

# **The International Protection of Refugees:**

## **Complementary Forms of Protection**

### **I. Introduction**

1. 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 for whom return is not possible or advisable for a variety of reasons. This represents a positive, pragmatic response to certain international protection needs. UNHCR welcomes these mechanisms when they serve to complement the international protection available to refugees under the 1951 Convention and 1967 Protocol relating to the Status of Refugees, and refers to them as “complementary” forms of protection.

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

3. An additional complicating factor to the development of these various statuses is the tendency to resort to them whenever it is difficult or time-consuming to determine refugee status according to the 1951 Convention/1967 Protocol.<sup>1</sup> Where a person’s situation is such that the criteria set out in the 1951 Convention are fulfilled,<sup>2</sup> providing only complementary protection to him or her may (depending on the treatment associated with that status) represent a failure on the part of a State party to the 1951 Convention to fulfil its obligations thereunder.

4. The purpose of this paper is to contribute to the discussion relating to the existence and harmonisation of these forms of protection by: i) identifying the appropriate beneficiaries; ii) sketching the applicable legal framework and the nature of protection provided by States; and iii) suggesting standards of treatment and procedural mechanisms which, from UNHCR’s perspective, would be most appropriate.

### **II. Permission to Stay: A Diverse Group of Beneficiaries**

5. A review of the categories of persons who benefit from permission to stay for a prolonged period demonstrates that States grant it for a whole range of reasons. The reasons may be unrelated to protection needs, for example, when they are purely compassionate, or related solely to practical considerations; or, they may be directly related to protection needs of the beneficiaries, for example when the risk of harm is great on account of widespread on-going armed conflict. The focus, for the purposes of this paper, will be on the latter category.

#### **i. Stay not related to Protection Needs: Compassionate Grounds/Practical Reasons**

6. States may decide to allow prolonged stay for compassionate reasons, for example, when this is done solely for reasons of age, medical condition, or family

connections.<sup>3</sup> Where removal is not possible, either because transportation is not feasible, or travel documents are unavailable or cannot be obtained, continued presence may be allowed for practical reasons. The persons concerned are normally not asylum-seekers or, having been asylum-seekers, have had their applications properly rejected and were found not to be in need of international protection. These cases must be clearly distinguished from cases where protection needs and an obligation to respect the fundamental principle of *non-refoulement* are present, and which are thus of direct concern to UNHCR. This paper does not purport to address the types of cases outlined above, as these are not of direct relevance to UNHCR. This paper also does not cover those persons who have been excluded from refugee status in application of the exclusion clauses contained in the 1951 Convention, but cannot, under relevant human rights law, be returned to a country where they would face a risk of torture.

## **ii. Stay on account of international protection needs**

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

a) Persons who should fall within the terms of the 1951 Convention/1967 Protocol, but who may not be so recognised by a State, as a result of varying interpretations;

b) Persons who have valid reasons for claiming protection, but who are not necessarily covered by the terms of the 1951 Convention/1967 Protocol.

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

### **a) Beneficiaries who could meet the 1951 Convention/1967 Protocol criteria**

8. Varying interpretations by States of the inclusion criteria set out in Article 1 of the 1951 Convention have resulted in significant differences in recognition rates between States for persons in similar circumstances. Some persons who are recognised as refugees in one State may be denied such status in another. It is important to acknowledge, however, that even in those cases where refugee status is denied, States provide an alternative form of prolonged stay in recognition of the protection need.<sup>4</sup>

9. At least three groups can be identified in relation to whom divergent views on the interpretation of the refugee definition criteria have emerged:

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

b) Another group comprises refugees who flee persecution in areas of on-going conflict. In a number of countries, they are treated as 'victims of indiscriminate violence' and provided with complementary protection. This is the case even where

the conflict they flee is rooted in ethnic, religious or political differences that specifically victimise those fleeing. In other States, this may well be the basis for their recognition as Convention refugees;

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

10. It is UNHCR's understanding, based not least on relevant State practice, that the aforementioned categories should be covered by the 1951 Convention/1967 Protocol. That there is a recognised need for international protection in such cases has been amply demonstrated by the fact that States provide some form of protection. To achieve overall consistency and to ensure a full and inclusive interpretation of the Convention refugee definition, a harmonised approach within the Convention regime is desirable.<sup>5</sup>

#### **b) Beneficiaries who might not meet the 1951 Convention/1967 Protocol criteria**

11. Persons who may not necessarily be 1951 Convention refugees but who nevertheless need international protection are commonly referred to as refugees falling under UNHCR's wider competence. This competence is generally understood also to cover persons outside their countries who are in need of international protection because of a serious threat to life, liberty or security of person in the country of origin, but for whom there may be no link to a specific Convention ground, as for example those for whom the threat arises solely as a result of armed conflict or serious public disorder.<sup>6</sup> For example, persons fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no specific element of persecution, might not fall under a strict interpretation of the 1951 Convention refugee definition but may still require protection, and be within UNHCR's competence.

12. The regional refugee instruments in Africa and Latin America<sup>7</sup> specifically state that refugee protection should also encompass this 'broader' category of refugees. In other regions, in the absence of such instruments, States have provided for prolonged stay under their domestic legislation. As regards this category of refugees, in UNHCR's experience, there is a need for greater harmonisation of complementary forms of protection, based on human rights and refugee law standards.

### **III. Determining the Beneficiaries of Complementary Forms of Protection**

#### **i. A Single Procedure to Determine Protection Needs**

13. Just as States have put in place procedures for determining who fulfils the criteria for refugee status in the 1951 Convention, there must likewise be some method by which a State will determine who is in need of, and thus entitled to, complementary protection.

14. UNHCR believes that the requirements of fairness and efficiency can best be met through the implementation of a broadly comprehensive system in which one central and expert authority would determine, in a single procedure, the protection

needs of an applicant. At the end of such a procedure, the deserving applicant would be awarded refugee or other protected status, depending on his or her reasons for requiring protection.

15. In this way time or other limitations would not prematurely preclude consideration of any applications for protection, duplication could be avoided, and the expertise of existing refugee status authorities could be utilised in determining other related international protection needs. UNHCR fears there would be a great potential for fragmentation of the international protection regime if different procedures, using vastly different standards, are established within and between States for refugee determination and complementary protection purposes.

16. As in all such determination systems, there should be an opportunity for a meaningful review of any negative decision, with suspensive effect, so that no applicant would be removed before a final determination of his or her need for protection. A meaningful review normally requires that reasons be provided for the decision at first instance.

## **ii. Role of UNHCR in Determining the Need for Complementary Protection**

17. UNHCR, on account of its responsibility for refugees (whether under the 1951 Convention or under UNHCR's wider competence), ought to be given access to other protection seekers just as the Office is provided access to asylum-seekers under the 1951 Convention. By virtue of its long experience, UNHCR has developed expertise in determining when persons not fulfilling the 1951 Convention criteria are nevertheless in need of protection. Assistance available from UNHCR may include country of origin information, advice on various legal or policy issues or participation in decision-making mechanisms.

## **IV. Standards of Treatment for Complementary Forms of Protection**

18. In the absence of a harmonised approach in those States or regions where the international or regional refugee instruments are not applicable, a variety of statuses may bring into play different regimes of rights. In some instances, these rights are much less expansive than in others. The following paragraphs propose standards of treatment consistent with international human rights and refugee law considerations,<sup>8</sup> which could assist or guide States in their harmonisation efforts.

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

20. 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.

21. The status afforded to beneficiaries should provide for recognition and protection of basic rights as defined in relevant international and regional instruments.<sup>9</sup> 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.

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

- be protected from *refoulement* and expulsion;
- not be subjected to discrimination on the basis of race, religion, political opinion, nationality, country of origin, gender, physical incapacity or 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.

23. 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.

24. The importance of putting in place measures that ensure respect for the unity of the refugee family has been highlighted by the Executive Committee on a number of occasions.<sup>10</sup> The family is acknowledged in human rights instruments as the natural and fundamental group unit of society: maintaining or reinstating family unity is one of the most important ways in which persons in need of international protection can enjoy the stability and certainty they require to continue their lives. Accordingly, any complementary protection regime should build in appropriate provisions for close family members to be reunited, over time, in the host country.

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

## **V. The Scope of Protection in Situations of Mass Influx**

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

27. Temporary protection is an exceptional emergency device to respond to an overwhelming situation, where there are self-evident protection needs, and little or no possibility to determine such needs on an individual basis in the short term. It is distinct from complementary protection, which is a legal status offered after recognition of individual protection needs, and a determination of their nature. Temporary protection, by definition, involves a group assessment of international protection needs based on the circumstances in the country of origin, whereas complementary protection measures apply to individuals whose protection needs have been specifically examined. While both temporary and complementary protection should ensure adequate standards of treatment for the beneficiaries, the provisional nature of temporary protection, its short duration and especially its use with large groups, warrants the use of minimum standards. Complementary protection measures, on the other hand, provide a definitively stable treatment immediately upon recognition of the individual's protection need.

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

## **VI. Concluding Observations**

29. While some States have used the mechanism of a 'broadened' definition in a regional instrument to provide for the protection of refugees falling within UNHCR's broader competence, other States have utilised legislative arrangements to provide permission to remain for a prolonged time. In the latter case, the proliferation of different treatment for various categories of beneficiaries has tended to obscure the refugee nature of some of them, and confused the considerations that should be paramount in their treatment.

30. In these circumstances, harmonisation of the treatment of those in need of international protection but not recognised as refugees in asylum States would be advantageous, and help to ensure their treatment in accordance with refugee protection principles. The 1951 Convention, though not directly applicable to a number of the beneficiaries, provides a useful guide for such harmonisation.

31. When considering the implementation of complementary forms of protection or the harmonisation of such mechanisms, States should bear in mind the following considerations:

a) The criteria for refugee status in the 1951 Convention/1967 Protocol should be interpreted in such a manner that individuals who fulfil the criteria are so recognised and protected under that instrument, rather than being treated under complementary protection schemes.

b) Measures to provide protection to deserving individuals outside the framework of the 1951 Convention should be implemented in a manner that complements and strengthens, rather than undermines, the existing global refugee protection regime.

c) 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. States should, so far as possible, strive to devise harmonised approaches to the treatment provided. They should implement complementary protection in such a way

as to ensure the highest degree of stability and certainty possible in the circumstances, including through appropriate measures to ensure respect for other important principles, such as the fundamental principle of family unity.

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

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

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

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## Endnotes

<sup>1</sup> Anecdotal evidence of refugee status determiners suggests this is indeed the tendency, and it appears to be borne out by UNHCR statistics (see *Individual Asylum Applications, Refugee Status Determination and Pending Cases by Country/Territory of Asylum and Origin*, 1999.) A careful comparative look at these statistics illustrate that acceptance rates for similarly situated applicants for refugee status are significantly different, and the difference appears often to depend on whether the State has available to it an alternative form of protection. Thus in States where there are no or very circumscribed alternatives, such as Canada and the US, rates of refugee recognition are very high for certain groups (where one would indeed expect a significant proportion to have a well-founded fear of persecution for a Convention reason) e.g. Afghans (97.6% and 100% at first instance respectively) and Iraqis (84.6% and 92.3% respectively). The same groups, however, are rarely recognised as Convention refugees in some other States where alternative forms of protection are available and widely used. They are, nevertheless, allowed to stay in significant numbers in those same States where they are not recognised refugees. This is the case, for example, in the Netherlands (only 6.3% of Afghans got refugee status, but 47.6% were allowed to stay); Germany (only 1.7% of Afghans were recognised but 26.4% allowed to stay); and in the Scandinavian countries. In Denmark, for instance, only 4.2% of Iraqis were recognised as Convention refugees, but 83.2% were allowed to stay; in Norway a mere 0.7% of Iraqis were recognised as refugees, but 66.9% were allowed to stay; and in Sweden, only 2.4% of Iraqis got refugee status, but 63.9% were allowed to stay legally on other grounds. While it is recognised that there may be a myriad of reasons why such statistics may differ, even widely, such striking correlations for the same groups suggest there is at least some sort of relationship between the availability of complementary forms of protection and the Convention refugee determination rate.

<sup>2</sup> It should be recalled that refugee status determination is declarative, not constitutive. Thus, as stated in paragraph 28 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR, Geneva, 1979, re-edited 1992), “A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. ... Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee.” For UNHCR’s views on the appropriate interpretation of various elements of the definition found in Article 1 of the 1951 Convention, please see the companion paper *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees* UNHCR, January 2001.

<sup>3</sup> This refers to family connections which are unrelated to any protection need. Such family reasons for providing prolonged stay are different than the considerations in the context of family reunification for refugees and their families. The latter remains a protection concern.

<sup>4</sup> In some cases States have obligations under applicable human rights instruments prohibiting torture, not to return persons to their countries of origin where such a risk is present. The 1984 UN Convention against Torture is the prime universal example, but there are other international, regional and domestic provisions of a similar nature. Persons covered by these provisions may fall into one or the other of the identified protection groups.

<sup>5</sup> For a fuller explanation of UNHCR’s current thinking on these interpretative issues see the companion paper *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees* referred to in note 2.

<sup>6</sup> The competence of the Office has been enlarged by successive General Assembly resolutions since the elaboration of the mandate in the Statute in 1950. For a more elaborated view and references to the resolutions, please see the article by Volker Thirk “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.

<sup>7</sup> The 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees.

<sup>8</sup> The 1951 Convention relating to the Status of Refugees provides the most elaborated inventory of standards of treatment for persons in need of protection. While admittedly only strictly speaking applicable to Convention refugees, the Convention’s provisions nevertheless may be usefully referred to in elaborating complementary protection standards. It must be kept in mind, however, that the Convention standards are avowedly minimal (see Article 5),



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and in light of developments in international, regional and domestic human rights law may now represent standards which are below those otherwise required of States. Executive Committee Conclusion No. 22, which is formally about treatment in situations of large-scale influx, also offers some helpful guidance, on the basis of the refugee standards in the 1951 Convention, for the most basic rights that should be guaranteed to persons in need of international protection.

<sup>9</sup> The International Bill of Rights (consisting of the Universal Declaration of Human Rights and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights) sets out fundamental human rights. Regional instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights ("Pact of San Jose") also provide useful guidance regarding fundamental human rights.

<sup>10</sup> Most recently in Conclusions No. 85 (1998) (A/AC.96/911, para. 21) and 88 (1999) (A/AC.96/928, para. 21)