obligations under the European Convention on Human Rights*, Katharina Röhl (for UNHCR’s series of working papers on New Issues in Refugee Research), 2005, on the boundaries of implicit prohibitions on refoulement in the ECHR.

flexibility with regard to the author of potential torture or related ill-treatment has led to it bestowing protection from return in the case of individuals wrongly denied 1951 Convention refugee status by countries unwilling to accept that persecution can take place at the hands of non-state agents. However, its impact on the position of non-Convention refugees is less clear as many of the expulsion cases before the Court have involved discriminatory treatment in the country of origin of the kind envisaged by the 1951 Convention. However, the possibility of the Court finding an Article 3 breach clearly on the basis of indiscriminate violence or generalised human rights violations in the country of origin is arguably still there. The key issue in this regard would seem to be how the Court develops its interpretation of the ‘real risk’ standard for establishing an Article 3 violation. Will it accept that such a risk may exist even where the harm feared arises out of conditions that may affect many inhabitants in the country of origin, for example widespread unintended civilian casualties from an internal armed conflict?<sup>98</sup>

ii. *Other Human Rights Treaties*

69. Article 5 of the 1969 American Convention on Human Rights and Article 5 of the 1981 African Charter of Human and Peoples’ Rights both complement the customary law and ICCPR prohibition on torture, cruel, inhuman or degrading treatment or punishment. There is no specific jurisprudence yet on the question of an implied *non-refoulement* obligation but support is found in the case law of the African Commission on Human and People’s Rights.<sup>99</sup> There are also two regional conventions dealing specifically with torture, the 1985 Inter-American Convention to Prevent and Punish Torture and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The latter has an express prohibition on return to such forms of treatment.

70. Article 22(8) of the American Convention on Human Rights states that, ‘In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.’ As this provision is open to any alien, its scope would appear to be wider than Article 33 of the 1951 Convention which only applies to those fulfilling that treaty’s refugee definition. For example, persons who have committed serious, non-political crimes would seem to benefit from Article 22(2) of the American Convention although they may not be eligible for protection under the 1951 Convention given the exclusion clauses in its refugee definition.

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<sup>98</sup> This issue is investigated in more detail in the observations on standard of proof for determining if an individual is a non-Convention refugee in Chapter IV.

<sup>99</sup> In *Modise v Botswana* (Communication No.97/93), the Commission found that deportation to no-man’s land between Botswana and South Africa constituted cruel, inhuman or degrading treatment. Bethlehem and Lauterpacht consider that ‘there is no reason to believe that the organs responsible for interpreting’ these regional human rights instruments will take a different line to that of the Human Rights Committee and the European Court of Human Rights in finding an implied prohibition on return: see page 158 of ‘Non-refoulement’ in *Refugee Protection in International Law*, Feller, Türk and Nicholson (eds. for UNHCR), Cambridge, 2003.

### **C. Procedural Standards for Determining Eligibility for Protection From Removal**

71. Section B above indicates various provisions found in international law which may require states to refrain from removing refugees falling within UNHCR's mandate even if they do not qualify for protection under the 1951 Convention. However, none of these provisions in themselves stipulate the method by which a state should determine whether a particular asylum seeker is entitled to protection from return. However, Article 13 of the ICCPR states that an alien lawfully within the territory can only be expelled where this is in accordance with the law and after he has had a chance to be represented in front of a competent authority with the power to review the expulsion decision.<sup>100</sup> In addition, Article 13 of the ECHR is significant in relation to the processing of asylum claims. Article 13 requires an effective remedy for victims of violations of the ECHR's provisions. The European Court of Human Rights has ruled that refugee status determination procedures fall within the purview of Article 13 given the similarities in substance between a claim for Convention refugee status and requests for non-removal based on Article 3 of the ECHR. In relation to such procedures, the Court has ruled that an asylum seeker must have access to an independent body to appeal a negative first instance decision and that such a review must involve a 'rigorous' scrutiny of the risk of a violation.<sup>101</sup> The Court has also found that, even in cases raising national security issues, an effective remedy only exists where the reviewing body has an opportunity to look at the substance of the claim.<sup>102</sup>

72. Outside of the provisions mentioned above, other human rights treaties, as well as the regional refugee instruments, appear to have little to say on the question of procedural standards. Given that the 1951 Convention is also silent on this matter, the norms that have developed in relation to procedures for determining its beneficiaries are arguably also of relevance in any procedures to determine protection from removal on other grounds. In this respect, ExCom Conclusions No. 8 (1997) and No. 30 (1983) are instructive. Amongst their recommendations on the basic guarantees necessary in any refugee status determination procedure are the provision of adequate advice on the procedures to asylum seekers and a right of review (with suspensive effect) against a negative decision.<sup>103</sup>

### **D. Standard of Treatment for Those Protected From Return**

#### *1. Universally-Applicable Standards*

73. The majority of the provisions in the 1966 International Covenants on Civil and Political Rights and Economic and Social and Cultural Rights, as well as in other universal human rights instruments, apply to all individuals in the territory of a state, irrespective of their nationality. Thus, non-nationals who are granted relief from removal (whether or not on the basis of the 1951 Convention) are entitled to a core set of rights, unless an objective

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<sup>100</sup> This is subject to any compelling national security considerations.

<sup>101</sup> See *Jabari v Turkey*, (admissibility decision of 11 July 2000).

<sup>102</sup> See *Chahal v UK*, (judgment of 15 November 1996), at paragraph 151.

<sup>103</sup> As mentioned earlier in the study, although not legally-binding, ExCom Conclusions carry significant political weight. Further guidance on procedural standards may also be gleaned from Part 2 of the *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, 1992.

reason can be found to distinguish (as opposed to discriminate) them from the population at large.<sup>104</sup>

74. Therefore, individuals who have been granted protection from removal are entitled to basic human rights such as freedom of political opinion and religious belief, equality before the law, right to life and security of person as well as freedom from arbitrary detention.<sup>105</sup> Children of such persons are guaranteed access to free primary education.<sup>106</sup> In addition, all beneficiaries of protection from removal have the right to the highest attainable standard of physical and mental health,<sup>107</sup> as well as an adequate standard of living (i.e. shelter, food and clothing).<sup>108</sup> Indeed, the Human Rights Committee has commented that Article 2 of the ICCPR entails a positive duty on the state to ensure basic means of survival.<sup>109</sup> As for economic rights, Article 2(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) acknowledges that ‘developing countries’ have some discretion in determining to what extent these should be granted to non-nationals. Nonetheless, Article 6 of the ICESCR recognises, ‘the right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts...’

75. It is worth recalling that many of the civil, political and economic rights guaranteed under the universal human rights instruments are similar to the standards of treatment guaranteed for refugees in the 1951 Convention. Moreover, Recommendation E of the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons,<sup>110</sup> drafted originally in light of the Convention’s geographical and time limitations, expressed the hope that states would apply the 1951 Convention’s provisions regarding treatment of refugees to individuals not falling within the Convention’s scope but nevertheless in a similar situation.

## 2. *Regional Instruments*

### a. Refugee Instruments

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<sup>104</sup> See, for example, the non-discrimination provision in Article 2 of the ICCPR. Also, see *General Comment No. 15* (1986) of the Human Rights Committee in relation to the Position of Aliens under the ICCPR.

<sup>105</sup> See Article 5 of the 1985 UN Declaration on the Human Rights of the Individuals who are not Nationals of the Country in Which They Live. Although this Declaration is not legally binding, it is nevertheless an important affirmation by the international community of the rights of aliens. Also paragraph 10 of *General Comment No. 31* (2004) of the Human Rights Committee clearly states that the rights embodied in the ICCPR apply to all persons in a states territory including asylum seekers, refugees and other non-nationals.

<sup>106</sup> See Article 28 of the 1989 Convention on the Rights of the Child as well as Articles 2(2) and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>107</sup> See Article 12 ICESCR, as well as the 1979 Convention on the Elimination of Discrimination against Women and the CRC.

<sup>108</sup> See Article 11 ICESCR.

<sup>109</sup> See page 21 of *Fleeing Poverty and Violence: Non-refoulement obligations under the European Convention on Human Rights*, Katharina Röhl (for UNHCR’s series of working papers on New Issues in Refugee Research), 2005

<sup>110</sup> See page 33 of *Volume I of Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons*, UNHCR, 1995.

76. The only specific provision in the OAU Convention which deals with the rights of refugees falling within its scope is concerned with travel documents. Article VI requires the issue of 1951 Convention Travel Documents to refugees, as defined by the OAU Convention, who are lawfully in the territory of member states. More generally, given that the OAU Convention explicitly recognises the primacy of the 1951 Convention regime and the desirability of common global standards, the entitlements set out in the 1951 Convention are equally applicable to refugees falling within the scope of the OAU Convention.<sup>111</sup>

77. However, in practice many African states struggle to meet these requirements. Similarly, Conclusion 8 of the Cartagena Declaration calls upon states in the region to establish a minimum standard of treatment for refugees falling under its auspices based on the provisions of the 1951 Convention and the American Convention on Human Rights. Generally, states in this region do not distinguish, in terms of the standard of treatment, between refugees recognised under the 1951 Convention criteria and those recognised under the elements in the Cartagena Declaration definition.<sup>112</sup>

78. As for the EU Qualification Directive, it sets out minimum standards of treatment for those with subsidiary protection status. In common with individuals granted refugee status, such persons are entitled to freedom of movement, full access to primary education, educational opportunities for adults as well as a right to accommodation on the same basis as non-EU legal residents. However, in all other areas, their entitlements are inferior to those prescribed under the Directive for Convention refugees.<sup>113</sup> Thus, whilst refugees receive residence permits valid for at least three years, the minimum duration for beneficiaries of subsidiary protection is only one year. Restrictions on access to employment, as well as to social benefits and medical care, are permitted in the case of persons under subsidiary protection, but not in the case of refugees. As for travel documents, these must be issued to refugees (save in exceptional circumstances), whereas persons with subsidiary protection status must first demonstrate the impossibility of obtaining a passport from the authorities of the country of origin. Integration facilities are not automatically available to persons under subsidiary protection, nor are their dependents guaranteed rights equal to those they possess. Recommendation (2001) 18 of the Council of Europe Committee of Ministers suggested a similar set of rights to those in the Directive for persons granted subsidiary protection with the addition of family reunion entitlements.

#### b. Other Regional Instruments

79. Numerous regional human rights treaties contain provisions relevant to the treatment of persons protected from return outside of the 1951 Convention. Key examples of instruments that complement the standards found in the universal human rights instruments are the European Convention on Human Rights, African Charter on Human

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<sup>111</sup> Paragraph 9 of the Preamble to the OAU Convention reads:

Recognizing that the United Nations Convention of 28 July 1951, as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment.

<sup>112</sup> See page 92 of *The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention – A Comparative Perspective*, Eduardo Arboleda, International Journal of Refugee Law, Special Issue Summer 1995.

<sup>113</sup> See Articles 24, 25, 26, 28, 29 and 33 of the Directive.

and People's Rights and the American Convention on Human Rights. Article 3 of the ECHR has had particular impact. For example, the English courts have interpreted this provision as obliging the state to make available basic assistance for asylum seekers who would otherwise end up destitute.<sup>114</sup>

### **III. OVERVIEW OF STATE PRACTICE**

#### **A. Regional Practice**

80. As most African states are party to the 1969 OAU Convention, complementary protection has not arisen in this region. In terms of the actual application of the OAU's refugee definition, due to the frequent use of group protection mechanisms, such as prima facie recognition, practice as regards individualised assessments is limited. In Latin America, again the regional refugee definition has generally rendered unnecessary discrete mechanisms for protection from return based on criteria additional to the 1951 Convention. This is despite the long history of 'territorial' and 'diplomatic' asylum in this region.<sup>115</sup> These institutions have not been employed as vehicles for protection additional to the 1951 Convention, given that their ambit is either narrower than that of the 1951 Convention or inapplicable anyway to externally displaced persons.<sup>116</sup>

81. In Europe, by contrast, the proliferation of complementary protection mechanisms with varying eligibility criteria, nomenclature, determination procedures and standards of treatment has, for the 25 EU member states, now been addressed to a certain degree by the Qualification Directive. The Directive has already necessitated legislative reform in certain states, even though compliance is not required until October 2006. However, it only sets minimum standards for eligibility criteria and standards of treatment, so there continues to be room for significant variation between the systems in individual states. Moreover, given the criteria of the EU subsidiary protection regime the question remains as to whether the Directive alone, or in conjunction with each member state's particular practice, will be sufficient to provide protection to all persons considered to be refugees within UNHCR's mandate.

#### **B. National Regimes – Findings of Survey on State Practice**

82. In order to obtain a representative overview of the variety of state practice in relation to providing protection from return outside of the 1951 Convention, the current regimes in eleven countries have been investigated. The countries selected were Australia, Brazil, Canada, Ecuador, France, Germany, Russia, South Africa, Tanzania, the UK and USA. Descriptions of their practices can be found in the Annex to this study and an

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<sup>114</sup> See, for example, *Q v Secretary of State for the Home Department* [2003] EWCA Civ 364.

<sup>115</sup> See *Principles and Criteria for the Protection of and Assistance to Central American Refugees and Displaced Persons in Latin America*, note 51 above. The 1889 Montevideo Treaty of International Penal Law contains the first reference to 'asylum' in a treaty, albeit in the limited context of extradition.

<sup>116</sup> Territorial asylum is confined to persons at risk of persecution on extradition because of their political opinions. As for diplomatic asylum, it is only concerned with individuals who are still in their country of origin.

overview takes up the remainder of this chapter.<sup>117</sup> The countries chosen reflect regional arrangements involving an elaborated refugee definition (Brazil, Ecuador, South Africa, Tanzania) as well as common and civil law traditions. Many of the states selected host significant numbers of asylum seekers and refugees. Thus the aim is to present a truly global picture while recognising that the very limited accession to the 1951 Convention/1967 Protocol in the Middle East and Asia means the phenomenon of complementary protection has not arisen there. These regions also do not apply any regional refugee definition.

83. In terms of the mechanisms actually examined in the states selected, it is worth recalling that ‘complementary protection’ is a generic term and not the name necessarily given by countries to their national systems for protection from return based on grounds other than 1951 Convention. Thus the survey has looked at the substance of various procedures in states, rather than simply their national classification, in order to identify those mechanisms relevant to the issues dealt with in this study.<sup>118</sup> Indeed the survey confirms the range of national terminology currently in use to describe complementary protection initiatives, ranging from ‘subsidiary protection’ (France), ‘person in need of protection’ (Canada), ‘temporary asylum’ (Russia) to ‘Humanitarian Protection’ and ‘Discretionary Leave’ (UK).

1. *Eligibility Criteria for Relief from Return Outside of the 1951 Convention*

a. Domestic Legal Basis

84. In all of the states surveyed, non-Convention protection is effected pursuant to legislative provision. However, in the case of Australia, the UK and Russia, the scope of the legislative provision has been drafted in very open terms, leading to refinement through administrative guidelines or, it would seem in the case of Russia, judicial decisions. Interestingly, in the countries surveyed which do not employ a regional refugee definition,<sup>119</sup> the grant of complementary protection is often mandatory if the relevant criteria are met. The key exceptions appear to be Australia, UK and Russia, with the latter’s discretion apparently limited to some extent by the availability of judicial intervention.

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<sup>117</sup> The country summaries and the overview represent as far as could be ascertained the factual position in February 2005. The information has been compiled from a variety of publicly-available sources, such as legislative texts, official government documents, IGO and NGO reports and academic literature, as well as from internal UNHCR reporting.

<sup>118</sup> Therefore emergency protection mechanisms, such as ‘temporary protection’ in western Europe, have not been included as they provide short-term protection without ever ruling out the applicability of the 1951 Convention.

<sup>119</sup> The instructions on how to interpret various elements of the 1951 Convention refugee definition found in the EU Qualification Directive do not constitute a regional refugee definition, in that they are not intended to provide grounds for refugee recognition additional to the criteria already found in the Convention.

b. Scope of Criteria

i. *African and Latin American States*

85. In the African and Latin American countries examined, protection from deportation is available in principle to anyone falling within the criteria of the applicable regional refugee definition. Thus all individuals covered by UNHCR's mandate for refugees should be able to access international protection through the grant of refugee status rather than through a complementary protection mechanism. In terms of the exclusion criteria applied by these states, these are the same whether the 1951 Convention definition or the other elements in the OAU Convention and Cartagena Declaration refugee criteria are being considered. However, with the exception of Ecuador, the exclusion criteria relating to undeserving individuals found in national legislation appear to go beyond that permitted by Article 1F of the 1951 Convention. As for actual application of the national refugee definition, the survey highlighted that in South Africa refugees fleeing situations of conflict tend to be recognised under Article I(2) of the OAU Convention rather than the 1951 Convention-inspired Article I(1) criteria. However, it is not clear whether this is representative of practice elsewhere in the continent. It may also be worth noting that in Ecuador, refugee status has very occasionally been conferred on compassionate cases, such as single pregnant women, even though the legislative definition is not satisfied.<sup>120</sup>

ii. *Other States*

86. As for the other states examined, it is not easy to summarise the criteria they use to govern eligibility for complementary protection in their jurisdictions. Firstly, this is due to the diversity of the factors referred to in their national legislation, jurisprudence and/or administrative guidelines. Secondly, the open language of some of the relevant legislative provisions makes it difficult to ascertain their exact scope. Nevertheless, the following broad categories seem to underpin the range of criteria in use: armed conflict in the country of origin; human rights concerns; compassionate circumstances, including ill-health; children's interests; and logistical barriers to return. However, there is clearly significant overlap between these categories.

87. One notable feature of the eligibility criteria adopted by these states is the absence of language reminiscent to that found in the OAU and Cartagena Declaration refugee definitions, and in UNHCR's description of its own mandate. The exception is France where legislation specifically provides protection from removal if the individual faces a threat to life or person resulting from an internal or international armed conflict in his country of origin. Russian jurisprudence indirectly raises the question of armed conflict by indicating that individuals should be protected from removal to countries suffering from unstable conditions. In the other states examined, potential protection from return to a conflict situation is found arguably in the widespread use of criteria concerned with protection from return to a risk of unlawful killing or threat to personal security. Examples of such criteria are found in the Australian and UK guidelines as well as legislative provisions in Canada, France and Germany.

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<sup>120</sup> Some hardship cases have received 'temporary protection' in the past but this practice has been suspended given the lack of any domestic legal basis.

88. Looking at human rights concerns, all of these states prohibit removal to the risk of torture, and in most cases also to cruel or inhuman or degrading treatment or punishment. Undoubtedly, this pattern has been influenced by the *non-refoulement* principle in relation to risks of torture that has developed in international law. It is also worth noting that these torture-related grounds for non-removal may coincide to some degree with some of the refugee criteria found in UNHCR's mandate. Turning to other human rights-influenced grounds for complementary protection, in the EU countries surveyed and Australia, protection from removal is explicitly available for individuals at risk of receiving the death penalty.<sup>121</sup> A number of countries, such as France and Germany, also have a catch-all provision for preventing return if otherwise the country's human rights obligations would be engaged. Such provisions may implicitly cover scenarios, for example disruption to family life, which are explicitly referred to in the legislation or administrative guidelines of other countries as grounds for complementary protection. The UK guidelines are notable in that they expressly state that Article 3 of the ECHR may prevent removal where this would otherwise lead to exceptional cases of hardship caused by dire conditions, such as severe food shortages, in the country of origin. As for protection for trafficking victims, in many ways a human-rights related matter, this is specifically provided for in the US through the T-class visa initiative.

89. In terms of compassionate grounds, there is a clear overlap with human rights criteria as ill-health and family unity issues can fall into both categories. In Russian jurisprudence as well as the guidelines applicable in the UK and Australia, a risk of severe medical suffering is clearly recognised as a justification for non-removal, whereas Canadian legislation rules out protection based on inadequacy of medical care in the country of origin. As for family life, considerations of this nature are explicit in the UK and Australian guidelines. Both these countries also have a general 'compassionate reasons' ground, as does Canada (although this is located in a mechanism quite separate to that used to identify Convention refugees, potential victims of torture etc.). Apart from having a general compassionate reasons ground, other humanitarian cases are referred to specifically in the Australian guidelines, for example, refugees for whom repatriation is not a humane option because of continuing trauma.

90. Theoretically, the broad nature of the wording of legislation in several jurisdictions leaves open the possibility that victims of natural disasters may in certain circumstances be protected under them. Criteria relating to 'compassionate reasons' would seem the most obvious basis. However, the UK's interpretation of its Article 3 obligations in its guidelines on 'Discretionary Leave' indicate that it may sometimes consider itself bound to prevent the removal of persons to countries suffering a natural disaster where the prevailing conditions are desperate. Indeed, it is possible that the authorities in France and Germany may also conclude that individuals facing such extreme situations may be entitled to protection from return on the basis of their legislative provisions forbidding removals which would lead to a violation of the state's human rights obligations.

91. A number of the countries investigated make special provision for children. The Australian and UK guidelines state that the welfare of a child is a relevant consideration in decisions on removal. In the case of the UK this is in relation to unaccompanied children only, while the Australian guidance explicitly acknowledges the impact of the Convention

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<sup>121</sup> See paragraph 46 above where the implications of the EU's abolitionist policy is discussed in the context of the EU Qualification Directive's eligibility criteria for subsidiary protection.

on the Rights of the Child. In the US, the SIJ visa is available for alien children and young adults in the care of the state.

92. Several states consider that logistical barriers to removal necessitate some regularisation, (often on a very temporary basis), of the affected individual's immigration status. It is harder to see the conceptual link between such practices and ensuring protection of all refugees under UNHCR's mandate, than between the criteria discussed above and the former. Therefore, given this study's focus, consideration of how states deal with practical obstacles to removal is not particularly relevant. Indeed, the survey illustrates that mechanisms for dealing with individuals who cannot be returned for logistical reasons are often distinct from those related to the criteria described in the preceding paragraphs. For example, in Germany, practical obstacles to return are not considered in the refugee status determination procedure (although various other non-Convention criteria are) but instead by the local aliens authority. In the UK, the guidelines make clear that logistical barriers to removal are not to be examined in relation to the grant of 'Humanitarian Protection' or 'Discretionary Leave'.

93. In most of the jurisdictions examined, the criteria described in paragraphs 86-91 above are subject to exclusion grounds based on circumstances that render an individual undeserving of protection from removal. These criteria tend to be wider than those found in Article 1F of the 1951 Convention, with Canada standing out as applying Article 1F both to the 1951 refugee definition and to other grounds for protection. In many of these countries, however, some residual protection from return is still available where the excluded individual is at risk of torture.<sup>122</sup> The absolute nature of the *non-refoulement* principle in relation to torture and related ill-treatment under international law is no doubt the key consideration here.

94. In terms of how the non-Convention eligibility criteria discussed in paragraphs 86-91 above are actually applied, in Russia, protection from removal is most commonly provided for medical reasons. In the UK, a large proportion of those benefiting from 'Discretionary Leave' are unaccompanied minors without adequate reception arrangements in their home country. By contrast, 'Humanitarian Protection' has been granted in relatively few cases and these tend to be concerned with preserving the family unit in the UK. The limited number of cases decided so far in France and Germany under their new legislation makes it difficult to draw any firm conclusions. However, in the case of Germany it is worth recalling the practice under the old legislation as the complementary protection criteria have actually remained the same. Previously, the majority of cases were granted protection on the basis of a danger to life/limb/safety or because of a possible (non-torture related) ECHR violation. That being said, in relation to the former category, the practice was very restrictive when it came to persons fleeing generalised violence. Moreover, under the new legislation it is possible that more individuals may receive protection on the grounds of a risk of torture in the country of origin as a more generous approach may be taken to acts of non-state agents.

95. In Australia, the lack of reasons given by the Minister for his decisions under the openly-worded section 417 of the Migration Act confounds any effort to analyse how this

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<sup>122</sup> For example, individuals excluded from 'Humanitarian Protection' in the UK are still entitled to 'Discretionary Leave' if they are at serious risk of torture on return to their home country. Similarly, in the US, the application of exclusion criteria in torture cases results in inferior status ('deferral of removal') rather than actual deportation.

discretionary power is used. However, NGOs have intimated that the majority of cases where it is deployed are concerned with maintaining family links. The survey was not able to discern any pattern in the cases in the US that receive protection on the basis of the Convention against Torture, save that often persons considered ineligible to even apply for refugee (asylum) status appear to benefit.<sup>123</sup> Indeed, this is an example of how non-Convention protection in practice may be awarded to an individual who actually deserves recognition under the 1951 Convention itself. Another illustration is the use of ‘T class’ visas in the US for victims of trafficking, as it is possible that some of these persons may also be eligible for recognition as refugees under the 1951 Convention.

96. In terms of natural disasters, there is little evidence that complementary protection mechanisms are being used to assist displaced persons from devastated countries. For example, even though the UK halted removals of rejected asylum seekers from the region affected by the Asian tsunami, they were not provided with ‘Discretionary Leave’ (or ‘Humanitarian Protection’). However, as intimated above, it is difficult to tell in Australia whether such individuals are benefiting from the Minister’s section 417 powers.

97. Looking at the statistics available, the proportion of individuals obtaining protection from return under the 1951 Convention as opposed to other criteria varies significantly between countries. In Canada, for example, instances of 1951 Convention recognition far outweigh the grant of protection under the ‘person in need of protection’ category. By contrast, in the UK in 2004 of all initial decisions made on asylum applications only 1515 resulted in refugee status, with ‘Discretionary Leave and ‘Humanitarian Protection’ being granted in 3840 and 155 cases respectively. A number of factors influence these substantial variations, including differing profiles of asylum applicants and the range of situations covered by a particular state’s complementary protection criteria. However, it is also arguable that the high percentage of cases recognised as Convention refugees in Canada may be influenced significantly by that state’s comparatively generous and progressive interpretation of the 1951 Convention. Moreover, unlike many of the other countries surveyed, in Canada the formal status of, and standard of treatment received by, an individual is the same whether he is deemed to be in need of protection from removal under the 1951 Convention or other criteria examined in the asylum procedure. This in itself may influence the attitude of the first instance decision-makers.

98. As well as looking at the eligibility criteria for complementary protection developed in the states surveyed, consideration was also given to the criteria employed in these countries to determine admission on the basis of resettlement. In a number of countries the resettlement criteria appear to go beyond the 1951 Convention refugee definition. For example, Canada accepts ‘humanitarian-protected persons’ as well as Convention refugees for resettlement, the latter including individuals who have fled their country of origin because of civil war or massive violations of human rights.<sup>124</sup> Moreover, the UK’s resettlement programmes allow in certain circumstances for resettlement of refugees recognised under UNHCR’s mandate. Such policies provide further evidence that states do recognise that a need for international protection may arise in relation to individuals falling outside of the 1951 Convention criteria.

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<sup>123</sup> For example, persons who have committed an ‘aggravated felony’ are barred from claiming refugee status.

<sup>124</sup> However, their access to government, as opposed to private, funding for resettlement appears more limited than in the case of Convention refugees.

## 2. *Status Determination Procedure*

### a. Relationship with Refugee Status Determination Procedure

99. As one would expect, in the African and Latin American states surveyed, both elements of the national refugee definition (1951 Convention and other aspects from the relevant regional instrument), are examined in a single determination procedure. In Ecuador, the eligibility committee looks first at the 1951 Convention refugee definition before moving on to the additional criteria in the Cartagena Declaration. This would seem to be an approach found elsewhere in the region,<sup>125</sup> although not apparently in the case of Brazil.

100. Most of the other states surveyed examine their complementary protection criteria<sup>126</sup> along with the 1951 Convention refugee definition in a single asylum procedure.<sup>127</sup> In terms of the decision-making process, in Canada,<sup>128</sup> France and the UK, determination officials consider the applicability of the 1951 Convention refugee definition before looking at the non-Convention criteria available. The clear exceptions to the single procedure approach are Australia and Russia. In the latter case, although applications for ‘temporary asylum’ must be made separately to those for refugee status, the initial decision is made by the same government body. By contrast, for example, in Australia the Minister is only able to exercise his discretionary power under section 417 to grant an individual leave to remain ‘in the public interest’ once the refugee status determination procedure, including rights of appeal, have been exhausted.

### b. Standard of Proof

101. Of the countries which apply a regional refugee definition, the survey found that South Africa appears to apply a ‘serious possibility’ standard of proof. However, clear information on the evidentiary threshold in Ecuador, Brazil and Tanzania was not available. As for the other states surveyed, the standard of proof adopted seems to vary. In some countries which employ a single asylum procedure, the standard to be met by applicants is the same in relation to the 1951 Convention refugee definition as it is for other criteria examined: ‘reasonable degree of likelihood/real risk’ in the UK and an

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<sup>125</sup> Opinion provided in correspondence from UNHCR officials to the author.

<sup>126</sup> Given the reasons stated in paragraph 92 above, discussion from here on of criteria used by states to grant complementary protection is not meant to include provisions concerned with logistical barriers to return.

<sup>127</sup> In a number of countries, certain non-Convention criteria are examined outside of the refugee status determination procedure. For example, in the US the granting of ‘T’ and ‘SIJ’ class visas is separate from the refugee status determination process, although the torture criteria are investigated in the latter. In Canada, although non-Convention criteria relating, for example, to torture are considered alongside the 1951 Convention refugee definition in the asylum procedure, a few people secure relief from removal on the basis of such factors at the pre-removal stage. In addition, the Minister’s powers to grant leave to remain on compassionate and humanitarian grounds are completely separate to the refugee status determination procedure. In practice, though, it is not clear how many rejected asylum seekers benefit from this non-suspensive procedure.

<sup>128</sup> *Ibid.*

individualised threat in France.<sup>129</sup> In Germany, however, the standard of proof required is distinct for each of the legislative criteria, with the 1951 Convention ground seeming to have the lowest threshold of all. By contrast, in the US the ‘more likely than not’ standard applied in relation to protection from removal under the Convention against Torture is considered to be less stringent than the ‘well-founded fear’ test for Convention refugee status.

102. In countries such as Australia, where non-Convention protection is not considered during the refugee status determination procedure, the very personal nature of the Minister’s section 417 powers make it difficult to discern what standard of proof, if any, is applied. However, hints are given in the text of the Ministerial guidelines: ‘sound basis for believing’ in relation to significant threats to personal security, human rights or human dignity as well as danger of torture, and ‘real risk’ in relation to possible ICCPR violations (for example, Article 2 right to life, Article 7 cruel, inhuman or degrading treatment). In Russia, given that medical cases tend to benefit from ‘temporary asylum’, the focus is on whether an individual’s test results meet the relevant medical criteria.

c. Right of Appeal and Other Aspects of Procedural Fairness

103. In the states applying a regional refugee definition, the right of appeal is against a refusal of refugee status (irrespective of which criteria the refusal was based on). In the other surveyed countries, where a single asylum procedure is employed the right of appeal against refusal of Convention refugee status also generally covers complaints concerning grant of another protection status instead. Even in Russia, where the grant of ‘temporary asylum’ is discretionary and outside of the asylum procedure, a right of appeal still exists with the same procedural safeguards as appeals against refusal of refugee status.

104. As for other aspects of procedural fairness, in most of the countries surveyed, the extent of such safeguards is the same in relation to determination of eligibility under the 1951 Convention as it is for other grounds for non-removal, because a single status determination procedure is being used. However, in the case of Australia, it is evident that consideration of the section 417 Migration Act criteria takes place with very little in the way of safeguards to protect the applicant’s interests, especially when compared to the refugee status determination procedure. Certainly, individuals seeking relief under section 417 have no right to compel the Minister to even look at their arguments, never mind the possibility of a hearing before him.

3. *Standard of Treatment*

105. Ecuador, Brazil, South Africa and Tanzania do not distinguish between refugees recognised under the 1951 Convention-inspired criteria and those qualifying under the other elements in their national refugee definitions when it comes to the formal status and accompanying treatment provided to such individuals. Whilst this is required as a result of international obligations in OAU Convention countries, this is not the case in Ecuador and Brazil, where the similar needs of all recognised refugees (as advocated by the Cartagena Declaration) are nevertheless acknowledged. It is worth noting in this respect that Ecuador,

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<sup>129</sup> In Canada although the ‘balance of probabilities’ standard appears to be used overall to determine the need for protection under the asylum system, this is in relation to distinctive tests for Convention refugees (‘reasonable chance’) and other categories, such as victims of torture, covered by the Immigration and Refugee Protection Act (‘more likely than not’).

Brazil and South Africa all appear to provide recognised refugees with access to the labour market.

106. In relation to the other countries surveyed, Australia and Canada are notable in that the status and treatment afforded to individuals benefiting from Ministerial (section 417 Migration Act) intervention and the ‘person in need of protection’ criteria respectively are the same as those enjoyed by Convention refugees. As for the other states, Convention refugees are generally entitled to superior treatment compared to persons afforded protection from return on other grounds. Having said that, the UK has indicated that this gap may be narrowed down in the foreseeable future. Similarly, in Germany, recent legislation has reduced the difference in entitlements between Convention refugees and persons benefiting from complementary protection.

107. Where there are differences in entitlements, these tend to concern duration of residence permit, family reunion and travel documents. With regard to residence permits, the most extreme contrast appears to exist in France where a Convention refugee obtains a ten year residence permit but a person afforded ‘subsidiary protection’ only a one year permit (albeit potentially renewable). In other countries, the difference in period of validity is far less marked, for example one year for ‘temporary asylum’ in Russia compared with up to three years for Convention refugees.

108. As for family reunion, in the UK this is discretionary in the case of individuals with ‘Humanitarian Protection’ or ‘Discretionary Leave’ unless they obtain indefinite leave to remain. By contrast, it is a right for those with refugee status. In Germany, again only individuals with refugee status have a right to family reunion. In terms of obtaining travel documents, in many of the countries surveyed this is much harder for persons granted relief from return outside of the Convention than it is for Convention refugees. For example, in Germany and the UK, provision of such documents is discretionary in the case of persons benefiting from complementary protection, whereas it is a right of those granted refugee status.

109. Interestingly, political concerns about the impact of aliens on the local job market do not really seem to be reflected in the approach taken towards right to employment opportunities in the countries surveyed. In France, UK, Canada, Australia and the US,<sup>130</sup> persons granted complementary protection have the right to work and support themselves, as is the case with recognised refugees. Germany stands out as the exception with its labour market test.

110. The discussion in the preceding paragraphs has concentrated on the position of persons who have not been subject to exclusion criteria. However, where an individual secures protection from removal even after being excluded from refugee status or certain forms of complementary protection, his entitlements are generally much lower than those described in the paragraphs above. For example, holders of ‘Toleration Permits’ in Germany and individuals with ‘Discretionary Leave’ in the UK have reduced rights to long term residence compared with other beneficiaries of complementary protection in these states. In some cases the protection afforded to excluded individuals amounts to little more

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<sup>130</sup> Dependent on exactly which category of protection an individual benefits from and if he is released from detention.

than detention as opposed to deportation, at least in the short term. This seems to be the situation with ‘deferral of removal’ in the US.

#### 4. *Ending of Protection From Removal*

111. The legislative provisions in Brazil, Ecuador, South Africa and Tanzania which deal with cessation of refugee status incorporate the criteria found in the cessation clauses of the 1951 Convention or the OAU Convention. In the other countries studied, a variety of approaches emerge in relation to ending protection from removal granted for reasons outside of the 1951 Convention.<sup>131</sup> In Canada and Australia persons benefiting from complementary protection essentially have the same status as recognised refugees. Therefore, in Canada, for example, the Minister must apply, (as he would in the case of a recognised refugee), to the Immigration and Refugee Board to obtain a declaration of cessation of an individual’s ‘person in need of protection’ status.

112. By contrast, in the UK an active review is held at the end of each period of ‘Humanitarian Protection’ or ‘Discretionary Leave’. The burden of proof lies on the individual to demonstrate that the circumstances justifying leave to remain still exist. In France, although the relevant legislation has only recently come into force, there are already indications that renewal of ‘subsidiary protection’ status will generally be automatic. That being said, the legislation specifically provides for the ending of such status if the conditions justifying it no longer exist. In Germany it is too early to tell how the authorities will deal with renewal of permits under the new governing legislation. As for Russia, renewal of temporary residence in instances of ‘temporary asylum’ involves a fresh consideration of the individual’s circumstances to ensure the reasons for protection have not changed.

#### 5. *Durable Solutions*

113. Of the countries applying a regional refugee definition, Brazil displays an integrationist attitude, with refugees able to apply for citizenship after four years and automatically becoming permanent residents after six years in the country. Ecuador also makes allowance for local integration with recognised refugees only having to wait two years before they can apply for permanent residence. However, the high cost deters many such applications. The policy in Tanzania appears to be quite different, with the emphasis on voluntary repatriation and resettlement. Citizenship is rarely granted to refugees, even those who have been living there for decades. In South Africa, permanent residence is also hard to obtain but, with limited opportunities for resettlement or voluntary repatriation, it seems the government is considering ways in which to facilitate local integration.

114. Of the other countries surveyed, a few exhibit a positive stance towards local integration of individuals benefiting from complementary protection. For example, in Canada, ‘persons in need of protection’, like recognised refugees, can immediately seek permanent residence and, if successful, can apply for citizenship after three years as a permanent resident. Likewise, in Australia, beneficiaries of Ministerial intervention who obtain a Permanent Protection Visa (PPV) can apply straight away for permanent residence

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<sup>131</sup> The possibility of obtaining permanent residence and citizenship are also relevant in terms of the duration of protection from removal. These matters are discussed in the section below on durable solutions (regarding local integration).

and are eligible to seek citizenship after two years on such status. Thus, their position is similar to those recognised refugees who have also received PPVs.<sup>132</sup>

115. However, in a number of countries which traditionally have emphasised integration as the only real permanent solution for their Convention refugee populations, such generosity is not necessarily apparent in their approach to other individuals granted relief from return. For example, in the UK only refugees obtain ‘Indefinite Leave to Remain’ from the moment of their recognition. Individuals under ‘Humanitarian Protection’ can only apply for this as their initial leave runs out and they will only be successful if they can demonstrate a necessity for continued stay in the UK. Individuals with ‘Discretionary Leave’ are on even more tenuous ground, as their initial leave can be for as little as six months and even if this is renewed/extended they will not necessarily get indefinite leave to remain. In France, whilst a recognised refugee can apply for citizenship after five years, a beneficiary of ‘subsidiary protection’ can only apply for a ten year residence permit after spending ten years in the country. In Germany, the preconditions for applying for permanent residence are more difficult for persons with complementary protection than for recognised refugees. The same is true in Russia.

#### **IV. OBSERVATIONS**

116. The observations in this chapter are aimed at informing the principles that UNHCR might put forward for the proposed ExCom conclusion on complementary protection. As such, they are concerned with how states, which do not apply the OAU or Cartagena refugee definitions, can better ensure that non-Convention refugees in their territory receive international protection. In making suggestions, note is taken of the legal framework as set out in Chapter II; namely, that despite the lack of any specific, universally-applicable prohibition in international law on the removal of non-Convention refugees, a variety of international legal instruments are of relevance to the position of such individuals. The observations also draw on the findings on state practice described in Chapter III, even though some of the national mechanisms described may provide protection from return to a wider or narrower group of individuals than non-Convention refugees. In addition, attention has also been paid to the observations made by UNHCR in its discussion paper for the Global Consultations on complementary protection given the support these received from states. The matters considered in this chapter include appropriate criteria for identifying non-Convention refugees, suitable procedures for applying such criteria, the necessary standard of treatment in the country of asylum, the factors determining the end of international protection for this category of refugees and the question of durable solutions.

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<sup>132</sup> However Temporary Protection Visa holders, whether section 417 beneficiaries or recognised refugees, do not necessarily get PPVs even if a continuing protection need is found on the expiry of their temporary visa.

## A. Eligibility Criteria for Refugee Protection Outside of the 1951 Convention

### 1. General Requirements

117. Although many factors<sup>133</sup> may influence eligibility criteria used by states to provide protection from return to individuals other than Convention refugees, this section will look at one particular set of criteria: those that determine whether an individual falls within UNHCR's mandate for refugees even though the 1951 Convention/UNHCR Statute refugee definition is not applicable. As mentioned in Chapter I, the General Assembly resolutions which form the basis of UNHCR's mandate in relation to such refugees have not been particularly consistent in their language. Hence, it is necessary to consider in a little more detail the exact breadth of UNHCR's competence for non-Convention refugees, in order to suggest criteria that states could usefully apply to secure international protection for these individuals. The formulation in current use by UNHCR – 'serious threat to their life, liberty or security of person in their country of origin as a result of armed conflict or serious public disorder' – provides some helpful guidance as regards UNHCR's activities in relation to non-Convention refugees.<sup>134</sup>

118. Unlike the 1951 Convention/Statute refugee definition, the above description of UNHCR's mandate is concerned with specific objective situations in the country of origin as well as particular threats to any one individual. In terms of the scenarios covered, it is not clear whether the reference by UNHCR to **armed conflict** is meant to cover both international and internal armed conflict, as opposed to the latter being caught under the concept of 'serious public disorder'. This is not so much a question of determining the scope of UNHCR's mandate (there is no doubt that civil war refugees fall within the organisation's responsibility), as clarifying the language to be used in terms of the proposed eligibility criteria. In order to be consistent with international humanitarian law, it would make sense for the phrase 'armed conflict' to cover both international and civil wars. Under international humanitarian law, international armed conflict relates to wars between states and wars of national liberation,<sup>135</sup> while internal armed conflicts consist of violence of particular intensity between government forces and dissident groups or, where central authorities have collapsed, between different dissident groups struggling for power.<sup>136</sup>

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<sup>133</sup> For example, considerations related to human rights obligations.

<sup>134</sup> See paragraph 10 above. When describing all refugees under its mandate, UNHCR also includes the concept of 'persecution' alongside 'armed conflict and public disorder' as a reference to its Statute's (and the 1951 Convention's) refugee definition. Compare paragraph 32 of *Note on International Protection*, (A/AC.96/830), UNHCR, 7 September 1994 with paragraph 10 of *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, (EC/50/SC/CRP.18), UNHCR, 9 June 2000.

<sup>135</sup> The inclusion of wars of national liberation as a form of international armed conflict in Protocol 1 to the Geneva Conventions of 1949 was a matter of some controversy; a significant number of states have still not ratified this treaty.

<sup>136</sup> No definition of internal armed conflict exists as such in the treaties governing international humanitarian law. However, this working definition is based on the circumstances in which common Article 3 of the 1949 Geneva Conventions is generally considered to apply. See further, *International Humanitarian Law: An Introduction*, Hans-Peter Gasser (for Henry Dunant Institute), 1993 at pages 21-23.

119. Turning to state practice in this area, whilst only states party to the OAU Convention are explicitly prohibited under international law from returning individuals to situations of armed conflict,<sup>137</sup> the survey highlights that similar protection is available in a significant number of other countries. Prime examples are those countries that have adopted the Cartagena refugee definition.<sup>138</sup> Elsewhere, French legislation expressly prohibits the return of an individual to situations of armed conflict, as does Article 15(c) of the EU Qualification Directive. In addition, the Russian courts have indicated that individuals facing return to unstable countries should be granted ‘temporary asylum’. Moreover, the majority of the other industrial states examined in the survey bar removal where this would put a person’s life at risk.<sup>139</sup> Another relevant area of state practice is the common prohibition, in terms of legislation and actual practice, on removal to a risk of torture or cruel, inhuman or degrading treatment.<sup>140</sup> This emphasises the potential relevance in relation to ‘war refugees’ of *non-refoulement* obligations under, for example, the ICCPR’s provisions on torture or related ill-treatment and, indeed, unlawful deprivation of life.

120. What exactly, though, should the individual be protected from? Is it the very existence of an internal or international armed conflict in the country of origin? Or is it necessary to demonstrate exposure to a specific kind of harm if returned there, as implied in UNHCR’s formulation of its own mandate? The contrast between these two approaches is exemplified in the refugee definitions of the OAU Convention and the Cartagena Declaration. In the former, only the nature of the objective conditions in the country of origin appear to be relevant under the Article I(2) criteria. However in the Cartagena Declaration, a threat to life, safety or freedom arising from the country conditions (such as armed conflict) is also necessary in principle. In practice, though, Cartagena states do not appear to question the particular nature of the threat in an overly legalistic manner given

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<sup>137</sup> Article I(2) of the OAU Convention clearly brings persons displaced as a result of international armed conflict within its remit, through references to ‘external aggression’, ‘occupation’ and ‘foreign domination’. As mentioned in paragraph 33 above, the Article I(2) definition is also considered to cover those exiled because of internal armed conflict. Although the latter concept is not referred to specifically, it is inherent in the criterion of ‘events seriously disturbing public order’.

<sup>138</sup> See paragraph 42 above on the coverage of international and internal armed conflicts in the Cartagena refugee definition. Although one of the Cartagena countries included in the survey, Brazil, does not refer to armed conflict in its national refugee definition, it still considers asylum seekers fleeing such circumstances to fall within the Cartagena-inspired limb of this provision.

<sup>139</sup> For all the EU states, when the Qualification Directive comes into force their legislation and practice will have to ensure protection where there is a threat to an individual’s life or person from a conflict situation. More generally, there is substantial evidence of states providing protection from return to persons fleeing armed conflict who do not fall within the scope of the 1951 Convention; see, for example page 9 of ‘Human Rights and Forced Displacement: Converging Standards’, J. Fitzpatrick in *Human Rights and Forced Displacement*, edited by A. Bayefsky and J. Fitzpatrick, 2000.

<sup>140</sup> See *Subsidiary Protection and Primary Rights*, Ryszard Piotrowicz and Carina van Eck, 53 *International and Comparative Law Quarterly*, 107 at page 133: ‘The threat posed by general situations of armed violence, whether or not involving an armed conflict, may often include the types of breach that would activate one of the other grounds of subsidiary protection, such as torture or inhuman or degrading treatment.’

the Declaration's aim to protect the broadest categories of people fleeing these dire situations.<sup>141</sup>

121. It is interesting to note that the legislation in France, (the only non-OAU/Cartagena country in the survey which explicitly provides for protection from return to armed conflict) stipulates that a causal link be established between the conflict situation in the country of origin and the threat of harm to the life or person of the asylum seeker. Similarly, the Qualification Directive requires a '... threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.' However, it is important to remember that the Directive only sets minimum standards; member states are free to adopt more generous eligibility criteria. The Cartagena approach would seem to bridge the gap between the purely objective criteria used in the OAU Convention and the approach adopted in states operating complementary protection regimes. Thus the question would be whether an individual's life, liberty or security is threatened because of armed conflict in the country of origin. In interpreting this threat, the liberal and indeed pragmatic line taken by Cartagena states is to be recommended. In particular, as an armed conflict may well affect large sections, if not all, of the population, demonstrating that the required threat exists may not be particularly difficult.<sup>142</sup>

122. The concept of **serious public disorder** in UNHCR's formulation of its mandate is clearly drawn from similar terminology found in the OAU Convention and Cartagena Declaration refugee definitions. Given the nature of public order, this category relates to factual circumstances where law and order in a country can no longer be properly maintained. This may involve outbreaks of violence where the intensity of the fighting or the identity of the parties involved means that a situation of internal armed conflict cannot be said to have arisen. Examples might include widespread anti-government riots, sporadic clashes throughout the territory between the military and dissident groups as well as regular attacks on civilians by criminal gangs (such as drug lords). Any breakdown in public order is likely to stem from a major national crisis. Apart from political crises (such as military coups or post-conflict turmoil), it is conceivable that other social emergencies,<sup>143</sup> such as economic or ecological disasters, may on their own or in combination lead to a situation where the rule of law has collapsed.<sup>144</sup>

123. Turning to state practice, in those countries which apply the Cartagena refugee definition, 'generalised violence' in the country of origin is a distinct basis for recognition as a refugee (compared to flight from internal armed conflict). As for OAU Convention states, the criterion of 'events seriously disturbing public order' found in this instrument's

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<sup>141</sup> However, the survey found that in Ecuador a more restrictive approach appears to have arisen in relation to assessing whether Colombian asylum seekers are entitled to refugee status on the basis of the additional grounds in the Cartagena definition. They are required, it would seem, to demonstrate that they have been directly affected in a serious, if not life-threatening, manner by the violence in the country of origin.

<sup>142</sup> This point is discussed further in relation to the issue of standard of proof. See paragraph 149 below.

<sup>143</sup> See paragraph 9 above on the broad range of circumstances, including man-made ecological disturbances thought to give rise to refugee movements.

<sup>144</sup> However, an environmental disaster or economic crisis in itself is arguably not grounds for non-Convention refugee protection, even if it results in difficult living conditions, for example scarcity of food and drinking water.

refugee definition would seem broad enough to cover such situations of violence.<sup>145</sup> The public order ground in both the OAU and Cartagena refugee definitions would also seem sufficiently wide to deal with breakdowns in law and order which do not necessarily manifested themselves in violence. In the case of Cartagena countries, it is significant that the regional refugee definition lists ‘generalised violence’ and ‘events seriously disturbing public order’ separately, indicating that public disorder has a meaning beyond widespread violence.

124. In terms of state practice and applicable international obligations in the industrialised countries surveyed, many of the factors discussed in relation to armed conflict in paragraph 119 above would also seem to support protection from removal to a situation of generalised violence in the country of origin. However, there is less evidence in state practice of complementary protection being provided in relation to instances of public disorder which do not amount to generalised violence. Nevertheless, depending on the consequences of a breakdown in public order, again the prohibitions, under international law and often in state practice, on return in relation to threats to life or of being subjected to torture, or cruel, inhuman or degrading treatment may well be of relevance.

125. As with situations of armed conflict, it is suggested that the objective situation is not necessarily enough in itself to indicate a need for international protection. Instead the criteria should be whether an individual’s life, liberty or security is threatened by the situation of serious public disorder.

126. As UNHCR’s formulation of its mandate is a synthesis of the concepts found in the various mandate-extending General Assembly resolutions, drawing as necessary from related concepts in regional refugee instruments, it is important to consider whether the shorthand language used is actually comprehensive. One area which unfortunately appears to have been overlooked in the drafting of the mandate description is the position of individuals fleeing **massive violations of human rights**. They arguably constitute a category of persons of concern to UNHCR, not least because they are specifically covered by the Cartagena Definition. Admittedly, there is no doubt an overlap between situations of massive human rights violations and those of armed conflict or indeed serious public disorder. However, it is conceivable that there may be occasions where massive violations of human rights take place outside such parameters. As noted in the discussion of the Cartagena refugee definition in Chapter II, it would seem that the combination of two factors results in a situation of massive violations of human rights: the high frequency and severity of the violations.<sup>146</sup>

127. Apart from Brazil and Ecuador, the concept of protection based specifically on massive violations of human rights in the country of origin is not explicitly found in the refugee definitions or in the complementary protection mechanisms investigated in the states surveyed. However, in the industrialised states studied, protection from return is often provided on the basis that an individual’s human rights will be violated if returned to the country of origin. Such provisions seem generally to be based on those specific instances where international human rights law contains a *non-refoulement* obligation.

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<sup>145</sup> See paragraph 33 above. This same criterion arguably also covers internal armed conflicts as the latter are not explicitly referred to in the OAU Convention refugee definition.

<sup>146</sup> See paragraph 42.

Although human rights are ‘indivisible and interdependent’,<sup>147</sup> these obligations are attached to those human rights which, when abused, inflict egregious suffering on the individual concerned. Thus state practice and international law do, to an extent, already reflect the concept of not returning an individual to a country where massive violations of human rights are taking place.

128. In recommending that ‘massive violations of human rights’ be adopted as one of the criteria for protecting individuals from return, it is acknowledged that such circumstances will only arise where serious violations are fairly commonplace in the country concerned. Thus, it seems rather unnecessary to require an individual to indicate that his life, liberty or security is threatened. However, for the sake of consistency with the other grounds mentioned above, it is recommended that this qualification be included.

129. State practice in terms of resettlement also provides further support for criteria along the lines of those suggested above to be used in determining which asylum seekers are non- Convention refugees. The survey indicated that some resettlement states are willing to go beyond the 1951 Convention refugee definition when it comes to admitting refugees for resettlement (as opposed to granting refugee status to asylum seekers). For example, individuals displaced because of armed conflict may be accepted for resettlement even if they do not satisfy the Convention definition.

130. Before moving on to other eligibility factors, it is important to note that there is a significant overlap between the Convention definition and the criteria suggested in relation to non-Convention refugees (life, liberty or security threatened by return to armed conflict, serious public disorder or massive violations of human rights in the country of origin). For example, an individual may be persecuted on the grounds of his ethnic identity during an armed conflict. In such circumstances he could be eligible for recognition under the 1951 Convention refugee definition and so may not be a non-Convention refugee. Again, where human rights violations are taking place on a ‘massive’ scale, it is likely that a discriminatory motive lies behind this. If so, asylum seekers fleeing such situations would arguably fall within the 1951 Convention refugee definition. Therefore, the non-Convention refugee eligibility criteria should be read as always subject to an individual not satisfying the refugee definition in the 1951 Convention.

a. Source of Harm

131. Under the 1951 Convention, the author (as opposed to the act) of persecution is not relevant in establishing refugee status. It is difficult to see why consideration of the exact agent of persecution should be any more relevant in relation to the criteria recommended above for non-Convention refugees than it is in relation to the 1951 Convention refugee definition. Indeed, given that many of the situations covered by the recommended eligibility criteria are by nature concerned with violence on the part of individuals not associated with the state, responsibility for acts which give rise to a need for international protection are as likely to emanate from non-state agents as from the state itself. In that sense, the approach of the UK and France is worth noting. Their guidelines and legislation respectively refer to the issue of non-state agents in terms of determining eligibility to complementary protection and indeed refugee protection. However, the position taken is

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<sup>147</sup> See Vienna Declaration and Programme of Action 25 June 1993, Part I paragraph 5.

essentially that acts of such individuals can be sufficient to found a need for protection from return.

b. Internal Relocation Alternative

132. As with agents of persecution, the concept of an internal relocation alternative has also been transposed by some countries, such as the UK, into their consideration of complementary protection criteria.<sup>148</sup> However, such an approach is explicitly ruled out in relation to the refugee definition in Article I(2) of the OAU Convention as this describes events occurring in ‘either part or the whole of his country of origin or nationality’.<sup>149</sup> Although the Cartagena Declaration refers to Article I(2) of the OAU Convention as part of the inspiration behind its refugee definition, it does not incorporate similar language in the definition itself. It would seem that Ecuador has, at least, on occasion had recourse to such concepts in rejecting asylum claims.

133. Given the situations covered by the eligibility criteria for non-Convention refugees recommended above, it is conceivable that there may be situations where an internal armed conflict, for example, may be localised. In principle, therefore, the application of the internal flight alternative may be possible. However, as all the situations covered by the recommended eligibility criteria foresee a rather high level of instability, whether through fighting or human rights abuses, there is likely to be a significant chance of these disturbances spreading throughout the country at any time. Therefore, great caution must be taken when assessing whether, for example, the armed conflict or breakdown in public order is truly confined to a particular region. If this does turn out to be the case, then the ‘Relevance’ and ‘Reasonableness’ tests recommended in UNHCR’s Guidelines<sup>150</sup> regarding the internal relocation alternative in the case of the Convention refugee definition would seem to be equally helpful in determining whether an individual who might be a non-Convention refugee has a realistic in-country alternative to protection in a country of asylum.

c. Exclusion

134. The survey highlights that, whether or not a regional refugee definition is applied, the use of exclusion criteria in relation to non-Convention protection is prevalent. In the case of OAU countries this is a legal necessity. Elsewhere, the practice is based on policy rather than any obligation under international law.<sup>151</sup> Therefore, it would seem that the international community considers certain behaviour to render individuals undeserving of being granted a particular formal status even if protection from removal is still provided because of absolute obligations under human rights law. As for the factors actually taken

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<sup>148</sup> This concept is also incorporated into the EU Qualification Directive under the guise of ‘internal protection’.

<sup>149</sup> See paragraph 5 of *Guidelines on International Protection: “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*, (HCR/GIP/03/04), UNHCR, July 2003.

<sup>150</sup> *Ibid*, paragraphs 6 and 7. These tests are further elaborated on in the following paragraphs of the Guidelines.

<sup>151</sup> Conversely, those countries which provide protection from removal based on a risk of torture are actually barred from deporting such individuals under treaty and customary law. Nevertheless, exclusion criteria may still be applied in relation to such individuals, in so far as this affects the status with which they are allowed to stay in the country.

into account, the majority of the countries in the survey employ exclusion criteria wider than that found in Article 1F. However, the justification for this seems weak as the moral and political issues surrounding the denial of protection on the basis of an individual being undeserving would seem to be the same in relation to many of the non-Convention criteria currently in use as they are in respect of the Convention's protection regime.<sup>152</sup>

135. Where non-Convention refugee protection on the grounds of the eligibility criteria suggested above is clearly linked in the national system with UNHCR's mandate, as a matter of principle it would be appropriate to examine exclusion criteria. This is because the question of whether an individual is deserving of international protection is inherent in the refugee protection regime. In terms of the actual criteria to be applied, there appears to be no good reason for departing from the grounds set out in Article 1F of the 1951 Convention, as it represents a considered balance between the humanitarian imperative of international protection and the need to maintain the integrity of the institution of asylum. In this respect, the validity of the Article 1F grounds has been explicitly affirmed in the OAU Convention and implicitly in the Cartagena Declaration. Many of the considerations that arise in the application of Article 1F in the 1951 Convention context would also be relevant in cases of refugee protection based on the eligibility criteria being recommended by this study.<sup>153</sup> For example, it would be equally important to adopt a restrictive interpretation of the exclusion criteria, given the consequences of their application. Moreover, where an individual granted non-Convention refugee protection subsequently engages in conduct of the kind envisaged by Article 1F(a) or (c) of the 1951 Convention, revocation of non-Convention refugee protection status would arguably be appropriate.<sup>154</sup>

136. The issue of exclusion is more difficult where non-Convention refugees are actually provided protection from removal on grounds which seem unrelated to UNHCR's mandate (for example, criteria based on the *non-refoulement* principle in relation to torture). Exclusion on the basis of abhorrent behaviour is peculiar to international refugee law. Similar concepts are not found, for example, in human rights law even though some of its provisions allow for a balancing act between the good of the state/community and the interests of an individual. Thus, it is questionable whether exclusion concepts from international refugee law should be adopted in relation to complementary protection criteria that are not directly based on UNHCR's mandate.<sup>155</sup>

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<sup>152</sup> See paragraph 3 of *Position on Exclusion of from Refugee Status*, European Council for Refugees and Exiles, March 2004: 'Since refugee protection within the ambit of the 1951 Convention and complementary protection have the same aim of sheltering those who flee human rights violations, ECRE believes that the concept of exclusion applies by analogy to complementary protection status as well.' However, as Chapter III has observed, many states do seem to go beyond human rights considerations in the criteria they use for complementary protection, for example compassionate reasons.

<sup>153</sup> In particular, attention is drawn to the guidance set out in *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, 2003 (as well as its accompanying *Background Note*).

<sup>154</sup> See paragraph 17 of the Guidelines, *ibid*, with regard to revocation of refugee status. Revocation should clearly be distinguished from cessation of refugee status – see further paragraph 170 below.

<sup>155</sup> It is worth noting the system, for example, in Germany where the legislation makes no provision for exclusion from complementary protection, although exclusion-type criteria determine an individual's entitlements in the country of asylum.

137. The other exclusion clauses in the 1951 Convention, Articles 1D and E, deal with individuals considered not to be in need, rather than undeserving, of international protection. They cover individuals who have secured protection either through another UN agency (at present, the UN Relief and Works Agency for Palestine Refugees) or by obtaining rights equivalent to a citizen of the host state. Logically, it would make sense for similar issues to be examined in relation to individuals who may deserve protection as non-Convention refugees. This would seem to be the case even where a non-Convention refugee receives protection from return on a basis under national law/policy which is quite distinct from UNHCR's mandate; such considerations are merely concerned with the fundamental question of whether international protection has already been found through another route.

## 2. *Discretionary or Mandatory Nature of Non-Convention Refugee Protection?*

138. Even in states that are not under any specific international obligation to prevent the removal of non-Convention refugees, many such individuals may nevertheless benefit from prohibitions on deportation under international human rights law. Therefore, there are legal, as well as practical and humanitarian, reasons for suggesting that states make the grant of protection on the basis of the eligibility criteria proposed by this study mandatory under their legislation. This is not only supported by the approach in OAU and Cartagena states but also by the practice in several countries which run complementary protection regimes (for example, Canada, France and Germany) as well as the position under the EU Qualification Directive. The adoption of a mandatory institution for all refugees within UNHCR's competence sends a clear message about their international protection needs.

## **B. Status Determination Procedure**

### 1. *Access to Procedures*

139. Under the 1951 Convention and customary international law, states are obliged to ensure that asylum seekers at their border are not *refouled*. Given the difficulties of making a sound determination as to whether an individual is actually a Convention refugee at the point of entry, this obligation will generally entail admitting asylum seekers into the territory in order for them to be examined under a fair and efficient refugee status determination procedure. Thus, the *non-refoulement* obligations in respect of Convention refugees indirectly secure admission to such procedures for non-Convention refugees.

140. Particular mention should be made of persons under temporary protection, where this is understood to cover any emergency mechanism for providing protection from *refoulement* without any prior determination of eligibility under the 1951 Convention. Where temporary protection is coming to an end it is important to deal with any continuing protection needs. Possibilities include access to an individualised determination procedure (for example, a single asylum procedure as discussed below) or group recognition (of Convention refugee status or non-Convention refugee protection).

### 2. *Relationship With Refugee Status Determination Procedure*

141. The survey's findings demonstrate a strong preference on the part of states to examine non-Convention grounds for protection from removal in the refugee status

determination process. This is consistent with both UNHCR's position<sup>156</sup> and the views expressed by states participating in the Global Consultations.<sup>157</sup> Moreover, the Commission of the European Union has made positive comments about the benefits of a single asylum procedure.<sup>158</sup> The advantages of operating such a procedure are numerous. A single asylum procedure helps to ensure that any need for international protection is comprehensively assessed. In addition, it enables a proper and consistent application of the 1951 Convention as well as other protection criteria as eligibility officers will need to be conversant in both. Moreover, a single procedure reduces the layers of bureaucracy, increasing administrative efficiency (including the cost aspect) with obvious benefits for the applicant. For example, it allows for file management and research on country of origin information to be situated in one department. By contrast, employing separate procedures may place an asylum seeker in the unenviable position of deciding whether an application for Convention refugee status, as opposed to non-Convention refugee protection, is more likely to succeed.

142. The survey has not elucidated whether countries applying regional refugee definitions generally require examination of the 1951 Convention criteria before moving on the other grounds for recognition. However, in UNHCR's experience,<sup>159</sup> this is certainly the case in the asylum procedures of many countries applying the Cartagena refugee definition, as borne out by the findings on Ecuador. As for the other countries examined, in a number of them, eligibility officials are required to consider the 1951 Convention definition first before moving on to other criteria.

143. Such an approach would be advisable in relation to the non-Convention refugee eligibility criteria recommended above, as it recognises the primary role of the 1951 Convention. This point has been made by UNHCR in relation to the EU's subsidiary protection regime.<sup>160</sup> Not only is a procedural hierarchy important in ensuring that the 1951 Convention is applied in a full and generous manner, it may also have serious consequences for the individuals concerned where the grant of non-Convention refugee protection is only discretionary and the attendant entitlements are inferior to those of recognised Convention refugees. Nevertheless, even where Convention refugees and non-Convention refugees essentially end up with the same status and rights, establishing a pre-determined sequence of evaluation is still desirable in ensuring a proper application of the Convention and reflecting the truly complementary nature of the other grounds being looked at. The Canadian example is illuminating in this regard.

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<sup>156</sup> As illustrated by paragraphs 8-10 of *Complementary Protection*, (EC/GC/01/18), UNHCR, September 2001 and, in relation to the EU's subsidiary protection regime, *UNHCR's Observations on the European Commission Communication on "A more efficient common European asylum system – the single procedure as the next step"*, UNHCR, September 2004.

<sup>157</sup> See paragraph 17 of *Global Consultations on International Protection: Report of the Third Meeting in the Third Track*, (EC/GC/02/2), UNHCR, April 2002. The reference to a single procedure in Objective 3 of Goal 1 of the Agenda for Protection is also relevant.

<sup>158</sup> See *A more efficient common European asylum system – the single procedure as the next step*, (COM (2004)503 Final), Commission of the European Union, 15 July 2004.

<sup>159</sup> Email communication between author and UNHCR staff.

<sup>160</sup> See paragraph 2 of *UNHCR's Observations* (note 156 above). Similar views are expressed in pages 3 and 5 of *Comments of the European Council on Refugees and Exiles on the Communication from the Commission to the Council and the European Parliament on "A more efficient common European asylum system – the single procedure as the next step"*, ECRE, September 2004.

144. The desirability of a single status determination procedure is predicated on the existence of adequate procedural standards. There is no reason why the safeguards generally considered necessary to ensure the fairness of refugee status determination should not be equally important where criteria other than those in the 1951 refugee definition are also under examination.<sup>161</sup> Without such safeguards, the predictability of individuals obtaining non-Convention refugee protection is much reduced to the detriment of such persons and the institution of asylum in general.<sup>162</sup> The guidance in, for example, ExCom Conclusion No. 8 (1977) on fair and efficient procedures is of assistance in this regard.<sup>163</sup> The specific question of appeal rights is dealt with in paragraph 155 below. Moreover, the benefits of a unified procedure are dependent on all asylum applications being treated as claims for non-Convention refugee protection if 1951 Convention refugee status is found to be inappropriate, even where this alternative claim has not explicitly been spelt out by the applicant.

145. The discussion above has concentrated on individualised status determination procedures for two reasons. Firstly, the Agenda for Protection's specific reference to the merits of a single asylum procedure was in the context of discussions about individualised procedures. Secondly, countries which currently operate complementary protection regimes tend to rely on an assessment of an individual's situation before making a decision on whether to grant Convention refugee status or any other protection from return. However, it is important to recall that in both Africa and Latin America refugee status is often accorded on a group basis. In principle, therefore, it is open to any country to grant non-Convention refugee protection on a group basis if, for example, there is clear evidence that all those of a certain nationality are in need of international protection because of civil war in the country of origin.

### 3. *Burden and Standard of Proof*

146. Given the nature of the matters being investigated, it seems appropriate (as in the case of the 1951 Convention definition) for the burden to be shared between the applicant and the authorities in relation to the eligibility criteria for non-Convention refugee protection. In relation to matters such as exclusion and internal relocation alternative,

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<sup>161</sup> The same is true, as a matter of principle, if separate procedures are used to determine claims to Convention refugee status and non-Convention refugee protection.

<sup>162</sup> It is worth recalling paragraph 11(e) of UNHCR's Concluding Observations in its discussion paper for the Global Consultations (*Complementary Forms of Protection*, (EC/GC/01/18), UNHCR, 4 September 2001):

A single comprehensive procedure, before a central expert authority, for assessing whether an asylum-seeker qualifies for refugee status or other complementary protection represents an efficient means of identifying persons in need of international protection. Such a single procedure *should meet all the requirements of fairness*, including the right to appeal with suspensive effect, and access to UNHCR.

(emphasis added)

<sup>163</sup> In the EU context, the Asylum Procedures Directive on which political agreement was reached in 2004 will, when in force, apply to asylum procedures in member states which look at both 1951 Convention and subsidiary protection claims. Thus, the minimum standards may well apply to consideration of criteria concerning non-Convention refugees given their overlap with the concept of subsidiary protection. However, concerns have been expressed that some of the provisions of the Asylum Procedures Directive may well lead to breaches of international law. See paragraph 6 of *UNHCR's Observations* (note 156 above).

however, the burden should rest squarely on the authorities as these factual issues are for them to raise.<sup>164</sup> Indeed, in a single asylum procedure, sheer practicality would push for the same approach to burden of proof in examining non-Convention refugee as well as 1951 Convention criteria.

147. As for the standard of proof, the survey shows that this varies considerably. That being said, in a number of countries a uniform standard is applied in relation to the 1951 Convention refugee criteria and other grounds for non-removal, whether or not the latter are related to a regional refugee definition. There is much to be recommended in this approach. Firstly, it simplifies the task of the determination officer in a single asylum procedure as he will only have to familiarise himself with one evidentiary test rather than several gradations. Secondly, it is hard to find principled reasons for differentiating between the level of proof necessary to satisfy the Convention criteria and that required for other grounds. Nothing in the substance of the recommended eligibility criteria for a non-Convention refugee renders them unsuitable to the same level of examination as that conducted in relation to the Convention refugee definition. Support for this is found in the case of South Africa,<sup>165</sup> given that Article I(2) of the OAU Convention definition has similar criteria to those being recommended for identifying non-Convention refugees in countries which do not operate a regional refugee definition.

148. Indeed, similar factual circumstances may well have to be considered in relation to the Convention and the non-Convention refugee criteria. This is another argument for adopting a single standard of proof. In addition, it also suggests that whilst consideration of the different eligibility grounds should involve discrete reasoning processes, some conclusions drawn from an evaluation of the applicability of 1951 Convention definition in a particular case may legitimately be referred to when considering whether the standard of proof is met for the non-Convention refugee criteria.

149. UNHCR has advocated ‘serious possibility’ as the appropriate standard of proof to be utilised in examining the 1951 Convention refugee definition.<sup>166</sup> Thus, this same standard of proof should be applied in determining if an individual is a non-Convention refugee. Therefore, an asylum seeker would have to demonstrate a ‘serious possibility’ of his life, liberty or security being threatened by return to armed conflict, serious public disorder or massive violations of human rights in the country of origin. In terms of applying this standard of proof, it is important to recognise that it requires something more than a theoretical risk but falls short of beyond reasonable doubt. The latter standard places an unrealistic burden on the individual to demonstrate that harm would befall him as a matter of certainty. Instead, ‘serious possibility’ envisages evidence of a real and immediate threat.

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<sup>164</sup> The recommendations in relation to burden of proof under the 1951 Convention in UNHCR’s various *Guidelines on International Protection* can offer helpful guidance for non-Convention refugee protection as well. See paragraph 34, page 9 of the *Guidelines on Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, 2003 and paragraph 33, page 7 of the *Guidelines on “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.

<sup>165</sup> In the time available, it was not possible to confirm if this is also the case in the other countries included in the survey which apply a regional refugee definition.

<sup>166</sup> Presumably this is intended to provide practical guidance on the concept of ‘well-founded fear’ as set out in the Article 1A(2) definition in the 1951 Convention.

150. In the context of an armed conflict, the ‘serious possibility’ test should not be too difficult to satisfy as by their nature such situations generally place civilians at risk of death or other physical harm, including in the case of women and girls the threat of sexual violence. Where the violence in a country is raging in an uncontrollable manner, the very existence of this objective situation may in itself satisfy the evidentiary burden, without further enquiry into the individual’s specific position. As for serious public disorder, although this may not involve violence on the scale of an armed conflict, it may nevertheless consist of quite widespread fighting. Moreover, as with an armed conflict, there is always a propensity for disorder to escalate, in intensity as well as in geographical scope. Thus, like armed conflict, the very fact of a situation of public disorder may sometimes be enough in itself to meet the standard of proof for non-Convention refugee protection.

151. Indeed, all of the country conditions covered in the non-Convention refugee criteria are liable to affect large sections, if not all, of the population. Thus, in applying the standard of proof recommended the notion of an ‘individualised’ threat is likely to arise. This concept, requiring an asylum seeker to demonstrate that he will be ‘singled out’ for ill-treatment, is employed by some states in determining eligibility to complementary protection. In doing so, these countries reveal an unwillingness to recognise, for example, that almost anyone sent back to a conflict situation is likely to face a significant risk to their physical safety. The individualised threat approach has also been adopted by the EU Qualification Directive in relation to situations of indiscriminate violence arising from internal or international armed conflict.<sup>167</sup>

152. To some extent these attitudes may have been influenced by the jurisprudence of the European Court of Human Rights. The Court has emphasised that an individual needs to show a ‘real risk’ that treatment contrary to Article 3 will be meted out to him before a violation based on return to the country of origin will be found.<sup>168</sup> It has not always been sympathetic to the argument that such a risk may arise because of generally unstable conditions in the country of origin.<sup>169</sup> Instead, in many of the cases where the Court has found that removal would violate Article 3, the decision appears to have been influenced by the applicant’s particular political or social profile.<sup>170</sup> That being said, there are instances where the Court has looked to generalised situations of violence as sufficient evidence of a ‘real risk’ of an Article 3 violation taking place if an individual is returned. For example, in *Ahmed v Austria*,<sup>171</sup> the Court found that the continued existence of a ‘fratricidal war’ in Somalia put the applicant at ‘real risk’ of treatment contrary to Article 3 if he was sent back there. However, in so deciding the Court noted that the applicant was

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<sup>167</sup> See Article 15(c) of the EU Qualification Directive.

<sup>168</sup> The ‘real risk’ test is discussed at page 19 of *Fleeing Poverty and Violence: Non-refoulement obligations under the European Convention on Human Rights*, K. Röhl (for UNHCR’s series of working papers on New Issues in Refugee Research), 2005.

<sup>169</sup> See *Vilvarajah v UK*, (judgment of 26 September 1991), in which the Court found that the applicants were only exposed to the same risks as other young Tamil men in relation to the lingering conflict situation in Sri Lanka. Such risks were considered to amount only to a ‘mere possibility’ rather than a real risk.

<sup>170</sup> See for example *Chahal v UK*, (judgment of 25 October 1996), concerning an active supporter of the Sikh terrorist movement and *HLR v France*, (judgment of 22 April 1997), regarding an informer on a Colombian drug cartel.

<sup>171</sup> Judgment of 17 December 1996.

associated with a particular clan. It is therefore unclear if it would have reached the same conclusion in relation to any Somali facing return at this point of time.

153. Thus the Court's approach to situations of generalised violence or widespread human rights violations is somewhat ambiguous.<sup>172</sup> It does not appear to have ruled out that the 'real risk' standard may be met by applicants whose fear is based on the impact of indiscriminate violence. However, from the case law so far, it would seem that the Court would be looking for evidence about the intensity and distribution of the violence or other ill-treatment and the specific likelihood of the individual being affected, for example because of where he lives. Thus a 'singling out' test would not necessarily be required, but rather some indication of why that individual (potentially in common with many others) might be at real risk of harm because of the fighting.

154. Turning back to state practice, the emphasis by some states on the 'individualised' nature of a threat is misplaced in the context of the factual situations (conflict, public disorder and widespread human rights abuse) covered by the eligibility criteria recommended in this study. By their very nature, they deal with circumstances where violence and other ill-treatment is indiscriminate and unpredictable. If this was not the case it is likely that the 1951 Convention would apply. In such an environment it does not make much sense to evaluate whether an applicant faces an individual risk, in the sense that the risk is confined to that person alone. However, it is legitimate to enquire into the immediacy of the threat, hence the adoption of a 'serious possibility' standard of proof. Any emphasis on 'individualised' threats would undermine the effectiveness of this protection regime. As with the 1951 Convention, the fact that many individuals are at risk does not necessarily lessen the seriousness and probability of the risk for a particular person. The very nature of generalised violence and other ill-treatment is that they place many people in danger and therefore in need of surrogate protection by third states. Arguably, therefore, the focus should be less on whether a particular individual is disproportionately in danger and more on whether the widespread nature of the violence/ill-treatment is such that there is a real and immediate threat to the person seeking international protection.

#### 4. *Right of Appeal*

155. A vital element of the procedural safeguards mentioned in paragraph 144 above is a right of appeal to an independent body in relation to the first instance decision. Practice in the countries surveyed strongly supports this. Moreover, in a number of states an appeal lies against denial of refugee status even where an alternative ground for protection from removal has been granted. Given the primacy of the 1951 Convention (not least because it sets out specific rights for its beneficiaries), it is recommended that a similar approach is followed in asylum procedures which examine non-Convention refugee protection as well

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<sup>172</sup> As Röhl comments:

In some cases such as *Hilal*, the Court has used existing patterns of ill-treatment in the country of origin as supporting evidence for a real risk to the applicant; in other cases, such as *HLR*, the Court has demanded that the applicant demonstrate that his or her situation upon return would be significantly worse than that of the average population. This stands in stark contrast to 'domestic' cases like *Kalashnikov*, where no such 'singling out' of an applicant has been an issue.

See page 28 of *Fleeing Poverty and Violence: Non-refoulement obligations under the European Convention on Human Rights*, K. Röhl (for UNHCR's series of working papers on New Issues in Refugee Research), 2005.

as Convention refugee status. However, the necessity of appealing for ‘upgraded’ status is arguably removed if the state decides to adopt an extended concept of refugee or to award those with non-Convention refugee protection identical rights to that of Convention refugees.

### C. Standard of Treatment

#### 1. Protection From Refoulement

156. Non-Convention refugee protection requires the host state to prevent the removal of the beneficiary to his country of origin. As in the case of Convention refugees, this covers both direct and indirect *refoulement*. Thus, deporting a person deserving of non-Convention refugee protection to a third state is not acceptable if there is a risk that he will be forced on from there to the country of origin. Any exceptions to protection from *refoulement* should arguably be limited to the grounds covered in Article 33(2) of the 1951 Convention.

#### 2. Other Entitlements

157. The question then arises as to whether international protection in relation to non-Convention refugees requires states to do anything more than just refrain from *refoulement*. Unlike Convention refugees, there is no specific international instrument setting out rights attendant to *non-refoulement* for other refugees falling within UNHCR’s mandate. However, mere suspension of deportation would leave such individuals in a position of extreme insecurity. In this respect, minimum standards laid down in international human rights law for all individuals present within a territory, irrespective of immigration status, is clearly of crucial significance.<sup>173</sup> As a result of these standards, non-Convention refugees should be able to enjoy core political, social and economic rights in the country of asylum. In addition, such refugees have similar, if not identical, needs to Convention refugees. They are without the support of their national government or authorities, generally in a poor financial/material position, often psychologically and physically scarred by the events that have forced them to flee their homes and fearful for their future. Not only does this raise moral and political difficulties in terms of differential treatment from Convention refugees, it may also raise legal issues under the non-discrimination provisions of the relevant international human rights instruments.<sup>174</sup> Moreover, many of the rights applicable to aliens under the universal human rights instruments are similar anyway to those embodied in the 1951 Convention.

158. Therefore, persuasive arguments exist for recommending that individuals benefiting from non-Convention refugee protection should receive the same standard of treatment as persons recognised under the 1951 Convention. Indeed, similar sentiments were expressed by states on the adoption of the 1951 Convention in the form of Recommendation E of the Final Act.<sup>175</sup> Admittedly, the preoccupation of states at that time may have been individuals who would have satisfied the 1951 Convention definition were it not for its (then) geographical and temporal limits. Nevertheless, Recommendation E establishes the principle that certain persons outside the scope of the 1951 Convention may

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<sup>173</sup> These standards are discussed in Chapter II on the Legal Framework Under International Law.

<sup>174</sup> *Ibid.*

<sup>175</sup> See note 110.

still deserve to be treated in the country of asylum with the same consideration as enjoyed by Convention refugees. The consequent recognition that individuals fleeing, for example, armed conflict and serious public disorder are also in need of international protection suggests that Recommendation E should be applied to all refugees within UNHCR's mandate.

159. Further support comes from the legal framework in Africa as well as Latin America. Despite applying to a wider group of people, both the OAU Convention and the Cartagena Declaration adopt, implicitly in one case and explicitly in the other, the standard of treatment set in the 1951 Convention. The survey found that in Brazil, Ecuador, South Africa and Tanzania, the same standard of treatment appears to be applied to refugees recognised under the 1951 Convention criteria and those recognised under the other criteria in the relevant regional refugee instrument. However, these uniform standards may not always meet the requirements of the 1951 Convention.

160. The approach taken by the European Union has differed from that in the OAU Convention and Cartagena Declaration. Under the Qualification Directive, beneficiaries of subsidiary protection are subject to inferior rights in a number of areas including duration of residence permits, employment opportunities and social benefits. However, it must be recalled that this Directive only sets minimum standards and the actual practice in many EU states, for example the UK, appears to be more generous. Away from Europe, both Australia and Canada provide equal standards of treatment for Convention refugees and those protected from removal on other grounds.

161. Thus, it is recommended that all refugees be given the same rights in line with the standards set in the 1951 Convention and international human rights treaties. Therefore, non-Convention refugees should have the right to work, to material assistance if they are unable to provide a basic standard of living for themselves, public accommodation where necessary, access to educational and medical facilities, freedom of movement and identity documents. A key underpinning issue is the duration of the residence permits received. It is important to acknowledge, as a number of countries in the survey have done, that there is no real justification for assuming that refugees outside the scope of the 1951 Convention will be in need of international protection for a shorter period than Convention refugees. Accordingly, their initial residence permit should last for the same period as that given to Convention refugees, which in any case should be of sufficient length to allow these people to regain a sense of security.

162. In terms of the right to work, often a politically-sensitive matter, providing such an entitlement enhances the psychological and material security of refugees, enabling them to achieve self-reliance in the country of asylum. Not only does this reduce the public burden (by lessening recourse to social assistance funds), it can enhance community relations as such persons are seen to be productive members of their new society. As for travel documents, the survey notes that several of the countries applying a regional refugee definition offer, in principle at least, a travel document to all recognised refugees, even if they are not Convention refugees. This is supportive of non-Convention refugees outside of these regions also receiving some form of travel document, for example CTDs or similar travel documents which omit any reference to the 1951 Convention. A similar approach is found in Article 25 of the Qualification Directive in relation to beneficiaries of subsidiary protection (save for a requirement to first demonstrate inability to obtain a national passport).

163. With regard to family unity, a clear principle was established in Recommendation B of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.<sup>176</sup> Moreover, the importance of preserving family unity has been increasingly stressed through subsequent developments in international human rights law, particularly Article 23 of the ICCPR.<sup>177</sup> In commenting on Article 23(5), the Human Rights Committee has stressed the need for appropriate measures ‘to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.’<sup>178</sup> Moreover, ExCom has repeatedly underlined the importance of states protecting the unity of a refugee’s family, including through admission of dependents into the country of asylum.<sup>179</sup>

164. The human rights arguments as well as humanitarian considerations behind the principle of family unity for Convention refugees apply equally to individuals granted non-Convention refugee protection. State practice, however, does not uniformly recognise this. Generally in the states surveyed, persons receiving non-Convention protection from removal were not entitled to family reunion, although the state could exercise discretion in their favour. In this context, it is interesting to note the positive approach of countries such as Australia (in relation to permanent protection visa holders) and Ecuador (in relation to all recognised refugees) in bestowing a right to family reunion. As for derivative status for accompanying relatives, this was the case in a number of countries and arguably should be the rule for non-Convention refugees. Although there appears to be a tendency to restrict family reunion and derivative status to spouses and dependent children, some countries covered in the survey have embraced other dependent relatives in line with the concept of family unity.<sup>180</sup>

#### **D. Ending of Non-Convention Refugee Protection**

165. Like Convention refugee status, in principle non-Convention refugee protection should only continue for as long as a need for international protection exists. For Convention refugees, ending of protection is managed through the cessation clauses in Article 1C of the 1951 Convention. The OAU Convention incorporates similar cessation clauses in relation to refugees recognised under its auspices, whilst this is implicit in the

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<sup>176</sup> Recommendation B reads:

The CONFERENCE

CONSIDERING that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and

NOTING with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems, the rights granted to a refugee are extended to the members of his family,

RECOMMENDS Governments to take the necessary measures for the protection of the refugee’s family, especially with a view to:

1. Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.
2. The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

<sup>177</sup> See *Family Unity and Refugee Protection*, Kate Jastram and Kathleen Newland in *Refugee Protection in International Law*, page 555 at 571.

<sup>178</sup> See paragraph 5 of *General Comment No. 19 on Article 23(5)*, UN Human Rights Committee, 1990.

<sup>179</sup> See, for example, ExCom Conclusion No. 88 (1999).

<sup>180</sup> *Ibid.*, at paragraph (b)(ii).

Cartagena Declaration.<sup>181</sup> The state practice survey illustrates, however, that a rather different approach is taken by many countries offering complementary protection. There is a tendency to require the beneficiary of such protection to demonstrate, yet again, his continued need for protection from removal on the expiry of his initial authorised period of residence. This runs counter to the concept of cessation under the refugee instruments, where essentially the presumption is that refugee status should continue unless the authorities can establish that one of the grounds for cessation has been met.<sup>182</sup> The rationale behind the latter approach is the need to provide a level of security and clarity for refugees in terms of their status in the country of asylum. It is difficult to see why these considerations about stability are not equally important in the case of non-Convention refugees. In fact, support for this argument is found in the attitude towards ending of complementary protection in Canada and Australia (in relation to Permanent Protection Visa holders).<sup>183</sup>

166. Thus, there are strong arguments against reviewing non-Convention refugee protection status at the end of each residence permit period. Not only does this place a severe strain on the individual concerned, there is no obvious reason why the need for international protection in such cases is likely to dissipate sooner than in the case of Convention refugees.<sup>184</sup> Moreover, adopting a cessation-like approach could also ease the administrative burden, by harmonising the concepts and procedures used in ending Convention and non-Convention refugee protection as well as avoiding unnecessary case reviews. In doing so, it is clearly relevant to look at the circumstances covered by the cessation clauses in the 1951 Convention. While these comprehensively set out the factors which indicate whether a Convention refugee has or can re-avail himself of national protection, it is necessary to see to what extent they can be applied to the situation of non-Convention refugees. In this respect it is worth noting the practice of the UK, where the grounds in Article 1C of the 1951 Convention form one of the elements that may be taken into account in reviewing the continued necessity of ‘Humanitarian Protection’ or ‘Discretionary Leave’.<sup>185</sup> Further support for adopting aspects of the cessation clauses in relation to complementary protection was given by states participating in the Global Consultations who endorsed UNHCR’s proposal that:<sup>186</sup>

(f) Criteria for ending complementary protection should be objective, clearly enunciated in law and should never be arbitrary. Where it is relevant, the doctrine that has been developed regarding the cessation provisions of Article 1 of the 1951 Convention offers helpful guidance in this regard. A consultative role should be envisaged for UNHCR, given

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<sup>181</sup> See paragraphs 38 and 43 above. However, those criteria in the OAU Convention’s cessation clauses which are additional to the elements found in Article 1C of the 1951 Convention are arguably inconsistent with the OAU Convention’s complementary function in relation to the universal refugee instruments.

<sup>182</sup> See *Guidelines On International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, (HCR/GIP/03/03), UNHCR, 2003 at paragraphs 1 and 25(ii) in particular.

<sup>183</sup> See paragraph 111 above.

<sup>184</sup> This also ties in to the issue of how long residence permits should be issued for – see paragraph 161 above.

<sup>185</sup> See paragraph 8.1 of *Asylum Policy Instructions on Humanitarian Protection*, Home Office, available at <http://www.ind.homeoffice.gov.uk/ind/en/home/laws>

<sup>186</sup> See paragraph 11, *Complementary Forms of Protection*, (EC/GC/01/18), UNHCR, 4 September 2001.

its particular expertise, when considering the appropriateness of ending complementary protection measures.

167. In examining the various grounds under Article 1C, cessation on the basis of changed circumstances in the country of origin (paragraphs (5) and (6)) seems most obviously applicable to the situation of non-Convention refugees. Indeed UNHCR's guidelines<sup>187</sup> on this matter make specific reference to the application of these particular clauses in conflict situations which, as noted earlier, can result in the bestowal of Convention or non-Convention refugee protection depending on the exact circumstances. However, the relevance of cessation based on an individual's conduct (Article 1C(1) to(4)) is less clear-cut.

168. In the case of Convention refugees, the scenarios covered in Article 1C(1) and (2) are capable of demonstrating that an individual no longer has a well-founded fear of persecution, for example because he is able and willing to approach the diplomatic authorities of his country of origin for assistance. However, in themselves, obtaining diplomatic protection from, or re-acquiring the nationality of, the country of origin does not prove that the danger to an individual from an armed conflict has ceased. It is quite conceivable that in a situation of civil war the diplomatic missions of the government are still functioning and able, for example, to provide passports to their citizens abroad. However, this is no real indicator of whether it is safe for an individual to return home, when his reason for being out of the country is the danger from widespread, indiscriminate violence. Therefore, it would seem that the principles contained in Article 1C (1) and (2) are not of much assistance in determining whether a need for international protection persists in the case of non-Convention refugees.

169. By contrast, the acquisition and enjoyment of a new nationality (Article 1C(3)) is relevant as it implies that the individual is able to avail himself of the protection of the country of nationality, for example by taking up residence there. Often the new nationality will be that of the country of asylum. However, as in the case of Convention refugees, for a new nationality to evidence the end of a need for international protection, there must be a genuine link between the individual and the country of nationality, plus a willingness and ability on his part to call on the protection of his new government. Just obtaining a passport is not enough. As for Article 1C(4), if 'fear of persecution' is replaced by 'his life, liberty or security is threatened' then it is amenable to application in a non-Convention context.<sup>188</sup> However, as with Convention refugees, careful examination must be undertaken of whether the individual's acts are voluntary and actually represent re-establishment. For example, simply making short visits to see whether the situation is stable enough for repatriation cannot amount to re-establishment.

170. Apart from some of the concepts found in the 1951 Convention's cessation clauses, it is difficult to discern any other grounds for legitimately concluding a need for international protection has ended. The prohibitions on *refoulement* under international human rights law which overlap to some extent with eligibility for non-Convention refugee protection do not explicitly deal with ending of protection under their provisions; except,

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<sup>187</sup> See, for example, paragraph 14 of *Guidelines On International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, (HCR/GIP/03/03), UNHCR, 2003.

<sup>188</sup> Adaptations along these lines are, not surprisingly, found in the legislation of OAU and Cartagena Countries, for example section 5(d) of the 1998 Refugees Act of South Africa.

the basic point that these obligations fall away once the risk in question disappears. As for factors relating to the individual's illegal or immoral conduct, these are irrelevant to the question of whether a need for international protection still exists. Such concerns should be considered instead in relation to revocation<sup>189</sup> or any legitimate exceptions to the prohibition on *refoulement*.<sup>190</sup> Similarly, where subsequently information comes to light indicating that an individual was never in need of international protection, this should lead to cancellation of non-Convention refugee protection rather than a finding that it is no longer necessary.<sup>191</sup>

171. In applying the grounds suggested in paragraphs 167 and 169 to determine the ending of non-Convention refugee protection, UNHCR's guidelines on Article 1C of the 1951 Convention are very relevant. Firstly, in terms of interpreting the substantive content of paragraphs (3), (4), (5) and (6) of this provision; but also in relation to procedural considerations.<sup>192</sup> Thus, the possibility of ending non-Convention refugee protection should only be raised where the authorities have good grounds for believing that one of the situations covered by Article 1C(3), (4), (5) and (6) may apply to a particular individual. Automatic reviews of an individual's need for continued protection would not be appropriate. Instead, a residence permit allowing a degree of stability in the country of asylum should be issued. Moreover, a declaration of cessation on a group basis is as conceivable in the case of non-Convention refugees as it is in relation to Convention refugees, so long as appropriate safeguards are built in to allow consideration of continuing protection needs in individual cases.<sup>193</sup> In general, given UNHCR's experience in cessation matters for all refugees under its mandate, it would seem prudent for states to consult UNHCR when contemplating ending of non-Convention refugee protection.

172. A potential complication is the status given to Convention refugees who have 'compelling circumstances arising out of previous persecution' for not availing themselves of national protection. Although this exception to cessation is raised in the 1951 Convention in relation to Article 1C (5) and (6), it has come to be understood as applying to the other (voluntary conduct) grounds of cessation as well. The survey revealed that Australia, at the very least, considers the grounds for non-removal of such persons alongside other criteria, such as risk of torture, when it comes to bestowing protection visas outside of the 1951 Convention. However, in terms of the international legal framework, 'compelling circumstances' should result in the retention of Convention refugee status

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<sup>189</sup> Revocation of refugee protection takes place when exclusion criteria only come to light after determination that an individual is in need of international protection. See paragraph 135 above.

<sup>190</sup> See paragraph 156 above which suggests that, at most, the narrow grounds established in Article 33(2) of the 1951 Convention may apply to non-Convention refugees.

<sup>191</sup> This draws on the approach taken in relation to the 1951 Convention, discussed in paragraph 117 of the *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, 1992 and in *Cancellation of Refugee Status*, Sybille Kapferer (in UNHCR's Legal and Protection Policy Series), 2003. The latter, at paragraph 125, notes that in many countries, however, 'cancellation' is authorised in circumstances not justified by the 1951 Convention, for example on grounds of national security which at most should lead to expulsion. In other cases cancellation is confused with revocation, see note 189 above.

<sup>192</sup> See UNHCR's guidelines referred to in note 187 above and, in so far as this discusses Article 1C(3) and (4) of the 1951 Convention, *The Cessation Clauses: Guidelines on their Application*, UNHCR, 1999.

<sup>193</sup> See paragraphs 18 and 19 of *Guidelines On International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)* (HCR/GIP/03/03), UNHCR, 2003.

rather than bestowal of complementary protection.<sup>194</sup> Indeed, given the reasons militating against the lifting of protection of removal in such cases, it may be more appropriate to grant permanent residence. The same may also be true in cases where the consequences of cessation would severely disrupt strong family, economic and social ties established through long stay in the country of asylum.<sup>195</sup>

173. In principle, ‘compelling circumstances’ stemming from the cause of displacement may arise in respect of all refugees. For example, a non-Convention refugee may be extremely traumatised as a result of witnessing the death of her young children and other members of her family from indiscriminate fighting during a civil war. Like Convention refugees, such individuals should for humanitarian reasons be able to benefit from permanent residence or, at the very least, continued protection status if the grounds suggested in paragraphs 167 and 169 above come into play. Moreover, where a non-Convention refugee has become well integrated into the local community, the authorities may wish to grant him permanent residence if questions arise as to his continuing need for international protection.<sup>196</sup>

## **E. Durable Solutions**

174. As regards the OAU and Cartagena countries surveyed, national preferences in relation to the three traditional durable solutions applied to all recognised refugees, not just Convention ones. However, in other regions a number of countries with a generally integrationist attitude towards Convention refugees tended to take a different approach when it came to persons protected from removal on other grounds. The attitude of the US and some European governments seems to stem from a belief that only Convention refugees deserve real opportunities for local integration. There is no clear reason why the situations that give rise to non-Convention refugee protection should necessarily improve sooner than those circumstances covered by the 1951 Convention, thus increasing the chances of early voluntary repatriation in the case of beneficiaries of the former. For example, the risk of death from armed conflict may result in either Convention refugee status or non-Convention refugee protection dependent on the existence of a Convention motive, such as political identity. The lack of any such motive in itself is not a clear indicator that the threat to physical safety is more likely to diminish in the near future.

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<sup>194</sup> See ExCom Conclusion No. 65 (1991):

(q) *Underlines* the possibility of use of the cessation clauses of the 1951 Convention in situations where a change of circumstances in a country is of such a profound and enduring nature that refugees from that country no longer require international protection and can no longer continue to refuse to avail themselves of the protection of their country, provided that it is recognized that compelling reasons may, for certain individuals, support the continuation of refugee status...

See also, paragraph 56 of *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, UNHCR, 2001:

Those who can invoke “compelling reasons” arising out of past persecution or experiences leading to their recognition as refugees should not involuntarily cease to be refugees, despite a relevant, fundamental, stable and durable change.

<sup>195</sup> This is discussed in paragraph 22 of *Guidelines On International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*, (HCR/GIP/03/03), UNHCR, 2003.

<sup>196</sup> In addition to UNHCR’s guidance in note 195 above (in relation to Convention refugees), a similar recommendation is made in paragraph 22 of *Position on Complementary Protection*, European Council on Refugees and Exiles, 2000.

175. In this context it is interesting to look at the approach employed in Canada and Australia where similar opportunities for local integration are provided to Convention refugees as well as others granted relief from deportation.<sup>197</sup> As such, it is recommended that countries of asylum facilitate opportunities for local integration of non-Convention refugees where opportunities for voluntary repatriation<sup>198</sup> are not likely to arise in the near future. Thus, persons under non-Convention refugee protection should be given the same opportunity as Convention refugees to obtain permanent residence and eventually citizenship. This is not to rule out the possibility of voluntary repatriation should suitable conditions arise, but rather to prevent insecurity for such refugees stemming from misplaced confidence on the part of the authorities in their ability to return home in the short term.

#### **F. Issues Particularly Affecting Women and Children**

176. Any protection regime needs to take account of its impact on women and children given that they comprise the majority of individuals forcibly displaced from their country. For example, the eligibility criteria recommended will need to be interpreted in a gender sensitive way, for instance to acknowledge that massive violations of human rights may consist of widespread sexual violence against women by soldiers and police in a particular country. In addition, procedural considerations applicable to status determination (such as the opportunity for a woman to make a claim independent of her husband) are equally relevant when assessing non-Convention refugee protection claims. If, as recommended, a single asylum procedure is used such features will apply anyway to both those deserving of refugee recognition under the 1951 Convention and those eligible for non-Convention refugee protection.

177. In relation to children, the application of the ‘best interests’ principle will be critical. With respect to the recommended eligibility criteria for refugee protection outside of the 1951 Convention, the relative vulnerability of unaccompanied or separated children will be a key factor in determining if they have been satisfied. The survey reveals that in many industrialised countries protection from return is often granted to children simply because of their young age. Whilst laudable in many ways, this may on occasion result in children being overlooked for Convention refugee status. For example, a young victim of trafficking who is at risk of reprisal from a criminal gang in the country of origin because of his cooperation with the law enforcement authorities in the host state may well satisfy the Convention refugee definition; the fear of persecution can be linked to the child being a member of a social group which consists of child victims of trafficking.<sup>199</sup> Unless protection from removal on the basis of minority provides entitlements equal to those under the 1951 Convention or enjoyed by non-Convention refugees, it is important that their claims to the latter statuses be examined fully first. Child-sensitive considerations

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<sup>197</sup> Admittedly, in the case of Australia, such opportunities only arise for persons granted permanent protection visa; the situation is quite different for Convention refugees and other persons who merely receive a temporary protection visa.

<sup>198</sup> Even where resettlement may be relevant in countries operating a complementary protection regime, the number of places is likely to be low and so the choice is really between local integration and voluntary repatriation.

<sup>199</sup> The manner in which age can influence the identification of a particular social group is discussed in ‘Age and Gender Dimensions in International Refugee Law’, Alice Edwards in *Refugee Protection in International Law*, Feller, Türk and Nicholson (eds.), Cambridge, 2003, at page 70.

may also arise in relation to ending non-Convention refugee protection. Where a child has spent many of his formative years in the country of asylum, the severe disruption caused by repatriation may require the granting of permanent residence even though ending of international protection is justified for others of the same nationality.

#### **G. Application of Non-Convention Refugee Eligibility Criteria Given Existing Grounds for Complementary Protection**

178. As already noted, there are some similarities between the criteria currently used by many states to provide complementary protection and those being recommended with regard to non-Convention refugee protection. Therefore, from a practical point of view, it is conceivable that some countries may be able to implement a protection regime for non-Convention refugees along the lines suggested in this study through existing legislative powers. This would be dependent, though, on the standard of treatment currently prescribed and whether the relevant legislative provisions are mandatory rather than discretionary.

179. However, given that there are sound arguments for treating non-Convention refugees on a similar basis to Convention refugees in terms of determination procedures, socioeconomic and political rights, as well as duration of protection and durable solutions, there is merit in states marrying the two concepts into a single refugee status under national law. Thus the national refugee definition would mirror that under UNHCR's mandate: a refugee would be any person falling within the 1951 Convention refugee definition or whose life, liberty or security is threatened by return to armed conflict, serious public disorder or massive violations of human rights in the country of origin. This approach is taken by countries applying the OAU Convention or the Cartagena Declaration.<sup>200</sup> A consolidated approach helps to simplify both the asylum system from an administrative and legal point of view, while also reflecting the similarity in position of all persons falling within UNHCR's mandate for refugees.

180. Although EU Member States could not agree on the adoption of a similar approach, the Qualification Directive does not exclude the possibility of national refugee definitions encompassing all refugees within UNHCR's mandate. Its definitions of 'refugee status' and 'subsidiary protection status' are explicitly acknowledged as being 'for the purposes of this Directive'.<sup>201</sup> Moreover, the Directive does not dictate the terminology to be used to refer to such individuals under national arrangements. Thus, expanded national refugee definitions may well be consistent with the Directive's aims of harmonising protection criteria as well as consequent benefits.<sup>202</sup>

#### **H. Sufficiency of Existing Legal Framework**

181. The recommendations of this study are aimed at encouraging greater consistency in the provision of complementary protection, primarily through the adoption of guiding principles in an ExCom conclusion. The need for an ExCom conclusion is apparent in the lack of a clear and comprehensive international legal framework for refugees falling outside the scope of the 1951 Convention. Although, as the study has hopefully illustrated,

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<sup>200</sup> Canada has also moved some way in this regard as 'refugee protection' under its legislation applies to both Convention refugees and 'persons in need of protection'.

<sup>201</sup> Article 2 of the Qualification Directive.

<sup>202</sup> See Preambular Paragraph 6 of the Qualification Directive.

there are numerous overlaps between categories of refugees falling within UNHCR's mandate and obligations arising under international human rights law in relation to *non-refoulement* and consequent standards of treatment, it is not evident that all non-Convention refugees are adequately protected from removal by international human rights law as currently interpreted.

182. Even though a strong case can be made for arguing that many refugees falling outside of the ambit of the 1951 Convention will be eligible for protection under, for example, the *non-refoulement* provisions relating to torture, others will not benefit so clearly from an international legal obligation. This is partly due to a lack of unambiguous jurisprudence at an international level on, for example, the application of the right to life in relation to civilians being returned to situations of indiscriminate violence.<sup>203</sup> Therefore, an ExCom conclusion will be vital in providing guidance to states to complement existing *non-refoulement* and standard of treatment obligations under international law. In addition, as in the case of Convention refugees, various issues, (such as the detail of procedural requirements and durable solutions), are not really dealt with at all under existing international treaties. Here, the contribution of an ExCom conclusion is self-evident.

183. Perhaps it is appropriate to end with a reflection on the importance of continuing efforts to ensure a coherent, consistent and inclusive application of the 1951 Convention. If not, any national regime intended to provide protection for non-Convention refugees may end up being detrimental to the institution of the 1951 Convention. The importance of securing international protection for refugees falling outside of the 1951 Convention should not obscure the fact that many asylum seekers from, for example, conflict situations are capable of recognition under the Convention. Thus, activities promoting the progressive application of the 1951 Convention, such as the dissemination of UNHCR's Guidelines on International Protection, are arguably just as critical in terms of ensuring international protection for all refugees under UNHCR's mandate as the development of an ExCom conclusion on complementary protection.

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<sup>203</sup> As Röhl comments in relation to the caselaw of the European Court of Human Rights:

Certainly, general conditions producing refugees such as systematic violence, armed conflicts, natural or man-made disasters or extreme destitutions do not automatically generate *non-refoulement* obligations. However, none of these situations can in principle be excluded from providing the backgrounds against which an appeal against expulsion must be assessed.

## Annex: Survey of State Practice

### I. AUSTRALIA

184. Eligibility for refugee status ('Permanent Protection Visa' or 'Temporary Protection Visa') under the Migration Act 1958 (and subsequent legislation) is based on the criteria of Article 1 of the 1951 Convention. However, 'on-shore' asylum-seekers<sup>204</sup> whose claims have been rejected by both the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) as well as the Refugee Review Tribunal (RRT) may benefit from the Minister's discretionary power to intervene under section 417 of the 1958 Act:

(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

185. The Minister has listed the factors that he may take into account in deciding whether to exercise this discretion in a set of guidelines, Migrations Series Instruction (MSI) No. 386 of August 2003:<sup>205</sup>

4.1.1 The public interest may be served through the Australian Government responding with care and compassion where an individual's situation involves unique or exceptional circumstances. This will depend on various factors, which must be assessed by reference to the circumstances of the particular case.

4.1.2 I will generally only consider the exercise of public interest powers in cases that exhibit one or more unique or exceptional circumstances.

4.2 Unique or exceptional circumstances

4.2.1 The following factors may be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances.

- Particular circumstances or personal characteristics of a visa applicant which provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity on return to their country of origin, including:
  - persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees; and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country; or
  - persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but where such mistreatment does not amount to persecution under the Convention relating to the Status of Refugees 1951, as amended by the Protocol relating to the Status of Refugees 1967 (Refugees Convention) or has not occurred for a Convention reason.

<sup>204</sup> For the sake of clarity and in order to assess best practice, the restrictive arrangements in place for 'offshore' asylum seekers are not discussed.

<sup>205</sup> The guidelines also refer to other discretionary powers of the Minister in the immigration field.

- Substantial grounds for believing that a person may be in danger of being subject to torture if returned to their country of origin, in contravention of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).  
Article 3.1 of the CAT states...
- Circumstances that may bring Australia's obligations as a signatory to the Convention on the Rights of the Child (CROC) into consideration.  
Article 3 of the CROC provides:...
- Circumstances that may bring Australia's obligations as a signatory to the International Covenant on Civil and Political Rights (ICCPR) into consideration. For example:
  - A *non-refoulement* obligation arises if the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR, or face the death penalty (no matter whether lawfully imposed);
  - Issues relating to Article 23.1 of the ICCPR are raised. Article 23.1 provides: "*The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State.*"
- Circumstances that the legislation does not anticipate.
- Clearly unintended consequences of legislation.
- Circumstances where application of relevant legislation leads to unfair or unreasonable results in a particular case.
- Strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident).
- Circumstances where exceptional economic, scientific, cultural or other benefit to Australia would result from the visa applicant being permitted to remain in Australia.
- The length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community.
- Compassionate circumstances regarding the age and/or health and/or psychological state of the person.

186. The section 417 power is non-delegable, non-compellable and non-reviewable (sub-sections (3) and (7)). The initiative to refer a rejected case to the Minister comes from DIMIA officials who screen every appeal dismissed by the RRT for potential section 417 intervention. However, the Minister is under no obligation to even consider a case so referred. In submitting cases, officials are required under MSI 386 and 387<sup>206</sup> to inform the Minister of any security threat or prejudice to Australia's international relations from the continued presence of the individual as well as any character concerns, particularly in relation to criminal conduct. However MSI 386 recognises the absolute nature of the prohibition on *refoulement* under the Convention against Torture. This point is also made in Ministerial Direction No. 21 on section 501 of the Migration Act (refusal or cancellation of visa). As a result, where there is a risk of *refoulement* to torture, or cruel, inhuman or degrading treatment, bad character will result in detention rather than removal from Australia.

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<sup>206</sup> MSI 387 of August 2003 advising officials on how to interpret the Minister's guidelines on section 417 intervention.

187. Although under section 417(4) and (5) of the Migration Act the Minister must provide Parliament with a written statement in each case where he exercises this discretion, reasons for the decision are generally not given. Therefore, it is difficult to assess on which basis an individual benefits from this discretionary power. That being said, submissions were made during a 2003-2004 Senate Select Committee Enquiry into the Minister's use of his discretionary powers in migration matters to the effect that section 417 was being exercised primarily to preserve family links rather than provide protection from ill-treatment in the country of origin. From 1 July 2003 to 30 June 2004, 603 PPVs and 192 TPVs were granted to persons recognised as refugees, while 1406 PPVs and 85 TPVs were granted on the basis of section 417 (454 and 501J) intervention.<sup>207</sup>

188. Like other asylum seekers, those who eventually benefit from section 417 intervention may well be detained as part of the Australian government's general policy of detention for unauthorised entrants to its territory. Those who are not will, in common with asylum seekers generally, have restricted access to work, material assistance, education and legal aid. Where the Minister does exercise his discretion, he may grant either a permanent or temporary protection visa (PPV or TPV) (as for persons recognised as Convention refugees), although the reason behind the choice of visa is not clear. Thus, the rights of section 417 beneficiaries are essentially the same as recognised refugees. In the case of PPV holders, they have rights similar to Australian citizens (with the exception of the right to vote); including the right to work, access to education and medical facilities as well as social assistance, freedom of movement, right to family reunion and entitlement to Convention Travel Documents. However, the standard of treatment of TPV refugees is below those endorsed internationally in the 1951 Convention and ExCom conclusions – significantly, there is no right to travel documents or family reunion. PPV holders can apply for permanent residence and within two years of getting such status can also apply for citizenship. However TPV holders have their entitlement to such status reconsidered de novo after thirty months – their visa lapses after three years. If they are considered still to require protection from removal, they will receive a PPV unless they entered Australia illegally or via a safe third country. Where a PPV is not granted another TPV will be issued, though the Minister has discretion to issue a PPV even if the individual has transited a safe third country.

189. Australia accepts persons other than Convention refugees for resettlement under the Special Humanitarian Programme (SHP). To be eligible an individual must be outside his/her home country and subject to substantial discrimination amounting to a gross violation of human rights in their home country. Unlike Convention refugees who are resettled, SHP candidates must be sponsored by an individual or organisation within Australia able to meet the resettlement costs.

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<sup>207</sup> Sections 454 and 501J of the Migration Act provide the Minister with essentially the same discretion as section 417 except that they refer to decisions of the Administrative Appeals Tribunal (AAT) rather than the Refugee Review Tribunal. Although the RRT is the main body of appeal in relation to protection visa (i.e. refugee) claims, some appeals are also heard by the AAT.

## II. BRAZIL

190. Refugee status is defined in section 1 of Refugee Law No. 9474/97. Sub-sections (i) and (ii) incorporate the refugee definition in Article 1A(2) of the 1951 Definition, while sub-section (iii) reflects some of the language found in the third conclusion of the 1984 Cartagena Declaration: persons obliged to leave their country of nationality to seek refuge elsewhere because of 'serious and generalised violations of human rights.' In practice, it seems that subsection (iii) is also considered to apply to situations of armed conflict and generalised violence. As for criteria for exclusion from refugee status, these are set out in section 3 which seems to go further than Article 1F of the 1951 Convention by including specific references to involvement in drug trafficking and terrorism.<sup>208</sup>

191. Asylum applications are decided by a governmental body (CONARE) comprised of representatives from several ministries, a NGO representative and UNHCR (voice but no vote). Once an asylum application has been filed with the migration authorities, CONARE authorises the issue of a temporary residence document to the applicant confirming his/her right to remain in the country until status determination has been finalised. Applicants who have received such a document are guaranteed freedom of movement and may apply for a work permit. Although such permits are routinely issued some employers are unhappy to accept them given their temporary nature. Asylum seekers may nevertheless receive financial assistance through UNHCR-sponsored programmes depending on their needs.

192. As for the determination procedure, each applicant is interviewed by a CONARE member before a full committee actually makes a decision on the case (taking into account the recommendations of a working group of CONARE members). It does not seem that the committee has a practice of examining the refugee criteria (1951 Convention/Cartagena) in any particular order. Although the legal grounds for recognition are put in writing, the same cannot always be said for negative decisions, thus undermining the effectiveness of the right of appeal to the Minister of Justice and the courts. In 2004, 34 people were recognised as refugees on the basis of the 1951 Convention-influenced criteria (i.e. section 1(i) and (ii) of the Refugee Law) whereas 33 people obtained refugee status on the grounds of the Cartagena-based criteria (section 1(iii)). In terms of the main nationalities seeking asylum, applicants from Angola, Democratic Republic of Congo, Sierra Leone and Liberia have tended to be recognised on the basis of section 1(iii) (Cartagena). By contrast, Colombian asylum seekers are generally recognised on the grounds of the 1951 Convention criteria, on the basis of persecution for actual or imputed political opinion. However, some Colombians are granted refugee status further to the section 1(iii) Cartagena criteria.

193. Recognised refugees are entitled to an identity card (for foreigners), the continued validity of which, (it must be renewed every two years), does not seem to affect the legal right of the refugee to remain in Brazil. They also have the right to a work permit. In addition, they have freedom of movement and full civil and political rights (save for voting/holding office). Educational opportunities are on the same par as nationals, however there is no right to accommodation (a major problem in Brazilian urban society generally). Although legislative provision exists for Convention Travel Documents, refugees are actually issued with a specific Brazilian passport for aliens. Relatives eligible for inclusion

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<sup>208</sup> For the purposes of this study, the implementation of Articles 1D and E are of lesser relevance than the approach taken to 1F.

in a family reunion request are comparatively broad (e.g. children over 21 if handicapped, elderly parents). According to Brazilian legislation, refugees become permanent residents after 6 years stay. They are able to apply for citizenship after 4 years and, indeed, the authorities maintain that many refugees have successfully become citizens. Overall, the government appears to display an integrationist approach. In terms of cessation of refugee status, section 39 of the Refugee Law essentially replicates Article 1C of the 1951 Convention.

### III. CANADA

194. Under sections 95-98 of the Immigration and Refugee Protection Act 2002 (IRPA), 'refugee protection' is established for 'refugees' as defined by Article 1A(2) of the 1951 Convention (section 96) and 'persons in need of protection'. The latter are defined by section 97 IRPA:

- (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
  - (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
    - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
    - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
    - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
    - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Pursuant to section 98 IRPA, the exclusion clause in Article 1F of the Convention applies to all the above categories.<sup>209</sup>

195. All asylum applications are subjected to screening by immigration officers to determine eligibility for entry into the refugee status determination procedure. Sections 34-37 and 101 of IRPA set out the grounds for denying access to this procedure: determination of an earlier asylum application, i.e. acceptance, rejection, withdrawal or abandonment, by the Immigration and Refugee Board (see below); recognition as a Convention refugee in another state to which return is possible; security concerns (e.g. membership of a terrorist organisation); or involvement in human rights violations or serious or organised crime.

196. Refugee status determination is conducted by an administrative tribunal, the Immigration and Refugee Board (IRB), with a hearing required before a negative decision can be made. With regard to both protection grounds, the standard of proof which needs to be met is on the balance of probabilities. In the case of section 96 ('refugees'), the applicant needs to demonstrate on the balance of probabilities that there is a 'reasonable chance' (i.e. more than mere possibility but less than 50% risk) of persecution on a 1951 Convention ground. As for 'persons in need of protection' (section 97), the claimant must show on the balance of probabilities that the danger of torture or risk to life etc. is 'more likely than not'. Where the relevant standard is satisfied, the IRB is obliged to recognise the individual as a refugee or person in need of protection as appropriate. Although not a statutory requirement, the IRB's practice is to examine the refugee definition in section 96 IRPA first before moving on to the section 97 criteria. This may partly explain why in the vast majority of cases (over 95%) where the IRB determines a need for protection, this is on the basis of the refugee definition in section 96. IRB decisions are subject to judicial

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<sup>209</sup> See note 208.

review by the Federal Court. Success for the applicant results in referral for reconsideration by the IRB rather than a substantive decision on status.

197. In terms of the approach taken by the IRB and the Federal Court in interpreting the eligibility criteria in sections 95-97 IRPA, 1951 Convention principles are generally applied in a progressive and inclusive manner. For example, the 1951 Convention is considered to apply in situations of civil war/generalised disturbances where violence against civilians is motivated on Convention grounds. The asylum seeker need not show that he is at heightened risk of ill-treatment relative to other members of his, for example, ethnic group in order to establish persecution. Moreover, the Canadian approach to acts of non-state agents and the internal flight alternative concept is also very much in line with UNHCR's positions on these issues. As for the criteria in section 97(1), paragraph (a) is clearly influenced by the Convention against Torture, whereas paragraph (b) is based on provisions in the Canadian Charter of Fundamental Freedoms. Individuals may benefit from section 97 where their refugee claim fails because of a lack of a nexus to a Convention ground or because of credibility concerns which question the claimant's subjective fear notwithstanding an objective risk.

198. A small number of rejected applicants are recognised as refugees or persons in need of protection in the automatic pre-removal risk assessment process set out in section 112 IRPA. This procedure applies to the majority of persons subject to a removal order and involves a paper review by a government department, Citizenship and Immigration Canada (CIC), of any new evidence that indicates a need for protection on the basis of the criteria in sections 95-98 IRPA. However, for those persons whose asylum claims were found inadmissible on grounds such as criminal behaviour or security issues or were rejected on the basis of section 98 (exclusion criteria in Article 1F of the 1951 Convention), the risk assessment is confined to the *non-refoulement* obligations under section 97. Furthermore, such an assessment can only result in a stay of removal.

199. In terms of their entitlements, no distinction is made between individuals recognised as refugees and those recognised as persons in need of protection. On the grant of refugee protection they are all provided with a status document and have 180 days in which to apply to CIC for permanent residence (a deadline which is often hard to meet due to the formalities required). They are entitled to work, enjoy freedom of movement and access to all levels of education. They can also apply for a Convention Travel Document. The right to family reunion is, however, dependent on obtaining permanent residence. Nevertheless, non-accompanying family members can be included in the permanent residence application made by the principal, a process known as 'concurrent landing'. If this procedure is not elected, immediate family members abroad (spouse and dependent child) may still apply for family reunification within one year of permanent residence being granted to the principal. After that time, the latter will have to sponsor the application for family reunion through the regular immigration stream and, thus, be required to meet the financial conditions. Refugees and persons in need of protection can apply for citizenship after three years of permanent residence. As for cessation, the criteria are the same for refugees and persons in need of protection. Applications for cessation made by the Minister are heard by the IRB.

200. Under section 115 IRPA, refugees and persons in need of protection are liable to deportation from Canada on grounds similar to those governing admissibility to the RSD procedure (see above). These criteria go further than the exception to *refoulement* in

Article 33(2) of the 1951 Convention. Moreover, the Supreme Court of Canada has ruled in the case of *Suresh*, (decided under previous immigration legislation but still relevant), that the Minister for Citizenship and Immigration may, in exceptional circumstances, expel a refugee or person in need of protection on these grounds even where there is a substantial risk that this will expose him to torture. Before such expulsion can take place, though, the safeguards set out in sections 77-81 of IRPA must be met. These require that written reasons from the Minister be scrutinised by a Federal Court judge. In addition, the refugee or person in need of protection must be informed of the allegations against him (subject to any valid reasons for reduced disclosure) and have an opportunity to respond to these in the judicial proceedings.

201. Independent from the asylum regime, any individual can request leave to remain in Canada on ‘humanitarian and compassionate’ grounds under the discretion provided in section 25 of IRPA. Factors taken into account by the Minister of Citizenship and Immigration in exercising this discretion include the situation in the country of origin and degree of establishment in Canada (e.g. family links). However, removal is not suspended while such applications for leave to remain are considered and the processing fees may prohibit many rejected asylum seekers from pursuing a section 25 claim. Indeed, it is not clear how many rejected asylum seekers actually benefit from such decisions. Those who do succeed under section 25 IRPA are processed for permanent residence. Thus section 25 IRPA applications are also made by refugees and persons in need of protection who may have missed the deadline to apply for permanent residence.

202. As a resettlement country, Canada accepts ‘humanitarian-protected persons’ as well as Convention refugees. The former includes people who have left their country of origin because they were personally and seriously affected by civil war, armed conflict or massive human rights violations in their country of origin (‘country of asylum class’). However, the availability of public as opposed to private funding for their resettlement would seem to be more limited than in the case of Convention refugees.

#### IV. ECUADOR

203. The refugee definition in Presidential Decree 3301/92 is set out in Articles 1 and 2. These incorporate respectively the refugee definition in Article 1A(2) of the 1951 Convention and the recommended language in the third conclusion of the Cartagena Declaration.<sup>210</sup> The exclusion clauses in Articles 1D-F of the 1951 Convention are reproduced in Article 14 of the Decree and apply to both Articles 1 and 2.

204. Asylum claims are registered with UNHCR (or its implementing partner)<sup>211</sup> and applicants provided with provisional identification cards certifying their status as asylum seekers. This card ensures their right to remain and move freely in the country for an initial period of 90 days, extendable if necessary until the claim has been finally decided. While their applications are being processed, asylum seekers do not have the right to work or to receive public assistance (though limited shelter is available from UNHCR).

205. Each applicant is interviewed by an eligibility officer of the Ministry of Foreign Affairs (MFA) as well as by a member of UNHCR's protection staff (or a legal officer from one of its implementing partners). The cases are then submitted, with recommendations from both the MFA official and UNHCR or its implementing partner, to the Eligibility Commission. The Commission is composed of members of various government ministries as well as a representative from UNHCR, though the latter has no vote. Before reaching its decision, the Commission considers the recommendations before it and where these are compatible, a summary decision is made. Otherwise, a full consideration of the factual and legal issues takes place before the Commission votes.

206. In determining cases, the Commission first looks at the 1951 Convention criteria (Article 1 of the Decree) before considering the additional elements in the Cartagena Declaration (Article 2). Since the beginning of 2003, only 36 out of 5772 individuals recognised as refugees were recognised on the basis of Article 2 of the Decree. The vast majority of asylum seekers and refugees are Colombian nationals. The typical profile of these individuals who are recognised on the basis of Article 1 of the Decree includes people perceived as supporters of one or the other factions in the Colombian conflict, individuals who refuse to provide financial/material assistance to paramilitary or guerrilla forces, relatives and companions of people participating in the conflict (including rape victims targeted on this basis) and individuals who resist forced recruitment or are deserters from paramilitary or guerrilla forces. In contrast, refugees recognised under Article 2 tend to be extremely vulnerable persons who have fled from generalised human rights violations in Colombia. In relation to Article 2, the Eligibility Commission tends to require evidence that an individual has been directly affected in a serious or even life-threatening way by the conflict in Colombia.

207. Vulnerable non-nationals (e.g. single pregnant women, disabled persons, women victims of domestic violence) are sometimes recognised as refugees for humanitarian reasons even if they do not meet the criteria in the statutory refugee definition. On other

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<sup>210</sup> "...persons who have fled from their country because their life, security or liberty were threatened by a situation of generalized violence, external aggression, internal conflicts, the massive violation of human rights and other circumstances that have seriously disturbed the public order..."

<sup>211</sup> These consist of local non-governmental organisations which assist UNHCR in the fulfillment of its mandate through, for example, offering free legal counseling to asylum seekers and refugees.

occasions, the Commission has expressed its humanitarian concerns through the grant of 'temporary protection' to certain rejected asylum-seekers, such as Iraqis. From 1 January 2000 to 31 December 2004, 9009 individuals were recognised as refugees on the basis of Articles 1 and 2 of the Decree while only 30 persons were granted 'temporary protection'. However, given the lack of any legal basis, the latter practice has been halted. Individuals who have been persecuted by the drugs gangs or other mafia are not recognised as refugees. In addition, some asylum claims have been rejected on the basis that the individuals first tried to access protection in another region of Colombia before crossing into Ecuador.

208. There is a right of appeal to the Minister of Foreign Affairs against the Eligibility Commission's decision. This has suspensive effect under Article 3 of the Decree. Unfortunately, the rejection letters provided to asylum seekers do not contain any reasoning. However, details of the Commission's reasoning can be obtained by the asylum seeker or his representatives from the individual case files held by the authorities. The appeal is decided by officials from within the Ministry of Foreign Affairs (MFA) and so is in effect a review process. Thus the only possibility of an independent appeal of the Commission's decision lies in challenging the MFA's decision in the courts. However, the effectiveness of such an appeal is limited by, for example, the financial constraints on asylum seekers accessing the legal system.

209. Recognised refugees are issued with identity cards authorising their residence in Ecuador for the period of its validity, which is one year (renewable). Refugees enjoy freedom of movement as well as political (except voting/holding office), social and cultural rights. Although they have the right to work, opportunities are limited given the poor economic conditions. Full access is given to state education and public health facilities (though in reality not all necessary treatment is available through government facilities). The Eligibility Commission in practice recognises a right to family reunion through the regular provision of derivative status to relatives who arrive in Ecuador subsequent to the principal applicant. Spouses and minor children are given such status as a matter of routine, while the Commission is prepared to consider generously the position of other relatives, such as elderly parents, who are financially dependent on the refugee. In terms of Convention Travel Documents, these are available for all refugees recognised under Article 1 and 2 of the Decree, though in practice they tend to be issued mostly in the case of refugees who have been granted resettlement elsewhere. Refugees can apply for permanent residence and naturalisation after three years. However, they rarely take up this opportunity partly, perhaps, because of the significant fee involved. In terms of cessation of refugee status, this is provided for in Article 33 of the Decree, essentially reproducing Article 1C of the 1951 Convention.

## V. FRANCE

210. Under Article 2 (II) of Law 52-893 of 25 July 1952 relating to the right of asylum ('the Asylum Law'), an asylum application can result in the grant of refugee status or subsidiary protection. Refugee status is awarded under Article 2(II)(1) of the Asylum Law either on the basis of the definition in Article 1 of the 1951 Convention or on the basis of the Constitution.<sup>212</sup> As for subsidiary protection,<sup>213</sup> this is provided under Article 2(II)(2) of the Asylum Law to:

...anyone who does not fulfil the eligibility criteria for refugee status set out in the preceding paragraph and who can demonstrate that he is at risk of one of the following serious threats in his country:

- a) the death penalty;
- b) torture or inhuman or degrading punishment or treatment;
- c) (in the case of a civilian) a serious, direct and individualised threat to his life or person because of generalised violence resulting from internal or international armed conflict.

211. The grant of such status is mandatory where the criteria are met. Article 2(III) of the Asylum Law states that in relation to the criteria for both refugee and subsidiary protection, acts of non-state agents are relevant where the government or another body (including an international organisation) in control of the territory, or part of it, is unable or unwilling to offer protection. In addition, this provision also recognises the applicability of the internal flight alternative in determining the necessity for both refugee and subsidiary protection. As with refugee status, an individualised threat must be shown to establish eligibility for subsidiary protection.

212. Given the reference to Article 1 of the 1951 Convention in Article 2(II)(1) of the Asylum Law, the exclusion clause in Article 1F applies in determining refugee status on Convention grounds.<sup>214</sup> By contrast, under Article 2(IV) of the Asylum Law, exclusion from subsidiary protection is based on wider criteria. In addition to the grounds in Article 1F, exclusion also arises where there are serious reasons for believing that the individual has committed a serious non political crime in France or his conduct in France poses a serious threat to law and order, public safety or national security.

213. Given its recent introduction, only a few individuals have been granted subsidiary protection: people who have denounced mafia-related activities, a child mistreated by a neighbour following the death of his parents and individuals ill-treated in relation to common law crimes.

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<sup>212</sup> Constitutional asylum, as the latter is commonly known, is rarely bestowed. It was incorporated into the 1952 Asylum Law by Law 98-349 of 11 May 1998 and, in line with the preamble to the Constitution, covers all persons persecuted on the basis of their actions in favour of freedom ('à toute personne persécutée en raison de son action en faveur de la liberté').

<sup>213</sup> This form of protection was introduced by an amendment to the 1952 Asylum Law made by Law 2003-1176 of 10 December 2003. It replaces 'territorial asylum' which was often used to ensure protection for persons denied refugee status because of France's previously restrictive approach to persecution by non-state agents.

<sup>214</sup> See footnote 208 above.

214. Assessment of asylum applications is made by OPFRA (a government department). By law, eligibility for refugee status under the 1951 Convention or the Constitution<sup>215</sup> must be considered first before assessing any need for subsidiary protection. While awaiting the outcome of their claim, applicants have access to public housing, financial and medical assistance but not to employment opportunities. Unsuccessful applicants can appeal to the CRR (a judicial body) on the facts and the law, including challenging the grant of subsidiary protection as opposed to refugee status. Appeals of CCR decisions are to the Council of State. However, these must be confined to points of law and are non-suspensive.

215. Those given refugee status receive renewable, ten year residence permits. They are entitled to the full range of economic and social rights available to citizens e.g. education, right to work. They also are entitled to family reunion with their spouse and minor children. Like other aliens, they can apply for citizenship after five years of residence. By contrast, those on subsidiary protection only receive a one year temporary residence permit and even this may be denied on the grounds of protecting public order. Apart from this, though, the standard of treatment they receive is essentially the same as for recognised refugees, including the right to work and to family reunion. After 5 years of continued residence, persons under subsidiary protection may obtain a 10 years residence permit and, like other aliens, apply for citizenship.

216. Practice in relation to the review of subsidiary protection status is yet to be established. However, it is unlikely that OFPRA will undertake regular reviews of the status of all persons under subsidiary protection. Instead renewal of their temporary residence permits is likely to be automatic, with only cases relating to prominent individuals or specific situations actually reviewed. Article 2(IV) of the Asylum Law provides for the termination or discontinuation of subsidiary protection on the basis of the exclusion clauses or because of a change of circumstances.

217. Where a person under subsidiary protection is considered a threat to public order or to public security, under Article 23 of the 1945 Ordinance on Entry and Stay of Foreigners he can be expelled. However, article 25 of the Ordinance prevents the expulsion of certain categories of persons, including where expulsion would lead to a breach of Articles 3 or 8 of the ECHR.

218. Apart from subsidiary protection, the *Préfectures* (regional authorities) are authorised by the Ministry of Interior to issue temporary residence permits of one year to regularise the position of illegal immigrants on the basis of health reasons or in order to ensure the respect of the right to private and family life.

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<sup>215</sup> As, in practice, constitutional asylum is treated as synonymous with Convention status.

## VI. GERMANY

219. Entitlement to 1951 Convention refugee protection is established under section 60(1) of the recently-adopted Residence Act which, like previous legislation, basically reflects Article 33(1) (rather than the refugee definition in Article 1A(2)) of the 1951 Convention. Section 60(1) specifically notes that persecution on account of membership of a particular social group may arise where a person's life, freedom from bodily harm or liberty is threatened solely on account of his/her sex. In addition, this provision explicitly acknowledges that persecution may emanate from non-state agents where the government or a government-like body (including international organisations) is unable or unwilling to prevent such persecution, including situations where an entity capable of exercising control over the state no longer exists. Section 60(8) sets out the criteria for exclusion from refugee protection. These go beyond the grounds in Article 1F of the 1951 Convention<sup>216</sup> by including factors drawn from Article 33(2) of the 1951 Convention, i.e. risk to national security or public safety.

220. In addition to refugee protection under section 60(1) Residence Act, Article 16(a) of the Constitution guarantees the right to asylum for those who fear political persecution in their home country. This right has, however, been radically restricted by a 1993 constitutional amendment.

221. Protection against deportation is also provided in section 60 (2), (3), (5) and (7) as well as section 60a(2):

60 (2) A foreigner may not be deported to a state in which a concrete danger exists of the said foreigner being subjected to torture.

(3) A foreigner may not be deported to a state in which he or she is wanted for an offence and a danger of the foreigner receiving the death penalty applies.

(4)...

(5) A foreigner may not be deported if deportation is inadmissible under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (Federal Law Gazette 1952 II, p. 685).

(6)...

(7) A foreigner should not be deported to another state in which a substantial concrete danger to his or her life and limb or liberty applies. Dangers in this state to which the population or the segment of the population to which the foreigner belongs are generally exposed shall receive due consideration in decisions pursuant to Section 60a (1), sentence 1.<sup>217</sup>

60a(2) The deportation of a foreigner shall be suspended for as long as deportation is impossible in fact or in law and no residence permit is granted.

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<sup>216</sup> For the purposes of this study, the implementation of Articles 1D and E of the 1951 Convention are of little relevance compared to exclusion under Article 1F.

<sup>217</sup> Section 60a of the Act reads:

Temporary suspension of deportation

(1) For reasons of international law or on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany, the supreme Land authority may order the deportation of foreigners from specific states or of categories of foreigners defined by any other means to be suspended in general or with regard to deportation to specific states for a maximum of six months. Section 23 (1) shall apply to a period in excess of six months.

No exclusion criteria apply to these provisions and, with the exception of section 60(7), protection against deportation under them is mandatory if the grounds are satisfied. However, a residence permit is to be denied to persons protected against deportation under section 60 (2),(3),(5) and (7) where the conditions in section 25(3) lit. 2 (a) – (d) are met (see paragraph 228 below).

222. All the grounds for protection in section 60 Residence Act which are related to potential harm in the country of origin, (i.e. subsections (1), (2), (3), (5) and (7)), are examined in the asylum procedure. However, section 31(3) of the Asylum Procedures Act states that a decision on whether to grant relief from deportation under subsections (2), (3), (5) and (7) is not necessary where protection is granted under subsection (1) of section 60 Residence Act. The asylum procedure involves a personal hearing by an official of the Federal Office for Migration and Refugees. (However, where an individual chooses to restrict his application to protection under section 60(2), (3), (5) or (7) only, the case will be examined by the Aliens Office, in consultation with the Federal Office before any decision on section 60(7) is made).

223. In terms of the standard of proof applied, in general this is higher for subsections (2), (3), (5) and (7) than it is for the refugee definition in subsection (1). For example, where no past persecution exists, ‘a relevant probability’ is required in relation to the threat of persecution under subsection (1) rather than ‘real risk’, read as an almost certainty, for the danger of torture in subsection (2). As for subsection (7), a ‘relevant probability’ is interpreted as requiring demonstration of an individualised danger on return, for example, because the applicant is suffering from an illness or is a suicide risk. The language of its second sentence makes it extremely difficult for persons fleeing generalised situations of violence to secure protection under subsection (7); exposure to certain death or severest injury must be shown. Protection from removal for individuals who are fleeing situations which place the whole population or the group to which they belong equally at risk is supposed to be provided by group deportation bans issued under section 60a(1) Residence Act. However, such bans have rarely been used in the past<sup>218</sup> while many of those who did benefit from the previous equivalent of subsection (7) may well have actually deserved Convention refugee status.

224. Under the previous legislation, which mirrored the grounds now found in paragraphs (2), (3), (5) and (7), positive decisions were more likely to be based on the human rights and danger to life/limb/liberty criteria than in relation to torture. This was partly because of the restrictive attitude adopted by the courts and authorities to the issue of torture at the hands of non-state agents. Although the new legislation only specifically refers to acts of non-state agents as capable of amounting to persecution for the purposes of refugee recognition under sub-section (1), it is yet to be seen whether a similar approach will be taken with protection in relation to torture.

225. As for the frequency with which the various grounds of protection under section 60 may be used, some indication may be gleaned from the 2004 statistics relating to the practice under the previous legislation. However, it is not clear what the impact will be of the new provision on non-state agents in relation to refugee protection under section 60(1). In 2004, the breakdown of initial decisions by the Federal Office was:

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<sup>218</sup> The Aliens Act was replaced by the Residence Act on 1 January 2005.

- (a) refugee protection under section 51 (1) Aliens Act (predecessor to section 60(1) Residence Act): 1,107 people.
- (b) constitutional asylum: 960 people.
- (c) protection from deportation under section 53 Aliens Act (precursor to section 60(2), (3), (5) and (7) Residence Act): 964 people.

226. The Federal Office decision on an asylum application can be appealed to the administrative court responsible for the district to which the asylum seeker is assigned. This has suspensive effect, save in manifestly unfounded cases where such effect has to be specifically requested from the court. An appeal against refusal to grant Convention refugee status or constitutional asylum can be made even where protection from deportation has been given under section 60(2), (3),(5) or (7).

227. During the asylum procedure, freedom of movement is limited to the district/city to which the asylum seeker has been assigned. Public housing is generally provided, initially in reception centres. Asylum seekers are not allowed to work during the first year of their sojourn. Thereafter, employment is only permitted if a German national or privileged alien is not available for the job. Basic social and medical assistance is available, although for the first three years it is on a reduced scale in comparison to what is provided for German citizens and aliens with a residence permit. In principle, access is given to primary education, but in some Laender (states) this only arises once the asylum seeker and family are no longer housed in an initial reception centre (i.e. after a period of three months). Moreover, practical problems with regard to primary education arise in some of the Laender where school attendance is not compulsory for asylum seekers' children since expenditure for school books or travel to school are not covered.

228. Where relief from deportation is granted under section 60(2), (3), (5) or (7), a temporary residence permit should be issued under section 25(3) Residence Act unless the individual can be expected reasonably to secure admission to another country, has repeatedly or grossly breached his duty to cooperate or has committed serious offences or is a national/public security risk. The residence permit can be issued for a period of up to three years and is extendable (by a maximum three years for each extension) provided the basis for non-deportation still exists. Given that Residence Act permits have only been issued since the beginning of 2005 it is not possible to determine yet what approach the authorities will take in evaluating whether a permit should be renewed.

229. With such a residence permit, an individual is entitled to work subject to a labour market test. This requires the Federal Employment Agency to give permission to work only if it is satisfied in the particular case that this will (a) not undermine the labour market generally or the position of any German citizen, EU national or other resident with full employment rights, or (b) will contribute to particular sectors of the national economy. By contrast, recognised refugees have an unconditional right to work. Individuals with section 25(3) residence permits also have reduced access to family reunion. While recognised refugees have a right to such reunion (subject to a financial means test, which can be waived in certain circumstance), family reunion for persons with a section 25(3) residence permit is only discretionary. Apart from having to meet the financial test, any reunion is limited to spouse and minor children, and may only be granted for reasons of international law, on humanitarian grounds or in the political interests of Germany. Recognised refugees are eligible to the full range of social benefits. However, in the past housing benefit has been refused to some on the basis that their stay is not permanent, while the practice of issuing geographically-restricted residence permits has evolved in order to distribute the

cost of social aid amongst the different Laender. Other temporary resident permit holders are entitled to core social benefits (e.g. subsistence, illness, maternity). However, their entitlement to the full range of benefits depends on whether the authorities consider their stay is likely to be permanent. Section 25(3) permit holders are not entitled to a travel document (unlike recognised refugees); issuance of a German travel document is discretionary even where the authorities accept that the individual cannot be expected to obtain a national passport. Overall, the new asylum legislation has narrowed the gap between the entitlements of those recognised under the 1951 Convention and beneficiaries of protection under section 60(2), (3), (5) and (7).

230. After seven years (calculated from the beginning of the asylum procedure), beneficiaries of section 25(3) are entitled to apply for permanent residence if they can satisfy certain conditions (e.g. financial self-sufficiency). By contrast, those recognised as refugees under the Constitution or the Residence Act have an unqualified right to permanent residence after three years on a residence permit if their need for protection still exists. As for citizenship, the conditions that need to be fulfilled (e.g. seven or eight years of legal residence depending on the completion of an integration course) are the same for recognised refugees and section 25(3) residence permit holders, except that the latter only become eligible if and when they obtain a permanent residence permit. Section 25(3) permit holders are liable to expulsion on various grounds, (such as imprisonment for more than three years or for drug offences, membership of terrorist group, posing a danger to national security), even if they achieve permanent residence. By contrast, section 56(1) of the Residence Act exempts recognised refugees from expulsion whether they have temporary or permanent residence.

231. Persons granted relief from deportation under section 60(a)(2) may also obtain a temporary residence permit on the basis of section 25(5) if deportation has been suspended for more than 18 months and is impossible in fact or for legal reasons. However, the obstacles to removal must not be the fault of the individual concerned (e.g. because of deception as to nationality). In addition, a temporary residence permit may be given to individuals where their continued stay is necessary on urgent humanitarian or personal grounds or in the public interest (section 25(4)). Applications for such permits must be made to the local Aliens Authorities who can only grant them if a temporary residence permit under section 25(1) to (3) cannot be issued. In practice, though, hardly any such permits appear to be granted. In addition, the rights associated with such temporary residence permits are inferior to those accompanying a section 25(3) Residence Act permit e.g. no possibility of family reunion.

232. As for individuals granted relief from deportation under section 60(2),(3),(5) or (7) of the Residence Act but subsequently denied a section 25(3) residence permit, their presence in Germany is not legalised. Rather, they receive a toleration permit under section 60a of the Residence Act. Their entitlement to social assistance is at the same level as that of asylum seekers and their access to the job market is severely restricted.

## VII. RUSSIAN FEDERATION

233. Articles 1(1) and 2 of the 1997 Law on Refugees mirror respectively the refugee definition and exclusion clauses in the 1951 Convention. Additionally the President has a discretionary power to grant asylum to 'political refugees' under the Constitution. This seems essentially to be a political instrument to allow the government to admit high-profile foreign dissidents directly from their home countries and its use is largely determined by state (rather than individual) interests. However, the implementing mechanism for the grant of asylum to such 'political refugees' has only been in place since November 2004 so the exact practice is still to be seen.

234. Article 12(2) of the Refugee Law provides for 'temporary asylum' for persons who are not eligible for refugee status under the Act but nevertheless cannot be 'expelled from the territory of the Russian Federation for humanitarian reasons'. Although initially directed at refugees from conflict situations, recent practice by the migration authorities and court jurisprudence has established the following criteria for its grant: a) serious health problems where the appropriate medical care is not available in the country of origin and where expulsion would endanger the individual's life; b) instability in the country of origin or c) family unity considerations. Most grants of temporary asylum are based on medical criteria. There are concerns that some individuals who deserve to have been recognised as refugees have instead felt compelled to seek temporary asylum on rejection of their claim to refugee status. In 2004, refugee status was granted in 17 cases compared to the award of temporary asylum in 145 cases.

235. The procedures for claiming refugee status under Article 1 and temporary asylum under Article 12 are separate, with no legal bar to a failed refugee claimant seeking temporary asylum subsequently. Claims for temporary asylum must be made to the relevant regional office of the Federal Migration Services (the same department that handles applications for refugee status). The decision to grant temporary asylum is entirely discretionary although a rejection can be appealed in the same manner as a refusal of refugee status.

236. Applicants whose claims are found to be admissible receive a letter confirming their right to remain in Russia while their claim is considered (usually about a 3 month period). By law, they are entitled to the same rights as those seeking refugee status, i.e. full access to civil and economic rights (e.g. work opportunities), except for state financial benefit payments or state housing (though the latter in practice is not provided to refugee claimants either). Problems with meeting registration requirements (with the local police) can mean though that access to such rights is limited.

237. Applicants who have been granted temporary asylum receive a one year permit to remain. The permit is extendable/renewable if the authorities consider the reasons for protection from removal still exist; in essence this involves a fresh reconsideration of eligibility. By contrast, those with Article 1 refugee status can obtain a refugee permit with a right of residence for up to three years, renewable on an annual basis if the conditions in the country of origin have not changed. They are entitled to work and to receive a Convention Travel Document (though practice is inconsistent in relation to the latter). Temporary asylum beneficiaries are also entitled to work but unlike recognised refugees they do not have the right to accommodation or to medical assistance. In common with refugees, though, individuals enjoying temporary asylum often have problems in accessing

rights because of difficulties in obtaining the necessary residence registration. Persons granted temporary asylum are subject to the same naturalisation procedures as aliens generally, rather than the simplified citizenship procedures available to refugees.

## VIII. SOUTH AFRICA

238. In defining refugee status, section 3 of the 1998 Refugees Act incorporates the refugee definitions in Article 1A(2) of the 1951 Convention and Article I(2) of the 1969 OAU Convention (in sub-sections 3(a) and 3(b) respectively). Section 4 of the Act sets out the exclusion criteria which arguably are wider than those found in Article 1F of the 1951 Convention<sup>219</sup> and Article I(5) of the OAU Convention in that they refer to non-political crimes which are punishable by imprisonment in South Africa (rather than serious, non-political crimes).

239. Refugee status determination is conducted by the Department of Home Affairs (DHA). Asylum seekers are entitled to a hearing (i.e. non-adversarial interview with a DHA official) before any decision is made in their case. The standard of proof adopted appears to be 'serious possibility.' Negative decisions can be appealed to the Refugee Appeals Board (an administrative tribunal) with the possibility of judicial review thereafter. In terms of interpreting the refugee definition, asylum seekers from war-affected countries, (such as the Great Lakes Region, Sierra Leone, Ivory Coast and Liberia) tend to be recognised as refugees by DHA officials on the basis of section 3(b) of the Act (Article I(2) of the OAU Convention).

240. Under section 22 of the Act, all asylum seekers should receive an asylum permit authorising their stay in South Africa until their application is conclusively determined. In practice, though, difficulties have arisen in securing extension of these permits. Conditions may be attached to the permit by the Standing Committee, (an advisory/oversight body established under the Act), but only in so far as these are consistent with international obligations. In particular, the government has lifted previous restrictions on working and education.

241. Those granted refugee status are entitled to freedom of movement, civil and political rights (except the right to vote/hold office), access to the labour market and primary education. Access to public medical facilities is on less favourable terms than that for nationals and refugees are generally not eligible for social grants. Despite having a right to family reunification with dependent relatives, processing of such applications is slow and proof of the relationship must be provided. Refugees are increasingly able to benefit from their entitlement to identity and travel documents, with the issue of the latter in particular having improved dramatically in recent months. Identity documents are only valid for two years; renewal is dependent on proof that a person will continue to be a refugee for the foreseeable future. After five years a refugee can apply for permanent residence, but this is not frequently granted. Citizenship is in principle available to individuals who have been permanently resident for five years. Efforts are being made to encourage the government to view local integration as the principal durable solution, for example through more frequent granting of permanent residence and extending social assistance to refugees. Refugees may only be expelled by order of the Minister for Home Affairs on national security or public order grounds after the requirements of international refugee law have been taken into account. As for cessation, section 5 of the Act essentially reproduces Article 1C (1) to (5) of the Refugees Act.<sup>220</sup>

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<sup>219</sup> See note 208 above.

<sup>220</sup> Article 1C(6) which deals with refugees who are stateless is not reproduced.

## IX. TANZANIA

242. Refugee status is defined in section 4 of the 1998 Refugees Act. Section 4(1)(a) incorporates the language of Article 1A(2) of the 1951 Convention while section 4(1)(b) adopts the text of Article I(2) of the 1969 OAU Convention. Section 4(4) of the Act incorporates the exclusion clause in Article 1F of the 1951 Convention,<sup>221</sup> though some of these grounds are also included in the section 4(3) provision on cessation.

243. Unless an asylum seeker falls within a group of persons who benefit from group (*prima facie*) recognition under section 4(1)(c), he must register with the Director of Refugee Services and then substantiate his claim to refugee status before the National Eligibility Committee. However, certain groups of refugees appear to have been arbitrarily denied access to this procedure.

244. The Committee, comprised of delegates from several ministries (as well as a UNHCR representative in an advisory role), makes recommendations to the Minister for Home Affairs on the exercise of his non-delegable power to grant or deny refugee status in any particular case. Several problems seem to have arisen with this procedure however; for example, in some localities ad hoc screening committees have been set up without any referral to the statutory Committee process or indeed access to UNHCR. In addition, the only avenue for appealing the Minister's decision is to seek a review by the Minister himself. In any case, as he does not give reasons for rejections, it is difficult for asylum seekers to put together arguments for challenging his decision. Moreover, it is far from certain that the Minister actually conducts a review in every case where this is requested.

245. Asylum seekers are barred from working but receive material assistance from UNHCR. Their freedom of movement is extremely restricted. They must remain in designated areas (generally refugee camps) on pain of criminal penalties. Even when refugee status is granted, these restrictions may continue, in the interests of security from the government's point of view. In some cases refugees are prohibited from even moving more than 500m from their camp. Although small-scale, income-generating activities are tolerated, refugees do not have a right to enter the job market. They must first obtain a work permit which is not easy given that the potential employer must demonstrate that no qualified Tanzanian is available. Refugees are at risk of criminal penalties and even the loss of refugee status for involvement in political activities. On the other hand, their religious and traditional practices are respected. Only refugees who have permission to reside outside a camp are given refugee identity permits; others merely receive status notification letters with their photos on them. Primary and secondary education is provided by UNHCR which also facilitates a limited number of scholarships for higher education. Family reunification has been enabled on a number of occasions. As mentioned above, cessation is governed by section 4(3) of the Act which includes grounds additional to those permitted under Article 1C of the 1951 Convention.

246. In terms of durable solutions, the emphasis is on voluntary repatriation and resettlement. Even refugees who were born in Tanzania and have been there for more than thirty years are not able to obtain citizenship. The only exception is the case of Somali refugees in Chogo who have been naturalised because of their ancestral links to the local community.

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<sup>221</sup> See note 208 above.

## X. UNITED KINGDOM

247. Pursuant to Rule 334 of the Immigration Rules made under the 1971 Immigration Act, refugee status (asylum) must be granted if an applicant can satisfy the refugee definition set out in Article 1 of the 1951 Convention. In addition, an asylum application can result in Humanitarian Protection (HP) or Discretionary Leave (DL), further to the Home Secretary's delegable power under section 4(1) of the 1971 Act to give leave to remain in the UK for a reason not covered by the immigration rules. The grant of HP or DL is entirely discretionary. Guidance for granting HP and DL, including criteria for eligibility, are set out in published Asylum Policy Instructions ('instructions') directed towards government officials who decide on asylum applications at first instance: the three key instructions deal with HP, DL and the European Convention of Human Rights respectively. The instructions indicate that HP and DL are primarily focused on meeting the UK's ECHR obligations, although a number of criteria are considered to reflect policy, rather than legal, considerations (e.g. return to unlawful killing).

248. Subject to the exclusion grounds mentioned below, HP will be granted to anyone not falling within the Convention refugee definition who faces, in the country of return, a serious risk to life or person arising from the death penalty, unlawful killing, or torture, inhuman or degrading treatment or punishment (except where the latter arises because of a medical condition or severe humanitarian situation). In relation to the nature of torture, inhuman or degrading treatment, the instructions make it clear that HP is unlikely to be justified where refugee status has been ruled out because the ill-treatment complained of does not amount to persecution (as opposed to an absence of a link with a Convention ground). The policy instructions also list the mandatory grounds for exclusion from HP:

- commission of a serious crime (either an offence for which a sentence of at least 12 months was given in the UK or one which would come within Article 1F(b) of the 1951 Convention if the 'non-political' qualification is disregarded);
- commission of an act covered by Article 1F(a) or (c) of the 1951 Convention; or
- posing a threat to national security;

Exclusion may also be considered in light of bad character, conduct or associations of the individual concerned. As these exclusion criteria are broader than that applied to the refugee definition, persons excluded from refugee status will also be excluded from HP status.

249. DL is intended to apply to very few cases – it is not to be used where another immigration status is available or where removal is currently impractical (e.g. no travel route or documents). DL is appropriate where:

- return would involve a violation of Article 3 ECHR because of the impact on an individual's serious medical condition or because an individual would be particularly affected by poor conditions in the country of origin (such as absence of food and water);
- return would involve a violation by the UK of Article 8 ECHR (right to family life in the UK);
- an unaccompanied asylum seeking child would be sent back to inadequate reception arrangements;

- an individual would have qualified for refugee status or HP but has been excluded under the relevant criteria; or
- where the applicant can demonstrate particularly compelling reasons for not being removed.

The exclusion criteria as described above for HP also apply to DL. However, in cases where entitlement to DL is based on exclusion from HP or an Article 3 ECHR issue, the application of the exclusion criteria will generally result only in a shortening of the DL period (unless the option of deferred removal is considered more appropriate). Thus individuals who have been excluded from refugee status and HP under the relevant criteria may well find protection under DL.

250. Consideration of eligibility for HP and DL takes place automatically within the refugee status determination procedure; the hierarchy of consideration is refugee status, HP and finally DL. The procedure itself involves an interview by an immigration officer or official of the Immigration and Nationality Directorate of the Home Office (IND), where the applicant can be accompanied by a legal representative. Under the instructions, the standard of proof for HP is the same as for refugee status (reasonable degree of likelihood/real risk), as is the approach to non-state agents and the internal flight alternative. During the status determination process, asylum seekers generally have freedom of movement, access to public housing, income grants and medical services, as well as primary and secondary education. They are not entitled to work or to be readmitted if they travel abroad. Where HP is granted, reasons for rejecting refugee status as well as for giving HP must be provided in the decision letter to the applicant. Similarly, where DL is given, the reasons for refusing refugee status and HP must both be set out as well as the grounds for granting DL.

251. In 2004, the IND granted HP in 155 cases and DL in 3840 cases, with 1515 cases receiving refugee status. HP is generally granted where an individual can demonstrate a well-founded fear of persecution but cannot tie this to a Convention ground. This tends to involve cases of persecution at the hands of non-state agents, where the IND is less likely to find a motivation such as race or ethnicity behind the ill-treatment meted out. Persons fleeing generalised violence may obtain HP if they can show they are at risk of unlawful killing or inhuman or degrading treatment. As for DL, the majority of its recipients are unaccompanied minors who do not have adequate reception arrangements in their home country. Other typical beneficiaries are those who have established family life in the UK to the extent that their removal would breach Article 8 of the ECHR. Neither HP nor DL has been afforded to rejected asylum seekers from tsunami-affected countries even though their deportation has been halted.

252. There is a right of appeal against refusal of refugee status (even if HP or DL has been granted instead). However, there is right to challenge refusal of HP or DL as such, although eligibility for such status can be indirectly raised through an appeal on human rights grounds. The appellate authorities are empowered to look at entitlement for all three categories of protection status available, but a recommendation to grant HP or DL is not binding on the IND. However, generally HP recommendations will be followed.

253. HP will normally be granted for three years while the duration of DL depends on the basis of leave (e.g. normally three years in Article 3 ECHR cases, but only six months for those who have been excluded from refugee or HP status or where country conditions

are considered by the IND to be likely to improve in the short term). At the end of the HP or DL period, there will be an active review of the case, usually based on the papers although an interview can be called if appropriate. The applicant must submit reasons for continued stay in the UK and these will be considered in light of the grounds of the original asylum claim, any relevant changes in the country of origin and any voluntary behaviour (of the type mentioned in Article 1C(1-4) of the 1951 Convention) that might question a continuing need for protection. The burden of proof lies with the HP or DL beneficiary who must demonstrate a continued existence of the circumstances that led to the original grant of leave to remain.

254. If the IND decides that further protection is needed, HP beneficiaries will usually receive indefinite leave to remain (as afforded to recognised refugees) while DL beneficiaries will only receive leave to remain for a further set period. If, on the other hand, further protection is not considered necessary the person will be expected to leave the UK and a removal order may be made. A person granted DL would normally become eligible for indefinite leave to remain after six years of presence under DL, unless he was excluded from refugee status and/or HP.

255. Those granted HP or DL have similar rights to recognised refugees – the right to work, access to medical assistance and social services, right of re-admission (unless absent for more than two years or seeking admission for a different purpose from the one for which leave was granted) and access to an immigration status document (although this may merely comprise a vignette inserted into their national passport). However, they do not have a similar right to refugees when it comes to travel documents. Firstly, unless the Home Office accepts that the HP or DL beneficiary has a fear of approaching his national authorities, he will have to prove refusal of a passport by these authorities. He also has to demonstrate that his purpose for travel fits one of four specified grounds (i.e. study, business/employment, compassionate, religious/other compelling reasons of conscience). Even then, he may only receive a document valid for one specified trip. Moreover, unlike recognised refugees who have an immediate right to family reunion (spouse and dependent children), HP or DL beneficiaries are not entitled to family reunion (in the absence of compelling compassionate circumstances) unless they are granted indefinite leave to remain.

256. The Home Office has indicated that it is considering bringing HP status more into line with 1951 Convention status. For example, administrative practice may be amended so that an initial grant of HP will last five years and those recognised as refugees will also have their status reconsidered after the same period. Moreover, family reunion may in the future be made available immediately to those granted HP.

257. As for resettlement to the UK, under some of the available schemes, refugees falling within UNHCR's mandate but outside the 1951 Convention criteria may be accepted for resettlement.

## XI. UNITED STATES

258. The refugee definition in section 101(a)(42) of the Immigration and Nationality Act (INA) reflects the language of Article 1A(2) of the 1951 Convention/1967 Protocol. In addition, it specifically mentions that victims of forced sterilisation or abortion programmes can qualify as refugees (subject to an annual recognition limit). Under section 208(b) of the INA, ‘asylum’ may be granted to those falling within the legislative refugee definition unless the exclusion criteria in section 208(b)(2) apply. These criteria cover persons who have committed an ‘aggravated felony’ (wider than crimes falling within Article 1F(b) of the 1951 Convention);<sup>222</sup> individuals perceived to be a national security threat; and persons who have been involved in the persecution of others on the basis of their race, religion, nationality, membership of a particular social group or political opinion. In fact, it seems that these criteria are applied as barriers to the asylum procedure along with the admissibility grounds set out in section 208(a)(2) (e.g. failure to meet time limits).

259. Asylum applications are initially examined<sup>223</sup> by officials of the Department of Homeland Security (DHS) who may either grant asylum on the basis of section 208(b) of the INA or refer the case to superior administrative bodies (immigration judges and the Board of Immigration Appeals). The exact nature of the inquiry depends on whether the asylum claim was made before or after the issue of any removal order against the applicant. While awaiting the outcome of their application, asylum seekers have access to educational facilities but not to social assistance, with the exception of prenatal and maternity care. They can only seek authorisation to work once 150 days have passed from submitting their asylum application and such authorisation cannot be given if they are appealing a negative decision.

260. Refusal of asylum can be appealed in the federal courts but this does not necessarily suspend deportation. Moreover, the scope of appeal is limited given that the exercise of the discretion in section 208 to grant asylum is conclusive unless it can be shown to be ‘manifestly contrary to the law and an abuse of process.’ However, even where asylum is denied, individuals can receive protection on the basis of the 1951 Convention through requesting ‘withholding of removal’ in line with the *non-refoulement* provisions of section 241(b)(3) of the INA (i.e. lives or freedom would be threatened on Convention grounds if returned to their home country). Although the standard of proof, (‘more likely than not’), is higher than the well-founded fear required for obtaining asylum, if satisfied, withholding of removal is mandatory. In addition, the bars on seeking withholding of removal are fewer than in relation to claiming asylum.

261. During the asylum procedure, all applications are considered against the *non-refoulement* obligation in the Convention Against Torture (CAT) as well as the refugee definition in section 101(a)(42). However, such decisions are generally made by an immigration judge rather than a DHA official. If the applicant is entitled to apply for asylum or withholding under section 241(b)(3) of the INA, these possibilities are looked at before the CAT issue. Consideration of CAT not only benefits those at risk of torture unrelated to a Convention ground, it also appears to provide protection for those

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<sup>222</sup> See note 208 above.

<sup>223</sup> To limit the complexity and reflect best practice, the survey does not intend to look at the expedited asylum/removal procedures.

Convention refugees who are prevented from claiming asylum because of the extensive barriers to seeking asylum. For example, individuals convicted of an aggravated felony are automatically ineligible for asylum under section 101(a)(42) INA.

262. For protection from removal under CAT an individual must show that he or she 'is more likely than not to be tortured in the country of removal'. Two forms of protection are available under section 208.16 (c) of Title 8 of the Code of Federal Regulations (issued under the INA). Withholding of removal under CAT is available to those persons who are not excluded from withholding of removal under the 1951 Convention (see section 208.16(d)). By contrast, deferral of removal covers those cases which would be excluded under section 241(b)(3)(B). In both instances protection is mandatory if the criteria are met. Section 208.16 (c) of the Code notes that 'torture' is to be interpreted in line with the Senate's understandings expressed on ratification of the CAT. Accordingly, torture is understood to apply only to acts committed by or acquiesced in by state agents and not to third party actions which the government is unable to prevent. Thus, relief under CAT has been denied where removal risked subjecting the applicant to FGM in a country where this practice had been outlawed by the government. Prolonged mental suffering can amount to torture depending on its specific cause, e.g. intentional infliction/threat of pain or imminent threat of death.

263. Beneficiaries of withholding of removal under CAT are eligible for the same standard of treatment as those individuals subject to withholding of removal under the 1951 Convention. Deferral of removal is more temporary in nature. Neither form of relief, however, ensures release from detention or protection from deportation to a third country. Protection through withholding or deferral of removal under CAT can be terminated if the government determines that it is safe for the person to return to the country of origin, including on the basis of 'diplomatic assurances' from the government of that country.

264. Persons granted asylum under section 101(a)42 are issued with a DHS identity document and can obtain a US travel document. They are entitled to freedom of movement, full civil and political rights (save for voting/holding office), as well as access to education and employment opportunities. After one year of asylum status, they are entitled to apply for permanent residence but because of a restriction in the number of approvals per annum there is currently a fourteen year backlog. Many refugees are thus unable to obtain permanent residence which hampers their local integration, in particular their ability to access social assistance (which for non-permanent residents is only available for a period of seven years). For those who do get permanent residence, after five years they are eligible to apply for citizenship. Family reunion (spouse and children under 21) is available but only if the application is made within one year of obtaining asylum status. As for persons who secure withholding on the basis of CAT, they are entitled to the same treatment as persons granted withholding of removal on the basis of the s241(3)(b) criteria.

265. In terms of resettlement,<sup>224</sup> only refugees who fall within the 1951 Convention/1967 Protocol refugee definition as incorporated in the INA are eligible. Determination of such status is carried out by US officials for all candidates, whether or not they have been

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<sup>224</sup> Persons suffering persecution in their home state who may be directly admitted to the USA under its resettlement programme are not relevant to this study.

recognised as refugees by a third State or UNHCR in line with the Convention definition (as opposed to the criteria in UNHCR's mandate).

266. Separate to the asylum procedures above,<sup>225</sup> 'T' class visas have been introduced for victims of trafficking who can demonstrate they will suffer severe hardship involving unusual or severe harm if returned to their home country and who are willing to help the authorities prosecute their traffickers. (Child victims need only demonstrate that they have been subjected to a severe form of trafficking). Such visas confer similar benefits as enjoyed by those with asylum status and, after three years, permanent residence. However applications for 'T' status have been minimal. In addition, juvenile non-citizens may benefit from a Special Immigrant Juvenile (SIJ) Visa if they are under 21, unmarried, been declared dependent on a juvenile court or placed into the care of the state, and able to show that repatriation is not in their best interests (for example, because of the risk of human rights violations).

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<sup>225</sup> Specific legislation also exists for providing permanent residence to Guatemalan, El Salvadorian and Haitian asylum seekers. However, these mechanisms are not relevant to the study in that they only deal with asylum applications lodged before a certain date (the aim being to remove a substantial backlog relating to particular nationalities). Moreover, many of the persons benefiting would probably have satisfied the 1951 Convention refugee definition had their asylum applications been dealt with in a reasonable time period. Thus these legislative provisions are not directly concerned with providing protection from return on grounds outside the 1951 Convention.

# Discussion Paper



Asylum seekers attending computer classes held by AGORA, an organization that provides resources in Geneva, 2005. UNHCR/S. Hopper

## Complementary Protection

The issue of complementary forms of protection has been identified in the Agenda for Protection as an important protection tool to add to the Refugee Convention. The issue will be discussed at this year's Executive Committee meeting in October. For this discussion paper, UNHCR's Regional Office in Canberra invited perspectives on this issue and how it relates to our region from the Australian Government, the Refugee Council of Australia, and academic Jane McAdam. UNHCR's position drawn from Standing Committee papers, is also provided.

### Complementary protection: A Comparative Perspective by \* Dr. Jane McAdam

*Dr. Jane McAdam is a lecturer in the Faculty of Law at the University of Sydney. She is the co author of the forthcoming edition of *The Refugee in International Law* with Dr. Guy S Goodwin Gill. She wrote her doctorate at the University of Oxford on complementary protection in international refugee law.*

Ever since the international community has sought to regulate the movement of refugees through international law, States have recognized that not all persons seeking protection fit neatly within legal definitions. Accordingly, some countries have allowed persons who are not technically 'refugees', but who nonetheless have a valid need for protection, to remain in their territories.

Australia is one of the only western States not to have a system of codified complementary protection. Although the term 'complementary protection' only emerged in the 1990s, the concept itself is an old one, encompassed by notions such as 'externally displaced persons', 'de facto refugee status', 'B status', 'war refugees' and 'humanitarian asylum'.

In general terms, 'complementary protection' describes protection granted by States on the basis of an international

protection need outside the 1951 Refugee Convention framework. Such protection may be based on a human rights treaty, such as the ICCPR, the Convention against Torture or the Convention on the Rights of the Child, or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence. Its chief function is to provide an alternative basis for eligibility for protection. Understood in this way, it does not mandate a lesser duration or quality of status, but simply assesses international protection needs on a wider basis than the 1951 Convention.

On 29 April 2004, the European Union adopted the 'Qualification Directive'.<sup>1</sup> This instrument forms part of the first step towards a Common European Asylum System, which aims to reduce disparities between Member States' legislation and practices to ensure a consistent minimum level of protection throughout the EU, thereby reducing secondary movement between EU States based solely on differing rights and benefits accorded by different countries.<sup>2</sup> Member States must make sure that their national laws comply with the Qualification Directive by 10 October 2006.<sup>3</sup>

In addition to Convention refugees, the Qualification Directive establishes a further category of persons in need of international protection: beneficiaries of 'subsidiary protection'. A person eligible for subsidiary protection is defined as:

*a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.<sup>4</sup>*

'Serious harm' comprises:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Accordingly, persons seeking asylum in the EU are assessed against criteria far broader than the refugee definition in article 1A(2) of the 1951 Refugee Convention, and, if found in need of protection, are accorded a formal legal status.

Similarly, in Canada, protection is afforded not only to Convention refugees, but also to other persons 'in need of protection'. Both protection criteria are considered in a single process, and successful claimants are granted



Asylum seekers in the waiting room of the UNHCR refugee reception center in Moscow, 2004. UNHCR/V. Sokolova

permanent residence and the rights which that entails. Persons 'in need of protection' encompass people falling outside the Refugee Convention who face a personal danger of being tortured (as defined in article 1 of the Convention against Torture), as well as those who face a personal risk to life or a risk of cruel and unusual treatment or punishment where:

- (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.<sup>5</sup>

Regulations may prescribe further classes of such persons.

In addition to these 'front-end' protection categories, anyone who has been issued with a removal order in Canada may apply for Pre-Removal Risk Assessment (PRRA). This procedure acts as a safeguard for people facing imminent deportation, although unsuccessful asylum seekers may only apply for it where new information has come to light since the asylum decision was made. PRRA assesses the same grounds for protection as the 'protected person' claim (risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment), and may lead to permanent residency for persons identified as having protection needs.

In the US, people may also apply for protection on the basis of torture. If applicants can show that they are 'more likely than not' to be tortured if removed to a

particular country, then protection based on the Convention against Torture (CAT) will issue.

There are two types of protection within the CAT protection framework: 'withholding of removal' and 'deferral of removal'. 'Withholding of removal' is the more generous form of CAT protection, as it accords beneficiaries some of the same benefits as Convention refugees, but not family reunification or access to a special process to adjust to permanent residence. Once granted, the onus is on the Department of Homeland Security to show that return is safe.

Deferral of removal is a more transient form of relief. It is granted to persons who are more likely than not to be tortured if removed, but who are ineligible for withholding of removal. It does not confer a lawful or permanent immigration status<sup>6</sup> or necessarily require that an applicant be released from detention or prison if held in such a facility.<sup>7</sup> Furthermore, the grant is subject to review and can be withdrawn quickly and easily once the risk of torture has diminished.<sup>8</sup> It effectively amounts to nothing more than a 'tolerated' status.

By comparison to Australia, the protection regimes in the EU, Canada and the US appear generous and expansive. Nevertheless, there remain significant protection 'gaps' in national versions of complementary protection - in particular, the question of status for persons excluded from protection but who cannot be removed due to prohibitions on refoulement under international law. Furthermore, the quality of the domestic status granted to beneficiaries of complementary protection varies considerably. For example, Canada grants an identical status to Convention refugees and other persons in need of protection, whereas the EU accords beneficiaries of subsidiary protection a secondary status - a

decision reflecting political motivations but which is not justified by international law. Similarly, beneficiaries of subsidiary protection are given shorter residence permits than Convention refugees, despite the lack of empirical evidence to support subsidiary protection as a temporary status. Nevertheless, though the EU Directive is hallmarked by political compromise, it importantly recognizes States' broader *non-refoulement* obligations under international law and allows individuals to claim protection on those bases. In spite of its drawbacks, it is still preferable to Australia's narrow protection regime.

In any case, the shortcomings of national complementary protection systems, relative to the widened categories of persons protected by them, are an inadequate excuse to delay the implementation of complementary protection in Australia. Ultimately, it is the standards and obligations contained in international law, both in relation to eligibility for protection and substantive rights, that provide the crucial legal foundations for any domestic complementary protection regime.

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

2. Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third-Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' (COM(2001) 510 final- 2001/0207 (CNS)) (2002/C 221/11) OJ C221/43 (17 September 2002) (Brussels 29 May 2002) [1.9].

3. The Directive does not apply to Denmark, in accordance with articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C325/5 and the Treaty establishing the European Community [2002] OJ C325/33: Directive recital 40.

4. 7944/04 ASILE 21 (31 March 2004) art 2(e). It was originally art 5, but was moved to the definitions section in art 2 by 11356/02 ASILE 40 (6 September 2002).

5. Immigration and Refugee Protection Act 2001 s 97(1).

6. CFR §208.17(b)(i) (2000).

7. CFR §208.17(b)(ii) (2000).

8. CFR §208.17(b)(iii) (2000).

# Complementary Protection

## Complementary Protection and Australian Practice by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA)

The 1951 United Nations Convention Relating to the Status of Refugees is the cornerstone of the international protection of refugees. A full and inclusive application of the Refugees Convention ensures that persons who meet its requirements are recognized as refugees and are protected.

The Refugees Convention does not provide for protection of people who do not meet the Convention definition of a refugee. Practices which have come to be known as “complementary protection” are used by some European countries to provide temporary or permanent residence to people who are not owed refugee protection. The concept has been developed in individual countries through domestic legislation and is not defined or specified in any international treaty.

The nature and application of complementary protection differs between countries. It can include permanent or temporary residence on various grounds based on humanitarian concerns, obligations under international human rights treaties, or judgement by a State as to whether it is unsafe, inappropriate or not practicable to effect return to the country of origin. In general, the practice in those countries which offer complementary protection is that it affords fewer benefits and entitlements than those provided to refugees.

For example, in the UK, a person granted ‘humanitarian protection’ is initially given a three-year residence permit,

access to social security and health care and limited travel rights, but is not eligible for family reunion. They may apply at the end of the three-year period for indefinite leave to remain. Applications for indefinite leave to remain are assessed to determine whether the applicant still qualifies for humanitarian protection. It may be refused if protection is no longer required. Many other European countries (such as Denmark, Finland, France, Germany, the Netherlands) provide temporary residence initially to persons with complementary protection status with varying standards of access to benefits. Family reunion may be available in some countries (eg Denmark) but not in others (eg Germany).

Countries providing some form of complementary protection often have lower refugee status approval rates than is the case in Australia for applicants of a given nationality. In Europe, there is a tendency for complementary protection status to be granted more often than refugee status. For example, in 2002, the UK granted only 10% of asylum applications from asylum seekers on Refugee Convention grounds, but over 21% were given some status on humanitarian or other grounds. Sweden granted only 1.1% of asylum applications from asylum seekers on Convention grounds, but over 20% were granted some status on humanitarian or other grounds<sup>1</sup>. By comparison, Australia provided protection under the Refugees Convention to 29.4% of asylum seekers in 2001/02.<sup>2</sup>

Whilst other countries continue to have quite different practices with regards to complementary protection, it appears the European Commission is moving towards harmonising the approach to

complementary protection (termed ‘subsidiary protection’) in European Union countries. The Council Directive on ‘*Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*’ was adopted in April 2004. This Directive provides a framework for an international protection regime based on existing international refugee and human rights instruments obligations, which emphasises the primacy of refugee status. Member States are required to have implementing national legislation in place by October 2006.

The EC Council Directive sets out minimum standards, with flexibility for States to give lesser benefits to holders of complementary protection (subsidiary protection) reflecting the potentially more temporary nature of this category. For example, the Directive dictates that persons with subsidiary protection status are provided with an initial one year residence permit, automatically renewed until protection is no longer required. Member states need only issue travel documents to persons with complementary protection status when they are unable to obtain a national passport from their consular authorities. Access to social security is immediate and access to employment is available after six months of subsidiary protection status.

Australia’s commitment to assisting refugees and others in humanitarian need is reflected in its Humanitarian Program. Under this program Australia resettles some of the refugees in greatest need of protection and others of humanitarian concern and provides protection to refugees who arrived in Australia who



Refugees from Kosovo at the East Hills Safe Haven, Sydney.  
UNHCR/H. J. Davies

engage our protection obligations under the Refugees Convention. Australia has resettled over 645 000 people fleeing persecution since World War Two. In 2003-04, more than 2 000 people already in Australia received protection under the Humanitarian Program, a significant proportion of the total of more than 13 800 people who received protection in Australia that year.

Australia provides appropriate temporary or permanent solutions to those in humanitarian need, although it has not in the past sought to label such responses as forms of “complementary protection”. For example, the Minister for Immigration and Multicultural and Indigenous Affairs’ public interest powers to intervene and grant a visa is one means by which Australia meets the needs of those people in Australia whose circumstances do not fit the criteria of the Refugees Convention, but to whom Australia may owe protection under other international treaties. Included in this group is a small number of cases relating to Australia’s obligations under the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (CAT), the International Covenant on Civil and Political Rights (ICCPR), or the Convention on the Rights of the Child (CROC).

These arrangements allow protection claims to be tested first against the Refugees Convention definition which confers higher levels of entitlements to refugees than required under these other instruments. There is no indication that there are significant numbers of persons entitled to CAT, ICCPR or CROC protection against return who do not also meet the Refugees Convention definition of a refugee.

Australia also has classes of visas which have been used to provide temporary haven for certain prescribed groups. For example, in 1999 Temporary Safe Haven visas were used to provide temporary residence to some 4 000 Kosovars who were brought to Australia for temporary protection because they could not return home due to conflict. An equivalent ‘Safe Haven Visa’ was used to provide temporary protection to some 1 900 East Timorese evacuated by Australia from Dili in 1999. Similarly, the offshore humanitarian visa classes provide protection to persons on grounds broader than those set out under the Refugees Convention.

There have been other occasions in the past where groups in humanitarian need have benefited from Australian Government protection. In 1990 some 6 900 people were granted visas under a new visa category to allow certain people who were in Australia illegally prior to 19 December 1989 to apply to regularise their status. In November 1993, over 42 700 people from the People’s Republic of China, the former Yugoslavia, Sri Lanka and other countries were accommodated under three special visa categories. A further group of 7 200 people who did not meet the criteria for the November 1993 visas benefited from a further special initiative known as ‘Resolution of Status’ in June 1997.

The Australian Government’s willingness to provide flexible arrangements for those with particular differentiating circumstances can also be demonstrated through the Government’s legislative initiative in August 2004 to introduce the Return Pending Visa for those people who were formerly recognised as refugees and

who are no longer in need of Refugee Convention protection. The Return Pending Visa could also be seen as providing a form of complementary protection, as it provides 18 months of lawful stay in Australia with continued access to the same benefits and visa conditions as the Temporary Protection Visa, while the holder makes arrangements to depart Australia or to access other stay options. The Removal Pending Bridging Visa is a more recent initiative that could also be used as a form of complementary protection in certain circumstances where conditions in a country of origin made returns impracticable.

The above visa arrangements provide a range of mechanisms to provide continued lawful stay in Australia on general humanitarian grounds with considerable flexibility to respond appropriately to individual circumstances. It is not possible to anticipate and codify all human circumstances. Accordingly, the Ministerial intervention power plays a significant additional role in providing the capacity to flexibly and compassionately respond to other exceptional individual circumstances where there are public interest grounds in providing some form of continued stay in Australia. At the same time the migration framework allows the Government to develop regulations as necessary tailored to the particular circumstances of new groups as the need arises.

1. Data from UNHCR Statistical Yearbook 2002.  
2. Data from DIMIA source.

# Complementary Protection

## Complementary Protection – A New Model for Australia by the Refugee Council of Australia

Complementary Protection, or subsidiary protection as it sometimes known, is a concept that is being talked about a great deal in Australia at present. To many people involved in refugee and asylum issues, however, while the name might be familiar, the concept remains something of a mystery.

To understand complementary protection you need to realise that not everyone in need of protection is a refugee and thus can get access to the protection that refugee status affords. The Refugee Convention does not, for example, encompass all people who, for example:

- are stateless; and/or
- come from a country enveloped in civil war; and/or
- have been subject to gross violations of their human rights for non-Convention reasons; and/or
- would face torture on return to their country; and/or
- come from a country where the rule of law and order no longer applies.

Yet clearly these people have legitimate protection needs.

Some countries, such as Canada, have responded to this protection gap by expanding the definition of a refugee. This is also sometimes done on a regional basis such as in the Organisation of African Unity (OAU) Convention that covers refugees throughout Africa.

Most asylum countries, however, have elected to leave the definition of a refugee unchanged and instead introduce a separate – or complementary – form of protection to cover those people who fall outside the Refugee Convention. This is

the approach being adopted by the states of the European Union in their harmonized legal framework.

This second option (to introduce a separate form of complementary protection) is currently the one in greatest favour and it is consistent with the current direction of international protection. Not only is it being adopted by all 25 European Union states, it is also a concept endorsed by all of the members of the UNHCR Executive Committee, including Australia.

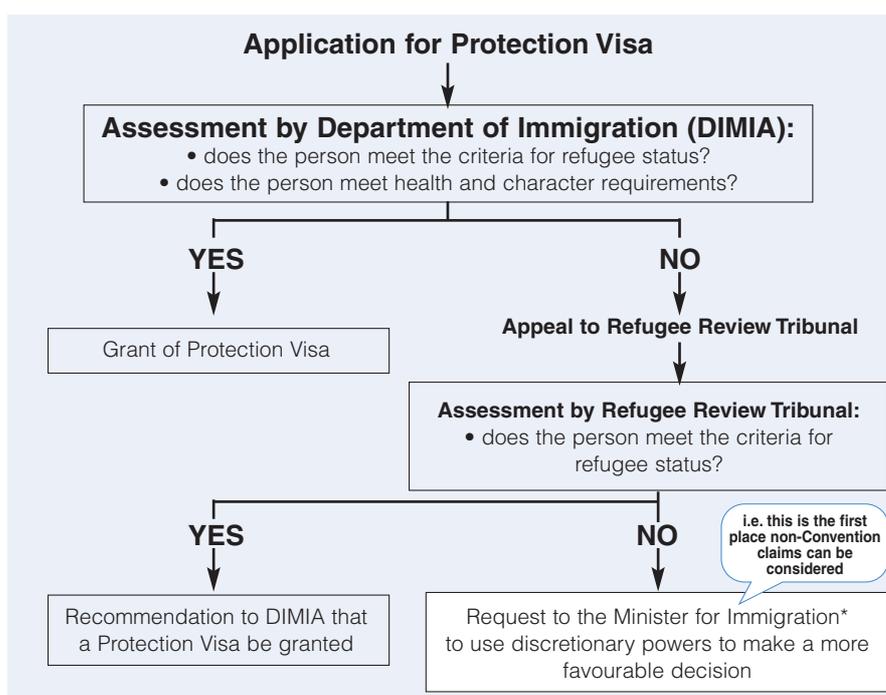
This was done when they adopted the **Agenda for Protection** in 2002. The Agenda is the product of the wide-ranging Global Consultation process and sets out the framework for action by UNHCR, States and other players to further refugee protection and one of its core objectives is:

*Provision of complementary forms of protection to those who might not fall within the scope of the 1951 Convention*

*but require international protection.*

Current practice in Australia is not, however, consistent with this international trend. Australia does not have an administrative process to assess protection applications from people with valid non-Convention reasons not to be returned to their country of origin or habitual residence. These claims can only be considered after the person has been rejected by each stage of the refugee determination process and then seeks personal intervention by the Minister for Immigration. The Minister has non-compellable, non-reviewable powers under Section 417 of the Migration Act to grant a visa to any failed visa applicant. In other words, the applicant has to go through an entire administrative determination process where his or her claims cannot be considered in order to get to the only place where they can.

**Table 1: Current Procedure**





Outside Baxter detention centre, near Port Augusta. UNHCR/R. Mignone

By leaving any consideration of non-Convention related protection claims to the very end of the process and by consigning the decision to Ministerial discretion, it can be argued that Australia's current practice is inefficient, unnecessarily expensive, places an unrealistic burden on the Minister for Immigration, lacks transparency and accountability, does not contain sufficient safeguards and is detrimental to both Convention refugees (by clogging up the system) and to those with non-Convention protection needs.

### A New Model for Australia

In order to address the identified deficiencies in Australia's current

procedures and to ensure that Australian practice is both consistent with internationally recognized best practice and the promises made by the Government when adopting the Agenda for Protection, Australian refugee groups are arguing that changes are required to the way that protection applications are considered.

Most of the advocates believe, and international practice would support this, that the most efficient and cost effective way to consider whether a person is in need of complementary protection is to use a single administrative procedure. This can first consider whether a person is a refugee and then, if the answer is no, assess whether there are grounds for the

grant of complementary protection. Table 2 gives a graphic representation of this process.

When considering the criteria for the grant of complementary protection, the first point that is necessary to stress is that it should be used only as a supplement to refugee status and never as a replacement for it. Refugee status affords particular protection under international law (most importantly protection from forced return to his or her country of origin) and where a person meets the criteria for the grant of refugee status, this form of protection should be used.

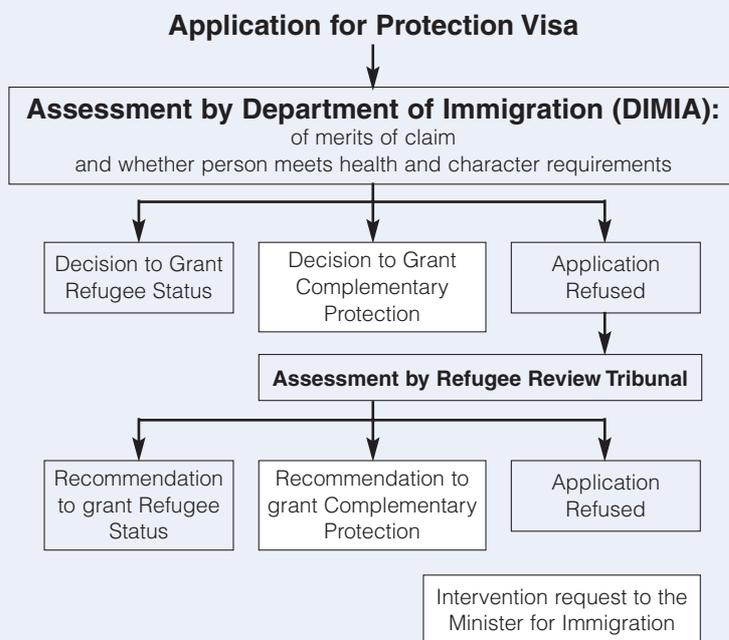
The deliberation process would necessarily involve the decision maker considering a series of questions in the following order:

- a. Does the person have a well-founded fear of persecution under the terms of the 1951 Convention (and thus meet the criteria for the grant of refugee status)? And if not:
- b. Does Australia have obligations to the person under other human rights treaties?
- c. Are there other protection-related reasons why a person should not be returned to his/her country of origin?

As the criteria for the grant of refugee status are already defined in Australian law, it is relevant to move on to how a decision maker should go about answering questions b and c.

The starting point for this consideration must be Australia's international treaty obligations. Australia is a party to a number of relevant international human rights treaties:

**Table 2: Proposed Model**



**Under the proposed model, an applicant's eligibility for complementary protection can be assessed at each stage of the determination process, thereby ensuring that those entitled to protection receive it at the earliest possible time.**

# Complementary Protection

- The Convention relating to the Status of Stateless Persons (1954);
- The Convention on the Reduction of Statelessness (1961);
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- The International Covenant on Civil and Political Rights (1966);
- The International Covenant on Economic, Social and Cultural Rights (1966);
- The International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- The Convention on the Elimination of all Forms of Discrimination Against Women (1979);
- The Convention on the Rights of the Child (1989).

Two of these treaties place specific obligations on States Parties that they cannot ignore:

- the Statelessness Conventions require States to provide assistance and protection (including the grant of nationality) to persons who are not considered as a national by any other State;
- the Convention Against Torture obliges a State not to return a person to a country where there are substantial grounds for believing that he or she will be subjected to torture, taking into account the existence in the State concerned of a pattern of gross, flagrant or mass violations of human rights.

In addition, the International Covenant on Civil and Political Rights imposes an obligation on States not to return a person who, as a foreseeable consequence of their removal or deportation, would face a

real risk of violation of his/her rights under Article 6 (right to life) or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment).

The criteria for the grant of complementary protection must therefore make specific reference to people who are stateless and to people who would face torture or death if returned to their country of origin or habitual residence.

The other treaties do not impose such specific obligations on other States but they do provide a framework of internationally accepted human rights standards against which protection applications can be assessed. Naturally there needs to be some form of test applied to assess whether the violation of rights is sufficiently serious to warrant protection being granted. The European Union, for example, has adopted the threshold of “*well founded fear of unjustified serious harm*”, noting that such harm can be direct physical harm or substantial deprivation of fundamental rights.

## Advantages of Complementary Protection

It is argued that if the model of complementary protection proposed in this paper if adopted, it would:

- bring Australia into line with international best practice, ensure compliance with its obligations under the Convention Against Torture and the Statelessness Conventions and fulfil one of the commitments Australia made when endorsing the Agenda for Protection;
- result in consistency between Australia’s policy with respect to off-shore and on-shore refugees;
- result in significant cost savings for the determination bodies and also reduce welfare (ASAS) payments to asylum seekers and detention costs;
- enhance the efficiency and productivity of both the Department of Immigration and the Refugee Review Tribunal;
- make it easier for applicants to



More than 200,000 East Timorese who had fled widespread violence in 1999 returned to their homes after independence was gained in 2002. UNHCR/M. Kobayashi



Asylum seekers from various countries at the Sangatte Red Cross Centre near Calais, 2002. UNHCR/H. J. Davies

present their claims as it will reduce the perceived need to find tenuous links between their fears of returning and Convention grounds;

- ensure necessary transparency, accountability and consistency in decision making;
- reduce the burden on the Minister for Immigration and enable the Minister's discretionary powers to be used for the exceptional cases for which such powers were intended;
- ensure that those entitled to Australia's protection receive it in a timely fashion and thus enhance their ability to become productive members of the Australian community;
- enable detained asylum seekers to have all relevant claims considered simultaneously and thus reduce the duration and trauma of the detention experience;
- benefit Convention refugees by freeing up the determination processes;
- benefit holders of Temporary Protection Visas by enabling a

thorough examination of the implications of changed country circumstances when their applications for a Further Protection Visa are being considered;

- reduce the incentive for people to abuse the protection application process to extend their stay in the country as decisions will be made faster.

Further, it can be argued that the proposed model:

- is simply the transfer of existing decision making powers and as such, cannot be seen as creating a pull-factor;
- need not result in abusive applications for judicial review if appropriate safeguards are incorporated. It is suggested that such safeguards might include clearly enunciated regulatory requirements and judicially controlled leave provisions.

The introduction of Complementary Protection provisions in Australia would require amending Section 36(2)(b) of the Migration Act (1958) to set out the criteria

for the grant of a visa and introduce a new visa subclass. It would also require that a new regulation be introduced to set out the framework for the grant of a visa and the rights and entitlements afforded to successful applicants.

The community sector considers that the introduction of a mechanism to provide complementary protection would not only enhance the efficiency and fairness of the current protection system in Australia but would also address many of the challenges currently facing the Government. Key amongst these, of course, is the dilemma of how to deal with Afghans, Iraqis and others (including those on Nauru) who cannot be returned to their country of origin because of ongoing instability and with people who cannot be removed because no country will recognise them as citizens. Many of these people are currently destined to remain in indefinite detention. Complementary protection is a concept whose time has come.

**To read an expanded version of this paper, go to [www.refugeecouncil.org.au](http://www.refugeecouncil.org.au).**



Refugees from Kosovo at the East Hills Safe Haven, Sydney.

UNHCR/H.J. Davis

# Complementary Protection

## Complementary Forms of Protection – Evolving Best Practices by the UNHCR Regional Office Canberra

### Introduction

A number of asylum countries have in place administrative or legislative mechanisms for regularising the stay of persons who are not recognised as refugees but who cannot safely return to their home country. UNHCR welcomes these mechanisms, in as far as they address international protection needs which may not be covered by the 1951 Convention and 1967 Protocol relating to the Status of Refugees (the Refugee Convention), and refers to them as “complementary” forms of protection.

### Beneficiaries of Complementary Protection

States that allow people who are not recognised under the Refugee Convention to stay, do so for a variety of reasons. The reasons may be compassionate, such as when stay is permitted for reasons of age, medical condition, other specific vulnerabilities, or family connections. In other cases the reasons may be practical, such as when removal is not possible, either because transportation is not feasible, travel documents are unavailable or cannot be obtained, or readmission otherwise proves infeasible. Where grounds for stay are purely compassionate or practical, the permission to stay is not related to international protection needs. Persons who have been given permission to stay on purely humanitarian grounds must be

clearly distinguished from persons in need of international protection, where an obligation to respect the principle of *non-refoulement* applies. With regard to persons permitted to stay on humanitarian grounds, UNHCR will generally have no direct role to play.

A restrictive interpretation of the Convention refugee definition in some States has left persons with an alternative status, even though they could have been and should have been granted refugee status. It is UNHCR's view that such persons should be covered by the Refugee Convention rather than being given a complementary form of protection. Similarly, complementary protection should not be a substitute for the application, in good faith, of the Statelessness Conventions.<sup>1</sup>

Persons who are unable to return to their countries because of serious and indiscriminate threats to life, liberty or security of person resulting from generalised violence or events seriously disturbing public order, may be regarded by States as not covered by the Refugee Convention, when such threats are not linked to one of the specific Refugee Convention grounds (race, religion, nationality or member of a particular social group). For example, people fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation with no specific element of persecution, might not fall under a strict interpretation of the Convention refugee definition. They may nevertheless still require international protection, and be assisted by UNHCR.

The regional refugee instruments in Africa and Latin America specifically include such people under the refugee definition. In other regions, States provide

complementary forms of protection.

UNHCR's mandate with regard to this refugee group derives from successive resolutions of the UN General Assembly and has also been confirmed by the Executive Committee of the High Commissioner's Programme (EXCOM).<sup>2</sup>

### Discussions on Complementary Forms of Protection at Excom

EXCOM meets each October in Geneva to review and approve UNHCR's programmes and budget, advise on international protection and discuss a wide range of other issues with UNHCR and its intergovernmental and non-governmental partners.

The consensus reached by EXCOM in the course of its discussions on international protection is expressed in the form of Conclusions on International Protection (EXCOM Conclusions). Although not formally binding, they are relevant to the interpretation of the international protection regime and constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of EXCOM, and the fact that its Conclusions are taken by consensus, gives EXCOM Conclusions weight as a guide to international protection standards.

EXCOM has recognised that, while persons who are unable to return in safety to their countries of origin as a result of situations of conflict may not all be refugees within the terms of the Refugee Convention, they are nonetheless often in need of international protection, humanitarian assistance and a solution to their plight. EXCOM has encouraged



Asylum seekers arriving in Nauru. Part of Australia's "Pacific Solution".  
UNHCR/M. Bandharangshi

UNHCR to continue to provide international protection to such persons and to seek solutions to the problems arising from their forced displacement. It also called upon all States to assist and support UNHCR's efforts in this regard<sup>3</sup>.

EXCOM has also emphasised that complementary protection should not come at the expense of the protection already afforded by the Refugee Convention and other human rights treaties, nor should it undermine the integrity of the existing international protection regime. Indeed, developments in relation to complementary protection have been accompanied by a renewed commitment by States to fully and effectively implement the Refugee Convention, including its exclusion provisions for people not deserving of refugee protection, and to maximize their use of other existing protection tools.<sup>4</sup>

One of the goals of the Agenda of Protection, a programme of action adopted by States and UNHCR in 2002, is strengthening implementation of the Refugee Convention. The Agenda identifies provision of complementary forms of protection to those who might not fall within the scope of the Convention, but require international protection, as one way of achieving this goal.

The Agenda calls upon EXCOM to:

*Within the framework of its mandate...work on a Conclusion containing guidance on general principles upon which complementary forms of protection should be based, on the persons who might benefit from it, and on the compatibility of these protections with the 1951 Convention and other relevant international and regional instruments.*

States are asked to:

*... consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.*

Both of these items are expected to be discussed at the EXCOM session in October 2005.

### **What Standard of Treatment for Complementary Forms of Protection?**

There is a growing consensus among States about the protection needs of persons who may not be covered by the 1951 Convention, even if it is fully and inclusively applied. However, as regards standards of treatment, State practice varies. To achieve greater harmonisation, the standards contained in the Refugee Convention could be used as a guide. Furthermore, the obligations deriving from international and/or regional human rights instruments need to be taken into account.

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

The status afforded to beneficiaries should reflect basic rights as defined in relevant international and regional instruments. In some States or regions, domestic or regional human rights provisions may require standards of treatment which are higher than those of

other States or regions, but the standards to be respected should not fall below a certain minimal level.<sup>5</sup>

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

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

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

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

The family is acknowledged in human rights instruments as the natural and fundamental group unit of society. The importance of putting in place measures that ensure respect for the unity of the refugee family has been highlighted by EXCOM on a number of occasions.<sup>6</sup> Maintaining or reinstating family unity is one of the most important ways in which persons in need of international protection can enjoy the stability and certainty they require to continue their lives. Accordingly,

any complementary protection regime should similarly build in appropriate provisions for close family members to be reunited, over time, in the host country.

Complementary forms of protection need not necessarily be permanent in nature. However, the ending of complementary status, just like the cessation of refugee status, should be based on objective legal criteria, and should never be arbitrary. It also needs to be based on objective and reliable country of origin information. UNHCR has particular expertise in this area, and can play a consultative role in deciding whether it is appropriate to end complementary protection measures.

In some States there are separate procedures for determining whether a person is a refugee within the terms of the Refugee Convention, or whether a person is in need of a complementary form of protection. More efficient may be a single procedure for determining whether a person is in need of international protection. This would entail first an examination of the Refugee Convention grounds, to be followed, as necessary and appropriate, by an examination of the possible grounds for the grant of a complementary form of protection. A single procedure would also make it easier to ensure that appropriate legal guarantees, including a right of appeal to an independent body, are available in relation to all decisions concerning a person's entitlement to international protection.

## Conclusion

The Refugee Convention remains the cornerstone of the international protection of refugees and provides the basic

framework for such protection. A full, inclusive and dynamic interpretation of the Refugee Convention, in accordance with its object and purpose, diminishes the need for complementary forms of protection.

Persons who are unable to return to their countries because of serious and indiscriminate threats to life, liberty or security of person resulting from generalised violence, or events seriously disturbing public order, may be regarded by States as not fulfilling the refugee definition of the Refugee Convention, if no link to a Convention ground can be established. However, they may nevertheless be in need of international protection.

The absence of a definitive legal framework agreed unanimously by all States may result in a protection gap for such persons. Two approaches have been developed to close such a potential gap: some States have accorded Convention refugee status to such people. In other States, complementary forms of protection provide a pragmatic response to such international protection needs.

The standards elaborated in the Convention, together with developments in international human rights law, provide an important guide to the treatment that should be afforded to all persons who are in need of international protection.

The standards of treatment afforded to persons not formally recognised as refugees, but nevertheless acknowledged to be in need of international protection, should provide for the protection of basic civil, political, social and economic rights. Complementary forms of protection should be implemented in such a way as to ensure the highest degree of stability and certainty possible, including through

measures to ensure respect for other important principles, such as the fundamental principle of family unity.

UNHCR would encourage greater consistency in the provision of complementary forms of protection through the adoption of guiding principles, possibly in an EXCOM conclusion.

1. 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.
2. For a more detailed view and full references to the resolutions, please see the article by Volker Turk "The role of UNHCR in the development of international refugee law" in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press, 1999, ed. Frances Nicholson and Patrick Twomey.
3. EXCOM Conclusion No. 74 (XLV) - 1994.
4. Excom Conclusion No. 89 (LI) - 2000, paragraph 10.
5. The International Bill of Rights (consisting of the Universal Declaration of Human Rights and the two International Covenants, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights) sets out fundamental rights. Important is furthermore the Convention on the Rights of the Child. Regional instruments such as the European Convention for the Protection of Human Fundamental freedoms, the African Charter on Human and Peoples' Rights and the American Convention Human Rights ("Pact of San Jose") also provide useful guidance regarding fundamental human rights.
6. See for example Conclusions 9(XXVII)-1977; 24 (XXXII) - 1981, 88(L)-1999.



Refugee from Kosovo at the East Hills Safe Haven, Sydney.  
UNHCR/H. J. Davies

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## COMPLEMENTARY PROTECTION AND JUDICIAL REVIEW Supplementary Paper

May 2005

### Background

There has been growing recognition in Australia about the importance of introducing a system of Complementary Protection that could give effect to the protection needs of people who:

- are stateless;
- come from a country enveloped in civil war;
- have been subject to gross violations of their human rights for non-Convention reasons;
- would face torture on return to their country;
- come from a country where the rule of law and order no longer applies;

... or have other protection needs not covered in the 1951 Convention relating to the Status of Refugees. In the paper "Complementary Protection: the Way Ahead"<sup>1</sup> a model is suggested that would give effect to this objective.

While there is widespread support for the need, and government endorsement of the concept,<sup>2</sup> some parties remain concerned that the introduction of any new visa subclass reliant on administrative determination would "open the floodgates" to litigation. It is the purpose of this paper to respond to this concern.

### Judicial Review of Decision Making

Before looking specifically at the issue of whether introducing administrative determination of Complementary Protection would lead to excessive demands on the court system, it is important to stress that:

- not all applications for judicial review are vexatious. There are many instances where people have been protected from forced return to a country where they would have faced persecution because a court has overturned an administrative decision;
- the administrative determination benefits greatly from the jurisprudential guidance developed through the judicial review process;
- it is not only the applicant that uses judicial review. This is an option open to the Minister for Immigration and it is one that is not used infrequently.

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<sup>1</sup> April 2004 at [www.refugeecouncil.org.au](http://www.refugeecouncil.org.au).

<sup>2</sup> As evidenced by the adoption of the Agenda for Protection by the UNHCR Executive Committee of which Australia is a member.

## **Judicial Review of Complementary Protection Decisions**

In proposing the introduction of administrative determination of Complementary Protection, the Refugee Council and the other agencies involved are as interested as the government is in ensuring that the new procedures do not undermine the protection regime in this country.

Any administrative determination process that leads to excessive litigation is problematic, and not just for the government. It also has the potential to undermine the court process and to prevent litigants with meritorious claims from having their case heard in a timely manner.

There are two ways in which control can be exercised over judicial review:

- through taking steps to limit access;
- through ensuring that the legislation is drafted clearly and unambiguously so as to limit grounds for appeal.

It is suggested that the government has already taken significant steps in relation to the first of these. Not only are there a number of ways in which abuse of the court system is currently limited (such as registration of agents and lodgement time limits) but the Migration Litigation Reform Bill (2005) is set to introduce additional and more substantial impediments to vexatious litigation.

It is argued, however, that the key to ensuring the viability of a Complementary Protection system lies in the second of these options: the way in which the legislation supporting its introduction is drafted. Criteria that are loosely defined and imprecise open the doors to appeal. Conversely, if the criteria for the new visa subclass are defined with explicit reference to relevant articles within international human rights treaties to which Australia is a signatory, the grounds on which appeals can be lodged will be limited.

When looking at the issue of containing litigation, it is also important to look beyond the court system. It is argued that it is equally important to take steps that focus on:

- improving the quality and timeliness of decision making at the administrative levels;
- improving access to competent, pro bono legal advice and assistance; and
- strengthening programs that provide non-legal case management of refused applicants.

Finally, it is argued that the introduction of Complementary Protection would in fact have a number of flow-on benefits for the system as a whole, not least by:

- reducing the number of people who have genuine grounds to believe that their protection needs have not been met by the administrative determination system and who feel compelled to use the judicial process to seek protection;
- alleviating strain on administrative decision makers by giving them a viable option for those cases where protection is clearly due; and
- preventing unwarranted extension of the refugee definition by judicial officers frustrated by the limitations of the current system.

It is important not to lose sight of the fact that Complementary Protection should be seen as a solution, not a problem.