

INTERNATIONAL LAW ASSOCIATION
DELHI CONFERENCE (2002)
COMMITTEE ON REFUGEE PROCEDURES

Members of the Committee:

Professor Kay Hailbronner (Germany): *Chair*
Professor Guy S Goodwin-Gill (UK): *Co-Rapporteur*
Professor Walter Kalin (Switzerland): *Co-Rapporteur*

Dr Michael Byers (UK)
Professor S V Chernichenko (Russia)
Professor Woon-Sang Choi (Korea)
Dr J P L Fonteyne (Australia)
Alternate: Ms Jenny Blokland
Professor Yoshio Kawashima (Japan)
Professor Jang Hie Lee (Korea)
Professor Stephen H Legomsky (USA)
Mr Erik Lempert (Sweden)
Mr Dinesh Chand Mathur (India)

Professor Ved P Nanda (USA)
Professor Bruno Nascimbene (Italy)
Mr Michael Petersen (HQ/Switzerland)
Mr Olaf Reermann (Germany)
Alternate: Professor Rainer Hofmann
Dr Volker Turk (Austria)
Dr Mieczysława Zdanowicz (Poland)
Dr M Zieck (Netherlands)
Dr Gottfried Zurcher (Switzerland)

INTRODUCTION

Prof. Kay Hailbronner, Chairman

The following report consists of two parts. The first part deals primarily with procedural issues relating to temporary protection. The second part deals with the general issue of minimum standards for refugee procedures. The Committee, aware of the increasing importance of issues of temporary protection, has decided to first devote its attention to the procedural aspects of temporary protection. At a second step the general issue of asylum procedure has been taken up. Both subjects have been discussed extensively at various Committee meetings, the last one being the meeting of November 23, 2001 in Konstanz, Germany. It is suggested to decide about the adoption of the final report and the draft guidelines at the 2002 Delhi Conference.

PART I: FINAL REPORT AND DRAFT GUIDELINES ON TEMPORARY PROTECTION

Prepared by Prof. Walter Kälin, University of Bern

I. INTRODUCTION

1. Past Work of the Committee in the Area of Temporary Protection

The Committee on Refugee Procedures was created in 1992. At its first meeting in 1993 in Konstanz/Germany, it was decided that one focus of activities would be on the issue of temporary protection. The first Interim Report of the Committee submitted to the 1996 Helsinki Conference described the origins and the background of the discussion on temporary protection and analyzed the main components of this concept (rationale; suitable situations; beneficiaries; relationship to national refugee determination and asylum procedures; status rights during temporary protection; and questions related to the termination of this status including return in safety and dignity and alternative solutions). It concluded with a list of questions which provided a framework for the further work of this Committee. The second Interim Report prepared for the 1998 Taiwan Conference took up a series of key issues regarding conceptual aspects of temporary protection. It dealt with problems such as the question of appropriate situations for granting temporary protection and beneficiaries of such protection, the complex relationship between temporary protection and national asylum procedures, the rights of those who are temporarily protected, and the issue of return and other solutions where return is not possible.

The third Interim Report presented a draft resolution to the 2000 London Conference addressing issues such as the categories of persons who should benefit from temporary protection, the standards for the treatment of temporarily protected persons and the complex question of how to end temporary protection.

Many aspects of the concept of temporary protection were not controversial among the members of the Committee. There was consensus that temporary protection should be provided in situations of *mass-influx* of persons on flight. There was also agreement that temporary protection should allow suspension of asylum proceedings for some time, i.e. make it possible for States to protect such persons without having to go into full-fledged status determination procedures. At the same time, there was agreement on the necessity to examine and accommodate, at some point, the claims of those who turn out to be genuine refugees in the sense of 1951 Convention Relating to the Status of Refugees (CSR51) and its 1967 Protocol. Finally, the members of the Committee agreed that temporary protection is a return-oriented concept although, in certain circumstances, return might not be a viable option for prolonged periods of time, thus making it necessary to find alternative solutions. Main areas of disagreement concerned the rights that should be granted to those receiving temporary protection, the question of duration of such protection and the issue of burden-sharing.

The Committee on Refugee Procedures has been requested to submit its final report to the 2002 Delhi conference¹. The present report which was revised and approved at a meeting of the Committee in November 2001 in Konstanz/Germany and subsequently circulated among those members who could not attend, proposes guidelines on temporary protection that should provide guidance to States and groups of States which choose to resort to temporary protection on an ad hoc basis or are conceptualizing such protection in a general manner as a measure to respond to exceptional situations of mass influx of persons in search of international protection. In this regard, it has to be stressed that present international law sets certain limits to the freedom of States to conceptualize temporary protection but, at the same time, does not promote one particular model. The proposed resolution attempts to outline both the possibilities and the limits relevant for States or groups of States resorting to temporary protection.

The Committee on Refugee Procedures refrains from proposing a draft convention on temporary protection. Some members of the Committee are concerned that such a draft convention might encourage international negotiations that could, in today's restrictive international climate, lead to solutions that would weaken rather than strengthen the obligations of States towards refugees and other persons in need of international protection. Other members of the Committee believe that a draft convention would provide a useful reminder to States of their obligations under the 1951 Convention and 1967 Protocol relating to the Status of Refugees and help to ensure that unacceptable *ad hoc* approaches to temporary protection are not regarded as somehow beyond the scope of international law. Nevertheless, all members of the Committee consider that a draft declaration on temporary protection would serve an important purpose in and of itself.

2. Recent Developments

Since the 2000 London Conference one important development has occurred that needs to be reflected in the resolution proposed in this report. On 20 July 2001, the Council of the European Union adopted a Directive on minimum standards for giving temporary protection in the event of mass influx² (hereinafter EU-Directive) which is based on Article 63(2) of the Treaty Establishing the European Community requiring the adoption of "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection". The directive establishes "minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin ..." (Article 1). Such protection is granted in situations of mass influx if the Council, upon recommendation by the Commission and taking into account reception capacities of the Member

¹ 69th Conference of the International Law Association, held in London, United Kingdom, 25-29 July 2000, Resolution No. 20/2000.

² Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of the European Communities, L 212/12, 7.8.2001.

States, so decides by a qualified majority. It may last up to a maximum of three years³ and is mainly aimed at protecting “(i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who have been victims of, systematic or generalized violations of their human rights”⁴. Member States are obliged to grant the following to the beneficiaries of temporary protection: A residence permit during the duration of such protection⁵, an authorization to engage in employed or self-employed activities⁶, access to suitable accommodation, necessary assistance in terms of social welfare and necessary medical assistance⁷, access to education for those under the age of 18⁸ and reunification of nuclear families⁹. Regarding access to an asylum procedure, the Directive states that those “enjoying temporary protection must be able to lodge an application for asylum at any time”; however, States may suspend the examination of such demands until after the end of temporary protection¹⁰. Regarding return, the Directive distinguishes two situations: (1.) Voluntary return in full knowledge of the situation in the country of origin shall be facilitated by Member States during and after the end of temporary protection, e.g. by allowing exploratory visits¹¹. (2) When temporary protection is lifted, former beneficiaries who are not entitled to asylum or other forms of admission may be returned against their will but such return must be “conducted with due respect for human dignity”; in cases of forcible return, Member States also have the duty to “consider any compelling humanitarian reasons which may make return impossible or reasonable in specific cases”¹². The Directive further provides for burden-sharing by not only making the European Refugee Fund¹³ available for measures in the area of temporary protection but also by stipulating that Member States shall indicate their capacity to receive beneficiaries of temporary protection, and that they are entitled to request other Member States to allow the transfer of specific persons enjoying temporary protection¹⁴.

This Directive, to a considerable extent, is based on conceptual ideas that are similar to those promoted in the past reports of this Committee, except one point: Whereas the Committee, in its past reports, based its work very much on the notion that temporary protection should primarily serve the purpose of bridging the gap between a narrow understanding of the refugee definition excluding many of those fleeing the dangers of armed conflict and similar situations of generalized violence and the need to provide international protection to a broader category of persons, the Directive not only covers such situations but encompasses also cases of mass-influx of refugees in the sense of the 1951 Refugee Convention. The present proposal tries to integrate the two approaches. They are both based on the idea that temporary protection is and should remain an exceptional instrument allowing States to address situations of mass-influx of persons in need of international protection where individual refugee determination is hardly feasible and, at the same time, the protection needs of those arriving are evident in most cases¹⁵. In this regard, temporary protection must be clearly distinguished from forms of subsidiary protection granted in individual cases to those who are not refugees but are allowed to stay because they are protected against return by relevant human rights guarantees such as Article 3 of the 1984 Convention against Torture or because they cannot be reasonably expected to go back to their country of origin for compassionate reasons or because they flee the indiscriminate effects of violence that is not related to any kind of political or similar persecution¹⁶.

³ According to Article 4 of the Directive, temporary protection lasts one year and is automatically prolonged by six-months periods for another year if return does not become possible in the meantime. If the reasons for granting temporary protection persist, the Council, with qualified majority, may prolong such protection for another year.

⁴ Article 2(c) Directive.

⁵ Article 8 Directive.

⁶ Article 12. However, according to this provision, Member States “may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third-country nationals who receive unemployment benefit.”

⁷ Article 13 Directive.

⁸ Article 14

⁹ Article 15. States may reunite extended families in the sense of “other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at that time.”

¹⁰ Article 17 Directive.

¹¹ Article 21 Directive.

¹² Article 22 Directive

¹³ This Fund was set up, in 2000, by Decision 2000/596/EC.

¹⁴ Articles 24 - 26 Directive.

¹⁵ See UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, EC/50/SC/CRP.18, 9 June 2000, para. 21.

¹⁶ *Id.*, paras. 5 and 10. See also Commission of the European Communities, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as*

3. *New Elements*

The draft resolution presented in last year's report has been revised in the light of the discussions among the members of the Committee. The present version also takes into account the EU-Directive mentioned above. In particular, two elements are new:

First, the resolution takes into account that, in State practice, temporary protection may serve at least two purposes, namely (1.) to bridge the gap between a narrow understanding of the refugee definition excluding many of those fleeing the dangers of armed conflict and similar situations of generalized violence and the need to provide international protection to a broader category of persons; and (2.) to provide States with an instrument allowing for an interim response in situations of mass-influx of Convention refugees that unburdens asylum-procedures and, at the same time, stresses return as the envisaged solution¹⁷. Whereas previous reports focussed on the first of these purposes, the second has become important with the adoption of the EU-Directive which aims providing the States with an instrument to address situations of mass-influx of refugees even if the majority of them fulfill the requirements of the 1951 Convention and 1967 Protocol relating to the Status of Refugees.

Second, the draft resolution presented to the 2000 London meeting made only a passing reference to the issue of burden-sharing. It was felt by many members that a separate paragraph was needed. As was stressed in the 2000 report, States have not been able to really to agree on effective mechanisms of burden-sharing on the universal or the regional level. This is even true for the EU-Directive which contains important elements of burden-sharing including some financial aid and the possibility to transfer temporarily protected persons from one EU member State to another, but contains no guarantees that the burden is equally shared among States if the political will to do so is absent. Outside an organization with the high degree of integration of the EU effective burden-sharing is even more difficult to achieve. At the same time, UNHCR's Executive Committee has been discussing international cooperation to share responsibilities in situations of mass influx since a long time¹⁸ and recently these debates were revived as part of the Global Consultations on International Protection¹⁹.

This Committee does not propose any specific mechanisms for burden-sharing but stresses, in the proposed guidelines, the need to assist States which are confronted with very large numbers of persons in search of protection. In this context, ExCom Conclusion No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx might provide some guidance, insofar as it stressed that "States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large-scale influx situations." At the same time, it is also necessary to recall 1998 ExCom Conclusion No. 85 (XLIX) on International Protection which stressed that access to protection should not be made "dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles is an obligation for all members of the international community".

II. GUIDELINES ON TEMPORARY PROTECTION

Preambular Paragraphs:

The International Law Association,

RECALLING the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the 1948 Universal Declaration of Human Rights, the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights as well as other relevant universal human rights instruments;

persons who otherwise need international protection, COM(2001) 510 final, 001/0207 (CNS), 12 September 2001, Article 15.

¹⁷ See Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, *The American Journal of International Law*, Vol 94, 2000, pp. 287.

¹⁸ See EXCOM Conclusions No. 22 (XXXII) of 1981 on the protection of asylum-seekers in situations of large-scale influx, No. 15 (XXX) of 1979 (f) and (g), No. 52 (XXXIX) of 1988, No 61 (XLI) of 1990 (g), No. 77 (XLVI) of 1995 (o), No. 80 (XLVII) of 1996, (a); No. 85 (XLIX) of 1998 (o) and (p), and No. 89 (LI) of 2000.

¹⁹ See *Global Consultations on International Protection, Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations*, EC/GC/01/7, 19 February 2001.

ALSO RECALLING that instruments for the protection of refugees such as the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa and the 1984 Cartagena Declaration on Refugees as well as relevant regional human rights conventions provide guidance on a regional level;

TAKING NOTE of the Directive on minimum standards for giving temporary protection in the event of mass influx adopted by the Council of the European Union on 20 July 2001,

RECOGNIZING that in the case of large-scale influxes, not only refugees within the meaning of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees but also other persons fleeing the indiscriminate effects of armed conflict or situations of generalized violence are in need of international protection as long as the dangers stemming from such situations last;

CONSIDERING that in cases of mass influx of persons in need of international protection individual refugee status determination may often not be possible or practical and that, therefore, temporary protection offers a pragmatic response to specific protection needs by enhancing the effectiveness of the principle of non-refoulement as well as the protection of those who, whether or not they are refugees within the meaning of the 1951 Convention and 1967 Protocol relating to the Status of Refugees, are forced to flee across international borders;

NOTING that beneficiaries of temporary protection may be refugees within the meaning of the 1951 Convention and 1967 Protocol relating to the Status of Refugees and that, therefore, the granting of temporary protection must not prejudice their entitlements under that Convention;

DESIRING to provide guidance for States and groups of States which, on an ad hoc basis or in a general manner, choose to resort to temporary protection as a measure to respond to exceptional situations of mass influx of persons in need of international protection;

Adopts the following guidelines:

Commentary:

The preambular paragraphs stress that temporary protection must be seen as a concept that has to be placed within and not outside the framework of international refugee and international human rights law. They also stress the character of temporary protection as an exceptional and subsidiary means of protection to be used when, in situations of mass influx of persons in need of international protection, individual refugee status determination may not be possible or practical. Finally, the preamble makes clear that the purpose of the resolution is to provide guidance to States wishing to use temporary protection either as an *ad hoc* measure or as an established instrument of their refugee related law and policy. This guidance is derived from present international law, including the principle of non-refoulement and human rights to be granted to everyone entitled to stay in a particular country during the duration of temporary protection.

Section I: General Provisions

1. *States shall implement temporary protection in a manner consistent with the framework of international refugee and human rights law preserving the institution of asylum, respecting their obligations regarding non-refoulement and ensuring that persons in need of international protection can enjoy such protection with full respect for their fundamental human rights. Temporary protection is without prejudice to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.*

Commentary:

Temporary protection is not an established concept of public international law but rather a practical instrument developed to cope with specific situations. As both sentences²⁰ of this paragraph underline, it does not constitute a measure that would allow to derogate from the obligations under 1951 Convention and 1967 Protocol relating to the Status of Refugees (CSR51) or relevant human rights instruments. Rather, temporary protection must be framed and evaluated in the light of international obligations of States. According to general international law, States are, to a very considerable extent, free to decide

²⁰ For the second sentence see Art. 3(1) of the 2001 EU-Directive.

which aliens may enter their territory and stay there. The right to be granted asylum²¹ is not internationally recognized. Nevertheless, the discretionary power of States regarding aliens in general and refugees in particular is limited by customary and treaty law in several regards. These limits also apply to temporary protection.

The most important limitation of the discretionary power of States flows from the principle of *non-refoulement* which is laid down in article 33 of the 1951 Convention and other instruments protecting refugees²² as well as in human rights provisions such as Article 3 of the 1984 Convention against Torture (CAT) or Article 3 of the European Convention on Human Rights (ECHR) prohibiting forcible return to situations of torture and ill-treatment. *Non-refoulement* has attained the status of international customary law.²³ It prohibits not only forcible return to the country of persecution of those who have entered the country of refuge but also applies to rejection at the border.²⁴ The principle protects not only persons who were granted refugee status in a national determination procedure, but also all persons seeking asylum or other forms of international protection as long as their claim to be refugees has not been refuted in a formal procedure.²⁵ This wide personal scope is especially important if refugee status procedures are suspended: In such situations, temporarily protected persons remain under the full protection of article 33 CSR51 as, exactly like asylum-seekers, they may be Convention refugees. Protection under article 33 only falls away when it is determined, in an individual procedure, that the claim to be a refugee is ill-founded.

2. *Temporary protection as envisaged in these guidelines is only appropriate in situations of mass influx of persons seeking refuge abroad, whether or not these persons are refugees within the meaning of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees or persons who are not persecuted but flee the indiscriminate effects of armed conflict or situations of generalized violence. Temporary protection should be understood as an element within the framework of a more comprehensive approach to situations of mass influx, involving concerted efforts on the part of the international community (i) to assist States particularly affected by such an influx in a spirit of international solidarity and burden-sharing, and (ii) to achieve a solution to the conflict or strife in order to enable those who have fled to return in safety and dignity.*

Commentary:

In which situations should temporary protection be used? From a legal perspective, asylum granted on the basis of an individual procedure is probably the best way to secure the rights of refugees. Temporary protection, though preferable to no protection at all, is problematic insofar as it leaves beneficiaries uncertain about their future, grants them only a limited set of rights and renders the process of rebuilding their lives more difficult. Therefore, temporary protection as envisaged in these guidelines, i.e. protection granted on a group basis, should only be used in exceptional cases where the application of the usual procedures is no longer possible or practical. There is consensus²⁶ today that temporary protection is only suitable in situations where there is a mass-influx of persons fleeing their country of origin across international borders and seeking refuge elsewhere²⁷. Mass-influx has to be distinguished from mass-exodus. Often, a mass-exodus leads to a mass-influx only in a few countries leaving other countries of asylum with relatively low numbers of asylum-seekers from that particular country of origin. There also might be situations where those fleeing *en masse* disperse to many countries in a way that does not overburden any particular country. Taking into account the exceptional and subsidiary character of temporary protection, its application is not justified if a country is not confronted with a mass-influx.

²¹Article 14 of the 1948 Universal Declaration of Human Rights is limited to the right to „seek“ and to „enjoy“ asylum.

²²E.g. article II(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; article 22(8) of the 1969 American Convention on Human Rights.

²³For a recent discussion, see Guy Goodwin-Gill, *The Refugee in International Law*, Oxford 1996, at p. 167.

²⁴See Opinion Sir Elihu Lauterpacht/Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, 20 June 2001; Goodwin-Gill, *supra* note 23, at 123-4.

²⁵See, e.g., ExCom Conclusion No. 6 (XXVIII), reaffirming „the fundamental importance of the principle of *non-refoulement* ... irrespective of whether or not individuals have been formally recognized as refugees“.

²⁶As expression of this consensus see e.g. Article 1 and 5 of the EU-Directive.

²⁷The use of temporary protection as a rule is, however, proposed by Manuel Angel Castillo/James C. Hathaway, *Temporary Protection*, in: James C. Hathaway (Ed.), *Reconceiving International Refugee Law*, The Hague/Boston/London 1997, pp. 1.

In situations of mass-influx, there will be an increased need to coordinate national policies in dealing with the specific large scale refugee crisis, e.g., in order to achieve a certain degree of burden-sharing or to avoid secondary migration flows. Therefore, temporary protection should preferably be used if, in addition, an *international process* is established which seeks to re-establish the conditions allowing for a safe and dignified return. The involvement of the international community will increase the chances of a solution of the conflict and thus enhance the possibility of return in safety and with dignity within a relatively short period.

3. *States shall, within the framework of international solidarity and burden-sharing, endeavor to take all necessary measures to assist, at their request, States which have temporarily admitted persons in search of international protection in large-scale influx situations, either by financial contributions or by accepting some of the temporarily admitted persons to their own territory. Within regional organizations such as the European Union, burden-sharing could include institutionalized mechanisms for the distribution of temporarily admitted persons among the member States.*

Commentary:

This paragraph further expands the issue of burden-sharing. It is recognized today that the reception of persons on flight might unduly burden particular States. In this regard, the Executive Committee on the Programme of the UNCHR, in its 1998 Conclusion on Refugee Protection No. 85 (XLIX), e.g., reiterated “that refugee protection is primarily the responsibility of States and that it is best achieved through effective cooperation between all States and UNHCR, as well as other international organizations and pertinent actors, in a spirit of international solidarity and burden-sharing”. Whereas this and many similar resolutions²⁸ refer to refugees and asylum-seekers in general, the Executive Committee, in its 1996 Conclusion No. 80 (XLVII) on Comprehensive and Regional Approaches within a Protection Framework, is directly applicable to the issue of temporary protection. It referred to situations “of large-scale involuntary population displacements”, encouraged “States, in coordination and cooperation with each other, and with international organizations, if applicable, to consider the adoption of protection-based comprehensive approaches to particular problems of displacement” and identified as one of the principal elements of such approaches “measures to reinforce international solidarity and burden-sharing”²⁹.

Unfortunately, it has not been possible thus far to agree on institutionalized mechanisms of burden-sharing on the universal level, and even the burden-sharing mechanism introduced by the EU-Directive³⁰ is rather weak. Taking this into account, it seems appropriate for this Committee not to propose a specific mechanisms for burden-sharing but instead to call upon States to assist, at their request, States which are confronted with very large numbers of persons in search of protection. Such assistance might be financial or consist in the offer of States to admit some of the temporarily admitted persons to their own territory. On the regional level, the Committee considers the distribution of temporarily admitted persons among member States as one appropriate mechanism for dealing with the issue of burden-sharing. The ongoing discussion in the context of UNHCR’s global consultations on international protection on how to design a more predictable framework of burden-sharing in such situations³¹ is a process that should be continued.

Section II: Beneficiaries

4. *Beneficiaries of temporary protection are persons who may or may not be refugees within the meaning of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. These include, in particular*
 - (a) *persons who have fled the indiscriminate effects of armed conflict and generalized violence;*
 - (b) *persons whose life, personal integrity or freedom is at risk as a result of systematic or widespread human rights violations.*

²⁸ See, e.g., ExCom Res No. 81/XLVIII (1997) General Conclusion on Refugee Protection.

²⁹ See also the 1981 ExCom Conclusion No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx

³⁰ See supra at I.2.

³¹ See UNHCR, Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations, 19 February 2001, EC/GC/01/7.

Commentary:

As mentioned above, temporary protection provides States with an instrument allowing for an interim response in situations of mass-influx that unburdens asylum-procedures and, at the same time, stresses return as the preferred solution. Generally, mass-influx includes refugees in the sense of the 1951 Convention and 1967 Protocol as well as other persons in need of international protection. Although there is a risk that in the first case temporary protection might become an easy and soft substitute to asylum in the traditional sense, the experience of the Kosovo crisis has shown that there may be situations where temporary protection is an appropriate response even though most of those arriving arguably qualify as Convention refugees.

This paragraph first states that Convention refugees may be beneficiaries of temporary protection and then goes on to stress that such protection should also be granted to persons who may not fulfill the criteria of the refugee definition as provided for by Article 1A(2) CSR51 but would be covered by the wider notion of refugee as embodied in regional instruments such as the 1969 OAU Refugee Convention and the Cartagena Declaration³².

5. *States deciding to grant temporary protection in a particular situation of mass-influx shall, when making such decision, designate the specific groups of persons to whom such protection will apply. In such cases, consultation with UNHCR would be appropriate.*

Commentary:

As each situation of mass-influx is different from others and because States have a large degree of discretion regarding the granting of temporary protection, they have to determine in each case to whom such protection will be given. In order to profit from the particular advantages of temporary protection, such determination should be made on a group basis and not in each individual case. Such decision will define the criteria of who belongs to the specific group (e.g. persons belonging to a specific nationality or ethnic or religious group, persons who fled a specific area in a war-torn country, persons who have deserted regular or irregular troops taking part in an armed conflict). It may also set a maximum number of those temporarily admitted³³, however without prejudice to the principle of non-refoulement and preferably on the basis of regional burden-sharing arrangements. The group based determination will not eliminate the need for any individual procedure but such procedure can be limited to the examination as to whether a particular person in fact belongs to the group of designated beneficiaries.

Section III: Access to Temporary Protection:

6. *If States resort to the instrument of temporary protection, beneficiaries should be given access to their territory without discrimination. Beneficiaries shall be protected against refoulement.*

Commentary:

A first essential element of temporary protection is admission to the territory of the country granting temporary protection. Arrival may be spontaneous or in the form of relocation from a first country of refuge to the country offering temporary protection, depending on how the category of beneficiaries is defined. Depending on circumstances, States may facilitate admission, e.g. by waiving visa requirements for beneficiaries or by assisting their transport.

A second essential element is the right to remain in the country as long as temporary protection lasts. Therefore, beneficiaries have to be protected against refoulement as long as the danger lasts. As mentioned above (commentary on para. 1), the principle of non-refoulement must be scrupulously observed by virtue of international law as long as it has not been established in the individual case that beneficiaries of temporary protection are not refugees in the sense of Article 1A(2) CSR51 or that human

³² Cartagena Declaration on Refugees, adopted at a colloquium entitled „Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios“ held at Cartagena, Colombia from 19 - 22 November, 1984.

³³ Persons from the same category after the maximum number has been exhausted will be treated like other asylum-seekers.

rights guarantees prohibiting return in case of imminent torture and similarly serious human rights violation fail to apply in the concrete circumstances.

7. *States may suspend the examination of requests by temporarily protected persons for refugee status determination. They may coordinate temporary protection with refugee status determination procedures in one of the following ways: (i) Granting temporary protection after a request for refugee status determination has been rejected; (ii) free choice between temporary protection or refugee status determination procedure; (iii) automatic determination of refugee status after a certain period of suspension (e.g. 2-3 years); or (iv) refugee status determination procedures at the end of the stay for those who claim to have a well-founded fear of persecution in case of return to the country of origin, or who are able to invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of the country of nationality. Total exclusion from an individual status determination procedure even at the end of temporary protection would contradict basic principles of international refugee law.*

Commentary:

Although the 1951 Convention and 1967 Protocol do not contain any provisions relating to national status determination procedures, the principle of good faith in fulfilling treaty obligations requires that States Parties to the Convention institute a procedure which allows for determination of who is entitled to the guarantees of that treaty.³⁴ Because some of the beneficiaries of temporary protection will fulfill the criteria of refugees as defined by Article 1A(2) CSR51 the question of access to national refugee status determination procedures becomes important. In its 1994 Note on International Protection, UNHCR has maintained „that while persons receiving temporary protection should not be precluded from applying for refugee status, the consideration of such claims could be suspended while they enjoyed temporary protection.“³⁵ However, for Convention refugees who are among the temporarily protected, *complete* exclusion of status determination procedures would be incompatible with the obligations of state parties to the 1951 Convention under circumstances where a State denies (even in the long run) Convention rights guaranteed to refugees lawfully in the country or forcibly returns a person claiming to be a Convention refugee without examining such claim. There are at least four models for dealing with this problem: (1) *Temporary protection is granted only after an asylum request has been rejected*: The advantage of this model lies in the fact that it has been determined in each case whether the person concerned is a Convention refugee or not; therefore, it is clear who is entitled to Convention status rights. However, this approach does not allow for a relief of strains on the asylum procedure and, therefore, it is hardly suitable for situations of mass-influx. (2) *Persons can choose, at any time, between temporary protection and an asylum procedure*³⁶: Free choice is probably the best system for the individuals concerned as they can decide themselves without risking their temporary protection. However, in countries where there are large numbers of temporarily protected persons and where there is a big difference between their treatment and that of refugees with asylum, there will be considerable strains on the asylum procedure. (3) *Automatic determination after a certain period* is a model which obliges authorities to start individual asylum procedures if, after a certain period (e.g. two years), return still is not possible. This model has the advantage of providing refugees with a certain degree of security from the beginning on without excluding them from access to asylum if the situation lasts longer. However, procedures will become complicated if there is still a large number of procedures pending at the time when temporary protection is lifted. (4) *Asylum-procedures (including accelerated procedures) are granted when temporary protection is lifted*: Here, access to the asylum procedure is blocked during temporary protection or their asylum procedures are suspended. In this model, asylum-procedures serve to determine those who still have valid reasons to invoke protection under the 1951 Convention and 1967 Protocol³⁷ when temporary protection is lifted at a time when return becomes possible for other beneficiaries; consequently, they will receive asylum. However, if temporary protection lasts for

³⁴Decision of the German Constitutional Court on the Safe Third Country-Rule of 14 May 1996, section C, I.2, abstract in 9 IJRL 292-296 (1997).

³⁵1994 Note on International Protection (UN Doc. A/AC.96/830), para. 3.

³⁶ Article 17 EU-Directive provides that „[p]ersons enjoying temporary protection must be able to lodge an application for asylum at any time.“

³⁷ Valid reasons can not only be invoked by those who have a well-founded fear of persecution in case of return to the country of origin in the sense of Art. 1A(2) CSR51, but also by persons who, in accordance with Article 1C(5) CSR51 are able to invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of the country of nationality

prolonged periods, the status of temporarily protected persons must be gradually improved to the level required by the Refugee Convention³⁸.

International law does not prescribe any of these models but leaves room for political preferences for one or the other possibility as they are all compatible with international law. To exclude temporarily protected persons entirely from any refugee determination procedures, in contrast, is highly problematic. Such a model is only compatible with international law if two conditions are met: (1) Status rights of the temporarily protected persons are, at least gradually, improved so as to reach the level required by the 1951 Convention in case of a prolonged stay; and (2) there is an effective possibility of raising the issue of non-refoulement in proceedings outside the asylum-procedures.

8. *If it is apparent that the majority of people seeking protection or a specific category among them fall under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, group determination under that instrument should be considered.*

Commentary:

Where it is apparent that the majority of people seeking protection or a specific category among them fall under the 1951 Convention and 1967 Protocol, it might be more appropriate to proceed on the basis of *prima facie status determination* and provide refugee status under these instruments. This is especially true where there is little chance of return becoming a real option in the near future. In the past, national authorities and UNHCR have resorted, in many situations of mass influx outside Europe, to group determination which is based on the assessment that in a given situation all or most of those seeking refuge qualify *prima facie* as refugees. Such a determination regularly leads to granting refugee status to all those belonging to the particular group; as a consequence, these persons are entitled to enjoyment of the guarantees provided to them by the 1951 Convention.

Section IV: Standards for the Treatment of Temporarily Protected Persons

9. *Beneficiaries of temporary protection should be provided with a legal status that authorizes them to remain in the country of refuge during the duration of such protection and receive the necessary documentation.*

Commentary:

Temporary protection as a form of protection subsidiary to asylum needs to be regularized in order to achieve its goal of providing security during a period of acute danger to those in need of it. Such regularization has to include the granting of a status that authorizes beneficiaries to remain in the country as long as temporary protection lasts, subject of course to expulsion in accordance with applicable international law. Such regularization has to be distinguished from the granting of refugee status and, unlike asylum, contains no guarantee of prolonged or permanent stay.

10. *Beneficiaries of temporary protection shall be treated in accordance with human rights standards and, where applicable, the guarantees of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. States should have due regard to the minimal guarantees set out in ExCom Conclusion No. 22(XXXII). In cases of prolonged stay, the rights of temporarily protected persons should be gradually improved.*

In particular, every receiving State should respect and ensure the following rights of all persons to whom it chooses to accord temporary protection:

- a) *the right to be protected against discrimination;*
- b) *the right to an adequate standard of living including adequate food, clothing and housing;*
- c) *the right to adequate health care,*
- d) *the right to adequate education,*
- e) *freedom of movement which, to the extent possible, should not be restricted;*

³⁸ See next chapter.

- f) *family reunification, in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass-influx;*
- g) *access to employment in cases of prolonged stay.*

Commentary:

Temporarily protected persons can invoke most *civil rights* as embodied in the 1966 International Covenant on Civil and Political Rights (CCPR) and other universal and human rights instruments as these protect not only citizens but persons regardless of their nationality. When discussing permissible limitations of many of these rights, authorities must take into account that such persons are legally present in the country and, therefore, cannot be treated like illegal or unwanted aliens. Some guarantees belonging to the category of *economic, social and cultural rights* are of special importance for persons who have been temporarily protected, and they provide guidance on how to treat such persons during their stay in the country of refuge. Among them are the rights to social security and the right to adequate food, clothing and housing as, e.g., guaranteed by articles 9 and 11 of the 1966 Covenant on Economic, Social and Cultural Rights (CESCR), the right to work (article 8) as well as the right to education (article 13 CESCR).

The fact that temporarily protected persons are entitled to the enjoyment of fundamental human rights has been recognized by the Executive Committee as early as 1981 in its Conclusion No. 22(XXXII). According to this conclusion, these rights should, *inter alia*, include: (i) Freedom of movement in the country of refuge with restrictions limited to those „which are necessary in the interest of public health and public order“; (ii) necessary assistance covering „the basic necessities of life including food, shelter and basic sanitary and health facilities“; (iii) non-discrimination; (iv) free access to courts and other competent administrative authorities; and (v) respect for family unity; assistance in tracing relatives; protection of minors and unaccompanied children.

Especially if beneficiaries of temporary protection are excluded from the asylum procedure or if the examination of their requests for asylum is suspended, States are under a legal obligation to make sure that these persons are not only protected against refoulement and that their status rights not only meet the requirements of relevant human rights but are also gradually increased to the level required by the 1951 Convention for refugees lawfully staying or residing in the country of refuge. Besides guarantees protecting refugees who are simply present in the country of refuge³⁹ provisions applicable to refugees with lawful residence⁴⁰ or domicile and habitual residence in that country⁴¹ become relevant even if refugees among the temporarily protected persons are not granted asylum. They cannot be denied the benefits of that Convention for prolonged periods.

The second sub- paragraph does not exhaustively list all rights and guarantees applicable to the beneficiaries but highlights some of the most important ones, in accordance with ExCom Conclusion No. 22(XXXII) and Articles 12 – 15 EU-Directive.

Section V: Ending Temporary Protection

11. *States should, in coordination with UNHCR and other relevant international organizations and bodies, withdraw temporary protection when the situation in the country of origin has changed so fundamentally that it allows for the durable return of beneficiaries to their country of origin in safety and with due respect for their dignity.*

Commentary:

In State practice, there is an emerging consensus that temporary protection can be terminated when, after the end of conflicts or similar situations of violence, return *in safety and with due respect for the dignity of returnees* to the country of origin becomes possible and if the improvement of conditions there is *durable*. These requirements now have become part of the EU-Directive. The elements of safety and durability are mentioned in article 6(2), that of respect for their dignity in Article 21 and 22 of the Directive.

³⁹ Articles 3, 4, 22, 27, 31, 33 CSR51. Articles 18 and 26 require lawful presence.

⁴⁰ See notably Articles 15, 17(1), 19, 21, 23, 24, 28 CSR51.

⁴¹ See e.g. Article 12 and 14 CSR51.

A comprehensive definition of the notion of return in safety and dignity can be found in the UNHCR Handbook on Voluntary Repatriation:⁴² It illustrates return in *safety* as

“Return which takes place under conditions of legal safety (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return), physical security (including protection from armed attacks, and mine-free routes and if not mine-free then at least demarcated settlement sites), and material security (access to land or means of livelihood).”

Regarding return with *dignity* the Handbook stresses that this concept is less self-evident than that of safety but, in practice, includes

“that refugees must not be manhandled; that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.”

12. *States shall take the measures necessary to facilitate the voluntary return of persons enjoying temporary protection or whose temporary protection has ended, and to ensure that the decision of such persons is taken in full knowledge of the facts. Exploratory visits shall be allowed. In cases of enforced return after the end of temporary protection, compelling humanitarian reasons which may make return impossible or unreasonable shall be taken into account. The principle of non-refoulement as embodied in international law must be scrupulously observed in all circumstances.*

Commentary:

Voluntary return of beneficiaries of temporary protection is the best solution and, as such, should be facilitated by States. However, taking into account the principle of non-refoulement as well as the risks involved in premature return, the voluntary and individual character of return is of utmost importance⁴³. To allow exploratory visits makes sure that the decision to return is taken in full knowledge of the facts.

After the end of temporary protection, return of those who are not leaving voluntarily can be enforced, subject however to the limitations set by the principle of non-refoulement⁴⁴.

Experience shows that even where the situation in a country has returned to full normality, some persons cannot be returned or not reasonably be required to return. Among them are notably persons who need ongoing medical treatment or are traumatized to an extent that life in the country of origin becomes insupportable, if no appropriate medical treatment is possible there.

13. *As regards return in safety and with due respect for dignity of the persons concerned, the following elements should be taken into account:*

- *possibility to return to the country of origin;*
- *existence of conditions ensuring the physical and legal safety of returnees;*
- *availability of an adequate infrastructure or of assistance guaranteeing the basic necessities of life, including food, shelter and basic sanitary and health facilities;*
- *non-discrimination and respect for other fundamental human rights of returnees.*
- *international monitoring of the safety of return.*

⁴²UNHCR, Handbook on Voluntary Repatriation: International Protection, Geneva 1996, at 12. For an analysis of „return in safety and dignity“ see Marjoleine Y.A. Zieck, UNHCR and Voluntary Repatriation of Refugees. A Legal Analysis, The Hague. 1997, at 443-445, 459-461.

⁴³ On this see ExCom Conclusion No. 40 XXXVI/1985 para. b.

⁴⁴ Regarding access to a refugee determination procedure see supra, paragraph 7 of these Guidelines.

Commentary:

There are at least five *elements* of return in safety and with due respect for the dignity of the persons concerned which constitute minimum requirements: (1.) *The possibility to return*: This is not only a necessary factual element but it also reflects the right to return to one's own country is a human right as recognized, inter alia, by Article 12(4) CCPR. The corresponding duty of the country concerned is to permit return of its citizens to its territory. (2.) *Physical and legal safety*: This includes the existence of conditions or measures providing for the absence of and protection from attacks and other forms of violence or persecution. Legal safety requires not only relevant legislation but also actual implementation through a functioning administrative and judicial system. (3.) *Availability of adequate infrastructure or assistance guaranteeing the basic necessities of life*: This element is not only a consequence of the requirement of due respect for the dignity of returnees but also a reflection of the subsistence rights as recognized, inter alia, by Article 12 CESCR. (4.) *Non-discrimination and respect for other fundamental human rights*: Most important is the absence of and protection from any discrimination of the returnees. Other fundamental rights such as freedom of movement, respect for family life, freedom of opinion or religion are important too. Regarding property rights, refugees and displaced persons were granted, in the context of Bosnia and Herzegovina, "the right to have restored to them property of which they were deprived in the course of hostilities ... and to be compensated for any property that cannot be restored to them." (5.) *International monitoring*: Reintegration is a gradual process which often takes years and is affected by the difficulties of the national reconciliation and rehabilitation process necessary after a period of violent conflicts. ExCom Conclusion No. 40(XXXVI), in the context of voluntary repatriation, has recognized that the High Commissioner has „a legitimate concern for the consequences of return“ and that, therefore, „ he should be given direct and unhindered access to returnees so that he is in a position to monitor fulfillment of the amnesties, guarantees or assurances on the basis of which the refugees have returned.“ This statement is also relevant for repatriations following temporary protection. Monitoring comprises free and unhindered access of UNHCR and other monitoring bodies to all returnees and *vice versa* as well as government cooperation including the providing of information on all arrests, detentions, legal proceedings and security incidents involving returnees.⁴⁵

All these elements must be seen as elements in an ongoing process. Such a process will regularly need an institutional framework *based on agreements* between the parties involved (incl. UNHCR). Sometimes, such agreements will be elaborated within the framework of peace negotiations; in other cases, tripartite agreements between country of origin, countries of refuge and UNHCR will be appropriate; finally the necessary provisions may be laid down within the framework of regional organizations.

14. *If return to the former habitual place of residence is not possible, temporarily protected persons can only be reasonably expected to return to another part of the country if they will enjoy safety and dignity there.*

Commentary:

Is return permissible only if the persons concerned can return to the place of their former habitual residence or is it sufficient that repatriation to some part of the country of origin is possible? The Dayton Peace Agreement recognizes the principle of return to the place of former habitual residence.⁴⁶ Similarly, the Cartagena Declaration stresses that repatriation should be carried out „preferably to the place of residence of the refugee in his country of origin.“⁴⁷ This approach avoids the legitimization of ethnic cleansing. It also takes fully into account the needs of returnees regarding their freedom of movement and facilitates reintegration to a very considerable extent. Therefore, apart from cases of return to other parts of the country of origin which are undertaken on an entirely voluntary basis, return to the place of former habitual residence should be the guiding principle when temporary protection is lifted.

Does this mean that countries of refuge are not allowed to repatriate temporarily protected persons if one part of the country of origin is safe but another part not? In strict legal terms the answer is no, at least in some circumstances: Freedom of movement is not an absolute human right but one which can be limited if valid circumstances so require.⁴⁸ International refugee law does not prohibit the application of a principle of „internal flight alternative“ if safety in fact exists in a certain geographical area and, at the

⁴⁵See article 13 of the sample tripartite agreement in annex 5 of the UNHCR Voluntary Repatriation Handbook, *supra* note 42.

⁴⁶Dayton Peace Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina, reprinted in 35 I.L.M. 89 [1996]), Annex 7, article 1, para. 1 and 4.

⁴⁷Cartagena Declaration, *supra* note 32, para. 12.

⁴⁸See article 12(3) of the Covenant on Civil and Political Rights.

same time, the person concerned can be reasonably expected to go there.⁴⁹ This is, according to state practice, not the case if living in the safe part of the country would involve excessive hardship, e.g., because the subsistence of the person concerned is not guaranteed there or if even a minimal level of freedom of religion could not be enjoyed there.⁵⁰

In the context of temporary protection, it can be said that the individual can reasonably be expected to return to a safe part of the country if he or she enjoys safety there as well as dignity in the sense of having a real prospect of a new life in the region concerned. The opposite is true, e.g., where there is safety but no dignity because the repatriated person would have to stay in camps for a prolonged period or live the existence of an internally displaced person struggling for survival and lacking any prospect of building up a new social and professional life.

15. *If return remains impossible after a prolonged stay of several but not more than three years, States shall review the situation of temporarily protected persons with a view to identifying durable solutions such as resettlement or regular admission to the country of refuge.*

Commentary:

Temporary protection is an instrument aimed at finding solutions for persons fleeing situations of danger; the question of whether, in the long run, a durable solution consists of safe return or integration should be left open, even if the main goal is the achievement of repatriation within a reasonable period. The possibility exists that return will not become feasible due to a prolongation of the conflict in the country of origin or to the specific situation of certain individuals who still might be endangered in case of return despite an overall improvement of the situation. Here, other solutions must be found. One solution is *resettlement* to a third country, but this is often an unlikely option. Should *asylum or a similar status* be granted in all other cases? Here, the following situations must be distinguished:

- (i) If the examination of asylum applications has been suspended during temporary protection, there is a need to determine who among the temporarily protected persons is a Convention refugee. Therefore, the applications have to be processed now and those with refugee status should be granted asylum. Individual examinations can only be avoided if the status of *all* temporarily protected persons (regardless of whether they might be Convention refugees or not) attains a level which includes all the status rights granted by the 1951 Convention.
- (ii) If temporary protection has been granted after an asylum procedure to those who are not Convention refugees, or if the possibility to request asylum exists at any time, there is no obligation to grant the status rights of the 1951 Convention. The status of those who are now admitted on a more permanent basis can be determined by the applicable domestic provisions on aliens which, however, must conform with all relevant human rights standards.
- (iii) Finally, it is possible that due to permanent changes in the country of origin (e.g. victory of insurgents; establishment of a government deeply hostile to a certain minority group), some temporarily protected persons who fled the general dangers of armed conflict become *sur place* refugees and, therefore, need permanent asylum as Convention refugees.

In all these cases, the difficult but important question of *the length of temporary protection* arises: After what duration should temporary protection be transformed into a permanent status? States differed greatly in their practice with regard to this question in the past. Recently, a consensus that temporary protection should not last more than three years was found in the EU⁵¹.

16. *States of origin shall cooperate in the repatriation and reintegration of beneficiaries of temporary protection.*

Commentary:

⁴⁹See Goodwin-Gill, *supra* note 23, at 74-5 and 252.

⁵⁰Decisions of the German Federal Administrative Court of 14 December 1993 (BVerwG C 45.92), case abstract in REFCAS/DEU/135; *Rasaratnam v. Canada* (Minister of Employment and Immigration) 1992/1 FC 706, case abstract in REFCAS/CAN/015 and IJRL/0099; 3 IJRL 95(1992).

⁵¹ See Article 4 EU-Directive.

The principle of voluntary return (paragraph 13 of these Guidelines) and the concept of return in safety and with dignity (paragraph 14) presuppose the willingness of the country of origin to readmit its citizens who have found temporary protection abroad and to facilitate their reintegration. As a corollary duty to right to return (Article 12 para. 4 CCPR) governments must take necessary measures such as issuing travel documents to make return possible. These obligations can be based on the principle of readmission of one's own nationals which is recognized in international treaty and customary law⁵².

Section V: Final Clause

17. The provisions of the present Resolution are without prejudice to the provisions enunciated in any relevant international or national instrument, and shall not be construed as restricting or derogating from any of those provisions.

Commentary:

This resolution is spelling out minimal standards and basic requirements regarding the conceptualization and implementation of models of temporary protection, and therefore, must not be invoked as justification for impairing any existing legal guarantees or lowering any standards under international or domestic law. This is important as the 1969 OUA-Convention Governing Specific Aspects of the Refugee Problem in Africa and the 1984 Cartagena Declaration on Refugees as well as the domestic legislation of some States go beyond the protection provided by this resolution.

⁵² See Kay Hailbronner, Readmission Agreements and the Obligation of States under Public International Law to Readmit their Own and Foreign Nationals, 57 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1 (1997), pp. 6-15.

ANNEX: DRAFT GUIDELINES ON TEMPORARY PROTECTION

The International Law Association,

RECALLING the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, the 1948 Universal Declaration of Human Rights, the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights as well as other relevant universal human rights instruments;

ALSO RECALLING that instruments for the protection of refugees such as the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa and the 1984 Cartagena Declaration on Refugees as well as relevant regional human rights conventions provide guidance on a regional level;

TAKING NOTE of the Directive on minimum standards for giving temporary protection in the event of mass influx adopted by the Council of the European Union on 20 July 2001,

RECOGNIZING that in the case of large-scale influxes, not only refugees within the meaning of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees but also other persons fleeing the indiscriminate effects of armed conflict or situations of generalized violence are in need of international protection as long as the dangers stemming from such situations last;

CONSIDERING that in cases of mass influx of persons in need of international protection individual refugee status determination may often not be possible or practical and that, therefore, temporary protection offers a pragmatic response to specific protection needs by enhancing the effectiveness of the principle of non-refoulement as well as the protection of those who, whether or not they are refugees within the meaning of the 1951 Convention and 1967 Protocol relating to the Status of Refugees, are forced to flee across international borders;

NOTING that beneficiaries of temporary protection may be refugees within the meaning of the 1951 Convention and 1967 Protocol relating to the Status of Refugees and that, therefore, the granting of temporary protection must not prejudice their entitlements under that Convention;

DESIRING to provide guidance for States and groups of States which, on an ad hoc basis or in a general manner, choose to resort to temporary protection as a measure to respond to exceptional situations of mass influx of persons in need of international protection;

Adopts the following guidelines:

Section I: General Provisions:

1. States shall implement temporary protection in a manner consistent with the framework of international refugee and human rights law preserving the institution of asylum, respecting their obligations regarding non-refoulement and ensuring that persons in need of international protection can enjoy such protection with full respect for their fundamental human rights. Temporary protection is without prejudice to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.
2. Temporary protection as envisaged in these guidelines is only appropriate in situations of mass influx of persons seeking refuge abroad, whether or not these persons are refugees within the meaning of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees or persons who are not persecuted but flee the indiscriminate effects of armed conflict or situations of generalized violence. Temporary protection should be understood as an element within the framework of a more comprehensive approach to situations of mass influx, involving concerted efforts on the part of the international community (i) to assist States particularly affected by such an influx in a spirit of international solidarity and burden-sharing, and (ii) to achieve a solution to the conflict or strife in order to enable those who have fled to return in safety and dignity.
3. States shall, within the framework of international solidarity and burden-sharing, endeavor to take all necessary measures to assist, at their request, States which have temporarily admitted persons in

search of international protection in large-scale influx situations, either by financial contributions or by accepting some of the temporarily admitted persons to their own territory. Within regional organizations such as the European Union, burden-sharing could include institutionalized mechanisms for the distribution of temporarily admitted persons among the member States.

Section II: Beneficiaries

4. Beneficiaries of temporary protection are persons who may or may not be refugees within the meaning of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. These include, in particular
 - (a) persons who have fled the indiscriminate effects of armed conflict and generalized violence;
 - (b) persons whose life, personal integrity or freedom is at risk as a result of systematic or widespread human rights violations.
5. States deciding to grant temporary protection in a particular situation of mass-influx shall, when making such decision, designate the specific groups of persons to whom such protection will apply. In such cases, consultation with UNHCR would be appropriate.

Section III: Access to Temporary Protection:

6. If States resort to the instrument of temporary protection, beneficiaries should be given access to their territory without discrimination. Beneficiaries shall be protected against refoulement.
7. States may suspend the examination of requests by temporarily protected persons for refugee status determination. They may coordinate temporary protection with refugee status determination procedures in one of the following ways: (i) Granting temporary protection after a request for refugee status determination has been rejected; (ii) free choice between temporary protection or refugee status determination procedure; (iii) automatic determination of refugee status after a certain period of suspension (e.g. 2-3 years); or (iv) refugee status determination procedures at the end of the stay for those who claim to have a well-founded fear of persecution in case of return to the country of origin, or who are able to invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of the country of nationality. Total exclusion from an individual status determination procedure even at the end of temporary protection would contradict basic principles of international refugee law.
8. If it is apparent that the majority of people seeking protection or a specific category among them fall under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, group determination under that instrument should be considered.

Section IV: Standards for the Treatment of Temporarily Protected Persons

9. Beneficiaries of temporary protection should be provided with a legal status that authorizes them to remain in the country of refuge during the duration of such protection and receive the necessary documentation.
10. Beneficiaries of temporary protection shall be treated in accordance with human rights standards and, where applicable, the guarantees of the 1951 Convention Relating to the Status of Refugees. States should have due regard to the minimal guarantees set out in ExCom Conclusion No. 22(XXXII). In cases of prolonged stay, the rights of temporarily protected persons should be gradually improved.

In particular, every receiving State should respect and ensure the following rights of all persons to whom it chooses to accord temporary protection:

- a) the right to be protected against discrimination;
- b) the right to an adequate standard of living including adequate food, clothing and housing;
- c) the right to adequate health care,
- d) the right to adequate education,
- e) freedom of movement which, to the extent possible, should not be restricted;

- f) family reunification, in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass-influx;
- g) access to employment in cases of prolonged stay.

Section V: Ending Temporary Protection

11. States should, in coordination with UNHCR and other relevant international organizations and bodies, withdraw temporary protection when the situation in the country of origin has changed so fundamentally that it allows for the durable return of beneficiaries to their country of origin in safety and with due respect for their dignity.
12. States shall take the measures necessary to facilitate the voluntary return of persons enjoying temporary protection or whose temporary protection has ended, and to ensure that the decision of such persons is taken in full knowledge of the facts. Exploratory visits shall be allowed. In cases of enforced return after the end of temporary protection, compelling humanitarian reasons which may make return impossible or unreasonable shall be taken into account. The principle of non-refoulement as embodied in international law must be scrupulously observed in all circumstances.
13. As regards return in safety and with due respect for dignity of the persons concerned, the following elements should be taken into account:
 - possibility to return to the country of origin;
 - existence of conditions ensuring the physical and legal safety of returnees;
 - availability of an adequate infrastructure or of assistance guaranteeing the basic necessities of life, including food, shelter and basic sanitary and health facilities;
 - non-discrimination and respect for other fundamental human rights of returnees.
 - international monitoring of the safety of return.
14. If return to the former habitual place of residence is not possible, temporarily protected persons can only be reasonably expected to return to another part of the country if they will enjoy safety and dignity there.
15. If return remains impossible after a prolonged stay of several but not more than three years, States shall review the situation of temporarily protected persons with a view to identifying durable solutions such as resettlement or regular admission to the country of refuge.
16. States of origin shall cooperate in the repatriation and reintegration of beneficiaries of temporary protection.

Section V: Final Clause

17. The provisions of the present Resolution are without prejudice to the provisions enunciated in any relevant international or national instrument, and shall not be construed as restricting or derogating from any of those provisions.

PART II: FINAL REPORT AND DRAFT DECLARATION ON MINIMUM INTERNATIONAL STANDARDS FOR REFUGEE PROCEDURES

Prepared by Professor Guy S. Goodwin-Gill, University of Oxford

1. INTRODUCTION

Refugees are a class known to and enjoying the protection of general international law. Article 14 of the 1948 Universal Declaration of Human Rights provides that 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.' By 30 November 2001, one hundred and forty-one States had ratified the 1951 Convention and 1967 Protocol relating to the Status of Refugees, thereby accepting

the definition of a refugee in article 1 and the fundamental principle of *non-refoulement* in article 33.⁵³ This rule, which requires that States parties not return a refugee to a country in which he or she may face persecution on grounds of race, religion, nationality, membership of a particular group or political opinion, now also extends to the protection of those who, if returned to a particular country, would face a substantial risk of torture.⁵⁴ Lawfully resident refugees are also protected against expulsion, save on the most serious grounds and subject to lawful procedures and the opportunity for challenge.⁵⁵

Moreover, many States also acknowledge *as a matter of fact* that international protection is often due to individuals or groups falling outside or not immediately covered by article 1 of the 1951 Convention/1967 Protocol, such as those having reasonable fear of prejudice or discrimination in the exercise of fundamental rights, or who flee the indiscriminate effects of conflict or serious disturbances of public order. The provisions of human rights treaties, and the protection due to those whose rights are at serious risk of violation if returned, are reflected in the reality of temporary protection.

Equally, many States which have not ratified the 1951 Convention/1967 Protocol nevertheless in practice will commonly provide protection to those who, in the sense of international law, are refugees. That refugee protection engages a human rights responsibility has also been recognized by different treaty supervisory bodies.⁵⁶

Refugees under the 1951 Convention/1967 Protocol are identifiable by their possessing four basic characteristics: (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion. Many States have incorporated this definition, with occasional slight modifications, into their laws and policies, and have often made provision also for the protection of those having other valid reasons for flight, or who are 'without, or unable to avail themselves of, the protection of the government of their State of origin'.

The criteria for refugee status in article 1 of the 1951 Convention relating to the Status of Refugees have the individual asylum seeker very much in mind, even though the notion of lack of protection is clearly wider and invites attention to the general issue of a State's duty to protect and promote human rights within its territory. This is hardly surprising, given the historical evolution of international protection and the gradual extension of a 'rights regime' into a system of administrative benefits. This dimension remains at the heart of the concept of international protection, and yet also produces concern among States concerned to devise efficient and effective means for the determination of status or the need for international protection.

The refugee definition accepted by States party to the 1951 Convention/1967 Protocol has been widely interpreted to require the evaluation of a complex of subjective and objective factors, while the context — interpretation of an international instrument with fundamentally humanitarian objectives — implies certain ground rules. The central question is that of *risk*, as it affects the individual in a particular social and political context.

⁵³ 1951 Convention (CSR51): 189 *UNTS* 150; 1967 Protocol (CSRP67): 606 *UNTS* 267.

⁵⁴ Art. 3, 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT84): 1465 *UNTS* 85 (No. 24841); 126 States were party at 30 November 2001.

⁵⁵ Art. 32 CSR51. See also Protocol No. 7 to the European Convention on Human Rights, which contains procedural guarantees applicable to the expulsion of aliens 'lawfully resident' in the territory of a State party. The UN Human Rights Committee, in General Comment 15 on the position of non-nationals under the 1966 International Covenant on Civil and Political Rights, has taken the position that Art. 13 ICCPR66 (which also refers to the expulsion of those legally resident) is capable of applying 'if the legality of the alien's entry or stay is in dispute'. In its view, 'any decision on this point leading to expulsion or deportation ought to be taken in accordance with article 13... Article 13 regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with law", its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case... This understanding, in the opinion of the Committee is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will... be an effective one. The principles of Article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from "when compelling reasons of national security" so require. Discrimination may not be made between different categories of aliens in the application of Article 13.' UN doc. HRI/GEN/1/Rev.1, 18.

⁵⁶ Human Rights Committee, General Comment 20, 'Replaces General Comment 7 concerning prohibition of torture or cruel treatment or punishment (Article 7)', 10 Apr. 1992, para. 9. Committee against Torture, *Mutombo v. Switzerland*, Communication No. 13/1993, 27 Apr. 1994; 7 *IJRL* 322 (1995); *Alan v. Switzerland*, Communication No. 21/1995, 8 May 1996; 8 *IJRL* 440 (1996); *Kisoki v. Sweden*, Communication No. 41/1996, 8 May 1996; 8 *IJRL* 651 (1996).

Fair and efficient procedures and consistent application of the terms of an instrument intended to provide protection to individuals in flight from their own country are among the objectives promoted by the Office of the United Nations High Commissioner for Refugees (UNHCR), which is recognized by States party to the 1951 Convention as having a special role in supervising the application of the Convention.⁵⁷ At the request of Governments, UNHCR prepared a *Handbook on Procedures and Criteria for Determining Refugee Status* in 1979; although not formally binding on States, it has received wide recognition as a guide to interpretation and practice.

Even though not formally required by the terms of the 1951 Convention/1967 Protocol,⁵⁸ procedures for the determination of status can ensure effective internal implementation of international obligations, and provide a basic and important guarantee that refugees will not be *refouled* and that they will receive the treatment due under the relevant international instruments. The same argument is equally applicable to the evaluation of the *human rights* implications of decisions on admission, removal and treatment.

This approach was endorsed by the European Court of Human Rights, for example, in its recent decision in the case of *Jabari v. Turkey*.⁵⁹ The Court found a violation of Article 3 of the European Convention, in that the authorities had failed in relation to this applicant for refugee status to conduct 'any meaningful assessment' of the claim, and had limited their review to a mechanical application of a five-day time limit. The Court also found a violation of Article 13 of the Convention, by reason of the failure of the local administrative court to undertake an 'independent and rigorous scrutiny' of the applicant's claim, which itself was found to contain substantial grounds for fearing a risk of treatment contrary to Article 3.

The Austrian Constitutional Court also has examined what the right to an effective judicial remedy entails with regard to time limits. In a judgment handed down on 24 June 1998, it held that a two-day time limit to appeal against application of the 'third State' clause was too short and violated the rule of law. In its view, the functional efficacy of a remedy was related to the complexity to the proceedings. It noted that asylum seekers often have difficulty obtaining legal advice, that the law required a reasoned appeal to be lodged within two days, and that the question, whether a third State was safe, raised serious evidential questions. In its view, asylum seekers must have the opportunity to make a meaningful appeal on matters of fact and law, and the two-day limit was therefore too short.⁶⁰

In the light of extensive State practice in refugee determination over the years, and taking account also of the strengthening of human rights doctrine and jurisprudence, it can be seen that international law, which previously had little to say on procedural standards, is now increasingly engaged. In 1977, the UNHCR Executive Committee adopted a set of recommendations on the determination of refugee status which set forth a very basic agenda, comprising guidance to applicants, the provision of competent interpreters, a reasonable time to 'appeal for formal reconsideration' of a negative decision, 'either to the same or a different authority, whether administrative or judicial, according to the prevailing system'.⁶¹ In 1983, the UNHCR Executive Committee also considered the problems arising from 'manifestly unfounded and abusive applications', and considered that special provision might be made for dealing with them in an expeditious manner. At the same time, however, it recognized the substantive character of such decisions, the serious consequences of error, and the consequential need for appropriate procedural guarantees. In this regard, it recommended that the individuals affected receive a complete personal interview, that the decision be taken by the authority

⁵⁷ See UNHCR Statute, UNGA res. 428(V), 14 Dec. 1950, para. 8(a); Art. 35(1) CSR51. Notwithstanding its supervisory responsibility, UNHCR is not a court of final authority.

⁵⁸ Note, however, that the German Constitutional Court (*Bundesverfassungsgericht*) has held that the principle of good faith in fulfilling treaty obligations requires that States party to the 1951 Convention institute a procedure which allows for the determination of who is entitled to the guarantees of the treaty: Decision of the *Bundesverfassungsgericht* on the Safe Third Country Rule, 14 May 1996, Section C, 1.2; abstract in 9 *IJRL* 292-6 (1997).

⁵⁹ Application No. 40035, Judgment of 11 July 2000.

⁶⁰ *Verfassungsgerichtshof*, Wien, Urteil vom 24. Juni 1998, 6, 14.

⁶¹ Executive Committee Conclusion No. 8 (1977); *Report of the 28th Session (1977)*: UN doc. A/AC.96/549. Cf. Council of Europe Recommendation no. R(81) 16 on the harmonization of national procedures relating to asylum, adopted by the Committee of Ministers on 5 Nov. 1981. See also *Report of the Sub-Committee of the Whole on International Protection*: UN doc. A/AC.96/613, paras. 37-8; *Report of the 33rd Session (1982)*: UN doc. A/AC.96/614, paras. 65-6, 70(4). As noted above, one of UNHCR's principal objectives has long been the establishment of fair and expeditious procedures for the determination of refugee status, preferably guaranteeing 'full access' by those in search of asylum, and with the opportunity for independent review of negative decisions. See various UNHCR 'Notes' on International Protection, including UN doc. A/AC.96/694, (3 Aug. 1987), paras. 13, 25-8; UN doc. A/AC.96/750 (27 Aug. 1990), para. 15; UN doc. A/AC.96/777 (9 Sept. 1991), paras. 25-6. UNHCR, 'Note on International Protection': UN doc. A/AC.96/815 (31 Aug. 1993), para. 19.

competent in asylum matters, and that there should always be a review of negative decisions (possibly simplified), before rejection at the frontier or forcible removal.⁶²

These recommendations today are regarded as a practically necessary minimum for refugees to be identified and accorded protection in accordance with international obligations, even as experience in refugee determination has revealed the value of a more developed approach to procedural due process if States are to achieve the goal of credible and defensible decisions.

In certain circumstances, States have found it convenient to adopt a group or categories approach to facilitate the determination of status and the grant of protection. This is particularly helpful, with consequential benefits to national asylum procedures, in situations of large-scale influx and in other situations of substantial movement, where the causes for flight are well-documented, unchallenged, and related to the grounds for recognition of refugee status (for example, ethnic conflict with resulting persecution and displacement, massive violations of human rights, and so forth). Where a groups and categories approach to recognition is adopted, States should nevertheless ensure that no individual is excluded or rejected without an examination of the merits of his or her claim. In addition, particular attention should be paid to the standards governing the grant of temporary protection (See Draft Guidelines on Temporary Protection).

1.1 Past work of the Committee in regard to Refugee Procedures

As already noted, the Committee on Refugee Procedures was established in 1992, and decided at its first meeting in Konstanz/Germany to divide its work between the issue of temporary protection and that of standards for refugee determination.

The First Interim Report on Refugee Procedures was submitted to the Helsinki Conference in 1996. Taking account of a considerable amount of information then available, the report recalled the basis elements of the Executive Committee recommendations and then reviewed a number of selected problems. These included the question of 'due process', and what exactly was due to the asylum seeker or required as a matter of practical necessity. The issue of appeal or review was considered, particularly in light of the principle of effectiveness of international obligations, and the question of access to procedures was examined, particularly in light of emerging or consolidating practice on 'safe third country', the attribution of responsibility to determine refugee claims, and the growing number of so-called readmission agreements.⁶³

In relation to refugee determination itself, the Report acknowledged the wide variety of practice, ranging between administrative, quasi-judicial, and judicial mechanisms. In a final section, the Committee identified a number of questions upon which it was thought further input might be useful. These included the personal and substantive scope of refugee procedures (whether they should be limited to applications for Convention refugee status, or also take account of human rights-based claims for protection); the scope and content of due process, internationally considered; the attribution of responsibility for refugee determination among States; and a number of specific procedural issues, for example, concerning the approach to be adopted to protection claims by unaccompanied minors, in light of the 1989 Convention on the Rights of the Child.

At the London Conference in 2000, an additional note on developments in Europe following the Treaty of Amsterdam was circulated, and the Committee invited further comment and input. It was noted that many issues relating to the content and administration of refugee procedures had grown in importance over the past four years. For instance, while everyone agreed on the need for due process, this did not necessarily mean agreement on its meaning, and on whether it included a right to counsel, the right to written decisions, and the right to judicial appeal or some form of review. A draft declaration on minimum standards for refugee procedures was also circulated.

1.2 Recent developments

⁶² Executive Committee Conclusion No. 30 (1983); *Report of the 34th Session* (1983): UN doc. A/AC.96/631, para. 97(2).

⁶³ In the decision declaring inadmissible the application in *T.I v. the United Kingdom*, No. 43844/98, 7 March 2000, the European Court of Human Rights nevertheless was of the view that, 'the indirect removal... to an intermediate country... does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom relay automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility among European countries for deciding asylum claims.'

In Europe, considerable impetus has been given to achieving the Union-wide objective of minimum procedural standards, since the Treaty of Amsterdam established this as a Community goal in 1997.⁶⁴ Already in 1995, the European Union Council of Ministers had adopted a resolution to this end.⁶⁵ It embodied preambular references to the refugee instruments, the European Convention on Human Rights, the refugee definition, and European practice beyond its scope. It set out the objective of establishing 'equivalent procedures' and 'common procedural guarantees', and referred to the minimum standards recommended by the UNHCR Executive Committee and the Council of Europe. At the substantive level, the resolution included recognition of the following nine general principles, each with an individual rights dimension:

- the principle of compliance with the 1951 Convention/1967 Protocol, including the refugee definition, *non-refoulement*, and co-operation with UNHCR;⁶⁶
- the principle that procedures should be regulated by law;⁶⁷
- the principle that every application should be considered individually, objectively and impartially, by qualified and informed personnel;
- the principle that refugee status determination involves a 'shared responsibility' between decision-maker and applicant, who should have an adequate opportunity to present his or her case;⁶⁸
- the principle of due process, including the opportunity to apply for refugee status/asylum at the border, the right to an interpreter, to legal advice, to access to UNHCR, and to a personal interview;⁶⁹
- the principle of written, reasoned decisions;
- the principle of appeal or independent review of negative decisions;
- the principle of entitlement to remain pending decision;
- the principle of recognition of status where the criteria are satisfied, and of recognized refugees' presumptive entitlement to residence.

In addition, unaccompanied minors and women asylum seekers are recognized as requiring further protection guarantees, including 'guardianship' and the use of female interpreters and examiners.

In many respects, these standards go farther than, or clarify the generality of, those laid down earlier by the UNHCR Executive Committee and the Council of Europe, but the 1995 Resolution was non-binding.

In November 1996, specifically with regard to asylum, the European Parliament noted that 'the right to request asylum is a fundamental right which it must be possible to exercise in accordance with the Geneva Convention and the 1967 Protocol, with the legislation of the EU and with the national laws of the Member States', and reaffirmed the principle of non-expulsion or return.⁷⁰ On procedures, it called for streamlining, 'with a view to making them more transparent... and speedy...', while guaranteeing a means of judicial appeal or appeal', and for priority to be given to 'improving the implementation of existing international conventions on asylum'.⁷¹

The Charter of Fundamental Rights, adopted in Nice in December 2000, goes some way towards meeting these objections, and Article 18, entitled 'Right to Asylum', provides: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees and in accordance with the Treaty establishing the European Community'.⁷²

⁶⁴ Art. 63(1)(c), Treaty establishing the European Community.

⁶⁵ Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures: OJ C 274, 19/09/1996, 0013-0017.

⁶⁶ These are described as 'universal principles': Council Resolution of 20 June 1995, paras. 1, 2.

⁶⁷ Cf. *Chahal v. United Kingdom*, No. 70/1995/576/662, Judgment of 15 Nov. 1996, paras. 131, 145-51.

⁶⁸ See UNHCR, *Handbook*, paras. 195-205.

⁶⁹ In *Amuur v. France*, No. 17/1995/523/609, 20 Jan. 1994, para. 50, the European Court of Human Rights ruled that detention or confinement 'must not deprive the asylum seekers of the right to gain effective access to the procedure for determining refugee status...', and that there is a need, 'to reconcile the protection of fundamental rights with the requirements of States' immigration policies'.

⁷⁰ European Parliament, Resolution on the Strategy Paper, para. 13; see also para. 15.

⁷¹ *Ibid.*, paras. 16, 17. The Parliament also 'opposes any attempt to renegotiate the existing conventions', recommending instead that they be supplemented to meet new circumstances: *ibid.*, para. 17.

⁷² See also Art. 19, entitled 'Protection in the event of removal, expulsion or extradition': 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

In September 2000, the European Commission took a significant step towards the Community goal and published a proposal for a Council Directive on minimum standards for procedures.⁷³ These took the earlier work into account, and suggested common definitions for inadmissible and manifestly unfounded cases, time limits for decision-making, and a common level of procedural fairness, including in the case of accelerated procedures. The Commission also proposed a basic three-level structure, comprising a determining authority, a reviewing body, and an appellate court; even if its institutional proposals are not universally adaptable, the core principles, which reflect a considerably body of practice, are nevertheless worth attention. In the context of UNHCR's Global consultations on International Protection, the issue of fair and efficient asylum procedures was discussed on 28 and 29 June 2001.⁷⁴ The discussion indicated that there would be some value in drafting an updated and revised Executive Committee Conclusion on Asylum Procedures.

2. PROCEDURAL STANDARDS REVISITED

It may be assumed that, in view of the interests involved, the only decisions in refugee matters worth having are those which can be defended. Certain international obligations having been accepted, it would seem to follow that the State would best be served by being able to claim with confidence that an individual applicant for refugee status had received a hearing, that the application had been considered impartially, on the basis of a hearing and in the light of the law and the best available country of origin information, that a reasoned decision had accordingly been taken, and that it had been subject to appeal and review. In addition, considered from the perspective of those obligations, it could be argued that every State party to the 1951 Convention/1967 Protocol, at least, should take the necessary steps to ensure the fair and expeditious determination of claims, including through the adoption of appropriate legislation and institutional mechanisms for determination, appeal and review.

The review undertaken by the Committee does indeed suggest that it is now widely accepted that efficient management of forced migration at the level of the receiving State requires a relative fast and simple system for dealing with asylum claims.⁷⁵ The essential elements of a fair and efficient refugee status/asylum procedure are not difficult to identify. A clear understanding of the definition to be applied is called for, and of the scope and limits of, where adopted, categories such as inadmissible or manifestly unfounded claims. It is now also widely accepted that procedural safeguards assist both States and individual applicants, and that specific safeguards may also be required for persons with special needs.

2.1 Access to the procedure and basic principles

The following are central to any fair and efficient process:

- *access* to the procedure and the right to remain on State territory or at the border pending determination of the claim;
- *information* to the applicant as to the different stages of the procedure, and as to his or her legal position;
- *appeal* against an initial negative decision.

In addition, so far as the determination of refugee status commonly involves an assessment of the credibility of the asylum seeker and of his or her story in social and political context,

- a *personal hearing* before the actual decision-maker is likely to produce better decisions;
- where that is not possible, then the applicant for refugee status should at least receive a *personal interview* by a competent official, with the assistance of an interpreter where necessary, and of a legal counsellor or representative.

⁷³ European Commission, 'Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status': COM(2000) 578 final, Brussels, 20.9.2000; OJ C 62 E, 27.2.2001, p. 231. The European Parliament suggested some 111 amendments: A5-0291/2001.

⁷⁴ See UN cod. EC/GC/01/12 of 31 May 2001.

⁷⁵ It is only slowly being recognized that the parallel problems of migration also need to be addressed on an international, rather than a generally unilateral, basis.

As indicated above and in the earlier Report, the nature of the refugee definition and the fundamental obligation of the State in regard to *non-refoulement* require an individual, objective and impartial process at every level of decision-making, including the admissibility stage, the substantive determination, and on appeal and review.

Every applicant, therefore, should be advised of the procedure to be followed, in language which he or she understands. Where necessary, interpretation should always be provided, at no cost to the claimant, who should be able to contact UNHCR or other organizations acting on behalf of refugees.

During the personal interview, every applicant should be afforded the opportunity to state the basis of his or her claim, to provide information in support, and to clarify any points of uncertainty or inconsistency. Where appropriate, separate interviews should be conducted with individual family members, and with any applicant or dependant who has or appears to have special needs (for example, victims of rape or torture). Any interview transcript or record should be copied to the applicant, or read out and confirmed as accurate.

Given the nature of the refugee determination process, legal advice and representation frequently play a critical part in assisting State authorities to reach the right decision promptly. As a minimum, a legal adviser or counsellor should be present at personal interviews, and legal advice or representation should be permitted in appeal and review proceedings.

Where States include admissibility criteria based on the safe third country/first country of asylum concept in their refugee determination procedures, the definition and application of the relevant concepts are without prejudice to the fundamental principles of protection and *non-refoulement*. 'Admissibility', it may be recalled, entails the non-determination of the merits of a claim; as such, it is inherently limited to the cases of those who have found *effective* protection in another State (the principle of first country of asylum), or if *responsibility* has been assumed by another State, for example, under a treaty arrangement such as the 1990 Dublin Convention. 'Accelerated procedures', on the other hand, do deal with the substance of a claim, albeit in simplified and shortened form. Here, it is important to set out with precision the types of case to which such procedures may apply (manifestly unfounded, repeat applications, and so forth), but also to provide appropriate safeguards, such as those recommended by the Executive Committee in Conclusion No. 30 and referred to above. In particular, it is especially important that the advantages in case management which derive from both admissibility and accelerated procedures be balanced by an opportunity for review which has suspensive effect.⁷⁶ Otherwise, the fundamental right to an effective remedy against actual or potential violations of rights risks being rendered worthless.⁷⁷

The experience of many States over recent decades has confirmed the value of an adequately supported infrastructure, including trained personnel and up-to-date and credible information. A matter for both training and instruction concerns the confidentiality of personal information, which should be protected in general, and in particular, so that individual-specific information is not passed back to the applicant's country of origin.

Since States party to the 1951 Convention/1967 Protocol have accepted the obligation to co-operate with UNHCR in fulfilling its responsibility to supervise the application of conventions for the protection of refugees, consideration should be given to allowing that Office to become party to any proceedings involving a claim to refugee status. This might take the form of participation as an observer in initial determination proceedings, access to files, or by way of a right to intervene, either on behalf of the party or as a friend of the court (*amicus curiae*) in appeal and review proceedings.

2.2 Procedural standards

2.2.1 *Hearing, interview and determination*

A principal area of concern for States in recent years has been the length of asylum proceedings. One measure which has been shown to assist in maintaining a fair and expeditious process is the setting of reasonable time limits, not only for the submission of application and supporting information, but also for the actual determination of claims and the hearing of appeals.

Good decisions have also been shown to depend upon the applicant for refugee status having an *adequate* opportunity to present his or her case as completely as possible; hence, the value of legal advice and representation already mentioned. Moreover, the forward-looking nature of the assessment of risk, considered together with the obvious difficulties for those having to fled to have possession of all

⁷⁶ UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)', doc. EC/GC/01/12, 31 May 2001, paras. 8, 25-43, 50(d).

⁷⁷ See the views of European Court of Human Rights and the Austrian *Verfassungsgerichtshof*, above n. and text; and further below, [p. ***].

necessary documentation, means that particular recognition must be given to the credibility of the applicant; hence, the value of country of origin information. If an applicant has identified him- or herself satisfactorily, set forth the reasons justifying the claim for protection, made a reasonable effort to substantiate the case with evidence, answered questions and shown a genuine willingness to deal with any inconsistency, these factors should be counted for the applicant and the decision-maker should decide in his or her favour, where the claim is coherent and believable in the light of known facts.

In each case, the decision should be reasoned as to the law and the facts, identifying why the applicant has or has not met the requirements of the refugee definition, providing the decision-maker's assessment of the credibility of the applicant with reference to the evidence and to contradictions or inconsistencies considered to be material, and citing the sources of information, particularly country of origin information, which have been relied on.

2.2.2 *Appeal and review*

Every applicant for refugee status should have the right to appeal against a negative decision as to inadmissibility or on the merits of his or her claim, and in principle appeals should have suspensive effect with respect to the implementation of measures of expulsion or removal. Where suspensive effect is limited, for example, in cases identified as inadmissible or manifestly unfounded or on other grounds prescribed by law, the applicant should nevertheless be entitled to apply for permission to remain, either in the State or at the border, until a final decision has been made.

The importance of the right to an effective remedy in the context of refugee determination procedures has been stressed repeatedly. Such remedies not only help to ensure national consistency in decision-making and conformity with the rule of law, but are also of central importance in assisting State authorities to comply with their international obligations. It is nevertheless recognized that the right to a remedy implies certain inherent conditions, for example, that the individual seeking to invoke a remedy should present an arguable case.⁷⁸

The appeal body should be independent of the original decision-maker, and should be required to consider the appeal on an individual basis, objectively and impartially.

The appeal body should be empowered to examine all aspects of the case, including matters of fact and law, and the applicant should be entitled to be represented in such proceedings and to enjoy the essential elements of 'due process', including an opportunity to know the case against recognition, to have access to the information on which the decision had been made and to be able to comment on such information, and to submit additional information and make representations.

Finally, in view of the importance which international human rights law attaches to the rule of law and to one of its essential components, namely, the principle that an effective remedy should be available in the case of an actual or potential breach of fundamental rights, the process of refugee determination should be subject to the controlling jurisdiction of the courts. In appropriate cases regulated by law, it should therefore be possible to secure a review of the 'legality' of any such determination, and for a supervisory court to correct any decisions affected by error of law, or in which the applicant had not received a hearing according to law.

3. DRAFT DECLARATION ON INTERNATIONAL MINIMUM STANDARDS FOR REFUGEE PROCEDURES

The following draft declaration is based on the text circulated after the London Conference, and has been amended in the light of comments received and later developments.

Draft Declaration on International Minimum Standards for Refugee Procedures

The International Law Association,

Recalling article 14 of the 1948 Universal Declaration of Human Rights and the right of everyone to seek and to enjoy in other countries asylum from persecution,

Recalling further the obligations assumed by States parties to the 1951 Convention and 1967 Protocol relating to the Status of Refugees, the 1984 United Nations Convention on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other universal and regional human rights conventions, particularly in regard to the procedural standards,

⁷⁸ See *Hatton v. The United Kingdom*, Application No. 36022/97, European Court of Human Rights, Judgment of 2 October 2001, para.113; also *Al-Adsani v. the United Kingdom*, Application No. 35763/97, European Court of Human Rights, Judgment of 21 November 2001, para. 38.

Bearing in mind the fundamental obligation of States not to return (*refouler*) a refugee in any manner whatsoever to a country in which his or her life or freedom may be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or in which he or she may be at risk of torture,

Noting that the obligations assumed under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees will only be effectively implemented if States take the necessary steps to identify those who should benefit, in particular, from the status of refugee and the principle of non-refoulement,

Recalling the principles of due process recognized by States at universal and regional level, and in their constitutions and legal systems,

Recalling that everyone whose human rights are violated or in danger of violation is entitled to an effective remedy, and that this right should be available also to ensure that no person entitled to international protection is returned or sent to a territory in which he or she is at risk of persecution or other relevant harm,

Noting also the importance of ensuring access, for all persons seeking international protection, to fair and efficient procedures for the determination of refugee status,

Declares the following minimum standards of international law for incorporation in all States in which individuals and groups may seek international protection:

Access to procedures

1. Everyone seeking international protection as a refugee outside their country of origin and in accordance with the relevant international instruments should have access to a fair and effective procedure for the determination of his or her claim.
2. Access to refugee status procedures and the benefit of refugee status should be granted without discrimination as to racial or ethnic origin, religion or belief, disability, sex, status, or country of origin.
3. Admissibility to the refugee determination procedure may be limited or excluded where effective international protection has been granted in another State, or where another State has assumed responsibility for deciding the claim; such exceptions shall be provided by law. The application of admissibility criteria is without prejudice to the fundamental principles of protection and *non-refoulement*.
4. Agreements between States on the attribution of responsibility to determine claims to international protection or on the readmission of foreign nationals are without prejudice to the principle of individual and joint responsibility for the implementation of the principle of *non-refoulement* and should clearly provide for access to a fair and efficient procedure by any individual who seeks international protection.
5. No one who seeks asylum at the border or in the territory of a State shall be rejected at the frontier, or expelled or returned in any manner whatsoever to any country in which he or she may be tortured or subjected to inhuman, cruel or degrading treatment or punishment, or in which his or her life or freedom may be endangered for reasons of race, ethnic origin, religion, nationality, membership of a particular social group, association with a national minority, sex, language, political or other opinion, birth or other status.
6. In accordance with the provisions of the 1989 United Nations Convention on the Rights of the Child, States should make special provision for unaccompanied minors in need of protection.
7. States should take the necessary measures to ensure the sensitive handling of applications for refugee status by asylum seekers having special needs.

Procedural standards – General provisions

8. The effective identification of those entitled to international protection requires not only that claimants present their case fully and truthfully and show that they face a reasonable risk of persecution or harm, but also that States provide the opportunity to ensure that international obligations are fully implemented. To this end,
 - The relevant officials should be clearly instructed on the handling of all applications for international protection
 - Guidance should be provided to applicants, in a language which they clearly understand, on the procedure and on the opportunity to contact the Office of the United Nations High Commissioner for Refugees

- UNHCR or other organizations working for refugees should be allowed access to persons seeking refugee status
- Applicants should be given the opportunity of a personal interview and be examined by trained and fully qualified decision-makers, and decided on an individual basis, objectively and impartially.
- No claimant should be removed, excluded or deported from the country until a decision has been made in his or her case, subject to the provisions on appeal and suspensive effect.

9. Where a group or categories approach is adopted to facilitate the determination of status and the grant of international protection, States should ensure that no individual is excluded or rejected without an examination of the merits of his or her claim.

10. Where a State adopts an accelerated procedure for manifestly unfounded or other claims, it shall also provide appropriate guarantees, including review of negative decisions in accordance with the standards set out below.

Procedural Standards – Hearing and determination of claims

11. Every applicant for international protection is entitled,

- to the services of a competent interpreter, wherever necessary;
- to legal advice or representation, preferably without cost;
- to a full opportunity, through interview and hearing, to present his or her claim;
- to present evidence relating to his or her personal circumstances and to the conditions in his or her country of origin; and
- to know the evidence that may be used in the determination of his or her claim, and to have access to that information.

12. Every decision on an application for protection shall be based on evidence presented at the determination, and which is found to be credible and trustworthy. Reasons for the decision in fact and law shall be given in writing, and shall be communicated to the claimant in a language which he or she understands, together with information and advice on how to make an appeal.

Procedural standards – Appeal and review

13. Negative decisions on applications for refugee status shall be subject to appeal or review by an independent body on matters of fact and law. Every applicant for protection shall be advised of his or her rights and of the procedure to be followed.

14. A State may by law limit the right of appeal or review in cases that have been determined by the authority described in paragraph 1 to be manifestly unsupported by objective evidence or an abuse of the right of asylum.

15. Procedures for appeal or review may be accelerated or shortened in cases clearly defined by law and where reasonably necessary in a democratic society. The right of the individual to an effective remedy requires in principle that appeal or review proceedings should have suspensive effect in regard to the implementation of any measure of expulsion or removal. Wherever suspensive effect is denied, the person concerned should have the right to apply for permission to remain pending the outcome of an appeal.

16. In accordance with the principle of the rule of law, the decisions and procedures of refugee determination bodies and appeal authorities should be subject to the controlling supervision of the courts.