

The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
CCPR	UN Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCRUN	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CUP	Cambridge University Press
ECHR	European Convention for the Protection of Fundamental Rights and Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
ExCom	Executive Committee (UNHCR)
HRC	UN Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICJ	International Commission of Jurists
IJRL	<i>International Journal of Refugee Law</i>
OAS	Organization of American States
OAU	Organization of African Unity
OJ	Official Journal (EU)
PACE	Parliamentary Assembly of the Council of Europe
RSD	Refugee status determination
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	UN General Assembly
UNHCR	UN High Commissioner for Refugees
UNTS	UN Treaty Series

1. INTRODUCTION

The separation of families when people flee persecution and conflict can have devastating consequences on family members' wellbeing and their ability to rebuild their lives. At the moment of flight, they may be forced to leave without being able to ensure or know if their families are safe. Once in safety, refugees and other beneficiaries of international protection are often unaware of the whereabouts of their family. Others have to make difficult decisions about leaving their family behind to find safety in another country.¹

The right to family life and family unity, as set out in international and regional law and outlined in this research paper, applies to all, including refugees. It applies throughout displacement, including at the stage of admission, in reception, in detention, during the refugee status determination process, where expulsion may be threatened, and in the context of durable solutions.

Finding and reuniting with family members can be one of the most pressing concerns of asylum-seekers, refugees, and beneficiaries of complementary forms of international protection. Family reunification in the country of asylum is often the only way to ensure respect for their right to family life and family unity. In an increasingly restrictive environment in many countries, it has become even more difficult for them to realize this fundamental and essential right.

Against this background, this research paper examines:

- The legal basis in international and regional law for the right to family life and family unity, including the principle of non-discrimination;
- The jurisprudence of international and regional courts on the issue;
- States' obligations and responsibilities regarding the right to family life and family unity;
- The varying definitions of family applied in international and regional law and practice, including different persons accepted as able to be family members by international bodies and regional courts;
- The family definition applied by UNHCR; and
- The concept of dependency as an aid to determining family membership.

1.1 Methodology

¹ See generally, UN High Commissioner for Refugees (UNHCR), *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, available at: <http://www.refworld.org/docid/4f55e1cf2.html>, p. 3.

The research for this paper builds on existing UNHCR and other research and documents,² including notably the paper written by Jastram and Newland³ as part of the commemoration of the 50th anniversary of the 1951 Convention relating to the Status of Refugees (1951 Convention)⁴ in 2001 and on the Summary Conclusions⁵ of the expert roundtable held at that time. It sets out applicable international and regional standards and seeks to reflect developments since then in international, regional and national jurisprudence and practice and to identify ways to ensure that respect for the right to family life and family unity of refugees, asylum-seekers and others in need of international protection can be strengthened.

Research for the paper involved analysing relevant international, regional and national jurisprudence and conducting a desk review of academic literature and publications on the issue. This was complemented by responses to a brief questionnaire sent out to numerous UNHCR offices around the world to garner relevant State practice and jurisprudence and by discussions with UNHCR staff, notably at UNHCR headquarters in Geneva and during a mission to the Regional Representation for Northern Europe in Stockholm, where consultations were also held with the Swedish Red Cross and the Swedish Refugee Advice Centre. Thanks also go to the librarians at the law libraries at the University of Cambridge and University of Edinburgh for their assistance. The inputs of those consulted have been essential to enabling this paper to have global scope, although responsibility for any errors ultimately lies with the author.

The study has also benefitted from the valuable contributions made by participants at the expert roundtable on the Right to Family Life and Family Unity in the Context of Family Reunification organized by UNHCR in cooperation with the Odysseus Network in Brussels, Belgium, on 4 December 2017. A provisional draft of this paper was circulated at the meeting for comments. The presentations made by Professor Kees Groenendijk, Radboud University Nijmegen; Gisela Thäter, Swedish Red Cross; and Dr Jason Pobjoy, Blackstone Chambers, were particularly valuable, along with the many useful contributions from the participants more generally.

This research paper draws on and complements the research paper entitled: “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, also to be published in the Legal Protection and Policy Research Series.

²See, for instance, UNHCR, *Note on Family Reunification*, 18 July 1983, available at: <http://www.refworld.org/docid/3bd3f0fa4.html> and other publications listed in the bibliography.

³ K. Jastram and K. Newland, “Family Unity and Refugee Protection”, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, (Feller et al eds), Cambridge University Press (CUP), 2003, available at: <http://www.refworld.org/docid/470a33be0.html>, pp. 555-603.

⁴ UN General Assembly (UNGA), *Convention relating to the Status of Refugees*, 28 July 1951, UN Treaty Series (UNTS), vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

⁵ UNHCR, “Summary Conclusions: Family Unity, Expert roundtable organized by UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001”, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, (Feller et al. eds), CUP, 2003, pp. 604-608, available at: <http://www.unhcr.org/419dbfaf4.pdf> (UNHCR, Summary Conclusions, Family Unity).

2. THE RIGHT TO FAMILY LIFE AND FAMILY UNITY

The expert roundtable on family unity organized by UNHCR in 2001 agreed in its Summary Conclusions:

“A right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance. This right is entrenched in universal and regional human rights instruments and international humanitarian law, and it applies to all human beings, regardless of their status. It therefore also applies in the refugee context... .⁶

The subsections which follow set out the applicable standards affirming the right to family life and family unity under international human rights law, international humanitarian law and international refugee law, as well as those developed in the regional law and practice of the Council of Europe, the European Union (EU), and in the Americas.

2.1 *The right to family life and family unity in international law*

The legal framework on which the right to family life and to family unity is based is contained in numerous provisions in international human rights law, international humanitarian law, and international refugee law, as outlined in more detail below. Jastram and Newland summarize these rights as follows:

“As the foundation, there is universal consensus that, as the fundamental unit of society, the family is entitled to respect and protection. A right to family unity is inherent in recognizing the family as a ‘group’ unit: if members of the family did not have a right to live together, there would not be a ‘group’ to respect or protect. In addition, the right to marry and found a family includes the right to maintain a family life together. The right to a shared family life is also drawn from the prohibition against arbitrary interference with the family and from the special family rights accorded to children under international law.”⁷

2.1.1 *The right to family life and family unity in international human rights law*

The rights set out in international human rights law, including those relating to family life and family unity, are applicable to everyone, including refugees, asylum-seekers, and others in need of international protection.⁸

Under international human rights law, the family is recognized as **the fundamental group unit of society and as entitled to protection and assistance** in Article 16(3) of the 1948 Universal Declaration of Human Rights (UDHR);⁹ in Article 23(1) of the 1966 International

⁶ UNHCR, Summary Conclusions, Family Unity, above fn. 5, para. 1.

⁷ Jastram and Newland, “Family Unity and Refugee Protection”, above fn. 3, pp. 555-603.

⁸ Only a few rights, such as the right to vote, are reserved for citizens under these instruments.

⁹ UN General Assembly (UNGA), *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>. See also UNHCR Executive Committee (ExCom), *Protection of the*

Covenant on Civil and Political Rights (ICCPR);¹⁰ and in Article 10(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) contains similar language,¹² as do the preambles to the 1989 Convention on the Rights of the Child (CRC)¹³ and the 2006 Convention on the Rights of Persons with Disabilities (CRPD).¹⁴

The **right to marry and to found a family** is contained in Article 16(1) of the UDHR and Article 23 of the ICCPR (which adds that the right applies to persons of marriageable age and only with their full and free consent). Article 10(1) of the ICESCR requires States Parties to accord “[t]he widest possible protection and assistance ... to the family ... particularly for its establishment and while it is responsible for the care and education of dependent children”. The Human Rights Committee (HRC), established to monitor States’ implementation of the ICCPR, has clarified that: “[t]he right to found a family implies, in principle, the possibility to ... live together”.¹⁵

In addition, under Article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), States Parties undertake “to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... the right to marriage and choice of spouse”.¹⁶ The 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) also requires States Parties to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations”, including as regards the right to enter into marriage, rights and responsibilities during marriage and at its dissolution, and in all matters relating to children.¹⁷

The **right not to be subject to arbitrary or unlawful interference with privacy, family, home or correspondence** is protected, *inter alia*, by Article 17(1) of the ICCPR¹⁸ and in several corresponding regional instruments as outlined below. Further, Article 17(2) of the ICCPR affirms the right of everyone “to the protection of the law against such interference or attacks”.

Refugee’s Family, 8 October 1999, Conclusion No. 88 (L) - 1999, available at: <http://www.refworld.org/docid/3ae68c4340.html> using the same language.

¹⁰ UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

¹¹ UNGA, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>.

¹² UNGA, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, available at: <http://www.refworld.org/docid/3ae6b3980.html>, Article 44.

¹³ UNGA, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

¹⁴ UNGA, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I, available at: <http://www.refworld.org/docid/4680cd212.html>.

¹⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, available at: <http://www.refworld.org/docid/45139bd74.html>, para. 5.

¹⁶ UNGA, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, UNTS, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html>.

¹⁷ UNGA, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, UNTS, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html>, Article 16(1).

¹⁸ See also similar language in CRC, Article 16; CMW, Article 14.

A second set of rights protecting **the right of the child to remain with his or her family** is contained in the CRC.¹⁹ The CRC sets out some of the strongest protections of the child's right to family unity, as well as States Parties' corresponding obligations.²⁰

Article 7 accords the child "as far as possible, the right to know and be cared for by his or her parents". In Articles 8 and 9 respectively, States undertake to respect the right of the child to "family relations as recognized by law without unlawful interference" and to "ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine this is in the best interests of the child".²¹ Article 18 also recognizes that "[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child", that "[t]he best interests of the child will be their basic concern", and that "States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children".

Article 10 of the CRC requires, *inter alia*, that applications by a child or his or her parents for the purpose of family reunification shall be dealt with "in a positive, humane and expeditious manner". Article 22(1) explicitly concerns asylum-seeking and refugee children and requires States Parties to ensure that such a child "whether unaccompanied or accompanied by his or her parents or by another person, receives appropriate protection and humanitarian assistance". If the child is separated from his or her parents or other family members, States Parties also agree in Article 22(2) to cooperate with efforts to trace the parents or other family members for the purpose of family reunification and "[w]here no parents or other family members can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment". As Rohan has noted: "[I]n the context of refugee children, there is an explicit duty to assist in reunification. The CRC, then, is not merely an explication of children's rights, but also an expression of the rights belonging to the family."²²

Furthermore, the principle of the **best interest of the child** is an overarching human rights principle that must be respected in all matters including those relating to the child's right to family life. Article 3 of the CRC requires States to ensure that "[i]n all actions concerning children ... the best interest of the child shall be a primary consideration".

The best interest principle applies to all children without discrimination, including to unaccompanied and separated children at risk outside their country of origin, and to all actions affecting individual children. The Committee on the Rights of the Child views the

¹⁹ The ICCPR also addresses the protection of the rights of the child, as such or as a member of a family (Article 24).

²⁰ For a detailed analysis, see J.M. Pobjoy, *The Child in International Refugee Law*, CUP, 2017, pp. 19-22; 27-32.

²¹ Article 23 of the CRPD contains similar provisions regarding the right to respect for family life of such persons and regarding the separation of children from their parents.

²² M. Rohan, "Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence", *Chicago Journal of International Law*, 2014, Vol. 15, No. 1, Article 15, available at: <http://chicagounbound.uchicago.edu/cjil/vol15/iss1/15>, p. 354.

principle as a three-fold concept that encompasses a substantive right of a child to have his or her best interest assessed and taken as a primary consideration; an interpretive legal principle; and a rule of procedure that requires the decision-making process to evaluate the possible impact of the decision on the child(ren) concerned.²³

In a Joint General Comment on the general principles regarding the human rights of children in the context of international migration, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and that on the Rights of the Child require States parties to

“ensure that the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases, including in granting or refusing applications on entry to or residence in a country, decisions regarding migration enforcement and restrictions on access to social rights by children and/or their parents or legal guardians, and decisions regarding family unity and child custody, where the best interests of the child shall be a primary consideration and thus have high priority.”²⁴

The Member States of UNHCR’s Executive Committee have stressed that “all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity”.²⁵ UNHCR’s *Guidelines on Determining the Best Interests of the Child* state further:

“The term ‘best interests’ broadly describes the well-being of a child. ... The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:

- the [child’s] best interests must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from parents against their will (Article 9);
- the [child’s] best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).”²⁶

²³ UN Committee on the Rights of the Child (CRC Committee), *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <http://www.refworld.org/docid/51a84b5e4.html>, para. 6.

²⁴ Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and Committee on the Rights of the Child, *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, available at: <http://www.refworld.org/docid/5a2f9fc34.html>, para. 29.

²⁵ UNHCR Executive Committee (ExCom), *Refugee Children*, Conclusion No. 47 (XXXVIII), 12 October 1987, available at: <http://www.refworld.org/docid/3ae68c432c.html>, para. (d). See also UNHCR ExCom, *Refugee Children and Adolescents*, Conclusion No. 84 (XLVIII), 17 October 1997, available at: <http://www.refworld.org/docid/3ae68c68c.html>, para. (a)(i); *Children at Risk*, Conclusion No. 107 (LVIII), 5 October 2007, available at: <http://www.refworld.org/docid/471897232.html>, paras. (b)(v) and (h)(iii).

²⁶ UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: <http://www.refworld.org/docid/48480c342.html>, pp. 14-15, 31-32 and Annex 4 Family Reunification: Checklist to determine if a best interests determination is required.

In terms of how this provision should be interpreted, Smyth writes: “[T]he ‘best interests of the child’ are not only equal to other interests, but in principle precede these interests”.²⁷ According to Werner and Goeman this approach “seems to align best with the intentions of the contracting parties” to the CRC.²⁸

2.1.2 *The principle of non-discrimination*

An overarching principle of international human rights law is the **principle of non-discrimination**. Virtually every major international human rights instrument prohibits discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁹ Non-discrimination is also the subject of dedicated instruments that address particular forms of discrimination and apply the principles of universality, non-discrimination and equality in respect of particular groups, as for example in the ICERD, CEDAW, and CRPD.

Any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights constitutes discrimination. Discrimination also includes incitement to discriminate and harassment.³⁰

The principle of non-discrimination requires that similarly situated individuals should enjoy the same rights and receive similar treatment. This includes measures impacting upon individuals’ right to family life and family unity, regardless of their immigration or other status, except where such distinctions can be objectively justified.

Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation on account of his or her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Direct discrimination also includes detrimental acts or omissions on such a basis where there is no comparable similar situation (e.g. the case of a woman who is pregnant).

²⁷ C. Smyth, “The Best Interests of the Immigrant Child in the European Courts: Problems and Prospects”, in: G.G. Lodder and P.R. Rodrigues, *Het kind in het immigratierecht (The Child in Immigration Law)*, The Hague, Sdu Uitgevers, 2012, pp. 150-151.

²⁸ J. Werner and M. Goeman, “Families Constrained: An analysis of the best interests of the child in family migration policies”, Defence for Children The Netherlands and Adessium Foundation, October 2015, available at: http://www.defenceforchildren.org/wp-content/uploads/2015/12/20151021_DC_Families-constrained.pdf, p. 5.

²⁹ See for example, Article 2 in each of the UDHR, ICCPR, ICESCR, CEDAW, and CRC, as well as Article 1 of the CMW; discrimination is also prohibited under ICERD.

³⁰ Based on UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <http://www.refworld.org/docid/4a60961f2.html>, para. 7. See also in the EU context, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, OJ L 303, pp. 16–22, available at: <http://www.refworld.org/docid/583d783a7.html>, Article 2(2).

Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of rights as distinguished by prohibited grounds of discrimination.³¹

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with human rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.³²

In its General Recommendation on discrimination against non-citizens, the Committee on the Elimination of Racial Discrimination notes:

“Under the [ICERD] Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory.”³³

With regard specifically to children, the CRC Committee also states:

“The principle of non-discrimination, in all its facets, applies in respect to all dealings with separated and unaccompanied children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.”³⁴

2.1.3 *The right to family life and family unity in international humanitarian law*

International humanitarian law contains the most detailed family unification provisions in general international law. The 1949 Fourth Geneva Convention devoted considerable attention to the problems of “families dispersed owing to the war”.³⁵ In addition to provisions

³¹ These paragraphs are drawn from CESCR, *General Comment No. 20*, above fn. 30, para. 10. See also CESCR, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, available at: <http://www.refworld.org/docid/43f3067ae.html>, paras. 1 and 10-14.

³² Drawn from CESCR, *General Comment No. 20*, above fn. 30, para. 13. See also in relation to children in the context of migration, CMW and CRC Committees, *Joint General Comment on the general principles regarding the human rights of children in the context of international migration*, above fn. 24, paras. 21-26 on the principle of non-discrimination.

³³ UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on discrimination against non-citizens*, 1 October 2002, available at: <http://www.refworld.org/docid/45139e084.html>, para. 4. See also CEDAW, Articles 1 and 2.

³⁴ UN Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>, para. 18.

³⁵ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <http://www.refworld.org/docid/3ae6b36d2.html>, Article 26. See also, Jastram and Newland, “Family Unity and

aimed at maintaining family unity during internment or evacuation,³⁶ the Fourth Geneva Convention provides for mechanisms such as family messages, tracing of family members, and registration of children³⁷ to enable family communication and, “if possible”, reunification.

By the time of the first Additional Protocol in 1977, States were willing to strengthen their responsibility towards separated families by accepting the obligation to facilitate family reunification “in every possible way”,³⁸ while the second Additional Protocol states that “[a]ll appropriate steps shall be taken to facilitate the reunion of families temporarily separated”.³⁹

2.1.4 *The right to family life and family unity in international refugee law*

As for international refugee law, the 1951 Convention relating to the Status of Refugees does not specifically refer to the family. The Final Act of the Conference of Plenipotentiaries at which the Convention was adopted nevertheless agreed a specific and strongly worded recommendation:

“Considering that the unity of the family ... is an essential right of the refugee and that such unity is constantly threatened, [it] [r]ecommends Governments to take the necessary measures for the protection of the refugee’s family, especially with a view to ensuring that the unity of the family is maintained ... [and for] the protection of refugees who are minors, in particular unaccompanied children and girls, with particular reference to guardianship and adoption”.⁴⁰

Noting that “refugee law is a dynamic body of law”, the 2001 Summary Conclusions on family unity state that it “is informed by the broad object and purpose of the 1951 Convention and its 1967 Protocol,⁴¹ as well as by developments in related areas of international law, such as international human rights law and jurisprudence and international humanitarian law”.⁴²

Refugee Protection”, above fn. 3, p. 576. With regard to international, regional and national practice in the development of customary international law as regards respect for the right to family unity and to family life, see ICRC, Customary International Humanitarian Law Database, “Practice Relating to Rule 131, Treatment of Displaced Persons, Section C. Respect for family unity”, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter38_rule131_sectionc and ICRC, Customary International Humanitarian Law Database, “Practice Relating to Rule 105, Respect for Family Life”, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule105.

³⁶ Fourth Geneva Convention, 1949, Articles 82 and 49 respectively.

³⁷ Fourth Geneva Convention, 1949, Articles 25, 140, and 50 respectively.

³⁸ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: <http://www.refworld.org/docid/3ae6b36b4.html>, Article 74.

³⁹ ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: <http://www.refworld.org/docid/3ae6b37f40.html>, Article 4(3)(b).

⁴⁰ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <http://www.refworld.org/docid/40a8a7394.html>. For more on the drafting history, see A. Edwards, “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum”, *International Journal of Refugee Law (IJRL)*, vol. 17, no. 2 (2005), pp. 293–330, at p. 309.

⁴¹ UNGA, *Protocol Relating to the Status of Refugees*, 31 January 1967, UNTS, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁴² UNHCR, Summary Conclusions, Family Unity, above fn. 5, para. 3.

Among the documents evidencing State practice and contributing to this development are the numerous Conclusions of UNHCR's Executive Committee,⁴³ which represent the agreement of nearly 100 countries and express their collective international expertise on refugee matters, including on issues related to family life and family unity. Three Conclusions are particularly relevant and concern family reunion,⁴⁴ family reunification⁴⁵ and the protection of the refugee's family,⁴⁶ but there are many others.⁴⁷ As UNHCR has also noted, the Recommendation of the Final Act has been "observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol".⁴⁸

Other provisions of the 1951 Convention that may be relevant include Article 3, which requires States Parties to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin.

With regard to the question of rights which may attach to pre-existing marriages, Article 12 of the 1951 Convention concerns personal status and provides:

"Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by the Contracting State, subject to compliance, if this be necessary, with the formalities required by the laws of that State, provided that the right in question is one which would have been recognized by the law of that State had he [or she] not become a refugee."

As Edwards notes: "Although Article 12 does not specifically deal with the issue of family unity (it deals with personal status) and it is limited to the domestic law of each State, it may be a helpful, albeit not incontestable, tool to reinforce arguments in favour of family unity, especially its focus on recognising pre-existing rights attaching to marriage."⁴⁹

In addition, Article 25 of the 1951 Convention concerning administrative assistance could be relevant in the family reunification context. Article 25(1) requires Contracting States in which a refugee is residing to "arrange that such assistance be afforded to him by their own authorities or by an international authority", "[w]hen the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot

⁴³ See generally, UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th edition, June 2014, available at: <http://www.refworld.org/docid/5698c1224.html>, pp. 223-229.

⁴⁴ UNHCR ExCom, *Family Reunion*, Conclusion No. 9 (XXVIII), 12 October 1977, available at: <http://www.refworld.org/docid/3ae68c4324.html>.

⁴⁵ UNHCR ExCom, *Family Reunification*, Conclusion No. 24 (XXXII), 21 October 1981, available at: <http://www.refworld.org/docid/3ae68c43a4.html>.

⁴⁶ UNHCR ExCom, *Protection of the Refugee's Family*, Conclusion No. 88, above fn. 9.

⁴⁷ See, for example, ExCom Conclusions Nos. 1, para. (f); 15 para. (e); 22(II)(B)(2); 47 paras. (d), (h), and (i); 74 para. (gg); 84 para. (b); 85 paras. (k), (u), (v), (w), and (x); 91 para. (a); 93 para. (b)(iv); 100 para. (d); 101 para. (n); 103 para. (n); and 104 paras. (i)(iii) and (n)(iv), 105 para. (n); 107 paras. (b)(vi), (b)(vii), (c)(i), (g)(vii), (h)(iii) and (xviii); and 110, as referred to in UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, above fn. 43.

⁴⁸ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV.3, available at: <http://www.refworld.org/docid/4f33c8d92.html>, para. 182.

⁴⁹ Edwards, "Human Rights, Refugees, and the Right 'To Enjoy' Asylum", above fn. 40, p. 310.

have recourse". Such a right could include the refugee's right to family unity. Article 25(2) refers to "such documents or certifications as would normally be delivered to aliens by or through their national authorities", which it has been explained may include documentation needed to enable the refugee "to perform the acts of civil life", including e.g. "marriage, divorce, adoption, ... etc."⁵⁰ Article 25(3) affirms that "[d]ocuments or certifications so delivered ... shall be given credence in the absence of proof to the contrary" and Article 25(4) that any fees charged for these services "shall be moderate".

Arguably, if refugees are to exercise their right to family unity, they can be seen as entitled to assistance (at moderate cost) regarding the issuance of such documents or certification concerning their family members as are needed for them to enjoy this right. This could include documents or certification, whether on the basis of an affidavit or sworn statement, issued in lieu of the original document by the national authority of the refugee's country of residence or by an international authority, including notably documentation issued by UNHCR. At least Article 25 could be taken to require States to show greater readiness to give such documents "credence in the absence of proof to the contrary".

2.2 *The right to family life and family unity in regional law*

The rights related to family life and family unity under international law are mirrored in regional human rights provisions.

The **family as the fundamental group unit of society** and as entitled to protection and assistance is recognized in the Americas in Article 17(1) of the 1969 American Convention on Human Rights (ACHR),⁵¹ which also affirms that "the family is entitled to protection by society and the State". In Europe, similar provisions are contained, for instance, in Article 16 of the 1961 European Social Charter and of the 1996 Revised European Social Charter.⁵² In Africa, Article 18 of the 1981 African Charter on Human and Peoples' Rights likewise affirms that the family is "the natural unit and basis of society" and further requires States Parties to protect and assist the family.⁵³ Article 18 of the 1990 African Charter on the Rights and Welfare of the Child echoes this language, affirming in addition that the family "shall enjoy the protection and support of the State for its establishment and development".⁵⁴

The **right to marry and to found a family** is confirmed, for instance, in Article 17(2) of the ACHR, Article 15(2) of the Additional Protocol to the ACHR on Economic, Social and Cultural

⁵⁰ Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2 Annex, 1950, pp. 43-44. See also Robinson, *Commentary on the Refugee Convention 1951 (Articles 2-11, 13-37)*, 1997, p. 109; A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, OUP, 2011, p. 1143.

⁵¹ Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html>.

⁵² Respectively, Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, available at: <http://www.refworld.org/docid/3ae6b3784.html>, Article 19(6), and Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <http://www.refworld.org/docid/3ae6b3678.html>, Article 19(6).

⁵³ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html>.

⁵⁴ OAU, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html>.

Rights,⁵⁵ and Article 12 of the 1950 European Convention for the Protection of Fundamental Rights and Freedoms (ECHR).⁵⁶

The right not to be subject to arbitrary or unlawful interference with privacy, family, home or correspondence is protected, for instance, by Article 8 of the 1950 ECHR which affirms:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

“2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The EU Charter of Fundamental Rights contains a similar provision in Article 7, while Article 9 guarantees the right to marry and the right to found a family.⁵⁷

In the Americas, the protection of the family and its members is also guaranteed in Article 11(2) of the ACHR which encompasses the prohibition of arbitrary or abusive interference with the family, while Article 19 determines the protection of the rights of the child by the family, society, and State.

As for **children’s rights**, the African Charter on the Rights and Welfare of the Child builds on the rights set out in the CRC and specifies a number of resulting State obligations. Article 19 affirms that “[e]very child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents” and reiterates the language of Article 9 of the CRC on the separation of children from their parents. The Charter protects the child’s privacy and family home and gives the child the protection of the law against such interference (Article 10).

In addition, the African Charter contains provisions specifically relevant to refugees and other displaced persons. It requires States Parties “to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family” (Article 23(2)). Further, the Charter entitles any child “permanently or temporarily deprived of his family environment for any reason ... to special protection and assistance” and requires States to “take all necessary measures to trace and re-unite children with parents or relatives where

⁵⁵ OAS, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (“Protocol of San Salvador”), 16 November 1999, A-52, available at: <http://www.refworld.org/docid/3ae6b3b90.html>, Article 15(2).

⁵⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

⁵⁷ EU, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>.

separation is caused by internal and external displacement arising from armed conflicts or natural disasters” (Article 25).

Rights set out in CRC have also been enshrined in Europe in the EU Charter of Fundamental Rights. Article 24.2 incorporates the best interest principle, while Article 24.3 states: “Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”⁵⁸

The 2003 EU Directive on the Right to Family Reunification⁵⁹ goes further still in setting out a **right to family reunification** of third country nationals residing lawfully in the territory of the Member States, including refugees. This right is extended to nuclear family members and Member States *may* extend this right more broadly to other family members (Article 4).⁶⁰ As for the 2003 EU Long-Term Residents Directive,⁶¹ this contains provisions to enable family members to settle in another EU Member State with a long-term resident in order to preserve family unity. Initially it only applied to those lawfully resident in the EU for over five years, but it was amended in 2011 to extend its scope to beneficiaries of international protection.⁶²

2.3 State obligations and responsibilities regarding the right to family life and family unity

States have a range of responsibilities and obligations they need to meet if they are to ensure that the rights of refugees and other beneficiaries of international protection to family life and family unity are respected, protected and fulfilled. As the 2001 Summary Conclusions on family unity state:

“Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated. Refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities

⁵⁸ See also generally on international, European and German standards, UNHCR Deutschland, “Begriff der Familie im Kontext von Familienzusammenführungen”, *Asyl Magazin*, 2017/4, available at: https://familie.asyl.net/fileadmin/user_upload/pdf/AM17-4_thema_famzus.pdf, pp. 138–144.

⁵⁹ Council of the EU, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification* (Family Reunification Directive), OJ L. 251/12-251/18, 2003/86/EC, 3 October 2003, available at: <http://www.refworld.org/docid/3f8bb4a10.html>. It applies in all EU States except Denmark, Ireland, and the UK, which “opted out” of the Directive.

⁶⁰ For further details see UNHCR, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, research paper by F. Nicholson, Protection Policy and Legal Advice Research Series, December 2017, available at: <http://www.refworld.org/docid/5a3cebbe4.html>, Section 3.2.

⁶¹ Council of the EU, *Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who are Long-Term Residents*, 23 January 2004, OJ L. 16-44, 2003/109/EC, available at: <http://www.refworld.org/docid/4156e6bd4.html> (Long-Term Residents Directive).

⁶² Council of the EU, *Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, 19 May 2011, OJ L. 132/1-132/4, 2011/51/EU, available at: <http://www.refworld.org/docid/532bfaaf4.html>. For more on the right to family reunification generally see UNHCR, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, above fn. 60.

for enjoying that right elsewhere. Equally, deportation or expulsion could constitute an interference with the right to family unity unless justified in accordance with international standards.”⁶³

The scope for State action and how this may be constrained is at issue, for instance, in the contexts of admission, stay, expulsion, determination of refugee status and international protection needs, and durable solutions. In these, as in other contexts, States must refrain from discriminatory actions, whether direct or indirect, that undermine the enjoyment of the right to family life and family unity (duty to respect); to prevent and protect against certain actions by private actors (duty to protect); and to take positive pro-active steps to ensure the equal enjoyment of these rights (obligation to fulfil).⁶⁴ In order to correct situations of inequality and discrimination, a State may also be required to implement temporary special measures deemed necessary in order to (re)establish equality.⁶⁵

As the 2017 Joint General Comment by the Committee on the Rights of All Migrant Workers and Members of their Families (CMW Committee) and the CRC Committee states:

“Protection of the right to a family environment frequently requires that States not only refrain from actions which could result in family separation or other arbitrary interference in the right to family life, but also take positive measures to maintain the family unit, including the reunion of separated family members.”⁶⁶

In terms of jurisprudence on the nature and scope of States’ obligations in the context of the right to family life and family unity at the regional level, the European Court of Human Rights (ECtHR) has on numerous occasions affirmed that “although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective ‘respect’ for family life”.⁶⁷

In *Marckx v. Belgium*, for instance, the ECtHR has ruled that ensuring respect for family life “implies an obligation for the State to act in a manner calculated to allow these ties to develop normally” and “to allow those concerned to lead a normal family life”.⁶⁸ The principle that the State may be required affirmatively to promote family life has been repeated, if not extensively developed, in other cases, as noted in more detail below. As the Court determined in *Gül v. Switzerland*:

⁶³ UNHCR, Summary Conclusions, Family Unity, above fn. 5, para. 5.

⁶⁴ See generally, International Commission of Jurists (ICJ), *Migration and International Human Rights Law*, 2014, Practitioners’ Guide No. 6, updated edition, available at: <http://www.refworld.org/docid/4dcbac872.html>, pp. 45-46.

⁶⁵ Article 2(2) ICERD; Article 4, CEDAW.

⁶⁶ CMW and CRC Committees, *Joint General Comment on the general principles regarding the human rights of children in the context of international migration*, above fn. 24, para. 27.

⁶⁷ *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Applications nos. 9214/80; 9473/81; 9474/81, Council of Europe: European Court of Human Rights (ECtHR), 28 May 1985, available at: <http://www.refworld.org/docid/5183e6b34.html>, para. 67; many subsequent judgments; and generally, ECtHR, *Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life*, 31 December 2016, available at: <http://www.refworld.org/docid/5a016ebe4.html>, pp. 8-9.

⁶⁸ *Marckx v. Belgium*, Application No. 6833/74, ECtHR, 13 June 1979, available at: <http://www.refworld.org/docid/3ae6b7014.html>, paras. 45 and 31.

“[T]he boundaries between the State’s positive and negative obligations under this provision [Article 8] do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts [involving the negative obligation not to deport and the positive obligation to admit] regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.”⁶⁹

In practice, the ECtHR accords States a wide margin of appreciation in this area with the result that the balancing of these different interests tends to limit the family reunification possibilities for migrants.⁷⁰ As Lambert also notes: “Family reunification remains disputed as a human right precisely because it requires States to take positive steps.”⁷¹

Nevertheless, the particular situation of refugees and beneficiaries of complementary protection, the requirement to take account of their vulnerability, and the growing appreciation of what ensuring the best interests of the child are a primary concern means in practice in this context are among factors that have constrained States’ discretion.

2.4 Conclusion: The right to family life and family unity

In conclusion, international human rights law, international humanitarian law and international refugee law and jurisprudence, together with related regional legal standards and jurisprudence, clearly affirm the right to family life, which logically leads to a right to family unity, including for refugees, beneficiaries of complementary protection and other persons of concern to UNHCR. As the 2001 Summary Conclusions on family unity affirm: “The obligation to respect the right of refugees to family unity is a basic human right which applies irrespective of whether or not a country is a party to the 1951 Convention.”⁷²

The research paper entitled “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification” examines further the right to family reunification, which can be derived from the right to family life and family

⁶⁹ *Gül v. Switzerland*, Application no. 23218/94, ECtHR, 19 February 1996, available at: <http://www.refworld.org/docid/3ae6b6b20.html>, para. 38, reiterated in numerous subsequent judgments such as *Jeunesse v. Netherlands*, Application no. 12738/10, ECtHR Grand Chamber, 3 October 2014, available at: <http://www.refworld.org/docid/584a96604.html>, para. 106.

⁷⁰ See generally S. Starr and L. Brilmayer, “Family Separation as a Violation of International Law”, *Berkeley Journal of International Law*, 21(2), 2003, available at: <http://scholarship.law.berkeley.edu/bjil/vol21/iss2/3/>, pp. 213-287 at p. 221; H. Lambert, “The European Court of Human Right and the Right of Refugees and Other Persons in Need of Protection to Family Reunion”, *IJRL*, 11 (3) 1999, pp. 427-450; H. Lambert, “Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe”, in *Research Handbook on International Law and Migration*, V. Chetail and C. Bauloz (eds), Edward Elgar Publishing, 2015.

⁷¹ H. Lambert, “Family Unity in Migration Law”, above fn. 70.

⁷² UNHCR, Summary Conclusions, Family Unity, above fn. 5, para. 4.

unity in international law and which is explicitly recognized as a right in certain regions of the world.⁷³

3. THE DEFINITION OF FAMILY

The 2001 Summary Conclusions on family unity acknowledge:

“International human rights law has not explicitly defined ‘family’ although there is an emerging body of international jurisprudence on this issue which serves as a useful guide to interpretation. The question of the existence or non-existence of a family is essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, and economic and emotional dependency factors. For the purposes of family reunification, ‘family’ includes, at the very minimum, members of the nuclear family (spouses and minor children).”⁷⁴

The subsections which follow set out relevant jurisprudence and guidance provided at international and regional level and (very briefly) how “family” is defined in the asylum context at national level.⁷⁵ They seek to show how States can develop a clearer definition of the term “family” and who may be included in it in its different permutations, so as to take into account international standards and the particular situation of those forced to flee their homes who may become separated from their families.

3.1 *The concept of family in international law and practice*

International human rights bodies and UNHCR’s Executive Committee have taken a broad approach to the question of the definition of the family and who can be considered a family member, including those beyond the close family.⁷⁶

The **Human Rights Committee** (HRC) has affirmed in its General Comment No. 16: “Regarding the term ‘family’, the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.”⁷⁷

⁷³ See UNHCR, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, above fn. 60.

⁷⁴ *Ibid.*, para. 8.

⁷⁵ For more on the family definition applied in the context of family reunification, see UNHCR, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, above fn. 60, section 4.1.

⁷⁶ For an overview, see also F. Banda and J. Eekelaar, “International Conceptions of the Family”, *International and Comparative Law Quarterly*, vol. 66, October 2017, pp. 833–862.

⁷⁷ HRC, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <http://www.refworld.org/docid/453883f922.html>, para. 5. See, also, HRC, *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, above fn. 15, para. 2.

In its General Comment No. 19, the HRC indicates further:

“[T]he concept of the family may differ in some respects from State to State, and even from region to region within a State, and ... it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. ... Where diverse concepts of the family, “nuclear” and “extended”, exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.”⁷⁸

In its decision in *Ngambi and Nébol v. France*,⁷⁹ the Human Rights Committee recalls the language its General Comment No. 16⁸⁰ and goes on to determine:

“The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations.”⁸¹

In that particular case, the HRC found the documentation attesting to the family relationship was fabricated. In the case of *Winata v. Australia*, however, it clearly accepted the longstanding relationship between the applicants, which had resulted in the birth of a son, as a “de facto relationship akin to marriage”.⁸²

The **Committee on the Rights of the Child** has expanded further on the term “family”, stating that it “must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom” in accordance with Article 5 of the CRC.⁸³ Furthermore, the Committee has stated that the protections under Article 9 of the CRC concerning the separation of children from their parents also extend “to any person holding custody rights, legal or customary

⁷⁸ HRC, CCPR General Comment No. 19: Article 23 (The Family) Protection of the family, the right to marriage and equality of the spouses, above fn. 15, para. 2. See also HRC, CCPR General Comment No. 28: Article 3 (The equality of rights between men and women), 29 March 2000, CCPR/C/21/Rev.1/Add.10, available at: <http://www.refworld.org/docid/45139c9b4.html>, para. 27.

⁷⁹ *Benjamin Ngambi and Marie-Louise Nébol v. France*, CCPR/C/81/D/1179/2003, UN HRC, 16 July 2004, available at: <http://www.refworld.org/docid/4162a5a46.html>.

⁸⁰ See text at fn. 77 above.

⁸¹ *Ibid.*, para. 6.4.

⁸² *Hendrick Winata and So Lan Li v. Australia*, CCPR/C/72/D/930/2000, UN HRC, 16 August 2001, available at: <http://www.refworld.org/docid/3f588ef67.html>, para. 2.1.

⁸³ CRC Committee, *General Comment No. 14*, 2013, above fn. 23, para. 59. See also CMW and CRC Committees, *Joint General Comment on the general principles regarding the human rights of children in the context of international migration*, above fn. 24, para. 27.

primary caregivers, foster parents and persons with whom the child has a strong personal relationship".⁸⁴

Article 4 of the 1990 **Convention on the Protection of the Rights of All Migrant Workers and Members of their Families** includes both married spouses and spouses having a relationship similar to marriage and acknowledges the concept of dependency as including not only dependent children but also other dependants, as follows:

"For the purposes of the present Convention the term 'members of the family' refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned."⁸⁵

In the refugee context, **UNHCR's Executive Committee** has called on countries of asylum to apply "liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family".⁸⁶ The UNHCR *Handbook and Procedures and Criteria for Determining Refugee Status* states: "As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household."⁸⁷

In **international humanitarian law**, the (non-binding) *Commentary to the Additional Protocols* of the Geneva Conventions of 1949 states: "In the narrow sense, the family covers persons related by blood and living together as one household." The *Commentary* continues:

"[I]t would be wrong to opt for an excessively rigid or precise definition: common sense must prevail. Thus the word 'family' here of course covers relatives in a direct line – whether their relationship is legal or natural – spouses, brothers and sisters, uncles, aunts, nephews and nieces, but also less closely related relatives, or even unrelated persons, belonging to it because of a shared life or emotional ties."

The *Commentary* concludes: "In short, all those who consider themselves and are considered by each other, to be part of a family, and who wish to live together, are deemed to belong to that family."⁸⁸

⁸⁴ Ibid., para. 60.

⁸⁵ CMW, Article 4.

⁸⁶ ExCom Conclusions No. 24, above fn. 45, para. 4 and No. 88, para. b(ii), above fn. 9.

⁸⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, above fn. 48, para. 185.

⁸⁸ Secretariat of the Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Family Reunification: Overview of Policies and Practices in IGC Participating Countries*, Geneva, Switzerland, March 1997, p. 357, cited in UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: <http://www.refworld.org/docid/4ae9aca12.html>, para. 14. (The 1987 Commentary itself is available at: http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf.)

3.2 *The concept of family applied at regional level*

At regional level the concept of family has been clarified and developed in particular in EU instruments, European jurisprudence and that of the Inter-American Court of Human Rights (IACtHR). This section looks generally at who may qualify as a family member beyond a married couple and their unmarried minor children and in particular as to how regional instruments have interpreted the concept of dependency. Section 3.3, which follows, provides further information on specific individuals accepted by regional courts as able to be family members.

In the EU, different Directives contain slightly different definitions of who may be a family member for the purposes of the Directive concerned. The focus is very much on close family members, that is, spouses and minor unmarried children, although dependent parents and dependent unmarried children are in some circumstances included.

The 2003 **EU Family Reunification Directive**⁸⁹ states that EU Member States:

- *shall* authorise the entry and residence for family reunification of the following family members: the sponsor's spouse; the minor children of the couple (i.e. unmarried children below the legal age of majority in the EU country concerned), or of one member of the couple, where he or she has custody and the children are dependent on him or her, including in each of these cases adopted children (Article 4(1)), and
- *may* authorize, under certain conditions, the family reunification of: first-degree ascendants in the direct line (father and mother of the foreign national) where they are dependent on them and do not enjoy proper family support in the country of origin); adult unmarried children where they are objectively unable to provide for their own needs on account of their state of health (Article 4(2)); and unmarried partners, their unmarried minor children, including adopted children, and their adult unmarried children who cannot provide for their own needs on account of their state of health (Article 4(3)).

Polygamy is not recognized: only one spouse can benefit from the right to reunification and EU Member States may limit the family reunification of minor children of a further spouse (Article 4(4)). EU countries *may* also require the non-EU national and his or her spouse to be of a minimum age (subject to a maximum of 21 years), before they can exercise the right to family reunification (Article 4(5)).

By way of derogation, where a child aged over 12 years arrives independently from the rest of his or her family, EU Member States *may*, before authorizing entry and residence under the Directive, verify whether the family member meets integration conditions (Article 4(1)). Member States *may*, in addition, require applications for the family reunification of minor

⁸⁹ EU *Family Reunification Directive*, above fn. 59, Article 4.

children to be submitted before the age of 15, *if* this was provided for in existing legislation on the date of the implementation of the Directive (Article 4(6)).⁹⁰

The 2003 **Long-term Residents Directive**,⁹¹ which is intended to ensure long-term EU residents enjoy a “set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union”, was extended to apply to beneficiaries of international protection in 2011.⁹² It applies the definition of family contained in the Family Reunification Directive and provides that when a long-term resident exercises his or her right to reside in another EU Member State and when the family was already constituted in the first Member State, the second Member State *shall* authorize family members as defined in Article 4(1) of the Family Reunification Directive (see above) to accompany or join him or her, while it *may* authorize other family members to do so.

The 2013 **recast Reception Conditions Directive**⁹³ defines family members as comprising the asylum-seeker’s spouse, including “his or her unmarried partner in a stable relationship”, the couple’s unmarried minor children, whether “born in or out of wedlock or adopted”, and, when the asylum-seeker is an unmarried minor child, that child’s father, mother or another adult responsible for him or her. It also requires that “the family already existed in the country of origin” and that the family member be already present in the same country as the asylum-seeker (Article 2(c)).

The 2004 EU **Free Movement Directive**⁹⁴ defines family members more broadly as comprising the spouse; the partner in a registered partnership accepted as equivalent to marriage in the Member State concerned; direct descendants under the age of 21 and dependants (including of the spouse or partner); and dependent direct relatives in the ascending line (including of the spouse or partner) (Article 2(2)).

As for the European Commission’s **Proposal for a Regulation to replace the Qualification Directive** presented in July 2016, this affirms:

“The notion of family members should take into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child. It should also reflect the reality of current migratory trends, according to which applicants often arrive to the territory of the Member States after a prolonged

⁹⁰ The practice regarding these issues is discussed further in the UNHCR, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, above fn. 60.

⁹¹ Council of the EU, *Long-term Residents Directive*, above fn. 61.

⁹² Council of the EU, *Directive 2011/51/EU amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection*, above fn. 62.

⁹³ Council of the EU, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96-105/32, 2013/33/EU, available at: <http://www.refworld.org/docid/51d29db54.html>, (recast Reception Conditions Directive).

⁹⁴ Council of the EU, *Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, 29 April 2004, 2004/38/EC, available at: <http://www.refworld.org/docid/4a54bbb00.html> (Free Movement Directive).

period of time in transit. The notion should therefore include families formed outside the country of origin, but before their arrival on the territory of the Member State.”⁹⁵

The Proposal defines family members of a beneficiary of international protection present in the same Member State as comprising: (a) his or her spouse or his or her unmarried partner in a stable relationship; (b) the unmarried, minor children of this couple or of the beneficiary of international protection, regardless of whether they were born in or out of wedlock or adopted as defined under national law; and (c) in the case of a minor, unmarried beneficiary of international protection, the father, mother or another adult responsible for whether by law or by the practice of the Member State concerned. It also states that the family should “already [have] existed before the applicant arrived on the territory of the Member States” (as opposed to before departure from the country of origin).⁹⁶

In the Americas, the **Inter-American Court of Human Rights** has taken an approach that goes beyond “the traditional notion of a couple and their children” to include other blood relatives and others with no biological relation among whom there are “close personal ties”. In its 2014 *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* the IACtHR defines the family as follows:

“[T]he family to which every child has a right is, above all, her or his biological family, including extended family, and which should protect the child and also be the priority object of the measures of protection provided by the State. Nevertheless, the Court recalls that there is no single model for a family. Accordingly, the definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, “family ties” may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes.”⁹⁷

From a human rights perspective therefore and in order to be in line with the interpretation of these regional courts, it is necessary to identify and apply a broad definition of “family” that recognizes de facto family ties beyond narrow close family members. When defining who

⁹⁵ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, (European Commission Proposal for a Regulation to Replace the Qualification Directive) COM(2016) 466 final, 2016/0223 (COD), 13 July 2016, available at: <http://www.refworld.org/docid/58ac43474.html>, recital 16.

⁹⁶ *Ibid.*, Article 2(9).

⁹⁷ *Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, IACtHR, 19 August 2014, available at: <http://www.refworld.org/docid/54129c854.html>, (footnotes omitted), para. 272.

may otherwise qualify as a family member, the extent of dependency and the closeness of personal ties have been identified as relevant criteria to be assessed.

3.3 *Individuals accepted as able to be family members by international bodies and regional courts*

This section examines the relations between different individuals that have been accepted by the Human Rights Committee and by regional courts – notably the ECtHR⁹⁸ and IACtHR – as able to constitute family life and thus who may be considered as family members. The listing is non-exhaustive.

The ECtHR has on numerous occasions ruled that the “existence or non-existence of ‘family life’ ... is essentially a question of fact depending upon the real existence in practice of close personal ties”.⁹⁹ Relevant factors to be assessed when deciding whether a relationship can be said to amount to “family life” are outlined below.

With regard to the Court of Justice of the European Union (CJEU), its jurisprudence essentially focuses on interpreting the terminology of existing Directives, which are generally quite prescriptive. It is thus more constrained by the terms of these Directives as regards family composition.

3.3.1 *Married spouses*

Lawfully and genuinely married spouses come within the term “family”. As the ECtHR ruled in *Abdulaziz, Cabales and Balkandali v. United Kingdom*, a case which concerned three women lawfully and permanently settled in the UK who were seeking to bring their three respective husbands to the UK:

“Whatever else the word ‘family’ may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage, ... even if a family life ... has not yet been fully established. Those marriages must be considered sufficient to attract such respect as may be due under Article 8 [of the ECHR].”¹⁰⁰

In addition, a lack of cohabitation does not necessarily mean there is no family life.¹⁰¹ There is also no mention in the judgment concerning Mr and Mrs Cabales, whose marriage was not recognized in domestic law (see below section 3.3.2), of the couple having any children, though their relationship was recognized as constituting family life. Furthermore, the

⁹⁸ See generally, ECtHR, *Practical Guide on Admissibility Criteria*, 2014, available at: <http://www.refworld.org/docid/54856b9c4.html>, pp. 71-73.

⁹⁹ See e.g. *L. v. The Netherlands*, Application no. 45582/99, ECtHR, 1 June 2004, available at: <http://www.refworld.org/docid/5852a7e54.html>, para. 36.

¹⁰⁰ *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, 1985, above fn. 67, para. 62.

¹⁰¹ *Berrehab v. The Netherlands*, Application no. 10730/84, ECtHR, 28 May 1988, available at: <http://www.refworld.org/docid/3ae6b6f424.html>, para. 21, cited with approval in *Wayne Smith, Hugo Armendariz, et al. v. United States*, Report N. 81/10 - Case 12.562, Inter-American Commission on Human Rights, 12 July 2010, available at: <http://www.refworld.org/docid/502ccca62.html>; *Kroon and Others v. The Netherlands*, Application no. 18535/91, ECtHR, 27 October 1994, available at: <http://www.refworld.org/docid/584a99574.html>.

situation of a married couple who are separated, where one continues to lend the other support after separation may also constitute a relationship falling within Article 8 ECHR.¹⁰²

In the case of polygamy, however, the HRC states:

“[E]quality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”¹⁰³

Similarly, the Committee on the Elimination of Discrimination against Women has determined that polygamy is a violation of Article 5 of CEDAW and has serious implications for the emotional and financial wellbeing of a woman and her dependents.¹⁰⁴

3.3.2 *Unmarried couples and couples whose marriage is not recognized*

In the ECtHR’s jurisprudence, the notion of “family life” in Article 8 is not confined solely to families based on marriage and may encompass other de facto “family” ties where the parties are living together outside marriage.¹⁰⁵ When deciding whether a relationship can be said to amount to “family life”, the Court has ruled that “a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means”.¹⁰⁶

Marriages that are not in accordance with national law are not necessarily a bar to family life. In *Abdulaziz, Cabales and Balkandali*, one of the three women concerned had entered into a purely religious marriage not recognized in domestic law. The Court’s judgment found:

“Mr. and Mrs. Cabales had gone through a ceremony of marriage ... and the evidence before the Court confirms that they believed themselves to be married and that they genuinely wished to cohabit and lead a normal family life. And indeed they subsequently did so. In the circumstances, the committed relationship thus established was sufficient to attract the application of Article 8.”¹⁰⁷

¹⁰² *M.P.E.V. and Others v. Switzerland*, Application no. 3910/13, ECtHR, 8 July 2014, available at: <http://www.refworld.org/cases,ECHR,53bd356f4.html>, para. 56.

¹⁰³ HRC, CCPR *General Comment No. 28: Article 3 (The equality of rights between men and women)*, 2000, above fn. 78, para. 24.

¹⁰⁴ UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in marriage and family relations*, 1994, available at: <http://www.refworld.org/docid/48abd52c0.html>, para. 14.

¹⁰⁵ See, among many authorities, *Marckx v. Belgium*, ECtHR, 1979, above fn. 68, para. 31; *Keegan v. Ireland*, Application no. 16/1993/411/490, ECtHR, 19 April 1994, available at: <http://www.refworld.org/docid/3ae6b6ff8.html>, para. 44; *Kroon and Others v. the Netherlands*, ECtHR, 1994, above fn. 101, para. 30; *X., Y. and Z. v. United Kingdom*, Application no. 75/1995/581/667, ECtHR (Grand Chamber), 22 April 1997, available at: <http://www.refworld.org/docid/3ae6b69010.html>, para. 36; *Z.H. and R.H. v. Switzerland*, Application no. 60119/12, ECtHR, 8 December 2015, available at: <http://www.refworld.org/docid/566843824.html>, para. 42.

¹⁰⁶ See e.g. *X., Y. and Z. v. UK*, ECtHR, 1997, above fn. 105, para. 36, and cases cited there, as well *Z.H. and R.H. v. Switzerland*, ECtHR, 2015, above fn. 105, para. 42 and case cited there.

¹⁰⁷ *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, 1985, above fn. 67, para. 63.

As an exception to this rule, the ECtHR has not recognized early marriage as constituting family life. The case of *Z.H. and R.H. v. Switzerland*¹⁰⁸ concerned two Afghan nationals who had a religious marriage ceremony in Iran in 2010, when Z.H. was 14 years old and R.H. was 18 years old. A year later they applied for asylum in Switzerland, which determined that Italy was responsible for assessing the claim under the (then applicable) Dublin II Regulation.¹⁰⁹ R.H. was expelled to Italy, but he returned to Switzerland after three days following which he was *de facto* allowed to remain in Switzerland despite his illegal presence and was able to request a re-examination of his asylum application. The Court concurred with the Swiss Federal Administrative Court's view that "the applicants' religious marriage was invalid under Afghan law and in any case was incompatible with Swiss *ordre public* due to the first applicant's young age". Once Z.H. turned 17, however, the authorities recognized that family life subsisted between the applicants and decided they should benefit from a joint asylum procedure. Subsequently, their religious marriage was judicially recognized by a Swiss court and they were both granted asylum. The Court considered that overall a fair balance had been struck between the personal interests of the applicants in remaining together pending the outcome of Z.H.'s asylum application and the public order interests of the State in controlling immigration.

In the Americas, the IACtHR reiterated in the *Atala Riffo* case that "the concept of family life is not limited only to marriage and must encompass other de facto family ties in which the parties live together outside of marriage".¹¹⁰

3.3.3 Engaged couples

The European Commission on Human Rights has ruled that engagement does not in itself create family life.¹¹¹ In *Abdulaziz, Cabales and Balkandali*, the ECtHR nonetheless ruled that "by guaranteeing the right to respect for family life, Article 8 'presupposes the existence of a family'", but that "this does not mean that all *intended* family life falls entirely outside its ambit".¹¹²

The Court has further determined that intended family life may, exceptionally, fall within the ambit of Article 8, notably in cases where the fact that family life has not yet fully been established is not attributable to the applicant.¹¹³ Edwards has argued that "[w]here the

¹⁰⁸ *Z.H. and R.H. v. Switzerland*, ECtHR, 2015, above fn. 105.

¹⁰⁹ Council of the EU, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* (Dublin II Regulation), 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC) No. 343/2003, available at: <http://www.refworld.org/docid/3e5cf1c24.html>.

¹¹⁰ *Caso Atala Riffo y Niñas v. Chile*, IACtHR, 24 February 2012, available in English and Spanish at: <http://www.refworld.org/docid/4f840a122.html>, para. 142. See also Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, IACtHR, 2014, quoted above at fn. 97.

¹¹¹ *Wakefield v. United Kingdom*, Application no. 15817/89, Council of Europe: European Commission on Human Rights, Admissibility Decision, 1 October 1990, available at: <http://www.refworld.org/docid/583ed8874.html>.

¹¹² *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, above fn. 67, para. 62 (emphasis added).

¹¹³ *Pini and Others v. Romania*, Applications nos. 78028/01 and 78030/01, ECtHR, 22 June 2004, available at: <http://www.refworld.org/cases,ECHR,58a730ab4.html>, paras. 143 and 146. The case concerned two Italian couples

‘intended’ spouse is known to the family before their departure or arrangements for marriage were in place but were interrupted, it is also arguable that entry and residence are required in order to effect the marriage”.¹¹⁴

3.3.4 Same-sex couples (and their children)

Both the ECtHR and the IACtHR accept that same-sex couples are able to establish family life and therefore that they can come within the definition of family. Both courts have also accepted that the situation of homosexual couples who have adopted or natural children and are living together can constitute family life.

In 2010, the ECtHR ruled that a homosexual couple living in a stable relationship falls within the notion of “family life”, in the same way as the relationship of a heterosexual couple.¹¹⁵ Whereas previously the Court had considered such cases in the context of private life, in its judgment in *Schalk and Kopf v. Austria*, it ruled that “a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would”. It also found “no basis for drawing the distinction ... between those applicants who live together and those who – for professional and social reasons – do not, ... since ... the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8”.¹¹⁶

The ECtHR has also found that the situation of same-sex couples applying for registered partnership status, who were unable to do so because legislation does not permit this for same-sex couples, falls within the definition of “family life”.¹¹⁷ This position may be particularly relevant in the case of same-sex couples recognized as facing persecution or serious harm and therefore as being in need of international protection, who are seeking to reunite.

With regard to children in families headed a same-sex couple, the ECtHR has found that the relationship between two women, who were living together and had entered into a civil partnership, and the child conceived by one of them by means of assisted reproduction but

seeking to adopt two Romanian girls, where a Romanian court had failed to execute decisions concerning the adoptions, although no violation of Article 8 was found.

¹¹⁴ Edwards, “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum”, above fn. 40, p. 317.

¹¹⁵ *Schalk and Kopf v. Austria*, Application no. 30141/04, ECtHR, 24 June 2010, available at: <http://www.refworld.org/docid/4c29fa712.html>, paras. 92-94; *P.B. and J.S. v. Austria*, Application no. 18984/02, ECtHR, 22 July 2010, available at: <http://www.refworld.org/docid/5852b79e4.html>, para. 30; *X. and Others v. Austria*, Application no. 19010/07, ECtHR, Grand Chamber, 19 February 2013, available at: <http://www.refworld.org/docid/5852c33f4.html>, para. 95.

¹¹⁶ *Schalk and Kopf v. Austria*, ECtHR, above fn. 115, para. 94.

¹¹⁷ *Vallianatos and Others v. Greece*, Applications nos. 29381/09 and 32684/09, ECtHR, Grand Chamber, 7 November 2013, available at: <http://www.refworld.org/cases,ECHR,5899eafb4.html>, paras. 73-74, finding a violation of Article 8 taken with Article 14 ECHR; *Taddeucci et McCall c. Italie*, Requête no. 51362/09, ECtHR, 30 June 2016, available at: <http://www.refworld.org/docid/5852ba884.html>; *Oliari and Others v. Italy*, Applications nos. 18766/11 and 36030/11, ECtHR, 21 July 2015, available at: <http://www.refworld.org/docid/55af917a4.html>.

being brought up by both of them, constituted “family life” within the meaning of Article 8 of the Convention.¹¹⁸

As for the IACtHR, it ruled in 2012 in the case of *Atala Riffo*, which also concerned a lesbian couple with children, ruled:

“[I]t is clear that they had created a family unit which, as such, was protected under Articles 11(2) and 17(1) of the American Convention [on Human Rights], since they shared their lives, with frequent contact and a personal and emotional closeness between Ms. Atala, her partner, her eldest son and the three girls. The aforementioned, without prejudice to the fact that the girls shared another family environment with their father.”¹¹⁹

3.3.5 Children (including in cases of divorce)

In the settled case law of the ECtHR, a child born of a marital union is *ipso jure* part of that relationship. For instance, the Court stated in *Berrehab v. the Netherlands*:

“The Court ... does not see cohabitation as a sine qua non of family life between parents and minor children. ... It follows from the concept of family on which Article 8 (art. 8) is based that a child born of such a union is ipso jure part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him [or her] and his [or her] parents a bond amounting to ‘family life’, even if the parents are not then living together.”¹²⁰

The Court has also found that the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of “family life” within the meaning of Article 8 of the Convention¹²¹ and that the family relationship between natural parents and their child “is not terminated by reason of the fact that the parents separate or divorce as a result of which the child ceases to live with one of its parents”.¹²² This position was reaffirmed both in relation to the parent and child, for instance, where the father raised his daughter with the mother and

¹¹⁸ *Gas and Dubois v. France*, Application no. 25951/07, ECtHR, Admissibility Decision, 31 August 2010, <http://www.refworld.org/docid/583ffa924.html>.

¹¹⁹ *Caso Atala Riffo y Niñas v. Chile*, IACtHR, 2012, above fn. 110, para. 177.

¹²⁰ *Berrehab v. The Netherlands*, ECtHR, 1988, above fn. 101, para. 21, and many other authorities including *Ahmut v. The Netherlands*, Application no. 73/1995/579/665, ECtHR, 28 November 1996, available at: <http://www.refworld.org/docid/3ae6b69014.html>, para. 30; *Gül v. Switzerland*, ECtHR, 1996, above fn. 69, para. 32; *Al-Nashif and Others v. Bulgaria*, App. No. 50963/99, ECtHR 20 June 2002, available at: <http://www.refworld.org/cases,ECHR,468cbc9d0.html>, para. 112.

¹²¹ See, among many authorities, *Kutzner v. Germany*, Application no. 46544/99, ECtHR, 26 February 2002, available at: <http://www.refworld.org/cases,ECHR,58c166454.html>, para. 58; *Monory v. Romania and Hungary*, Application no. 71099/01, ECtHR, 5 July 2005, available at: <http://www.refworld.org/cases,ECHR,5a4ca8d54.html>, para. 70.

¹²² *Ciliz v. The Netherlands*, Application no. 29192/95, ECtHR, 11 July 2000, available at: <http://www.refworld.org/docid/3ae6b6fd1f.html>, para. 59, citing *Berrehab v. The Netherlands*, ECtHR, 1988, above fn. 101, para. 21 and *Keegan v. Ireland*, ECtHR, 1994, above fn. 105, para. 50. See also generally, Parliamentary Assembly of the Council of Europe (PACE), Committee on Migration, Refugees and Displaced Persons, *Position paper on family reunification*, 2 February 2012, AS/Mig (2012) 01, available at: <http://www.refworld.org/docid/583ed4ef7.html>, paras. 11-12.

continued to involve himself in the child's upbringing following their separation,¹²³ and in relation to siblings when the parents separate or divorce.¹²⁴

3.3.6 *Children born outside marriage*

The ECtHR has confirmed:

“Article 8 (art. 8) makes no distinction between the ‘legitimate’ and the ‘illegitimate’ family. Such a distinction would not be consonant with the word ‘everyone’, and this is confirmed by Article 14 (art. 14) with its prohibition, in the enjoyment of the rights and freedoms enshrined in the Convention, of discrimination grounded on ‘birth’.”¹²⁵

Just as for children born of married parents, the Court has determined that “where the parties are living together out of wedlock”, “a child born out of such a relationship is ipso jure part of that ‘family’ unit from the moment and by the very fact of his [or her] birth.”¹²⁶

Also settled ECtHR case law is that:

“[I]n the absence of co-habitation, other factors may serve to demonstrate that a relationship has sufficient constancy to create *de facto* family ties. ... Such factors include the nature and duration of the parents’ relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child’s care and upbringing; and the quality and regularity of contact.”¹²⁷

3.3.7 *Adopted and foster children*

As for adopted children and their adoptive parents, the ECtHR has recognized that a lawful and genuine adoption may constitute “family life”, even in the absence of cohabitation or any real ties between an adopted child and the adoptive parents.¹²⁸

¹²³ *M.P.E.V. and Others v. Switzerland*, ECtHR, 2014, above fn. 102, para. 57.

¹²⁴ *Mustafa and Armağan Akin v. Turkey*, Application no. 4694/03, ECtHR, 6 April 2010, available at: <http://www.refworld.org/docid/5852aa214.html>, para. 19.

¹²⁵ *Marckx v. Belgium*, ECtHR, 1979, above fn. 68, (concerning an unmarried mother and her illegitimate daughter); *A.W. Khan v. United Kingdom*, Application no. 47486/06, ECtHR, 12 January 2010, available at: <http://www.refworld.org/docid/4b4f05c02.html>, paras. 34-35 (concerning a father originating from Pakistan who faced expulsion and who had a daughter with a British citizen who was unable to live with his partner and daughter but who had daily contact with them, even though he had lived with his mother and brothers until facing expulsion).

¹²⁶ *Schalk and Kopf v. Austria*, ECtHR, above fn. 115, referring at para. 91 to *Elsholz v. Germany* Application no. 25735/94, ECtHR Grand Chamber, 13 July 2001, available at: <http://www.refworld.org/cases,ECHR,58a72da64.html>, para. 43; *Keegan v. Ireland*, ECHR, 1994, above fn. 105, para. 44; and *Johnston and Others v. Ireland*, Application no. 9697/82, ECtHR, 18 December 1986, available at: <http://www.refworld.org/cases,ECHR,58a72e674.html>, para. 56.

¹²⁷ *Onur v. United Kingdom*, Application no. 27319/07, ECtHR, 17 February 2009, available at: <http://www.refworld.org/docid/49b153742.html>, para. 44 (references to other cases omitted).

¹²⁸ *Pini and Others v. Romania*, ECtHR, 2004, above fn. 113, paras. 143-148. This language was reiterated in *Topčić-Rosenberg v. Croatia*, Application no. 19391/11, ECtHR, 14 November 2013, available at: <http://www.refworld.org/docid/5852bb034.html>, para. 38.

The adoption need not, however, necessarily be formal, since the Court has also recognized the existence of de facto “family life” between foster parents and a child placed with them, having regard to the time spent together, the quality of the relationship and the role played by the adult *vis-à-vis* the child.¹²⁹ Nor does family life cease when a child is taken into care.¹³⁰

3.3.8 Parents

The 2017 Joint General Comment by the Committee on the Rights of All Migrant Workers and Members of their Families (CMW Committee) and the CRC Committee affirms that “the term ‘parents’ must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom”.¹³¹

3.3.9 Relations between adult children and their parents and between adult siblings

At the international level, the Human Rights Committee has found that relations between parents and their adult children can constitute family relations. The case of *Warsame v. Canada* concerned an adult man of Somali origin living for many years in Canada, whose proposed deportation would inter alia have separated him from his mother and sisters, when he had no family in Somalia. In its judgment, the Committee noted that his deportation to Somalia would interfere with his family relations in Canada and concluded that “the interference with the author’s family life, which would lead to irreparably severing his ties with his mother and sisters in Canada would be disproportionate to the legitimate aim of preventing the commission of further crimes”.¹³²

As for the ECtHR, it has determined that “there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence”.¹³³

In the expulsion case of *A.W. Khan v. United Kingdom*, the Court did not accept that “the fact that the [adult] applicant was living with his mother and brothers, or the fact that the entire family suffered from different health complaints, constitutes a sufficient degree of

¹²⁹ *Moretti et Benedetti c. Italie*, Requête no. 16318/07, ECtHR, 27 April 2010, available at: <http://www.refworld.org/docid/5852a94d7.html>, paras. 48-52.

¹³⁰ *Johansen v. Norway*, Application no. 24/1995/530/616, ECtHR, 27 June 1996, available at: <http://www.refworld.org/cases,ECHR,5a2fa9934.html>, para. 52.

¹³¹ CMW and CRC Committees, *Joint General Comment on the general principles regarding the human rights of children in the context of international migration*, above fn. 24, para. 27, referring to CRC Committee, *General Comment No. 14*, 2013, above fn. 23, para. 59.

¹³² *Jama Warsame v. Canada*, CCPR/C/102/D/1959/2010, UN HRC, 1 September 2011, available at: <http://www.refworld.org/docid/4ee0f0302.html>, paras. 8.8 and 8.10.

¹³³ See numerous ECtHR rulings including: *Kwakyie-Nti et Dufie c. Pays Bas*, Requête no. 31519/96, ECtHR, Admissibility Decision, 7 November 2000, available at: <http://www.refworld.org/docid/5852a72c4.html>; *Ezzouhdi c. France*, Requête no. 47160/99, ECtHR, 13 February 2001, available at: <http://www.refworld.org/cases,ECHR,58c164fe4.html>, para. 34; *Slivenko v. Latvia*, Application no. 48321/99, ECtHR, Grand Chamber, 9 October 2003, available at: <http://www.refworld.org/docid/402b5b034.html>, para. 97; *A.W. Khan v. UK*, ECtHR, above fn. 125, para. 32; *A.S. v. Switzerland*, Application no. 39350/13, ECtHR, 30 June 2015, available at: <http://www.refworld.org/docid/5592b8064.html>, and *Z.H. and R.H. v. Switzerland*, ECtHR, 2015, above fn. 105. Such relations may, however, come within “private life” for the purposes of Article 8 ECHR.

dependence to result in the existence of family life”, since the applicant was not “necessarily the sole carer for his mother and brothers” and there was no evidence regarding the health complaints suggesting that “these conditions are so severe as to entirely incapacitate them”.¹³⁴

By contrast, in the case of *Maslov v. Austria*, the Court has accepted that, where young adults have not yet founded a family of their own, their relationship with their parents and other close family members can constitute “family life”.¹³⁵ This position was confirmed by the court in *A.A. v. United Kingdom* when it ruled: “An examination of the Court’s case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having ‘family life’”.¹³⁶

The ECtHR has also recognized that family life can exist between adult siblings,¹³⁷ although again it requires “further elements of dependency involving more than the normal emotional ties” for family life to be recognized.

3.3.10 Other potential family members

With regard to older family members, the CESCR Committee has advised: “States parties should make all the necessary efforts to support, protect and strengthen the family and help it, in accordance with each society’s system of cultural values, to respond to the needs of its dependent ageing members.”¹³⁸ In the context of protecting the family life of asylum-seekers and refugees, Hathaway has argued that this should be read to “compel the inclusion of such persons in the family unit”.¹³⁹

With regard to the relationship between grandparents and grandchildren, the ECtHR has ruled that “‘family life’, within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life”.¹⁴⁰

¹³⁴ *A.W. Khan v. UK*, above fn. 125, para. 32.

¹³⁵ *Maslov v. Austria*, Application no. 1638/03, ECtHR, 22 March 2007, available at: <http://www.refworld.org/docid/464423e22.html> and *Maslov v. Austria*, Application no. 1638/03, ECtHR, Grand Chamber, 23 June 2008, available at: <http://www.refworld.org/docid/5852a8b97.html>, para. 62, referring also earlier authorities.

¹³⁶ *A.A. v. United Kingdom*, Application no. 8000/08, ECtHR, 20 September 2011, available at: <http://www.refworld.org/docid/583edcf1124.html>, para. 49.

¹³⁷ *Moustaquim v. Belgium*, Application no. 12313/86, ECtHR, 18 February 1991, available at: <http://www.refworld.org/docid/3ae6b7018.html>, para. 36; *Boughanemi v. France*, Application no. 16/1995/522/608, ECtHR, 27 March 1996, available at: <http://www.refworld.org/docid/3ae6b6f24.html>, para. 35. Both were expulsion cases. See also cases cited above at fn. 133.

¹³⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, 8 December 1995, E/1996/22, available at: <http://www.refworld.org/docid/4538838f11.html>, para. 31.

¹³⁹ J.C. Hathaway, *The Rights of Refugees under International Law*, CUP, 2005, p. 554.

¹⁴⁰ *Marckx v. Belgium*, ECtHR, 1979, above fn. 68, para. 45; *L. v. Finland*, Application no. 25651/94, ECtHR, 27 April 2000, available at: <http://www.refworld.org/cases,ECHR,5a4caaf94.html>, para. 101. See also *Price v. United Kingdom*, Application no. 12402/86, European Commission on Human Rights, Admissibility Decision, 9 March 1988, available at: <http://www.refworld.org/docid/583ed9a17.html>; *Bronda v. Italy*, Application no. 40/1997/824/1030, ECtHR, 9 June 1998, available at: <http://www.refworld.org/docid/583febd07.html>, para. 51. These two cases concerned the (in one case adoptive) grandparents of a child taken into care, among whom there were strong ties.

The European Commission of Human Rights has recognized other relations as coming within the concept of family life, such as those between an uncle and his minor nephew.¹⁴¹ For its part, the Court has also found family life to exist between two minor siblings and their aunt and uncle in the case of *Butt v. Norway*.¹⁴² In the case of *F.N. v. United Kingdom* it found that family life existed between an aunt and her adult niece, who “lived with and was more than usually dependent on her aunt as a result of her vulnerable mental state” and whose “aunt appears to be her only surviving relation”.¹⁴³ Finally, the Court has recognized family life without the existence of blood ties.¹⁴⁴

With regard to indigenous families, the IACtHR has recognized “the special significance that the coexistence of the family has in the context of an indigenous family, which is not limited to the familial nucleus but also includes the distinct generations that make up the family and includes the community of which the family forms a part”.¹⁴⁵

3.4 *The definition of family applied by States*

The absence of an agreed definition of “family” at the international level has meant that States may define the term according to their own interests, culture and system. Any such definition must, however, be “without discrimination”. As Edwards has observed:

“[T]he failure to agree a definition of, or to elaborate guiding principles, on what constitutes a family unit, has produced a dichotomy. On the one hand, this absence has allowed States to circumvent their obligations under international law, while on the other hand, it has given scope for the recognition of culturally-influenced, as well as evolving forms, of the ‘family’ beyond the Eurocentric ‘nuclear family’.”¹⁴⁶

The Constitutional Court of the **Czech Republic** addressed the question of the definition of the family and the State’s resulting obligations in a case concerning the guardianship of a young girl, whose mother was dead and whose paternity was initially contested. In its 2007 judgment the Court noted: “[T]he family is, in the first place, a biological connection, and then a social institution, which is only subsequently defined by a legal framework.” As a result, it

¹⁴¹ *Boyle v. United Kingdom*, Application no. 16580/90, European Commission on Human Rights, 9 February 1993, available at: <http://www.refworld.org/cases/COECOMMHR,583fec324.html>, paras. 41-47.

¹⁴² *Butt v. Norway*, Application no. 47017/09, ECtHR, 4 December 2012, available at: <http://www.refworld.org/docid/583ff1167.html>, para. 76.

¹⁴³ *F.N. v. United Kingdom*, Application no. 3202/09, ECtHR, admissibility decision, 17 September 2013, available at: <http://www.refworld.org/docid/583ff73d4.html>, para. 36. The case was declared inadmissible on the grounds that the applicant (the niece) had been found not to be in need of international protection and her removal was not disproportionate to the legitimate aim of maintaining effective immigration control. See also *Javeed v. The Netherlands*, Application no. 47390/99, ECtHR, Admissibility Decision, 3 July 2001 available at: <http://www.refworld.org/docid/584a94e44.html> (concerning an aunt and her minor nieces).

¹⁴⁴ *X., Y. and Z. v. UK*, ECtHR, 1997, above fn. 105, concerning a female-to-male transsexual and his child born by artificial insemination.

¹⁴⁵ *Case of Chitay Nech et al. v. Guatemala*, Serie C No. 212, IACtHR, 25 May 2010, available at: <http://www.refworld.org/docid/4f5a127a2.html>, para. 159.

¹⁴⁶ Edwards “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum”, above fn. 40, p. 313.

ruled that “when interpreting these concepts, we must take into account the biological connection, and then also the social reality of the family and family life”. The Court defined the family as “a social group of related persons, among whom there are close ties – blood, psychosocial, emotional, economical, etc”. It stated that “legal protection as a family can also be enjoyed by a social group of persons living outside the institution of marriage, or a group of persons not related by blood, among whom there are nonetheless the abovementioned emotional and other ties”. The Court found that the “concept of family and family life also assumes the importance of blood ties between family members”. Drawing on the jurisprudence of the ECtHR, the Constitutional Court found that “it follows from the obligation to respect family life that, as soon as the existence of a family relationship is proved, the state must fundamentally act in a manner so that this relationship can develop, and must take measures that will enable parent and child to be reunited”.¹⁴⁷

The family definition applied by States in the asylum context generally focuses on the close or nuclear family. As but one example of the narrower definition adopted by many European States in the asylum context, in **Italy**, “family members” comprise, in so far as the family already existed in the country of origin, the spouse; the minor, unmarried children regardless of whether they were born in or out of wedlock or adopted as defined under national law; and, if the applicant/beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible.¹⁴⁸

By contrast, some States, notably in Africa and the Americas, accept dependent family members as able to be part of the family. For instance, in **South Africa**, the Refugee Act defines dependants of a refugee or asylum-seeker as including “the spouse, any unmarried dependent child or any destitute aged or infirm member of the family”.¹⁴⁹ In **South Sudan**, the members of a refugee’s family comprise a spouse or spouses of the refugee; dependent children of the refugee; and any person who is dependent on the refugee.¹⁵⁰

As the **South African** Constitutional Court has acknowledged: “[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.”¹⁵¹

¹⁴⁷ *Judgment II. ÚS 568/06: Protection of Family Life, Czech Republic: Constitutional Court, 20 February 2007*, available at: <http://www.refworld.org/docid/5a4cbe7f4.html>. In this case, the father was later proven to be the son of the woman to whom guardianship had been assigned, not the dead mother’s husband. While acknowledging the different ties between the parties involved, the Court gave weight to the relationship between the girl and her grandmother, with whom there was a direct blood line, as well as emotional and other psychosocial ties. It overturned the lower court decision granting access to the dead mother’s husband, referring both to the best interests of the child and the right to family life of the grandmother.

¹⁴⁸ See among others, *Legislative Decree 251/2007* (transposition of Qualification Directive 2004/83/EU and Directive 2011/95/EU), Article 2; *Legislative Decree 142/2015* (transposition of Reception Conditions Directive 2013/33/EU), Article 2.

¹⁴⁹ *South Africa: Act No. 130 of 1998, Refugee Act, 1998*, 26 November 2008, available at: <http://www.refworld.org/docid/4a54bbd4d.html>, section 1(ix).

¹⁵⁰ *South Sudan: Refugee Act, 2012, Act No. 20, 2012*, available at: <http://www.refworld.org/docid/51499cd02.html>, Article 5.

¹⁵¹ *Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others*, CCT35/99 2000 (8) BCLR 837 (CC), South Africa: Constitutional Court, 7 June 2000, available at: <http://www.refworld.org/docid/58501f464.html>, para. 31. All three

The research paper entitled “The ‘Essential Right’ to Family Life and Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification” examines further the family definition applied at national level in the context of family reunification.¹⁵²

3.5 *The definition of family applied by UNHCR*

In UNHCR’s operations around the world the organization uses a definition of family that *presumes* a relationship of social, emotional or economic dependency among close family members (a term preferred over nuclear family) and *requires it to be shown* where other family members are involved. Building on jurisprudence regarding the concept of family as outlined in section 3.3 above and on its own experience in varied contexts, the organization uses the concept of dependency to ensure that family members, who may not be close family members but are nevertheless dependants, are also able to enjoy the right to family life and family unity.

It is worth recalling that UNHCR operates in countries with diverse and evolving concepts of family, where the impact of displacement may mean that families are separated, have to reform, and/or are reconstituted in different combinations over time, as family members are separated, absent, reunited, die or are killed.

UNHCR issued guidance on procedural standards on processing claims based on the right to family unity in 2016¹⁵³ and the definition below draws on that given there. The concept of family and who can be considered a family member is, however, also relevant in other contexts from registration and protection delivery to family reunification and durable solutions. It applies equally in refugee situations and in internal displacement.

3.5.1 *Close family members*

In UNHCR’s practice close family members are *presumed* to have a relationship of social, emotional or economic dependency. They comprise:

- Spouse, including a fiancé.e, common law spouse, and couples involved in an enduring relationship, whether physically living together or not, including same-sex couples, and spouses who have entered into a customary marriage. In the case of an underage spouse, a best interest assessment is generally required to determine any protection needs;
- All unmarried children of the parent and all unmarried children of his or her spouse as defined above, who are under 18 years, including children born in the host country/country of asylum, provided that UNHCR interventions, such as granting

joined cases concerned the circumstances in which foreign spouses of South African residents are permitted to reside temporarily in South Africa pending the outcome of their applications for immigration permits.

¹⁵² See UNHCR, “The ‘Essential Right’ to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, above fn. 60, section 4.1.

¹⁵³ UNHCR, *UNHCR RSD Procedural Standards - Processing Claims Based on the Right to Family Unity*, 2016, available at: <http://www.refworld.org/docid/577e17944.html>.

- derivative refugee status, are not incompatible with the child’s personal legal status;
- The parents or primary legal or customary caregivers of an asylum-seeking or refugee child under 18 years, as well as the dependants of the adult parent or caregiver; and
- The minor siblings of an asylum-seeking or refugee child who is under 18 years.¹⁵⁴

With regard to polygamous marriages, UNHCR states:

“UNHCR aims to respect the culturally diverse interpretations of family membership and ensure the protection of members of polygamous families, and recognizes polygamy in its criteria for eligible unions. Therefore, where a polygamous marriage is contractually valid, all family members are eligible for UNHCR assistance, including consideration for resettlement. Where a relationship of dependency exists, particularly when children are concerned and when the marriage has been validly contracted according to the laws of the country of origin or asylum, UNHCR respects and promotes the unity of the family during resettlement.”¹⁵⁵

3.5.2 *Persons other than close family members*

UNHCR also considers that other family members and certain other individuals may be part of a family and therefore entitled to family unity, if it is established, on balance, that a relationship of social, emotional or economic dependency exists between them. Individuals who may fall within this category include, but are not limited to:

- Parents or former caregivers of an adult refugee or asylum-seeker, or of his or her spouse, where the parents/caregivers are dependent on the refugee or asylum-seeker;
- Married children under 18 of the refugee or asylum-seeker, or of his or her spouse, who remain dependent on the refugee or asylum-seeker, and the spouse of married children where he or she is dependent on the refugee or asylum-seeker. In the case of a married child under 18 or his or her underage spouse, a best interests assessment is generally required to determine what protection needs and resulting interventions may be needed in their respective best interests;
- Dependent children of the refugee or asylum-seeker who are over 18 and their spouses where the adult child or couple is dependent on the refugee or asylum-seeker;
- Other dependent relatives, including brothers, sisters, uncles, aunts, cousins, who were part of the household of the refugee or asylum-seeker in the country of origin, or whose situation has subsequently changed in such a way as to make them dependent upon the refugee or asylum-seeker in the host country/country of asylum. Whether such individuals are part of the household of the refugee or asylum-seeker in the host country/country of asylum is a relevant factor to consider in determining whether a relationship of dependency exists, but it is not determinative;
- Other relatives on whom the refugee or asylum-seeker was dependent in the country

¹⁵⁴ For the purpose of assessing eligibility for derivative refugee status, the age of the Derivative Refugee Status Applicant is considered as that at the date on which the Refugee Status Applicant was recognized as a refugee. In this context, children include the biological or adopted children of the Refugee Status Applicant, as well as children otherwise under his or her legal or customary care.

¹⁵⁵ UNHCR, *Resettlement Handbook*, July 2011, available at: <http://www.refworld.org/docid/4ecb973c2.html>, p. 207 et seq.

of origin or who have, subsequently, become dependent on him or her in the host country/country of asylum. Whether such individuals are part of the household of the refugee or asylum-seeker in the host country/country of asylum is a relevant factor to consider in determining whether a relationship of dependency exists, but it is not determinative;

- Any other individuals who, though not related to the refugee or asylum-seeker, have a dependency relationship that is similar to the categories of family members described above. The term “household” is understood as comprising persons living as a family unit under the same roof.

3.6 Conclusion: The definition of family and the concept of dependency

In conclusion, international, regional and national practice focuses on family members as being persons who are termed nuclear family members, though UNHCR prefers the term close family members. There may be varying willingness to include, for instance, spouses married in traditional ceremonies, engaged couples or same-sex partners. Such persons are nevertheless generally recognized as able to be family members in international and regional level guidance and judgments.

UNHCR explains the concept of dependency as follows:

“The principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific. Given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a *nuclear* family (husband, wife and minor children). In some cases the difference in the composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience. A broad definition of a family unit – what may be termed an extended family – is necessary to accommodate the peculiarities in any given refugee situation, and helps minimize further disruption and potential separation of individual members during the resettlement process.”¹⁵⁶

The concept of dependency is increasingly accepted at least at the international and regional level, as a useful tool to identify the circumstances under which other individuals may also be considered family members.

The ECtHR has, for instance, examined the question of dependency in the context of relations between adult children and their parents and between uncles/aunts and their nephews/nieces and has sometimes determined that there are “additional elements of dependence” with the result that family life is deemed to exist.¹⁵⁷

¹⁵⁶ UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: www.refworld.org/docid/4ae9aca12.html, para. 1(c).

¹⁵⁷ See sections 3.3.9 and 3.3.10 above

In the EU context, the recast Qualification Directive acknowledges that “[i]t is necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child”.¹⁵⁸

The View of the Advocate General in the case of *Dereci*¹⁵⁹ before the CJEU is also informative. He defined the notion of dependency broadly as encompassing “economic and/or legal, administrative or emotional” dependency.¹⁶⁰ While not referring directly to the concept of dependency, the Advocate-General in the case of *O. and S.* referred in his Opinion to the necessity to “carry out an in-depth examination of the entire family situation and take due account of the particular circumstances of the case, whether they are of a factual, emotional, psychological, or financial nature”.¹⁶¹

By contrast, a 2014 report by the European Council on Refugees and Exiles (ECRE) and the Red Cross, notes that “States tend not to use this possibility, or they interpret the concept of ‘dependency’ very strictly by limiting it to full financial dependency or physical dependency”. It found that the “[c]riteria for determining dependency vary widely across Europe, creating a lottery for applicants who seek to be reunified with their family (beyond the nuclear family)”.¹⁶²

UNHCR nonetheless argues:

“Given the traumatic and arduous experience associated with flight from persecution, emotional dependency should factor equally with financial dependency. The specific refugee context thus requires a broader definition of dependency, namely one that includes not only financial but also physical, psychological, and emotional attachment.”¹⁶³

Thus, while dependence can be *presumed* between close family members, it needs to be *established* for other close family members and dependants. Ultimately, the assessment of

¹⁵⁸ Council of the EU, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>, (recast Qualification Directive), recital 19.

¹⁵⁹ *Murat Dereci and Others v. Bundesministerium für Inneres*, View of Advocate General Mengozzi, C-256/11, CJEU, 29 September 2011, available at: <http://www.refworld.org/docid/583d81e44.html>, although the judgment itself does not address the meaning of dependency. See also C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2016, p. 138.

¹⁶⁰ *Murat Dereci and Others v. Bundesministerium für Inneres*, View of Advocate General, CJEU, 2011, above fn. 159, para. 48.

¹⁶¹ *O. and S. v. Maahanmuuttovirasto* (C-356/11) and *Maahanmuuttovirasto v. L.* (C-357/11), CJEU, Opinion of Advocate General Bot, 27 September 2012, available at: <http://www.refworld.org/cases,COUNCIL,58ab05f64.html>, para. 79.

¹⁶² European Council on Refugees and Exiles (ECRE) and Red Cross EU Office, *Disrupted Flight: The Realities of Separated Refugee Families in the EU*, November 2014, available at: <http://www.refworld.org/docid/58514a054.html>, p. 10.

¹⁶³ UNHCR, *Refugee Integration and the Use of Indicators: Evidence from Central Europe*, December 2013, available at: <http://www.refworld.org/docid/532164584.html>, pp. 70-71.

whether a non-close family member has on balance a relationship of significant dependency with a refugee, asylum-seeker or beneficiary of complementary protection is a determination of fact. It must be determined on a case-by-case basis, taking into account social, emotional and economic factors. Dependency is thus more than a matter of financial dependence. The determination requires a detailed examination of all available evidence, including documentary evidence and other relevant information regarding the personal circumstances of the family. It also requires awareness of the varying socio-cultural contexts of family life in different countries, where the basic family unit may also include grandparents, grandchildren, married brothers and sisters, their spouses and children, etc., who may or may not be dependent on the family unit, as well as awareness of the impact of flight and displacement on family formation and reformation.

4. CONCLUSION

The right to family life and family unity of people forced to flee can be threatened at all stages. This paper sets out the legal framework on which these rights are based in international and regional human rights law, international humanitarian law, and international refugee law, along with related international and regional jurisprudence, notably of the HRC, ECtHR, CJEU and IACtHR. The paper explains how States have positive obligations they must fulfil if they are to uphold their obligations. In addition, the principles of non-discrimination and of the best interests of the child can be seen as key principles underpinning and strengthening the right to family life and family unity.

With regard to the family definition applied, the paper stresses the importance of adopting a flexible definition in the refugee context that builds on the international and regional jurisprudence. This needs to take account of varying cultural and social customs and different legal systems and of the impact of conflict and displacement on family formation and reformation. In such circumstances, a flexible, open-ended and adaptable definition that goes beyond the nuclear or close family to recognize situations of dependency that may exist and takes into account social, emotional and economic factors is essential.

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