



UNHCR

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



2010 High Commissioner's Dialogue on Protection Challenges
Background Paper

PROTECTION GAPS AND RESPONSES

I. INTRODUCTION

'Protection Gaps and Responses' is the theme of the 2010 High Commissioner's Dialogue on Protection Challenges. The outcomes of the Dialogue will provide an important basis for the activities planned throughout the coming year to commemorate the 60th anniversary of the 1951 *Convention relating to the Status of Refugees* and the 50th anniversary of the 1961 *Convention on the Reduction of Statelessness*.

Part II of this paper presents a summary of various aspects of the current environment in which the Office of the United Nations High Commissioner for Refugees (UNHCR) and its partners are working in order to provide protection and seek solutions for tens of millions of people across the world in situations of forced displacement or statelessness.

Part III of the paper proposes a framework for breakout session discussions during the Dialogue, as follows:

- Gaps in the international protection framework and in its implementation
- International cooperation, burden sharing and comprehensive regional approaches
- Reduction of statelessness and the protection of stateless persons

Key issues and challenges under each of these sub-themes are briefly outlined for ease of reference, and some questions for discussion are proposed.

II. BACKGROUND

The magnitude and complexity of forced displacement and statelessness issues are enormous. Some 36 million people fall under the mandate of UNHCR as refugees, stateless persons and others of concern. Yet even this striking figure does not fully reflect the extent of displacement or statelessness today.

Patterns of displacement

Patterns of forced displacement have been far from static over the sixty years since the 1951 *Convention relating to the Status of Refugees* (1951 Convention) was put in place. The classical notion of forced displacement centred on victims of persecution for reasons such as political opinion, religious belief or ethnic origin. The 1951 Convention provided for a framework which presupposed, at least in practice, solutions outside the countries of origin.

This approach came under considerable strain when the focus of refugee problems started to shift from Europe to the developing world, which was experiencing major displacements due to decolonization, foreign occupation, resurgent nationalism, events seriously disturbing public order and inter-ethnic conflicts. Large numbers of refugees crowded into camps and their assistance and protection suffered at times from a deficit of political will and economic support.

Displacement scenarios continue to evolve, though traditional forms of displacement owing to conflict, persecution and human rights violations are still prevalent. The drivers appearing today include population growth, urbanization, governance failures, food and energy insecurity, water scarcity, natural disasters, climate change and the impact of the international economic crisis and recession. Unemployment, social unrest, violence and crime fuel not only local problems, but may well drive more internal and external displacement. These factors are becoming ever more inter-linked. In particular, conflict, extreme deprivation and climate change are tending to act more and more in combination; a trend that is likely to intensify.

Clearly, these various drivers will impact different groups and regions in varying ways. As a result, not all displaced people will fall within the mandate of an organization like UNHCR. However, quite some numbers will. This has created a need for the organization, indeed the United Nations as a whole, to review priorities, partners and methods of work.

New dynamics affecting humanitarian action

Moreover, new dynamics affecting humanitarian action challenge the provision of protection. A major one is the erosion of humanitarian space. In many internal conflict situations, the actors do not fit traditional patterns. There is an ever growing diversity of actors with whom humanitarian entities have to relate, both as partners in humanitarian programmes and as interlocutors in conflict situations. As most conflict situations are now internal rather than international, the identity of the principal actors, who are mainly non-State actors, is much less clear.

Another aspect of these new dynamics is increased urbanization. Traditionally, national and international responses to large-scale displacement have focused on the establishment of camps and the provision of food and other forms of assistance to displaced persons in rural areas. But increasingly, refugees and the internally displaced congregate in towns and cities, where they place additional pressure on scarce urban resources and add to the potential for social tension and political violence. Once people have found their way to an urban area, they usually do not return to the countryside, even if the peace and stability has returned to their original place of residence. Indeed, forced displacement has become an important driving force of the urbanization process in parts of the world, without assistance and protection responses necessarily keeping pace.

Statelessness

The global statelessness problem has also grown and become more complex in the decades following the adoption of the 1954 *Convention relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness*, raising questions about how this phenomenon can best be resolved in today's world. Since its creation, the United Nations has endeavoured to address and resolve this international

problem. Yet there may be as many as 12 million people worldwide today who are not considered as nationals by any State under the operation of its law.

Stateless persons struggle to get by with limited access to birth registration, identity documentation, education, health care, legal employment, property ownership, political participation or freedom of movement. Women are at heightened risk of statelessness, which leaves them particularly vulnerable to abuse. Stateless children can be deprived both of their childhoods and the foundation for any hope of a better future. Denial of basic human rights impacts not only the individuals concerned but also society as a whole, in particular because excluding an entire sector of the population may create social tension and significantly impair efforts to promote economic and social development. Moreover, statelessness may lead to forced displacement, in particular where it results from arbitrary deprivation of nationality.

Legal frameworks

In light of this challenging environment, questions arise as to the adequacy and use of the legal frameworks for protection in situations of cross-border and internal forced displacement and statelessness. In recognition of the diversity of reasons why people flee, the refugee concept was broadened in Africa and Latin America to encompass, *inter alia*, both victims of generalized violence and victims of persecution. Many national systems remain, however, pegged to a more limited definition. UNHCR can make its best efforts to promote a flexible approach to the refugee definition. But the fact remains that the current global architecture for refugee protection significantly rests on a definition which some governments have used to restrict the scope of their refugee responsibilities. This is a weakness in the system. There are other weaknesses as well, such as the 1951 Convention's silence on durable solutions.

As for internal displacement, the *Guiding Principles on Internal Displacement* have made a significant contribution to improving the global response to internal displacement, and every opportunity needs to be taken to ensure their incorporation into national legislation. Another important step forward was the adoption by Member States of the African Union, on 22 October 2009, of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*. However, it is still a challenge to anchor protection in ways which will guarantee that States will respect the rights of internally displaced persons.

There also remain some ambiguities in doctrinal questions regarding statelessness and the right to nationality, which have posed difficulties for the prevention of statelessness and the protection of stateless persons. Issues include distinguishing between *de jure* and *de facto* stateless persons, and deciding which procedures can be developed to determine whether an individual is stateless and what benefits should accrue to those who are recognized. UNHCR is organizing a series of expert meetings to address these doctrinal questions, which will result in the issuance of guidelines.

Implementation gaps

In addition to these legal framework issues, there is also in some measure an implementation deficit. Even individuals who meet the definition of a refugee or stateless person in the relevant instruments may not find the protection they need if

the States in which they seek protection are not signatories to those instruments, if they maintain reservations to key provisions or otherwise do not fully implement them. A low rate of accessions to the statelessness conventions is a particularly serious problem in this respect.

Responses

Against this background, developing responses to forced displacement and statelessness gives rise to important questions for Governments and humanitarian actors alike. Can the international community tackle effectively the challenges of forced displacement today within the current legal and normative framework? What can be done to reinforce commitment to existing instruments and reaffirm the fundamental principles which underlie them? Is the current architecture of humanitarian action adequate or are new mandates, institutions, coalitions or partnerships required?

Refugee protection could be enhanced by improved implementation of the 1951 Convention by individual States, including greater acceptance of protection responsibilities on their territories. Further, greater solidarity with refugees is most likely to be forthcoming when it is underpinned by solidarity among States. This can be particularly important in the context of regional displacement challenges. Burden sharing is a unifying principle for the refugee protection system, but the absence of clear parameters for burden sharing is another important omission from the protection architecture of today.

The legal implications of displacement driven by forces other than persecution, human rights violations and war have yet to be seriously thought through. Whatever might be the responses deemed necessary to displacement generated by climate change or other forms of disaster, asylum will have to find its appropriate place. On what legal basis this response is built, and whether additional tools might be required to translate the needs of the displaced into tangible forms of protection, are questions still to be answered.

Statelessness poses numerous legal, operational and policy challenges, for which solutions do not yet exist. But past experience shows that the solutions required are not necessarily complex or costly to implement. Moreover, States often require legal, technical and operational assistance to address gaps in their own capacity, and UNHCR has increased its expertise to provide such support. As a result of growing momentum to address situations of statelessness worldwide, the conditions are now in place for the international community to make significant progress on statelessness at the global level. An important first step would be to achieve wider accession to the international statelessness instruments.

Conclusion

Overall, the international refugee and statelessness regime has stood strong over the past six decades, but there are gaps through which protection sometimes falls. It will be important over the coming period to ensure that this regime is not only strengthened in areas where it is still weak, but also that it is made flexible enough to accommodate the new displacement and statelessness challenges that we inevitably will have to confront.

III. FRAMEWORK FOR DISCUSSIONS AT THE DIALOGUE

The following sections expand upon the major protection gaps and challenges identified above. These will be discussed throughout this year's Dialogue, particularly in the three breakout sessions,

It should be noted that the Dialogue will focus on cross-border displacement and statelessness. Accordingly, the following sections do not address gaps in the protection of internally displaced people.

Breakout Session 1: Gaps in the international protection framework and its implementation

Many protection gaps result from the non-application or inconsistent application of existing standards and norms for the protection of refugees. These so-called 'implementation' or 'operational' gaps have varying origins. They can be linked to resource and capacity issues, political and security concerns, the complexity of particular situations, differences in the way legal provisions are interpreted, a failure to incorporate international obligations into domestic law or, when they are incorporated, to ensure their proper implementation. The first objective of this breakout session is to identify important examples of implementation gaps and assess how they could be better addressed.

There are also gaps in the scope of the existing refugee protection framework. Notwithstanding the continuing relevance of the 1951 Convention and its 1967 Protocol for the international protection of refugees, some contemporary forms of forced displacement may not fit comfortably within their scope.¹ Nevertheless, those affected may have protection needs. Responding appropriately is a humanitarian necessity, but there is no international consensus on how this should be done. The second objective of this session is to identify the main normative gaps in the international protection framework and suggest innovative ways to respond.

Some current challenges

- States' obligations under the 1951 Convention are not always fully incorporated into national legal frameworks
- In an age of heightened political and security concerns, international protection responsibilities are sometimes insufficiently prioritized
- The guidance offered by UNHCR pursuant to its supervisory responsibility for the 1951 Convention is not always followed in practice, resulting, for example, in people being forcibly returned to situations of conflict or serious human rights abuse
- States and other stakeholders can have divergent views as to the meaning and application of 1951 Convention provisions

¹ The 1951 Convention refugee definition requires a well-founded fear of persecution that is linked to one or more of the five Convention grounds. These requirements may not necessarily be met by individuals who leave their countries due to causes that are not man-made, or due to the indiscriminate effects of man-made actions.

- Some States, particularly those in the developing world hosting large numbers of refugees, are unable to implement all of their 1951 Convention obligations owing to resource and capacity constraints
- UNHCR continues to perform refugee status determination in some countries that have ratified the 1951 Convention, in spite of clear State responsibility to identify refugees and asylum-seekers on their territory
- There is a lack of international guidance on meeting the protection needs of people forcibly displaced as a result of climate change, natural disasters and other circumstances that may fall outside the scope of the 1951 Convention
- Many States' responses to situations of forced displacement are *ad hoc*, offering little consistency or predictability
- International refugee instruments do not set norms for matters such as durable solutions.

Questions for discussion

- What are the most important gaps in the international protection framework?
- What are the reasons for gaps in the implementation of refugee instruments and how could these be more effectively addressed?
- To what extent can normative gaps be filled by regional refugee instruments and international human rights law?
- What are examples of good State practice in addressing normative protection gaps? In light of these, how could States better respond at the national, regional and international levels?
- What is the best way to address the silence of the 1951 Convention on important matters such as addressing root causes or durable solutions?

Breakout Session 2: International cooperation, burden sharing and comprehensive regional approaches

The international protection regime is predicated on the principle of international solidarity. The preamble to the 1951 Refugee Convention recalls the international scope and nature of the refugee problem and affirms that a satisfactory solution can only be achieved through international cooperation. Enhancing cooperation and burden sharing is a longstanding priority for UNHCR and is

repeatedly urged by UNHCR's Executive Committee.² This is also referred to in a number of regional and international legal and policy instruments governing asylum and refugee protection.³

States in all regions of the world, including those that are not parties to the 1951 Convention, already share responsibilities with respect to the forcibly displaced in various ways. A number of promising initiatives have been undertaken in recent years to remedy the inequities in burden sharing, such as the creation of resettlement pools, redistribution agreements and emergency evacuation arrangements. But the principles of international cooperation and burden sharing are still not clearly defined and, as a result, are inconsistently applied.

A means of improving burden sharing at the regional level, often with a global dimension, is the development of comprehensive approaches to respond to refugee situations, particularly protracted ones.⁴ There have been several examples in the past, which have met with varying degrees of success.⁵ Comprehensive regional approaches aim to complement rather than replace national asylum efforts and imply coordinated actions to address the full life cycle of displacement within a given region. They are based on cooperation between affected States, UNHCR and a broad range of other stakeholders.

This breakout session is dedicated to brainstorming on how to improve burden-sharing efforts, including through the use of comprehensive regional approaches. It will also be an opportunity to identify good practices in regional and international cooperation and burden sharing, with particular attention to replicability elsewhere.

Some current challenges

- Responsibility for meeting the needs of refugees is not evenly distributed among States – 80 per cent of all refugees reside in the developing world, often in countries which alone lack the required resources to meet all their needs

² Principles of burden sharing, international solidarity and/or cooperation have been referred to in more than thirty UNHCR Executive Committee Conclusions. A complete listing is available in UNHCR's *Thematic Compilation of Executive Committee Conclusions (4th edition)*, August 2009, available at <http://www.unhcr.org/3d4ab3ff2.html>, at pages 38-62.

³ For instance, the Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45, Article II.4; the *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, Part II, para. K; the UN *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312 (XXII), Article 2(2); the EU Council Resolution on burden sharing with regard to the admission and residence of displaced persons on a temporary basis (1995) and EU Council Decision on alert and emergency procedures for burden sharing with regard to the admission and residence of displaced persons on a temporary basis (1995) and the EU Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁴ A majority of all refugees today live in protracted situations, defined as populations of at least 25,000 persons of the same nationality who have been refugees for five years without any imminent prospect of a durable solution.

⁵ Examples include the 1989 Comprehensive Plan of Action for Indo-Chinese Refugees; the 1989 International Conference on Central American Refugees; the 1982 and 1984 International Conference on Assistance to Refugees in Africa; the 1992 Comprehensive Response to the Humanitarian Crisis in the former Yugoslavia; and the 1996-2004 International Conference on Refugees, Returnees, Displaced Persons and Related Migratory Movements in the Commonwealth of Independent States and Relevant Neighbouring Countries.

- There is insufficient understanding or recognition of the impact that hosting refugees can have on States in the developing world, including those not party to the 1951 Convention
- Insufficient burden sharing can have a detrimental impact on the availability of protection to refugees, notably in the context of large-scale influxes, mixed movements, secondary movements, rescue-at-sea operations and protracted situations
- A lack of effective burden sharing can also impact on the relations between refugees and host communities and between States
- While indispensable, the concepts of international cooperation and burden sharing are not clearly defined in international instruments, including the 1951 Convention
- Burden-sharing arrangements tend to be *ad hoc* and unpredictable
- Some displacement situations go beyond the capacity or scope of national asylum systems or bilateral arrangements, and may require a regional response which is not in place.

Questions for discussion

- How could burden-sharing arrangements be made more timely, predictable and effective?
 - What scope is there for reaching consensus on burden-sharing principles and how, if at all, should these be codified?
 - What situations must burden-sharing arrangements address and what should trigger them?
 - How can UNHCR and other actors enhance cooperation between States?
- Where could comprehensive regional approaches be useful?
 - What are the common elements of comprehensive regional approaches?
 - Which stakeholders would be involved and what would be their role?
- What are some examples of effective international cooperation and burden-sharing arrangements, including comprehensive regional approaches?
- What are the immediate next steps to promote enhanced international cooperation and burden sharing?

Breakout Session 3: Reduction of statelessness and protection of stateless persons

The situation of stateless persons can sometimes ‘fall through the cracks’ despite what would appear to be a robust legal framework. The 1954 *Convention relating to the Status of Stateless Persons* sets minimum standards for the treatment of stateless persons. The 1961 *Convention on the Reduction of Statelessness* offers a framework to States to prevent statelessness both at birth and later in life, as well as means to prevent statelessness in the context of State succession. Additionally, a number of international and regional treaties affirm the right of individuals to a nationality.

There are, according to UNHCR statistics, 6.6 million stateless persons worldwide. The true figure may be as high as 12 million. While some regions have larger stateless populations than others, every State and continent is, or has the potential to be, affected by statelessness, which occurs in a variety of ways. In some cases, people become stateless as a result of the technical operation of often complex citizenship laws. In other cases, statelessness arises as a result of discrimination against particular ethnic or social groups, including women and children - for instance, when women marry foreigners or have children out of wedlock in States that do not recognize a mother’s right to pass on her nationality. Whatever the cause, statelessness has a serious impact on the lives of individuals.

This is not to say there has not been (modest at least) progress. The number of States Parties to the 1961 Convention has risen from 29 in 2005 to 37 today. Many States have introduced into their domestic laws provisions to prevent statelessness, including through recognition of the right of women to pass on their nationality to their children. A Strategy Note to Address Statelessness,⁶ issued by UNHCR in March 2010, provides operational guidance to Offices that deal with protection challenges relating to this mandate function. Most recently, a Statelessness Conventions Campaign was launched to encourage accessions to the statelessness conventions.

The objectives of this breakout session are twofold. The first is to identify how increased accessions and improved implementation of the statelessness conventions can assist in overcoming protection gaps for stateless persons. The second is to explore how other measures, such as the use of existing human rights norms, can contribute to preventing and reducing statelessness and protecting the rights of stateless persons.

Some current challenges

- Only 65 States are parties to the 1954 *Convention relating to the Status of Stateless Persons* and only 37 States are parties to the 1961 *Convention on the Reduction of Statelessness* – contrast this with the 147 States which are parties to either the 1951 Convention or its 1967 Protocol
- Statelessness has still not been comprehensively mapped worldwide and many stateless populations lack the identification documents (or entitlements) that would allow this to be remedied
- Many nationality laws fail to include safeguards against statelessness, or contain discriminatory provisions causing statelessness among particular groups

⁶ Available at <http://www.unhcr.org/4b960ae99.html>.

- Few procedures for determining statelessness status exist and where they do, they are often inaccessible and do not contain adequate procedural safeguards to protect the rights of the individuals concerned
- Some weaknesses in the statelessness regime persist – for instance, the lack of a means for enforcing the right to nationality under international law and ambiguities in the definition of statelessness and the application of some directives contained in the conventions
- Low public awareness of statelessness has resulted in a low level of concrete responses to situations of statelessness and the concerns of stateless people

Questions for discussion

- How can increased accessions to the statelessness conventions be achieved in a way which strengthens the protection framework for stateless persons?
- Can good practice examples be identified that have led to the resolution of statelessness situations and contributed to the improved implementation of the statelessness conventions?
- How can the international human rights framework be used to fill some of the protection gaps for stateless persons?
- How can public awareness of statelessness issues be enhanced and the expertise of diverse fields marshalled to improve the protection of stateless persons?
- What other measures can be taken to address statelessness issues?

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