



UNHCR

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

Background Paper

Preserving the Institution of Asylum and Refugee Protection in the context of Counter-Terrorism: the Problem of Terrorist Mobility **5th Special Meeting of the Counter-Terrorism Committee with international, regional and subregional organizations** **29-31 October 2007, Nairobi - Kenya**

I. Introduction

1. The Office of the United Nations High Commissioner of Refugees (UNHCR) welcomes the invitation extended to it to participate as a Keynote Speaker in the 5th Special Meeting of the Counter-Terrorism Committee with international, regional and sub-regional organizations on “*Prevention of Terrorist Movement and Effective Border Security*” to take place in Nairobi from 29-31 October 2007.

2. The meeting, whose theme is “Prevention of Terrorist Movement and Effective Border Security”, focuses on security measures aimed at preventing terrorist movement and establishing effective border security mechanisms, and the areas of complementarity and co-operation among the Counter-Terrorism Committee and international, regional and sub-regional organizations in the identification, promotion and development of international best practices and standards.

3. UNHCR acknowledges that international terrorism poses a threat to the security of all and fully supports all legitimate efforts by States to safeguard national security and to protect, within their jurisdiction, against human rights violations, including those resulting from terrorist acts. UNHCR also recognizes the need for appropriate measures and mechanisms to counter terrorism and secure national safety. Evidently, preventing terrorist mobility and implementing effective border control mechanisms are key parts of this strategy. The role of the Counter-Terrorism Committee and its Executive Directorate in assisting States in these endeavors and to meet their obligations under United Nations Security Council Resolution 1373 (2001) is instrumental. UNHCR reiterates its commitment to work with the Committee and other international, regional and sub-regional organizations on the best ways to assist States in this respect, as envisaged by the United Nations Security Council Resolution 1377 (2001).

4. UNHCR appreciates the importance attached within this framework to the preservation of the institution of asylum and the international refugee protection regime by States, and the opportunity to introduce the fifth session of the meeting entitled “*Preserving the Institution of Asylum and Refugee Protection in the context of Counter-Terrorism: the Problem of Terrorist Mobility*”.

5. This Background Paper provides an overview of the linkages and intersections, as UNHCR sees it, between national security imperatives and the need to preserve the international protection regime in the context of counter-terrorism, and outlines in detail the main elements of UNHCR’s intervention under Theme No. 5 of the Agenda.

II. The meaning, nature and purposes of the institution of asylum and refugee protection

6. In the context of the war against terrorism, UNHCR is increasingly concerned by the growing perception that the institution of asylum is itself inherently a facility to hide or provide safe havens for terrorists. Asylum-seekers and refugees are often themselves stigmatized, vilified, criminalized and even stereotyped as terrorists and can by these reasons be denied admission to territories and access to protection. This perception and the often unwarranted linkage between refugees and terrorists tend to seriously undermine the integrity of the institution of asylum and its nature, and needs to be avoided.

7. The institution of asylum, which derives directly from the right to seek and enjoy asylum as set out in Article 14 (1) of the 1948 Universal Declaration of Human Rights¹, is among the most basic mechanisms for the international protection of refugees.² The grant of asylum is, by its nature, a humanitarian, peaceful and non-political act which provides a structured framework for protection and assistance for those who are fleeing persecution, violence, forced displacement, or serious human rights violations, including situations resulting from terrorist acts or against threats to their security. Asylum is thus incompatible with any acts of violence, terrorism or other criminal, subversive or heinous acts.

8. Under international refugee law, States have the primary duty to preserve and nourish the institution of asylum and ensure that core principles of refuge protection are not eroded, undermined or ignored. UNHCR is not itself a counter terrorism organization. It has been entrusted by the United Nations General Assembly and the UNHCR Statute with the mandate to ensure the protection of refugees and to seek durable solutions to their problems, as well as to assist States in meeting their asylum and refugee obligations under international refugee law³, most notably those contained in the 1951 Convention relating to the Status of Refugees⁴ and its 1967 Protocol⁵, as well as part of customary international law.

9. In relation to the fight against terrorism, a key part of States obligations is precisely to ensure that counter-terrorism measures are not inconsistent with international refugee law, including those aimed at preventing terrorist mobility and ensuring effective border security. This has been underscored in the pertinent resolutions of the United Nations Security Council and General Assembly whereby counter-terrorism efforts must be consistent with States' obligations under international refugee, human rights and humanitarian law⁶.

¹ Under Article 14 (1) of the 1948 Universal Declaration of Human Rights, “*everyone has the right to seek and to enjoy in other countries asylum from persecution*”.

² See Executive Committee Conclusions on International Protection No. 82 (XLVIII), “*Safeguarding Asylum*” (1997); No. 81 (XLVIII), “*General Conclusion on International Protection*” (1997); No. 85 (XLIX), “*International Protection*” (1998); No. 94 (LIII), “*Civilian and Humanitarian Character of Asylum*” (2002); and No. 99 (LV), “*General Conclusion on International Protection*” (2004).

³ As established under the Statute of the Office of the High Commissioner for Refugees (Article 8), Annex to the General Assembly Resolution 428 (V) of 14 December 1950, and subsequent resolutions of the General Assembly and the Economic and Social Council (ECOSOC). See also Article 35 of the 1950 Convention relating to the Status of Refugees and Article II (1) of its 1967 Protocol.

⁴ See 189 U.N.T.S. 150.

⁵ See 606 U.N.T.S. 267.

⁶ See, for example, Security Council Resolutions SC/RES/1269 (1999) of 19 October 1999; SC/RES/1371 (2001) of 28 September 2001; SC/RES/1456 (2003) of 20 January 2003; SC/RES 1535 (2004) of 26 March 2004; and SC/RES/1624 (2005) of 14 September 2005. See also General Assembly Resolutions A/RES/49/60 of 9 December 2004; A/RES/51/210 of 17 December 1996; A/RES/60/43 of 6 January 2006; and A/RES/60/288 of 20 September 2006 on the United Nations Global Counter-Terrorism Strategy and the Plan of Action annexed to it.

III. The intersection between asylum and counter-terrorism: pursuing national safety and security while preserving asylum and refugee protection

10. The institution of asylum and the prevention of terrorist mobility are not mutually exclusive. Today, these two areas are intersecting in many critical ways. Providing effective refugee protection and assuring security can complement each other in creating an environment of safety, dignity and the full enjoyment by all of their basic human rights.

11. Today, some 10 million individuals require protection as refugees. They are victims of human rights abuses and are often among the first victims of terrorism whether at home or abroad. Similarly, UNHCR reiterates its full support to States in combating terrorism and ensuring that there should be no avenues for those supporting or committing terrorist acts to secure access to territory, whether to find a safe haven, avoid persecution or to carry out further attacks. Efforts to combat terrorism can contribute indeed to eliminating some of the core causes of forced displacement, which is often caused by the absence of rule of law and criminal justice, and violations of human rights.

12. However, the concern that UNHCR has is that efforts in combating terrorism have also had adverse impacts on the institution of asylum. In particular, UNHCR is increasingly concerned that a number of otherwise necessary and legitimate policy, legal and operational measures of law enforcement and border security have been applied in a manner that have undermined core principles of refugee protection, often preventing those fleeing persecution from access to asylum and safety.⁷ In practice, some recent examples include:

- (i) A number of States that have been traditionally and generously hosting large numbers of refugees for many years have now adopted more restrictive policies, resulting in border and camp closures, restrictions of movements or detention of refugees.
- (ii) There is also an increasing trend by which asylum-seekers and refugees suspected of supporting terrorist activities are more frequently detained, extradited, returned or expelled without minimum procedural guarantees or judicial review. This may result in denial to persons at risk of persecution of the right to seek asylum, rejection at the borders, or breaches of the principle of non-refoulement.⁸
- (iii) Some States have applied the exclusion clauses in the 1951 Convention relating to the Status of Refugees in a manner which has considerably broadened their scope and narrowed the applicable procedural rights. In particular, UNHCR is concerned that some States apply the exclusion clauses on a collective basis, rather than based on individual assessment.⁹

⁷ See UNHCR *Note on Addressing Security Concerns without Undermining Refugee Protection*, November 2001. See also the *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin to the Commission on Human Rights, Sixty-second Session, E/CN.4/2006/98, 28 December 2005. In his UNGO Press release of 25 September 2006, Mr. Scheinin identified a number of current trends in counter-terrorism measures that entailed a risk of human rights violations, such as “*justifying tightening immigration controls by the risk of terrorism*” or “*going beyond the criminalization of incitement to commit serious crime, by penalizing the “glorification” or “apology” of terrorism, or the publication of information that “could be useful” in the commission of acts of terrorism*”.

⁸ For further guidance on detention of asylum-seekers, see UNHCR *Revised Guideline on the Detention of Asylum-Seekers*, 26 February 1999.

⁹ See UNHCR *Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion under Article 1F of the 1951 Convention relating to the Status of Refugees*, 9 December 2005. In this context, one example is the interpretation by the United States (US) of the “material support” provisions of the US Immigration and Nationality Act. By virtue of this provision, anyone who has provided any form of assistance, however negligible or even under duress, to a group designated as “terrorist” by the US Government will be denied asylum or admission to the US. The

- (iv) Some States have begun to restrict the right to seek asylum, establishing low thresholds to the exception of the principle of *non-refoulement* (Article 33 (2) of the Convention relating to the Status of Refugees) and expanding the scope of crimes deemed to be “particularly serious”.¹⁰ This article is also being used in the eligibility process, often assimilated or used rather as an “exclusion clause” to exclude from refugee status.
- (v) In the absence of a universally agreed definition of terrorism, national security concerns have led to the creation or categorization by States of terrorist-linked offences defined within domestic criminal legislation in broad and ambiguous terms,¹¹ which have the potential to result in injustice and to target non-citizens, including asylum-seekers and refugees. Asylum-seekers could then find themselves labeled as terrorists on account of their political, ethnic or religious affiliations or ties.¹² Likewise, in the context of the fight against terrorism, asylum-seekers and refugees are often the primary targets of racism, racial discrimination, xenophobia and related intolerance.¹³
- (vi) We have confronted situations whereby conventional mandate refugees traveling outside their country of asylum, holding Conventional Travel Documents, are apprehended or detained abroad, without access to due criminal law process, unable to return to their countries of asylum, and subsequently finding themselves in “limbo”.
- (vii) The increasing use of rendition and diplomatic assurances as means of removal of asylum-seekers and refugees, which may amount to refoulement.¹⁴
- (viii) Lastly, some countries have revised their citizenship legislation, broadening the conditions for deprivation of nationality on national security grounds which could lead to situations in which naturalized refugees become stateless.

13. The precedent paragraphs reflect indeed the continuing need to find a proper balance between refugee obligations and national security imperatives. UNHCR believes that in the context in which refugee obligations intersect with the global fight against terrorism, two considerations need to be highlighted. On one hand, UNHCR does not believe that counter-terrorism measures lead necessarily to the erosion of the refugee protection regime. On the contrary, the implementation of counter-terrorism measures in a manner that is consistent with the rule of law and international refugee, human rights and humanitarian law, will not only preserve, but also underpin and expand the institution of asylum. On the other hand, when properly and duly applied, the legal, policy and operational instruments of the institution of asylum and international refugee protection can yield strong dividends for national safety and security.

application of this provision has resulted in the denial of resettlement for UNHCR mandate refugees from Myanmar and Colombia.

¹⁰ This is illustrated by *the United Kingdom Nationality, Immigration and Asylum Act (NIA) 2000*, which states that a crime which carries with it a sentence of two years or more is considered “particularly serious”. The Act categorizes several offences, such shoplifting and graffiti as particular serious crimes, includes crimes committed abroad, and has not time limitation.

¹¹ See the *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Martin Scheinin to the Commission on Human Rights, Sixty-second Session, E/CN.4/2006/98, 28 December 2005, at paragraphs 26-27.

¹² The *United Kingdom Nationality, Immigration and Asylum Act (NIA) 2000* extends the definition of “terrorist” to anyone who has “links” with an international terrorist group. Links are defined as existing if the person supports or assist such group. The ambiguity of such terms could lead to the categorization of asylum-seekers as terrorists without assessing each case on an individual basis.

¹³ See *Update Study of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, Doudou Diène. Human Rights Council, fifth session, Item 2 of the provisional agenda. A/HRC/5/10, 25 May 2007.

¹⁴ See UNHCR *Note on Diplomatic Assurances and International Refugee Protection*, 10 August 2006.

14. In particular, international refugee law provides for the identification and exclusion from refugee status of persons with regards to whom there are serious reasons to believe they have committed heinous acts or serious crimes, who are thus to be considered as undeserving of international protection. Likewise, refugees and asylum-seekers have the duty to comply with the laws and regulations of the host countries. Refugee status does not shield those who have transgressed the law from criminal prosecution, extradition or expulsion in accordance with due process. A more detailed explanation of such instruments is provided in the following paragraphs:

- (i) First, international refugee law provides for the determination and granting of refugee status only upon clearly established criteria. In particular, refugee status may only be granted to those who fulfill the criteria set out in the refugee definition in Article 1A(2) of the 1951 Convention relating to the Status of Refugees, that is, “those who have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion”.¹⁵
- (ii) Secondly, it provides for the identification and exclusion of persons with regard to whom there are serious reasons to consider they have committed heinous acts or serious crimes which render them undeserving of international protection, and ensures that those seeking to abuse or misuse the asylum system are identified and excluded.¹⁶ Persons responsible for terrorist acts who flee legitimate prosecution rather than persecution for the above stated reasons would not normally qualify for refugee status.
- (iii) Thirdly, once refugee status is granted, it may be revoked or cancelled where facts which would have led to exclusion have come to light after refugee recognition, or where a refugee subsequently engages in conduct which may be considered excludable under Article 1F (a) or (b) of the 1951 Convention relating to the Status of Refugees, provided all the exclusion criteria are met.¹⁷
- (iv) Fourthly, under Article 2 of the 1951 Convention relating to the Status of Refugees, persons who have been recognized as refugees as well as asylum-seekers whose claims are being determined are bound to conform to the laws and regulations of the host country. If they do not do so, they may be prosecuted to the full extent of the law. Where necessary, refugees or asylum-seekers may also be subject to police measures aimed at the prevention of crimes, provided such measures are applied in a non-discriminatory manner and with full respect for the principle of proportionality.

¹⁵ See UNHCR *Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992.

¹⁶ Article 1F of the 1951 Convention relating to the Status of Refugees provides that the Convention shall not apply to persons with regard to whom 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 non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; (c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations”. Under this provision, refugee status is denied to persons who would otherwise fall within the scope of Article 1A(2) of the Convention, but who are considered undeserving of international protection in view of the gravity of the acts committed. UNHCR encourages States to apply such provisions scrupulously and restrictively. See UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, and related *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003. See also UNHCR’s *Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion Under Article 1F of the 1951 Convention relating to the Status of Refugees*, 09 December 2005

¹⁷ See UNHCR *Note on the Cancellation of Refugee Status*, 22 November 2004.

- (v) Fifthly, Article 32 of the 1951 Convention relating to the Status of Refugees permits the expulsion of a refugee on grounds of national security or public order, albeit not to a country where the person concerned may be at risk of persecution. This provision also contains procedural guarantees, including the right to be heard and the right to appeal, as well as the right to be allowed a reasonable time within which to seek legal admission to another country.
- (vi) Lastly, the protection against refoulement to a risk of persecution is not absolute. While Article 33(1) of the 1951 Convention relating to the Status of Refugees prohibits the expulsion or return of a refugee to the frontiers of a country where he or she would be at risk of persecution, Article 33(2) provides for exceptions to the principle of non-refoulement on national security grounds or if the refugee has been convicted of a particularly serious crime and constitutes a danger to the community of the host country.¹⁸ Like any exception to human rights guarantees, Article 33 (2) should be applied restrictively and with full respect to the principle of proportionality. The application of this provision also requires an individualized determination by the competent authorities of the host country that the refugee comes within one of the two categories provided for under Article 33(2) of the 1951 Convention, and such decision must be reached in a procedure which ensures full respect for due process of law.¹⁹

15. In view of the above, the interest of UNHCR is therefore, to ensure that in the context of global fight against terrorism, the institution of asylum and its core principles are preserved and not abused. As already stated, for counter-terrorism measures to be effective, they must be consistent with States obligations under international law.²⁰ The proper and diligent implementation by States of such obligations is precisely a way to prevent the abuse of asylum and thus preserve its integrity, and is critical in the intersection between refugee protection and counter terrorism measures in the refugee context.

16. In UNHCR's view, for the purposes of realizing the objectives of national security and safety related to terrorist mobility in the context of refugee protection, national efforts should not be to re-engineer the asylum institution as itself a terrorist control regime or to redact its asylum-oriented characteristics, but rather to ensure the rigorous and diligent implementation of its legal, operational and policy instruments by States.

IV. The problem of terrorist mobility in the refugee context

17. UNHCR fully recognizes that prevention of terrorist mobility and implementation of effective border control mechanisms are key tools in the fight against terrorism. UNHCR also acknowledges the increasing challenge that securing national borders represents to States

¹⁸Article 33(2) of the 1951 Convention provides: "The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." For more detailed information, see E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), at pp. 87–177; See also UNHCR, *Advisory Opinion on the Extraterritorial Scope of the Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, <http://www.unhcr.org/home/RSDLEGAL/45f17a1a4.pdf>.

¹⁹ For more detail on the criteria which must be met for Article 33(2) of the 1951 Convention to apply, see E. Lauterpacht and D. Bethlehem, above footnote 18 at paragraphs 145–192. On the "danger to the security" exception, see also "*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*", in *International Journal of Refugee Law*, January 2002, 14: 141-157.

²⁰ See above footnote No. 6.

nowadays, as well as the adverse impact that these difficulties may have on the institution of asylum and the ability of States to comply with their international refugee obligations, such as securing access to their territory for those in need of protection. Likewise, securing national borders in the context of counter terrorism often intersects with other interrelated phenomena such mixed and irregular migratory movements, to which asylum-seekers and refugees may resort in order to flee persecution. Although not the specific focus of this paper, UNHCR wishes to note that national measures aimed at controlling irregular migration are often part of States' border management tools to prevent terrorist movements.

18. In this context, UNHCR reiterates that while States have a legitimate interest in controlling irregular migration and securing their borders, measures taken to secure airports, sea and land borders should not result in the inability of asylum-seekers and refugees to benefit from international protection²¹. Similarly, as previously stated, States have an obligation under international refugee law to ensure that counter-terrorism measures are not inconsistent with international refugee law, including those aimed at preventing terrorist mobility and ensuring effective border security.

Key principles, obligations and standards of refugee protection relevant to border management and security

19. International refugee law provides important parameters for States undertaking measures to prevent terrorist mobility and ensure effective border security. The present section outlines in a non-exhaustive manner, basic principles, standards and obligations under international refugee law that are most relevant in the context of border management and national security. These considerations should inform States' practice when undertaking measures aimed at preventing terrorist mobility and establishing effective border control mechanisms, in order to ensure that the rights of refugees and asylum-seekers subject by such measures are fully observed, in line with States' obligations to preserve the institution of asylum. In particular, UNHCR urges States' compliance with the following aspects of refugee protection:

- (i) The right to seek and enjoy asylum from persecution.²²
- (ii) Secure admission and non-rejection at the border: it implies the obligation of States to grant access to their territory to asylum-seekers and refugees, which includes non rejection at the border without a fair and efficient refugee status determination procedure.²³

²¹ UNHCR is actively involved in the international debate on "Asylum and Migration Nexus". It has strengthened partnerships and operational coordination with international actors, including the International Maritime Organization (IMO) and States on questions relating to maritime interception of irregular migrants. For further guidance see UNHCR *Interception of asylum-seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, Executive Committee of the High Commissioner's Programme, 18th Meeting of the Standing Committee (EC/50/SC/CPR.17), 9 June 2004. See also Executive Committee Conclusion on International Protection No. 97 (LIV) on "*Protecting Safeguards in Interception Measures*", 2003.

²² This right is enshrined in Article 14 (1) of the 1948 Universal Declaration of Human Rights, whereby "everyone has the right to seek and to enjoy in other countries asylum from persecution".

²³ Admission into asylum procedures may be denied only if the individual concerned has already found protection in another country, and such protection is both available and effective ("first country of asylum") or if the applicant can be returned to a country through which he or she has passed en route to the country where asylum is requested, provided he or she will be re-admitted, will be able to access fair asylum procedures and, if recognized, will be able to enjoy effective protection there ("safe third country"). See *Asylum Processes (Fair and Efficient Asylum Procedures)*, UNHCR Global Consultations on International Protection, 2nd mtg., U.N. Doc. EC/GC/01/12, 31 May 2001; and *Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum*

- (iii) Full respect for the principle of non-refoulement: this principle is the cornerstone of international refugee protection, for which no derogation by States is permitted²⁴. It establishes an obligation on States not to “expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion”.²⁵ This obligation applies to State’s organs or others acting on its behalf and includes deportation, non-admission at the frontier, extradition, or any form of “informal” rendition, irrespective of whether or not they have formally recognized being recognized as refugees²⁶. The only exceptions to the principle of non-refoulement with regard to refugees are those provided for in Article 33(2) of the 1951 Convention.²⁷
- (iv) Access to fair and efficient asylum procedures: States’ obligations to establish fair and efficient asylum procedures derive from the right to seek and enjoy asylum, and their refugee obligations under international and domestic law. They are instrumental in identifying those in need of international protection as well as those undeserving it. Functioning asylum systems require a number of procedural guarantees.²⁸
- (v) The need to apply scrupulously the exclusion clauses stipulated in Article 1F of the 1951 Convention relating to the Status of Refugees and other relevant international instruments. This is critical in ensuring that the integrity of asylum is not abused by the extension of protection to those who are not entitled to it.²⁹
- (vi) Prohibition of punishment for illegal entry or presence:³⁰ asylum-seekers and refugees should be protected against this measure, with may only be resorted to on grounds prescribed by law and in conformity with general norms and principles of international human rights law. Measures such as restriction of movement and detention, or expulsion of refugees for national security reasons can only be exceptionally justified under the terms of Articles 31, 32 and 33 (2) of the 1951 Convention relating to the Status of Refugees.³¹

Systems, UNHCR Global Consultations on International Protection, 3rd mtg., U.N. Doc. EC/GC/01/17, 4 September 2001.

²⁴ Article 42 (1) of the 1951 Convention relating to the Status of Refugees and Article VII (1) of the 197 Protocol list Article 33 as one of provisions of the 1951 Convention to which no reservations are permitted.

²⁵ It is enshrined in Article 33(1) of the 1951 Convention relating to the Status of Refugees, and guaranteed under customary international law.

²⁶ It is particularly relevant for asylum-seekers who are protected against return to the country they have fled until their asylum claim has been determined in a final decision.

²⁷ See above paragraph No. 14 (vi).

²⁸ UNHCR *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001. See also EC/GC/01/17, 4 September 2001.

²⁹ See above paragraph No. 14 (ii).

³⁰ Article 31 of the 1951 Convention relating to the Status of Refugees exempts refugees coming directly from a country of persecution from being punished on account of their legal entry or presence, provided they present themselves without delay to the authorities and show good cause for their legal presence or entry. It also provides that States should not apply to the movements of such refugees restrictions other than those which are necessary and only until such time as their status is regularized, or they obtain admission into another country. In UNHCR’s view, detention of asylum-seekers and refugees may only be resorted to, if necessary to: (a) verify identity; (b) determine the elements on which the refuge claim is based, in cases where they have destroyed their travel and/or identity documents or have been used fraudulently in order to mislead the authorities of the State in which they claim asylum, or (c) protect national security. For further guidance see also Executive Committee Conclusion No. 44 (XXXVII), “*Detention of Refugees and Asylum-Seekers*” (1996); and UNHCR *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999.

³¹ See above paragraphs No. 14 (v) and (vi).

- (vii) Minimum standards of reception and treatment of asylum-seekers and refugees: States should have in place or adopt adequate institutional and legal mechanisms to guarantee and afford basic standards of reception and treatment of asylum-seekers and refugees, on account of their special protection needs.³²

20. Border security measures undertaken by States also incorporate a number of tools and mechanisms, such as identity verification systems, visa requirements, carrier sanctions, interception, or data sharing and management systems, which are also of relevance to refugee protection. The following paragraphs elaborate some key aspects of refugee protection that intersect with those areas, such as identification, registration and documentation of asylum-seekers and refugees, issuance of Conventional Travel Documents to refugees, data protection, and the need to implement asylum sensitive border management systems:

- (i) Identification, registration and documentation of asylum-seekers and refugees: the obligation to provide all refugees with documentation enabling them to establish their identity is recognized in Article 27 of the 1951 Convention relating to the Status of Refugees. These mechanisms are considered as a tool of protection to ensure the legal and physical protection of such persons, which when duly implemented, can also be an important tool to address security concerns and identify those who are in need of protection from those who are not entitled.³³
- (ii) Conventional Travel Documents for refugees: States can issue Conventional Travel Documents (CTD) to recognized refugees, as per Article 28 of the 1951 Convention relating to the Status of Refugees. Only exceptionally a State Party may refuse for “compelling reasons of national security or public order” to issue a CTD to a refugee for the purposes stipulated in the Convention. As any human rights exception, it must be restrictedly applied.³⁴. Absence of adequate national refugee status determination procedures can make difficult the identification of refugees and hence also persons who are entitled to CTDs.
- (iii) Implementation of sensitive border management systems: this is particularly relevant to ensure that border management systems, which are essential in the fight against terrorism, incorporate adequate safeguards to address the specific situation of asylum-seekers and refugees, in particular at airports, land and sea borders, and take full account of States’ international refugee obligations. This should include for instance, mechanisms that allow for the

³² See *Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems*, UNHCR Global Consultations on International Protection, 3rd mtg., U.N. Doc. EC/GC/01/17, 4 Sept. 2001.

³³ See *Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems*, UNHCR Global Consultations on International Protection, 3rd mtg., U.N. Doc. See also Executive Committee Conclusion No. 91 (LII), “*Registration of Refugees and Asylum-seekers*” (2001).

³⁴ The 1951 Convention relating to the Status of Refugees, its Schedule and Annex provide an adequate framework and guidance for States to issue CTDs to refugees, which take into account security concerns. Article 28 of the Refugee Convention established the obligation on States to issue travel documents to refugees lawfully staying in their territory for the purposes of travel outside their territory, “unless compelling reasons of national security or public order”. During the “*Travaux Préparatoires*” to Article 28, it was stressed that “the word “compelling” was to be understood as a restriction upon the words “reasons national security or public order” and that “not every case which would ordinarily fall under the latter concept would therefore justify a refusal of a travel document, but only reasons of a very serious character”. See UNHCR *Note on Travel Documents for Refugees*, 30 August 1978, EC/SCP/10.

identification of asylum-seekers and refugees at borders,³⁵ referral of asylum claims to a central authority³⁶, or training of border officials on general principles of international refugee law, including, *inter alia*, the need to respect the principle of non-refoulement, non-rejection at the borders and implementation of minimum standards of reception and treatment of asylum-seekers and refugees.

- (iv) Data protection and exchange of information: Adequate data and information sharing mechanisms between States are essential in the fight against terrorism. However, States are bound by the principle of confidentiality as regards asylum-seekers and refugees. As a general rule, no information regarding an asylum application, or an individual's refugee status, should be shared with the country of nationality or, in the case of stateless persons, the country of former habitual residence, as this may breach the individual's right to privacy and protection against arbitrary or unlawful interference, as guaranteed under international human rights law³⁷.

21. As reiterated in this background paper, the diligent and proper implementation of the above principles, obligations and standards of refugee protection by States is critical in the intersection between asylum and counter terrorism measures in the refugee context. The implementation of border security measures in a manner that is consistent with the above, will not only preserve, but also underpin and expand the institution of asylum. Moreover, when properly and duly applied, such principles, obligations and standards can then generate strong dividends for national safety and security.

V. A framework for synergy and cooperation

22. The 5th Special Meeting of the Counter-Terrorism Committee is aimed at identifying areas of complementarity and co-operation among the Counter-Terrorism Committee and international, regional and sub-regional organizations in the identification, promotion and development of international best practices and standards in the areas of preventing terrorist mobility and establishing effective border control mechanisms.

23. UNHCR acknowledges the importance that institutional development and capacity building play in the development of these two areas. As regards their intersection with refugee protection, UNHCR has reiterated in this paper the need by States to preserve the institution of asylum and the implementation of border security measures that are consistent with international refugee law. Assisting States in keeping with their obligations under international refugee law is an important area of UNHCR's support to States through namely, institutional development and capacity building, training, advocacy, providing legal and interpretative guidance and expertise on the international refugee law regime³⁸, monitoring

³⁵ See *Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems*, UNHCR Global Consultations on International Protection, 3rd mtg., U.N. Doc.

³⁶ *Asylum Processes: Fair and Efficient Asylum Procedures*, *supra* note 10.

³⁷ See, for example, Article 12 of the Universal Declaration of Human Rights; Article 17 (1) of the International Covenant on Civil and Political Rights; Article 8 of the European Convention on Human Rights and Fundamental Freedoms; Article 11 of the American Convention on Human Rights. Effective measures need to be taken to ensure that information concerning a person's private life does not reach the hands of third parties that might use such information for purposes incompatible with human rights law. See Human Rights Committee, *General Comment No. 16 on Article 17 of the ICCPR*, U.N. Doc. HRI/GEN/1/Rev.1, 8 April 1988, at paragraph. 10.

³⁸ For instance, UNHCR has commented on the impact of a number of United Nations Security Council Resolutions on counter terrorism. See UNHCR's *Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion Under Article 1F of the 1951 Convention relating to the Status of Refugees*, 9 December 2005, and UNHCR's *Note on Addressing Security Concerns without Undermining Refugee Protection*, November 2001

and other interventions as part of UNHCR's advisory role³⁹. For instance, UNHCR provides training to asylum and border staff, assists in establishing proper refugee status determination systems, and developing national asylum legislation and structures, case management systems and identification documents for refugees and asylum-seekers. UNHCR also participates in international and regional fora where it promotes and advocates for the inclusion of relevant principles of international refugee law in various international and regional instruments such as those adopted to combat international terrorism.

24. In the context of refugee protection, UNHCR sees international collaboration, solidarity and partnership as essential platforms to assist States in addressing their national security imperatives while ensuring the preservation of the institution of asylum. This can be disaggregated in several ways including the delivery of material, technical and financial assistance and support, particularly to developing countries. UNHCR has identified a number of areas for complementarity and co-operation between international, regional and sub-regional organizations within their respective areas of competence, which could assist States in these endeavors. Such areas may include, for instance, training and capacity building activities; elaboration of relevant policy regimes; drafting and developing appropriate and differentiated legislation and institutional structures and procedures; developing proper asylum-sensitive entry management systems, data protection and exchange of information mechanisms, and identification, documentation and registration systems; enhancing criminal co-operation and mutual legal assistance; and developing proper refugee-sensitive information strategies.

25. Finally, UNHCR stands ready to continue supporting States in co-operation with international, regional and sub-regional organizations, in particular with the Counter-Terrorism Committee and its Executive Directorate, the United Nations Office on Drugs and Crime (UNODC), ICAO, IMO, WCO and Interpol in the identification, promotion and development of best practices and standards in the areas above identified. UNHCR also calls upon the States and the concerned international, regional and sub-regional organizations, to ensure an integrated and coherent approach and avoidance of duplication of tasks, and consistency with other frameworks of co-operation such as the United Nations Global Counter-terrorism Strategy.

26. In this context, UNHCR has already established close co-operation with the Counter-Terrorism Executive Directorate (CTED). In particular, it has been requested to assess whether States' measures taken to implement certain provisions of United Nations Security Council Resolution 1373 (2001) are in conformity with human rights law, refugee law and humanitarian law. UNHCR have also assisted the CTED in preparation of some of its country visits by sharing its expertise on asylum standards and practices.

27. UNHCR has also participated in the Symposium on "Advancing the Implementation of the United Nations Global Counter-terrorism Strategy" held in June 2007 and has established collaboration with UNODC. UNHCR has participated at the last UNDOC meeting on the "Draft Manual on International Co-operation in Criminal Matters" in April 2007, focused on providing guidance to practitioners on extradition, mutual legal assistance and international co-operation. UNHCR provided extensive comments on the manual on key aspects of refugee law. UNHCR also collaborates with the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedom while countering terrorism, Mr. Martin Scheinin and recently provided comments to his draft report to the next session of the United Nations General Assembly.

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³⁹ See Article 35 of the 1951 Convention relating to the Status of Refugees.

ANNEX
Selected UNHCR Documents relevant to Counter-Terrorism

I. UNHCR Documents

General

- I. UNHCR Key Note Speech “Deterring Terrorist Mobility while Protecting Refugee Mobility”. 5th Special Meeting of the Counter-Terrorism Committee with international, regional and subregional organizations, 29-31 October 2007, Nairobi (Kenya).
- II. UNHCR Background Paper “Preserving the Institution of Asylum and Refugee Protection in the context of Counter-Terrorism: the Problem of Terrorist Mobility”. 5th Special Meeting of the Counter-Terrorism Committee with international, regional and subregional organizations, 29-31 October 2007, Nairobi (Kenya).
- III. UNHCR Note on Addressing Security Concerns without Undermining Refugee Protection, November 2001, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c0b880e0>.

Exclusion

- I. UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, September 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f5857684>.
- II. Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, September 2003, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f5857684>.
- III. UNHCR Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees, 7 Feb. 2006, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43f48c0b41>
- IV. UNHCR Note on the Impact of Security Council Resolution 1624 (2005) on the Application of Exclusion under Article 1F of the 1951 Convention relating to the Status of Refugees, 9 December 2005, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=440ff69441>
- V. UNHCR Advisory Opinion Regarding the International Standards for Exclusion from Refugee Status as Applied to Child Soldiers, letter to J. Wells Dixon Esq. 12 September 2005, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=440eda694>.

Principle of *non-refoulement*

- I. UNHCR’s Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1976 Protocol, 26 January 2007, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4>.

- II. Summary Conclusions: the principle of non-refoulement, Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9–10 July 2000, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b4ec5a64>.
- III. "The Scope and Content of the Principle of *Non-Refoulement*: Opinion", Sir Elihu Lauterpacht and Daniel Bethlehem, 20 June 2001, in "*Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*", edited by Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, Cambridge (2003). available at <http://www.unhcr.org/publ/PUBL/419c75ce4>.
- IV. "The scope and content of the principle of *non-refoulement*: Opinion", Factum of the Intervenor United Nations High Commissioner for Refugees, Suresh v. Minister of Citizenship and Immigration, SCC No. 27790 (Can), 08 March 2001, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3e71bbe24>.
- V. UNHCR Advisory Opinion regarding the scope of the "danger to the security of the country" exception under Article 33(2) of the 1951 Convention relating to the Status of Refugees, 6 January 2006, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43de2da94>.

Asylum

- I. Asylum Processes (Fair and Efficient Asylum Procedures), UNHCR Global Consultations on International Protection, 2nd mtg., U.N. Doc. EC/GC/01/12, 31 May 2001, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b36f2fca>.
- II. Reception of Asylum-Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems, UNHCR Global Consultations on International Protection, 3rd mtg., U.N. Doc. EC/GC/01/17, 4 September 2001, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3bfa81864>.
- III. UNHCR Revised Guidelines on the Detention of Asylum-Seekers, 26 February 1999, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c2b3f844>.
- IV. UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3314>

Cancellation

- I. Note on the Cancellation of Refugee Status, 22 November 2004, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=41a5dfd94>.

Extradition

- I. UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006, available at

<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164>.

- II. The Interface between Extradition and Asylum, Sibylle Kapferer. March 2003, available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3fe846da4>.

Travel Documents

- I. UNHCR Note on Travel Documents for Refugees, 30 August 1978. EC/SCP/10, available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68cce14>.

II. International Instruments

- I. 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 150.
- II. 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267.
- III. Statute of the Office of the High Commissioner for Refugees, Annex to the General Assembly Resolution 428 (V) of 14 December 1950, U.N. Document A/1775 (1950).
- IV. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969, U.N.T.S., no. 14, vol. 691.

III. UNHCR Executive Committee Conclusions of the High Commissioner's Programme

- I. Conclusion No. 81 (XLVIII), "*General Conclusion on International Protection*" (1997), available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c690>.
- II. Conclusion No. 82 (XLVIII), "*Safeguarding Asylum*" (1997), available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c958>.
- III. Conclusion No. 85 (XLIX), "*International Protection*" (1998), available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c6e30>.
- IV. Conclusion No. 91 (LII), "*Registration of Refugees and Asylum-seekers*" (2001), available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3bd3e1d44>.
- V. Conclusion No. 94 (LIII), "*Civilian and Humanitarian Character of Asylum*" (2002), available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3dafdd7c4>.
- VI. Conclusion No. 97 (LIV), "*Protection Safeguards in Interception Measures*" (2003), available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f93b2894>.
- VII. Conclusion No. 99 (LV), "*General Conclusion on International Protection*" (2004), available at
<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=41750ef74>.

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UN High Commissioner for Refugees, *Background Paper on Preserving the Institution of Asylum and Refugee Protection in the Context of Counter-Terrorism: The Problem of Terrorist Mobility*, October 2007:

Erratum:

Pg. 5, para. 14 (iii) should read:

“Thirdly, once refugee status is granted, it may be cancelled where facts which would have led to exclusion have come to light after refugee recognition, or revoked where a refugee subsequently engages in conduct which may be considered excludable under Article 1F(a) or (c) of the 1951 Convention relating to the Status of Refugees, provided all the exclusion criteria are met.”

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