

PROVIDING INTERNATIONAL PROTECTION INCLUDING THROUGH  
COMPLEMENTARY FORMS OF PROTECTION

I. INTRODUCTION

1. The purpose of this conference room paper is to put forward some suggestions on how to protect those who might not fall within the scope of the 1951 Convention relating to the Status of Refugees but who nevertheless require international protection.<sup>1</sup> The current paper follows two earlier papers<sup>2</sup> which focused on the concept of complementary protection as such. It seeks to advance the debate by conceptualizing complementary forms of protection within a multidimensional global regime for international protection. The paper looks at the synergies between the different forms of protection available and promotes measures to ensure greater harmonization and complementarity. The advantages of a comprehensive single asylum procedure to assess all international protection needs of an asylum applicant are developed further. The aim is to promote the smooth functioning of a global international protection system which addresses all identified needs.

II. PERSONS IN NEED OF INTERNATIONAL PROTECTION

2. While it is the State which is primarily responsible for providing protection to its citizens, a need for international protection arises where such protection is lacking, either as a matter of law or as a matter of fact, with the result that basic human rights are seriously at risk. Such a situation classically comes about in relation to persecution, threats to life and personal security, armed conflict, serious public disorder or other man-made disasters. Natural or ecological disasters or insecurity due to statelessness are additional causes.<sup>3</sup> Frequently, these elements are interlinked and forced displacement is more often than not the manifestation.

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<sup>1</sup> A/AC.96/965/Add.1 of 26 June 2002, Goal 1, Objective 3.

<sup>2</sup> The issue of complementary forms of protection was discussed by the Standing Committee in June 2000 and during the Global Consultations on International Protection by the Executive Committee in September 2001 on the basis of two conference room papers (EC/50/SC/CRP.18 of 9 June 2000 ("the June 2000 paper") and EC/GC/01/18 of 4 September 2001 ("the September 2001 paper") which are attached to this paper. For the discussion in October 2000 see A/AC.96/944 of 13 October 2000, para. 23, and for discussions of September 2001, see A/AC.96/961 of 27 June 2002, pp. 3–4.

<sup>3</sup> See report of the working group on solutions and protection to the forty-second session of the Executive Committee of the High Commissioner's Programme, EC/SCP/64 of 12 August 1991. As elaborated in the June 2000 paper in para. 5, these cases must be clearly distinguished from persons who have been granted leave to remain for compassionate reasons.

3. States have increasingly recognized, in both law and practice, a responsibility for non-citizens on their territory in need of international protection. Consistent with the international character of the phenomenon, they established the Office of the High Commissioner for Refugees (UNHCR) as an international organization with a refugee protection mandate and agreed certain basic and common standards of treatment. This standard-setting process is still evolving.

4. Protection vulnerabilities may force displacement outside but also within a country of origin. As regards addressing protection needs in a situation of internal displacement, this remains, in the first instance, a matter of national responsibility and sovereignty. However, in several instances the United Nations has been called on to provide protection where the internal displacement is caused by massive violations of human rights or by generalized violence. These include instances where the government concerned has specifically requested international intervention, or where measures have been required by the Security Council. Relevant protection principles have been proposed by the Secretary-General's Special Representative on IDPs in the Guiding Principles on Internal Displacement.<sup>4</sup> IDP situations are not further discussed in this paper in view of the evolving nature of the debate and the complexity of the issues which warrant a separate study in themselves.

#### A. Addressing international protection needs through international refugee law

5. The 1951 Convention and its 1967 Protocol remain the cornerstone of the international protection of refugees, with their key elements of a definition of the term refugee (with provisions for inclusion, exclusion and cessation), a guarantee of protection against *refoulement* and a set of minimum civil, political, economic, social and cultural rights to be accorded to refugees. With 145 States party to either one or both instruments, they have received almost universal recognition. These two instruments, alongside the General Assembly resolution which created UNHCR and made it functionally responsible for providing international protection and seeking durable solutions for refugees, established an international protection regime for refugees as defined within these constituting instruments.

6. According to the 1951 Convention, individuals with a well-founded fear of persecution who fulfil the requisite elements of the refugee definition it contains are entitled to international protection under its regime. Nevertheless, differing State practice in the interpretation of the refugee definition, such as, for example, its application to non-state or gender-related persecution, shortcomings in some asylum procedures and a preference in some States for alternative forms of prolonged stay have resulted in the rejection of applications for refugee status made by asylum-seekers who would have fulfilled the Convention criteria if a full and inclusive approach had been taken. UNHCR advocates that such an inclusive approach be more regularly adopted and is strongly of the view that asylum-seekers who obviously fulfil the refugee definition should be accorded Convention refugee status, not an alternative.

7. Individuals without any nationality do not qualify for refugee status solely because they are stateless. The Convention refugee definition does, however, specifically include stateless persons who have a well-founded fear of persecution in their country of habitual residence. For

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<sup>4</sup> E/CN.4/1998/53/Add.2 of 11 February 1998.

example, if someone is arbitrarily deprived of his or her nationality and/or the right to return on one of the five Convention grounds, the requirements for granting refugee status may be fulfilled. Hence, the fact of being stateless should not be a reason for not according Convention status to a person who is otherwise entitled to such status.

8. In situations of armed conflict or serious public disorder, the parties involved often persecute entire groups of people based, for example, on their ethnicity or political affiliation. People with a well-founded fear of such treatment who claim asylum should clearly be considered as falling within the 1951 Convention.

9. Furthermore, situations of conflict and disorder may often create indiscriminate and serious threats to life, liberty or security. The international protection needs of persons fleeing such risks are real, as has long been acknowledged by the international community. General Assembly resolutions have recognized that UNHCR's protection mandate extends to these groups. In addition, in certain regions the Convention refugee definition has been formally broadened to bringing such victims of indiscriminate violence into the ambit of the 1951 Convention regime of rights and responsibilities. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa explicitly applies not only to persons fleeing persecution but also to those fleeing situations of armed conflict and generalized violence. In African countries, refugee status is widely provided, often on a *prima facie* basis, for persons fleeing such situations. In Latin America, the 1984 Cartagena Declaration on Refugees recommended a refugee definition which includes persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order. Although the Declaration as such is not legally binding, this definition has served as the basis for recognition of refugee status in quite a number of Latin American States.<sup>5</sup>

10. Individuals who cannot return to their country of origin because of natural or ecological disasters do not generally fall under the protection regime of the 1951 Convention, unless access to national protection is denied on the basis of a Convention ground.

11. The 1951 Convention is a human rights instrument, the interpretation of which is informed by human rights standards. Serious human rights violations should always qualify as persecution. If the persecution cannot be related to one of the five Convention grounds, however, victims are generally left outside the scope of the 1951 Convention since States consider these grounds to be absent where the human rights violations (such as torture or cruel, inhuman or degrading treatment or punishment) are perpetrated indiscriminately.

12. The international regime of rights and principles has at its core the principle of *non-refoulement*, the applicability of which is anchored in customary international law. Countries of asylum which are not party to either the 1951 Convention or to regional refugee instruments or which maintain a geographical limitation to the application of the 1951 Convention nevertheless

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<sup>5</sup> In similar vein, a revised text of the 1966 Bangkok Principles on the Status and Treatment of Refugees was adopted by the Asian-African Legal Consultative Organization (formerly Committee) in 2001 and incorporates a refugee definition similar to that in the OAU Refugee Convention.

continue to host large numbers of refugees fleeing from persecution as well as generalized violence on this basis, although the protected status of such persons can be vulnerable in the absence of formal recognition. UNHCR, by virtue of its mandate, has often been involved in supporting the hosting capacities of these countries and in seeking durable solutions for the individuals concerned.

13. In summary, with the 1951 Convention and its 1967 Protocol, States have adopted a basic protection framework to address identified protection needs. This framework should be rigorously and properly applied so that individuals or groups of persons who fulfil the refugee criteria are duly recognized and protected under these instruments. Their dynamic nature, which is informed by their object and purpose as well as by developments in related areas of law, offers the possibility of extending their application to persons in need of international protection outside their classical scope. Such an approach has been taken for example by the 1969 OAU Refugee Convention. Providing protection under the framework of the 1951 Convention is recommended, since it guarantees a harmonized approach and limits the need for recourse to complementary forms of protection.

B. Addressing international protection needs of stateless persons who are not refugees through the Statelessness Conventions

14. The international community has approached the protection issues inherent in situations of statelessness at two levels. Firstly, attempts have been made to address the root causes, *inter alia*, by identifying measures to reduce the problem of statelessness in instruments such as the 1961 Convention on the Reduction of Statelessness or, at the regional level, through instruments such as the 1997 European Convention on Nationality.<sup>6</sup>

15. Secondly, a definition of the term “stateless person” and minimum standards of treatment were agreed in the 1954 Convention relating to the Status of Stateless Persons. The standards are very similar to those provided for under the 1951 Convention, but with only 57 States Parties, the 1954 Convention does not enjoy such wide endorsement and the procedures established to implement it are in many States not well developed.

16. Thirdly, UNHCR has been entrusted by the General Assembly, pursuant to Article 11 of the 1961 Convention, with the mandate to assist stateless persons to rectify their situation with the national authorities. The Office’s mandate to promote the international protection of stateless persons and to work to prevent situations of statelessness, has increasingly been recognized.<sup>7</sup> The Office promotes States’ accession to and implementation of the 1961 Convention, related regional instruments and the 1954 Convention, including through the enactment and implementation of appropriate legislation.<sup>8</sup> The statelessness regime can only

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<sup>6</sup> Other important provisions, for example, are Article 5(d)(iii) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; Article 24(3) of the 1966 International Covenant on Civil and Political Rights (ICCPR); Articles 7 and 8 of the 1989 Convention on the Rights of the Child; Articles 1–3 of the 1957 Convention on the Nationality of Married Women and Article 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

<sup>7</sup> See also Conclusion No. 78 (XLVI), 1995, para. (b), of the UNHCR Executive Committee on Prevention and Reduction of Statelessness and Protection of Stateless Persons of 1995.

<sup>8</sup> See also, Agenda for Protection, Goal 1, Objective 12.

prove effective, however, if States recognize the importance of addressing statelessness, both because of the seriousness of the plight of the individuals affected and so as to avoid new situations of displacement.

C. Addressing international protection needs through mechanisms complementary to international refugee law

*Human rights law*

17. Certain human rights obligations, especially protection of the right to life and the absolute prohibition of torture or cruel, inhuman and degrading treatment or punishment, have been interpreted by the supervisory organs of the human rights instruments as prohibiting refoulement to such treatment. In this regard, a particular reference has been made to the need to prevent irreparable harm. *Non-refoulement* is considered a fundamental component of the customary international law prohibition of torture. Indeed, Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly refers to the obligation not to *refoule* someone to a country where he or she would be in danger of being subjected to torture.<sup>9</sup>

18. Since persecution can often include torture or similar treatment, Convention refugees may additionally be protected against *refoulement* under human rights law.<sup>10</sup> This is particularly important where a restrictive approach to applying the 1951 Convention leads to individuals not being recognized as refugees. In fact, in some States, certain groups of refugees have been granted protection on the basis of human rights instruments, thus in part overcoming the gap deriving from a narrow interpretation of the refugee definition. Similarly, where the removal of a stateless person would give rise to a threat to life, or to a risk of torture or other cruel, inhuman or degrading treatment, the human rights instruments may provide a basic safeguard against removal.

19. There is limited State practice to draw on as regards applying the *non-refoulement* prohibitions under human rights instruments to persons fleeing the indiscriminate effects of armed conflict or serious public order disturbances. This can partly be explained by the fact that, in such situations, temporary protection has often been granted as a pragmatic solution. The existing case law under international and regional human rights instruments indicates that the existence of such a situation in the country of origin is in itself generally not sufficient. The applicant has to show that he or she is personally at risk of serious violations of fundamental rights so that return would reach the threshold of torture, cruel, inhuman or degrading treatment.

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<sup>9</sup> See, for instance, jurisprudence and decisions related to Article 3 of the CAT; Articles 6 and 7 of the ICCPR; Articles 2 and 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 4 and 5 of the 1969 American Convention on Human Rights.

<sup>10</sup> This paper, like the 9 June 2000 paper, does not address the situation of persons who have been excluded from refugee status in application of the exclusion clauses contained in the 1951 Convention, but who nevertheless cannot, under relevant human rights law, be returned to a country where they would face a risk of torture, cruel, inhuman or degrading treatment or punishment.

The standard of proof applied is often quite high. This is an area of application which, in UNHCR's view, deserves to be revisited. Similarly, it could be argued that the return of individuals who have fled natural or ecological disaster to their country of origin might in exceptional circumstances reach a level of severity amounting to inhuman treatment and consequently give rise to protection from *refoulement* under human rights instruments.

20. The majority of the provisions of the international human rights instruments apply to all individuals on the territory of a State, irrespective of their nationality. Thus, non-nationals, including refugees and other persons in need of international protection, are in principle entitled to a core set of rights, unless an objective reason can be found to distinguish them from the general population. In the case of economic rights, however, Article 2(3) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) does acknowledge that "developing countries" have some discretion in determining the extent to which such rights should be guaranteed to non-nationals. In addition, and overall, the ICESCR provides for progressive implementation.

21. The rights guaranteed under the international human rights instruments are often similar to the standards of the 1951 Convention. They do not, however, provide protected persons with a clearly defined, internationally recognized status or a specific legal residency status, identity or travel documents, nor are there any specific provisions relating to eventual integration and naturalization, even though some of these deficiencies may have been addressed by national law. Yet while the human rights regime does not constitute a comprehensive legal system specifically designed to address the situation of persons in need of international protection, its strength lies in its universal character which reinforces and supplements international protection provided under international refugee law. Most notably, human rights law also prohibits *refoulement* and sets out rights applicable to every person under the contracting State's jurisdiction, including persons in need of international protection.<sup>11</sup>

#### *National protection obligations*

22. A number of States party to the 1951 Convention have complemented all of the above by establishing specifically tailored mechanisms to offer a form of international protection to persons who are considered to be in need of international protection but who fall outside the scope of the 1951 Convention and other international instruments to which the State is party. Such regimes often draw on national (constitutional) obligations beyond the international and regional human rights guarantees and may, for example, address protection needs arising out of situations of generalized violence. Although there is basically no State practice to accord victims of natural disaster protection under such mechanisms, it is worth noting, however, that UNHCR's call for suspension of return to the areas affected by the December 2004 tsunami, though not based on a legal obligation, was well respected.

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<sup>11</sup> Humanitarian law also contains specific prohibitions against *refoulement*, see Article 12 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War in conjunction with Articles 13 and 17 and Article 45 of the 1949 Convention relative to the Protection of Civilian Persons in Time of War, which are not discussed further in this paper, since they are only applicable in situations of armed conflict.

*Procedural aspects and status*

23. Complementary protection based on the country's human rights or on national obligations is regularly granted on the basis of legislation providing for individual procedures. In most such countries, the granting of complementary protection is mandatory if based on the country's human rights obligations and if the relevant criteria are met. Beneficiaries of complementary protection are regularly provided with a residence permit and access to fundamental human rights, though a permanent residence permit and citizenship are often more difficult to obtain for persons with complementary protection than for 1951 Convention refugees. In most countries, complementary protection is automatically renewed unless information comes to light that the need for international protection no longer exists, for example, because of changed country conditions.<sup>12</sup> The recommendations made by UNHCR as regards standards of treatment for complementary forms of protection are supported by many States and may therefore form the basis of a more harmonized approach.

24. In an increasing number of countries, all international protection needs are examined in a single consolidated procedure, with the same safeguards of procedural fairness and a right of appeal with suspensive effect. Best practice implemented in several countries is to grant the same status and rights as Convention refugees or a status similar to this. In these countries, the cessation clauses of the 1951 Convention are also applied by analogy to persons under complementary forms of protection.<sup>13</sup>

25. In addition to providing complementary forms of protection offered after recognition of individual protection needs and a determination of their nature, several States provide temporary protection based on a group assessment of individual protection needs as a provisional protection response in emergency situations where asylum systems would otherwise become overwhelmed. The tendency in some States to grant persons fleeing armed conflict and generalized violence temporary protection rather than refugee status or a form of complementary protection runs the risk that persons with recognized international protection needs, although protected from *refoulement*, will remain in the host country for longer periods of time without a definitive status. Persons with temporary protection should not be precluded from having access to asylum procedures to have their asylum applications examined individually.

26. In summary, complementary protection is one way of responding pragmatically to certain international protection needs. It should be granted to persons in need of international protection who fall outside the scope of the 1951 Convention following a full and inclusive determination of refugee status. Its beneficiaries should include persons who are outside their countries because of a serious threat to life, liberty or security of person in the country of origin, as a result of armed conflict or serious public disorder. Based on the increasing adaptation of complementary forms of protection to the standard of treatment of Convention refugees, at least

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<sup>12</sup> In the European Union context, the Council of Ministers included minimum rules on who should be granted "subsidiary" protection in Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.

<sup>13</sup> As reported in EC/GC/01/18 of 4 September 2001, the Lisbon Expert Roundtable on cessation of refugee status held in May 2001 recognized the doctrine developed with respect to the Convention cessation clauses as being one guide for the development of standards appropriate in the context of ending complementary protection.

in a number of States, UNHCR recommends adopting a harmonized approach to the grant of complementary forms of protection which is guided by the 1951 Convention and relevant developments in human rights law.

#### IV. CONCLUDING OBSERVATIONS

27. The following concluding observations might form the basis of a Conclusion by the Executive Committee on this topic:

- (a) International protection is necessitated and should be granted where there are identified protection needs and where national protection is lacking against the threat of persecution or violations of fundamental human rights, or where this is a result of statelessness;
- (b) The 1951 Convention and 1967 Protocol form the cornerstone of the international protection for refugees, provide the basic framework for such protection and should be rigorously and properly applied. The criteria for refugee status in the 1951 Convention should be interpreted in such a manner that individuals or groups of persons who fulfil these criteria are duly recognized and protected under that instrument, rather than being accorded a complementary form of protection;
- (c) Refugee law is a dynamic body of law, which is informed by the object and purpose of the 1951 Convention and 1967 Protocol, as well as by developments in related areas of international law, such as human rights law, and which is complemented by regional refugee protection instruments, such as the 1969 OAU Refugee Convention;
- (d) International and regional instruments to address the problem of statelessness such as the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are important instruments to avoid and resolve situations of statelessness and further the protection of stateless persons. States are encouraged to accede to them and/or apply them in good faith, with protection objectives to the fore;
- (e) Human rights law provisions prohibiting *refoulement* represent important tools to address protection needs of persons who have not been granted refugee status under the 1951 Convention;
- (f) States should make maximum use of existing protection instruments when addressing international protection needs. States that have not already done so should accede to the instruments mentioned in subparagraphs (c) and (d) and/or lift existing limitations or reservations in order to ensure the widest possible, and most closely harmonized, application of the protection principles they contain;
- (g) Complementary forms of protection adopted by States to ensure that persons in need of international protection actually receive it are a positive way of responding pragmatically to certain international protection needs. Measures to provide complementary protection should, however, be implemented in a manner that strengthens, rather than undermines, the existing global refugee protection regime;



- (h) Temporary protection, which is a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from other forms of international protection which provide a definitive status. Persons under temporary protection should be given access to asylum procedures so that their asylum applications can be examined individually;
- (i) Persons in need of international protection but clearly outside the scope of the 1951 Convention should be protected against *refoulement* and their basic human rights respected. The standards elaborated in the 1951 Convention, together with developments in human rights law, provide an important guide with respect to the treatment that should be afforded such persons;
- (j) States should, as far as possible, implement international protection measures in such a manner as to ensure the affected individual the highest degree of stability and certainty possible in the circumstances, including through appropriate measures to ensure respect for other important principles, such as the protection of the family unity;
- (k) Criteria for ending international protection which falls outside the scope of the 1951 Convention should be objective, clearly enunciated in law and should never be arbitrary. Where relevant, the doctrine that has been developed regarding the cessation provisions of Article 1C of the 1951 Convention offer helpful guidance in this regard. UNHCR has a consultative role, given its particular expertise, when States are considering the appropriateness of ending complementary protection measures;
- (l) A single comprehensive procedure, before a central expert authority, for assessing whether an asylum-seeker qualifies for refugee status or for other forms of international protection represents an efficient means of identifying persons in need of international protection. Such a procedure should meet all the requirements of fairness, including the right to appeal with suspensive effect and access to UNHCR;
- (m) The international protection system should be applied and developed in a way which avoids protection gaps and enables all those in need of international protection to find and enjoy it.