

Family Unity and Refugee Protection*

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I. Introduction

Family unity is a fundamental principle of international law.³ For refugees and those who seek to protect them, this principle has several important facets. The integrity of the refugee family is a legal principle and a humanitarian goal; it is also an essential framework of protection and a key to the success of durable solutions that can restore a refugee to something approximating a normal life.

Refugees run multiple risks in the process of fleeing from persecution, one of which is the very real risk of separation from their families. For individuals who, as refugees, are without the protection of their own countries, the loss of contact with family members may disrupt their major remaining source of protection and care or, equally distressing, put out of reach those for whose protection a refugee feels most deeply responsible.

Although the right to seek and enjoy asylum in another country is an individual human right⁴, the individual refugee should not be seen in isolation from his or her family. The role of the family as the central unit of human society is entrenched in virtually all cultures and traditions, including the modern, universal legal ‘culture’ of human rights. The drafters of the 1951 Convention relating to the Status of Refugees

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³ See Section III, below, for an explanation of the place of the family in international law.

⁴ “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” *Universal Declaration of Human Rights*, 1948, article 14(1).

linked a protection regime premised on the individual's fear of persecution to the family unity principle in a strongly worded recommendation in the Final Act of the diplomatic Conference that adopted the Convention. In Recommendation B, they urged governments to 'take the necessary measures for the protection of the refugee's family', and declared that 'the unity of the family... is an essential right of the refugee'.⁵ The States that are members of the Executive Committee of UNHCR have repeatedly emphasized the importance of family reunion.⁶

Protection at its most basic level derives from and builds on the material and psychological support that family members can give to one another. The trauma and deprivation of persecution and flight make this support particularly critical for refugees. Refugees repeatedly demonstrate remarkable powers of resilience in adversity, but the solitary refugee must of necessity rely more heavily on external providers of assistance and protection. The self-help efforts of the refugee family multiply the efforts of external actors. The Executive Committee of UNHCR recognized this dynamic in a 1999 Conclusion that called for 'programmes to promote the self-sufficiency of adult [refugee] family members so as to enhance their capacity to support dependent family members.'⁷

Implementation of the principle of respect and protection of the family in the refugee context requires not only that the State refrain from actions that would disrupt an intact family unit, but also that it take action to allow a dispersed family to reunite without returning to a country where they would face danger. Such policies, codified in domestic law and regulation, lower the costs and enhance the effectiveness of protection programs as refugee families provide mutual assistance to their members. Host countries benefit when their own policies, procedures and programmes strengthen the unity of the refugee family, helping individuals to function in countries of asylum or resettlement, facilitating their integration into the host society, and promoting social and economic self-sufficiency. As noted at a 2001 international conference on resettlement, 'A flexible and expansive approach to family reunification therefore not only benefits refugees and their communities, but also resettlement [and other host] countries by enhancing integration prospects and lowering social costs in the long term.'⁸

The international community has accepted the obligation of protecting people who cannot look to their own countries to safeguard their fundamental rights, which include the right to family life. It has also taken on the obligation to search for durable solutions to the plight of refugees, which can hardly be achieved while the members of a family are scattered and fearful for their own and each other's well-being. One aim of this paper is to explore the current understanding of the scope of this obligation, along with the successes and obstacles that have been encountered in fulfilling it.

⁵ Final Act of the 1951 U. N. Conference of Plenipotentiaries on the Status Of Refugees and Stateless Persons, Recommendation B.

⁶ See Section III for greater detail.

⁷ Executive Committee 50th session, 1999, Conclusion No. 88(L), "Protection of the Refugee's Family".

⁸ UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001.

That a principle so widely accepted in the abstract should be so frequently contested in reality is perhaps not surprising, given current concerns with migration control. The importance of maintaining or restoring the unity of the refugee family is well understood and accepted by most countries of asylum, for humanitarian as well as practical reasons. However, the actions of States are sometimes at odds with acknowledged principle. The special situation of refugees notwithstanding, family unity – particularly when it requires action in the form of family reunification -- is commonly seen through the lens of immigration, which many countries are trying to control or reduce. For the last two decades or so, the majority of legal immigrants to the member countries of the Organization for Economic Cooperation and Development (OECD) have immigrated under family reunion provisions. Attempts to control and narrow the stream of family migration have led many countries into more restrictive interpretations of their obligations to protect the refugee family.

In some countries, there is still a lack of information or awareness of State responsibilities in this respect. Where, for example, legislation relating to family reunification imposes the additional requirement that the family members must independently meet the refugee definition, the purpose of the family unity principle in the refugee context is defeated.⁹

In other countries, legal and administrative structures are lacking. For example, a refugee law recently enacted in Romania lacks any provision for family reunification, even though previous legislation had allowed asylum applications to be submitted at the country's missions abroad, a procedure that had been instrumental in family reunification cases. This procedure was not retained in the new law, which instead requires that all applicants for asylum must appear in person on the territory of the country. An unintended consequence of this new law is that family members are now more likely to enter the country illegally, since there is no longer the possibility of obtaining a visa.

Resources constraints also have an impact on family unity. In some cases, countries are not able or willing to allocate the necessary human or material resources to support the process of restoring family unity. In other situations, countries may be concerned at the prospect of additional costs posed by arriving family members, and so limit their possibilities for entry or require refugees to meet the same tests of income and accommodations that are required of immigrants. In particular, a number of countries retain the possibility of barring refugees' family members who may on account of health problems represent a drain on public resources.¹⁰

In the light of heightened security concerns following the September 11, 2001 terrorist attacks in the United States, family reunification criteria and procedures may become stricter and more protracted. Background checks on family members are already

⁹ Estonia is one of the countries that has such a provision in its Refugees Act.

¹⁰ Australia in 2001 saw a tragic case in which a refugee man set himself ablaze (and later died) outside the Parliament building after his wife and children, one of whom was handicapped, were refused permission to join him in Australia "on grounds of substantial health care costs to the Australian community" according to the Minister for Immigration. The Sydney Morning Herald, 3/4/01.

a common source of delays in processing family reunification cases. Given that many refugees come from regions in turmoil that also harbor terrorists, intense scrutiny is bound to be directed toward people trying to enter western States through all channels, including asylum channels and family reunification programs. Use of the exclusion clauses of the Refugee Convention may become more prevalent.

Finally, there are competing concerns, most notably migration control, which affect refugee family unity. States are concerned both with the multiplier effect of ‘chain migration’ of legitimate family members, and with fraud. Concerns about fraud are directed at migrants, as well, but are particularly marked in the refugee context, since refugees often lack documents attesting to the veracity of their claims of a family relationship.

This paper, after introducing the issues that arise in discussions of family unity (Part I) and examining the role of the family in refugee protection (Part II), reviews the position of the refugee family in international law (Part III). It then examines how these legal norms have been reflected in state practice, through legislation and case law on the one hand (Part IV), and policy and practice on the other (Part V). Finally (Part VI), it suggests some useful tools for protection of families, and proposes standards of family reunification based on the best practices of States and the applicable legal norms.

II. The family as a source of protection

A. The role of the family in protection and assistance

In the face of persecution, families adopt a variety of protective strategies, some of which may necessitate temporary separation: sending a politically active adult into hiding, helping a son to escape forcible recruitment by militia forces, sending abroad a woman at risk of attack or abduction. Family members may be forced to take different routes out of the country or to leave at different times as resources or opportunities permit.

Whether as a chosen strategy or an unintended consequence of the chaos of forcible displacement, the separation of a refugee family is rarely intended to be permanent. Refugees commonly go to great lengths to reassemble the family group, but often encounter enormous practical and legal obstacles in the process. The powerful motivation to maintain or restore family unity attests to the sense of safety and well-being that for many people resides uniquely within the family.

The most fundamental functions of physical care (particularly to the young, old, and sick), protection, and emotional support take place within the family unit. The weaker public institutions of social protection are, the more reliant individuals are on family structures. While many families fall short of idealized notions of functioning in the best interests of each of their members, involuntary separation from the family creates

particular vulnerabilities. When other institutions of society break down or are unavailable, as is so often the case in refugee situations, the family assumes a greater than usual importance. Refugees who are alone are more vulnerable to exploitation and attack, and may find themselves forced into servitude or prostitution in order to survive. Protection of the refugee family is thus a primary means to protect individual refugees.

The function of the family as a channel of distribution of resources from primary earners or producers to care-givers and dependents is commonly replicated in the methods of providing assistance to refugees. The household remains the most basic cell in the distribution network for food and other goods provided by international and national relief agencies. Isolated individuals may have difficulty gaining access to basic necessities. Organizations that provide assistance seek to reunite families for humanitarian reasons, but also find that it makes the task of distributing assistance easier. Both within the context of organized assistance programs and outside them, the family is for many refugees the most reliable means of assistance, spreading its resources along channels of mutual obligation that may include even quite distant relatives.

The protection of the family is most essential to the members who are least able to protect themselves individually, in particular, children and the elderly. Tracing and reunification programs for these and other vulnerable groups are matters of particular urgency. Protections for children separated from their families during flight have begun to be elaborated in recent years¹¹, but specific provisions for the elderly are much less developed. While minor children are almost universally permitted to reunify with parents, elderly relatives face greater obstacles both in principle and practice. Some States limit family unity possibilities to spouses and minor children, while others accept parents but insist on strict dependency criteria. More distant elderly relatives, such as aunts, uncles, or cousins, are admitted to join family members only exceptionally in most receiving states.¹² The vulnerability of elderly refugees, and elderly relatives left behind by refugees, should be recognized in the criteria governing eligibility for family reunification.

B. Durable Solutions

An intact family unit is an invaluable asset to refugees in the process of repatriation, local integration, or resettlement. Return to the country of origin commonly presents profound challenges as repatriating refugees attempt to reconstruct their lives and livelihoods. Single-parent or child-headed households may have difficulty establishing title to land, houses, and other property. While some refugee families may find it desirable for one or more members to precede others on the return journey, true reintegration is unlikely to gain momentum until the family unit is reassembled. Governments and agencies that assist repatriation should, therefore, devise plans that reinforce family unity.

¹¹ See, e.g., UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva, 1994).

¹² See Secretariat of the Inter-Governmental Consultations, *Report on Family Reunification: Overview of Policies and Practices in IGC Participating States*, (1997), 420.

Similarly, permission for refugees to settle in a country of first asylum should be granted to all the members of a household living together in that country, with the further possibility of other relations joining them from another asylum country or the country of origin. Experience has shown that family unity will enhance the prospects for successful local integration.

Resettlement is a powerful tool for family reunification, in some cases bringing together family members who have been stranded in different countries of transit or asylum, or have been unable to leave the country of origin. Most of the 18 countries that cooperate with UNHCR through resettlement programs for refugees will accept an entire household unit together from a country of first asylum or, in limited cases, directly from the country of origin. Some resettlement countries are more flexible than others about accepting non-traditional or complex family structures, going beyond the nuclear family. The June, 2001 Annual Tripartite Consultations on Resettlement endorsed “flexible and expansive” definitions of the family that are “culturally sensitive and situation specific”.¹³

Provided that all members of the family are included on the resettlement application form (whether or not they are then present in the same country as the principal applicant for resettlement), UNHCR finds that there are normally no difficulties with family members joining resettled relatives, even at later stages. NGO resettlement agencies, however, report that, in some cases, rigid application of rules can lead to unnecessary hardship. For example, a refugee family from Sudan with four children was granted visas to a resettlement country. Four days before departure, the woman gave birth. This 5th child had to stay behind in the refugee camp because there was no visa. It took more than four months to resolve the case.¹⁴

The importance for resettled refugees of family unity and family reunification is widely acknowledged. It was emphasized strongly at the International Conference on the Reception and Integration of Resettled Refugees, held in Sweden in April 2001.¹⁵ Refugees who are separated from close family members may be prevented by their distress and preoccupation from devoting themselves fully to building a new life in the country of resettlement. The positive corollary is that a unified family is the strongest and most effective support system for a refugee integrating into the social and economic life of a new country.

III. The refugee family in international law

In assessing the place of the refugee family in international law, it is useful to distinguish between family unity and family reunification, and also between close family

¹³ Annual Tripartite Consultations on Resettlement, UNHCR, Geneva, June 2001.

¹⁴ Refugee Council of Australia, ‘Position on Family Unity and Family Reunification’, (August 2001), page 6.

¹⁵ See John Fredriksson, ‘Protecting the Family: Challenges in Implementing Policy in the Resettlement Context’, background paper prepared for the International Conference on the Reception and Integration of Resettled Refugees (2001).

members and the extended family. It is important, as well, to differentiate between 1951 Convention refugees, persons benefiting from other types of protection, and asylum-seekers; and to keep these categories distinct from those of documented and undocumented migrants. In addition, differences between situations of large-scale influx and individual asylum systems must be borne in mind.

A. Family unity

The integrity of the family is protected under international law. There is universal consensus that, as the fundamental unit of society, the family is entitled to respect and protection.¹⁶ A right to family unity is inherent in recognizing the family as a ‘group unit’; if members of the unit do not have a right to live together, there is not a family to respect or protect.¹⁷

Over the past fifty years, respect for the rights and needs of the family, and awareness of the responsibilities of States, have developed at both the international and regional levels. It is now recognized, for example, that States have a duty not only to protect, but also to assist, families.¹⁸ Special provisions have been agreed to address the situation of families affected by armed conflict,¹⁹ and those with a member working in a foreign country.²⁰ There has been, in addition, international confirmation of the equality of men and women as parents,²¹ as well as extensive codification of children’s rights, including their right to live with their parents.²²

¹⁶ The *Universal Declaration of Human Rights*, 1948, article 16(3), *International Covenant on Civil and Political Rights*, 1966, article 23(1), and *American Convention on Human Rights*, 1969, article 17(1) each state that ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’. *European Social Charter*, 1961, article 16, ‘With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life’ *African Charter on Human and Peoples’ Rights*, 1981, article 18(1) ‘The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.’

¹⁷ Human Rights Committee, 39th Session, 1990, *General Comment 19 on Article 23*, paragraph 5.

¹⁸ *International Covenant on Economic, Social and Cultural Rights*, 1966, article 10(1), ‘The widest possible protection *and assistance* should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children’ (emphasis added). *African Charter on Human and Peoples’ Rights*, 1981, article 18 (2) ‘The State shall have the duty to assist the family’ *African Charter on the Rights and Welfare of the Child*, 1990, article XVIII(1), ‘The family shall be the natural unit and basis of society. It shall enjoy the protection *and support* of the State for its establishment and development’ (emphasis added). *See also, Convention on the Rights of the Child*, 1989, 5th preambular paragraph.

¹⁹ *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 1949, articles 25, 26, 49(3), 82(2). *Additional Protocol I*, 1977, articles 74, 75(5). *Additional Protocol II*, 1977, article 4(3)(b).

²⁰ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 1990, article 44(1), ‘States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.’

²¹ *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979, article 5(b) ‘States Parties shall take all appropriate measures to ensure ... the recognition of the common responsibility of men and women in the upbringing and development of their children ...’; article 16(1) ‘States Parties shall ensure ... (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters

B. The ‘essential right’ to family unity in the refugee context

The 1951 Refugee Convention provides protection for the refugee family in a number of articles,²³ without specifically mentioning family unity or reunification. However, refugees’ ‘essential right’ to family unity was the subject of recommendations approved unanimously by the Conference of Plenipotentiaries that adopted the final text of the Convention.²⁴

The representative of the Holy See who submitted the recommendation on family unity noted that although it was an ‘obvious proposition’ that assistance to refugees automatically implied assistance to their families, it would be wise to include a specific reference.²⁵ Debate on this recommendation, one of only five adopted by the Conference, centered on ensuring that it did not detract from the ‘categorical view’ of the preparatory *ad hoc* Committee on Refugees and Stateless Persons that ‘governments were under an obligation to take such action in respect of the refugee’s family.’²⁶

The States comprising UNHCR’s Executive Committee have emphasized the importance of State action to maintain or re-establish refugee family unity on repeated occasions, beginning with their first Conclusion adopted in 1975.²⁷ Although the right to family unity in the refugee context is not found in the 1951 Refugee Convention itself, it,

relating to their children.’ *Convention on the Rights of the Child*, 1989, article 18(1) ‘...both parents have common responsibilities for the upbringing and development of the child.’

²² *Convention on the Rights of the Child*, 1989, article 9(1), ‘States Parties shall ensure that a child shall not be separated from his or her parents against their will.’ *African Charter on the Rights and Welfare of the Child*, 1990, article XIX(1), ‘Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents.’ *Vienna Declaration on Human Rights*, 1993, paragraph 21, ‘... the child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection.’

²³ *Convention relating to the Status of Refugees*, 1951, article 4 refers to refugees’ ‘freedom as regards the religious education of their children’; article 12(2) provides that ‘... rights attaching to marriage, shall be respected ...’; article 22 concerns the public education of children in elementary school and beyond; paragraph 2 of the annexed schedule concerning travel documents notes that children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee.

²⁴ *Final Act of the 1951 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, Recommendation B, ‘Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and

Noting with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems, the rights granted to a refugee are extended to the members of his family

Recommends Governments to take the necessary measures for the protection of the refugee’s family, especially with a view to:

- (1) Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,
- (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.’

²⁵ P. Weis (ed.), *The Refugee Convention, 1951* (Cambridge University Press, 1995), 380.

²⁶ *Ibid.*, 381 (statement of the representative of the United Kingdom).

²⁷ See Executive Committee Conclusions No. 1(XXVI) 1975(f); No. 9 (XXVIII) 1977; No. 24 (XXXII) 1981; No. 84 (XLVIII) 1997; No. 85 (XLIX) 1998 (u)-(x); No. 88 ((L) 1999.

like refugee law generally, must be understood in light of subsequent developments in international law, including related treaties and agreements, State practice, and *opinio juris*.

Derivative status and the right to an individual hearing

At its most basic, the notion of family unity means that once one member of the family--‘the principal applicant’--is recognized as a refugee, the rest of the accompanying family members should also benefit from the same status.²⁸ With increasing awareness of the prevalence of gender-related persecution²⁹ and child-specific forms of harm, it is now understood that the principal applicant need not necessarily be the head of household.³⁰ All members of the family are entitled to an individual hearing.³¹ Respect for this right becomes crucial if the claim of the first family member is rejected.

The principle of derivative status operates only in favor of recognition, not in favor of rejection. In other words, if even one family member is recognized and all others are rejected on the merits of their individual claims, each member of the family is entitled to the benefit of derivative status.³²

C. Family reunification

There has been a progressive development in the international law of family reunification since the Fourth Geneva Convention of 1949, which devoted considerable attention to the problems of ‘families dispersed owing to the war.’³³ In addition to provisions aimed at maintaining family unity during internment³⁴ or evacuation³⁵, the Fourth Geneva Convention provides for mechanisms such as family messages³⁶, tracing of family members³⁷, and registration of children³⁸ to enable family communication and

²⁸ Executive Committee Conclusions No. 88 (L) 1999 (b)(iii) and No. 47 (XXXXVIII) 1987 (h); UNHCR, ‘Background Note: Family Reunification in the Context of Resettlement and Integration’, Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 5.

²⁹ See, e.g., R. Haines, ‘Gender-related Persecution’, background paper for the UNHCR Global Consultations Expert Roundtable, San Remo (2001) and the Summary Conclusions for that meeting.

³⁰ UNHCR, ‘Background Note: Family Reunification in the Context of Resettlement and Integration’, Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 6; UNHCR Standing Committee, ‘Family Protection Issues’: UN doc. EC/49/SC/CRP.14, 4 June 1999, paragraph 10.

³¹ Executive Committee Conclusion No. 88(L) 1999 (b)(iii).

³² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, paragraph 185.

³³ *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 1949, article 26. See also, S. Jaquemet, *Refugees in Armed Conflict: International Humanitarian Law and Refugee Protection* (Geneva: UNHCR, draft, 1999), 102-107.

³⁴ *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 1949, article 82.

³⁵ *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 1949, article 49.

³⁶ *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 1949, article 25.

³⁷ *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 1949, article 140.

‘if possible,’ reunification. The responsibility of States to separated families was deepened and made more explicit in the first Additional Protocol, which imposes an obligation to facilitate family reunification ‘in every possible way.’³⁹

The law of family reunification has been expressed in various ways. There is certainly, at a minimum, an emerging appreciation of a right to reunification in another country for at least some family members under some circumstances.⁴⁰ Some have acknowledged it as an independent and separate right.⁴¹ It has also been characterized as a self-evident corollary to the right to family unity⁴² and the right to found a family⁴³ and has been linked to freedom of movement.⁴⁴ Its most detailed provisions in general international law are found in international humanitarian law⁴⁵, in the Convention on the Rights of the Child⁴⁶, and in the migrant workers convention.⁴⁷ Particularly noteworthy is the obligation during armed conflict to facilitate family reunification ‘*in every possible way*’, along with the daily obligation placed on States to handle family reunification

³⁸ *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 1949, article 50.

³⁹ *Additional Protocol I*, 1977, article 74.

⁴⁰ See, e.g. European Union 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, article 15. See also, P. van Krieken (ed.), *The Migration Acquis Handbook* (T.M.C. Asser Press, 2001), 120: ‘The concept of reunification ... is now slowly being codified.’

⁴¹ R. Perruchoud, ‘Family Reunification’ (1989) XXVII(4) *International Migration* 509-522 at 519.

⁴² See, e.g., Human Rights Committee, 27th Session, 1986, *General Comment 15 on the position of aliens under the Covenant*, paragraph 5: ‘The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. ... However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of ... respect for family life arise.’ See also, Executive Committee Conclusion No. 24 (XXXII) 1981 paragraph 1: ‘In application of the principle of family unity and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.’

⁴³ Human Rights Committee, 39th Session, 1990, *General Comment 19 on Article 23*, paragraph 5: ‘The right to found a family implies, in principle, the possibility to ... live together. ...the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, *in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.*’ (emphasis added) See also, Conclusions on Family Reunification, XIIIth Round Table on Current Problems in International Humanitarian Law (1988), International Institute of Humanitarian Law, paragraph 2.

⁴⁴ G. Lahav, ‘National, Regional and International Constraints to Family Reunification: A European Response’ paper presented at the University of Konstanz Center for International and European Law on Immigration and Asylum Meeting of Experts (June 1999), III.A.

⁴⁵ In addition to the provisions cited above, see also *Protocol II*, 1977, article 4 (3)(b).

⁴⁶ *Convention on the Rights of the Child*, 1989, article 10, ‘Applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.’

⁴⁷ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 1990, article 44(2), ‘States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to the applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children. (3) States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.’

matters involving children ‘*in a positive, humane, and expeditious manner*’, including when reunification requires the entry of parents into a country (emphasis added).

Whatever the precise nature of the legal formulation,⁴⁸ many observers feel that existing instruments provide an adequate and appropriate legal framework for separated children and family reunification. The problem lies not with the lack of international standards, but rather with their implementation.⁴⁹

D. Family reunification in the refugee context

Family reunification principles pertaining specifically to those in need of international protection have been codified in conventions on the rights of children⁵⁰, in regional protection instruments⁵¹, and in provisions relating to internally displaced persons.⁵² UNHCR’s Executive Committee has stressed the importance of refugee family reunification on a number of occasions.⁵³

Legal issues in refugee family reunification arise most frequently with respect to admission of the refugee’s family to the country of asylum or resettlement. While some family members may well have an independent claim for refugee status, others may not. Instead, their admission is recognized to be a humanitarian imperative since, unlike other non-nationals in the host country, the refugee is not able to reunite with family members in their country of origin. A variation on this problem occurs when a migrant worker becomes a *de facto* refugee *sur place* in a country where he or she does not have family

⁴⁸ See P. van Krieken (ed.), *The Migration Acquis Handbook* (T.M.C. Asser Press, 2001), 120-121.

⁴⁹ C. Petty, ‘Family tracing and reunification – safeguarding rights and implementing the law’ (1996) 4 *International Journal of Children’s Rights* 165-176 at 174, citing in particular the lack of sanctions for enforcement.

⁵⁰ *Convention on the Rights of the Child*, 1989, article 22(2), ‘States Parties shall provide, as they consider appropriate, cooperation in any efforts ... to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.’ *African Charter on the Rights and Welfare of the Child*, 1990, article XXIII(2), ‘State Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family’.

⁵¹ European Union *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, article 15. *Cartagena Declaration on Refugees*, 1984, Conclusion III (13): ‘To acknowledge that reunification of families constitutes a fundamental principle in regard to refugees and one which should be the basis for the regime of humanitarian treatment in the country of asylum, as well as for facilities granted in cases of voluntary repatriation.’

⁵² *African Charter on the Rights and Welfare of the Child*, 1990, article XXV(2)(b), ‘States Parties shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.’ *Guiding Principles on Internal Displacement* presented to the United Nations Commission on Human Rights, 1998, Principle 17(3).

⁵³ Executive Committee Conclusions No. 1(XXVI) 1975(f); No. 9 (XXVIII) 1977; No. 24 (XXXII) 1981; No. 84 (XLVIII) 1997; No. 85 (XLIX) 1998 (u)-(x); No. 88 ((L) 1999. See also, UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, paragraph 186.

reunification rights, for example, a Kosovo Albanian in Bosnia, and then the family is forced to flee their country.

Family reunification issues can also arise in situations of voluntary repatriation in less than ideal circumstances, for example, when a decision must be made whether to reunite a separated child with parents in an unstable country of origin where conflict could resume at any time, or let the child remain with foster parents in a refugee camp. Determining the best interest of the child in such circumstances is a difficult task.⁵⁴ A related issue is cessation: how and when can a minor voluntarily re-avail him or herself of the protection of the country of nationality? Conversely, with respect to local integration, when can an adolescent, who may have spent all of his or her life in a country of asylum, choose to remain there even when the rest of the family is returning to their country of origin?

E. Family formation

A few words should be added concerning family formation. Although there is an internationally protected right to marry and found a family⁵⁵, the ability of a refugee to bring a fiancé(e) to the country of asylum is seen by many States as a generous, and discretionary, practice, particularly if the relationship was established subsequent to the recognition of the refugee claim. Others see it as an integral part of the right to family unity.⁵⁶

F. Close family members and the extended family: the scope of the right

1. Degrees of relationship

There is not a single, internationally accepted definition of the family⁵⁷, though there is universal agreement that it consists at least of the ‘nuclear’ family of a married man and woman⁵⁸ and their minor children.⁵⁹ It is widely recognized that a refugee has

⁵⁴ Inter-agency Guidelines on Separated Children, including a section on long-term durable solutions, are currently being finalized.

⁵⁵ *Universal Declaration of Human Rights*, 1948, article 16(1); *International Covenant on Civil and Political Rights*, 1966, article 23(2); *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, article 12; *American Convention on Human Rights*, 1969, article 17(2).

⁵⁶ Human Rights Committee, 39th Session, 1990, *General Comment 19 on Article 23*, paragraph 5; Caritas Europa-Migration Commission/Churches’ Commission for Migrants in Europe/Commission of the Bishops’ Conferences of the European Community/International Catholic Migration Commission/Jesuit Refugee Service Europe’s ‘Position on the Amended EU Commission Proposal for a Council Directive on the Right to Family Reunification’ (November 2000), paragraph 2.3.

⁵⁷ Human Rights Committee, 39th Session, 1990, *General Comment on Article 23*, paragraph 2.

⁵⁸ UNHCR also promotes reunification for engaged couples, those in a customary marriage, and those who have lived together for a substantial period, including same-sex partnerships. *UNHCR Resettlement Handbook*, Chapter 4.6.7.(a).

⁵⁹ It should be noted that some countries interpret minority to end at age sixteen, while others recognize offspring up to the age of twenty-one. Other countries set a lower age for non-nationals’ family reunification purposes than for their own citizens. UNHCR promotes reunification of parents with dependent unmarried children, regardless of age, who were living with the parents in the country of origin. *UNHCR Resettlement Handbook*, Chapter 4.6.7.(a).

the right to family unity and reunification with these individuals. Nevertheless, it is important to be aware of the impact of cultural differences regarding, for example, what constitutes a *bona fide* marriage. Some family reunification claims of separated spouses are based on a proxy marriage between a refugee in a resettlement country and a partner living in the country of asylum (or on a marriage conducted just days before the departure of one of the spouses to a resettlement country). Authorities in resettlement countries may see these unions as abusive of protection and perhaps also of the partners in an arranged marriage, although such marriages are fully in line with normal custom and practice in the country of origin.⁶⁰

Beyond the core members of the refugee family, there is great variation in the treatment afforded the larger sphere of family relationships. In UNHCR's view, the principle of family unity requires that the following people be reunited: dependent parents of adult refugees, other dependent relatives, and other dependent members of the family unit, such as friends or foster children.⁶¹ Some countries recognize some of these categories, but not others. Even when such relatives are admitted for reunification, it is often under less advantageous conditions, and after a longer wait, than closer family members. Such obstacles are the source of tremendous hardship and anxiety for refugees.

The more limited, or nonexistent, possibilities for family unity/reunification with members of the extended family are due in part to differences in the notion of family. Refugees tend to come from countries where notions of family are more inclusive, and often go to countries where they are less so. In addition, a refugee who has reached safety feels an understandable sense of obligation toward those who have been left behind.

For its part, the country of asylum or resettlement may well feel justified in placing greater emphasis on migration concerns over humanitarian ones when it comes to more 'distant' family members. The relative weight assigned to these concerns is not inevitable, nor is it necessarily based on correct premises. It has been suggested, for example, that as countries develop, their family structures move toward a Western norm where adult children are not responsible for their parents: policy makers should therefore not base decisions on an outmoded concept of cultural relativism favoring the extended family.⁶² However, while it is true that traditional societies are changing, it is also important to recognize that family life in every region of the world is evolving in response to new challenges and possibilities, such as the growing numbers of children

⁶⁰ There are many such cases. Although aware of the implied possibility that such marriages might be conducted with the sole intent to obtain resettlement, UNHCR recognizes these marriages as legally fully binding as long as they are in line with the relevant civil law. It should be recalled that marriages among some refugee communities, Kurds, for example, are contracts between families that have been carefully weighed as to the interests of each family and are not private affairs between two persons. It is thus not unlikely that the spouses do not consummate their marriage until the 'tribal marriage' has been conducted, which is sometimes a long time after the legally binding document has been signed before the court. E-mail from UNHCR field office to the authors, 22 July 2001.

⁶¹ UNHCR *Resettlement Handbook*, Chapter 4.6.7.(b).

⁶² P. van Krieken (ed.), *The Migration Acquis Handbook* (T.M.C. Asser Press, 2001), 118.

orphaned by AIDS or armed conflict, shortages of land and housing, the increased prevalence of divorce, greater social and legal acceptance of same-sex unions, advances in reproductive technology, and increased mobility within and between States. Given the range of variations on the notion of family, UNHCR promotes cultural sensitivity combined with a pragmatic approach.⁶³

2. Dependency

Many States recognize the concept of dependency as a ground for reunification with non-core family members. There is no internationally agreed definition of the term. UNHCR's operational definition is that a dependent person relies for his or her existence substantially and directly on another person, in particular because of economic reasons, but also taking emotional dependency into consideration.⁶⁴ The principle of dependency recognizes that in most cases, the family is composed of more than its nuclear members.⁶⁵ It should be noted that in many cultures young people over the age of majority, particularly young women, are considered part of the nuclear family unit until they are married. Aged parents are also considered part of the family in many societies.⁶⁶

It is important to recognize that dependency is not an additional requirement that nuclear family members must meet or risk being excluded from reunification, for example, if the dependent family members supported themselves or relied on others while separated from the refugee they now wish to join. Rather, the dependency principle is to be used to include family members who are not part of the core group but are nevertheless part of the family.⁶⁷

3. Ties of affection or mutual support

Refugee families, more so than many others, are likely to be melded from the remnants of 'real' families. The trauma of persecution and flight, the frequency of family separation, and the exigencies of life in exile create many families of choice or circumstance. These groupings should not be assumed to exist for convenience or for immigration purposes only. International humanitarian law recognizes that a family consists of those who consider themselves and are considered by each other to be part of

⁶³ UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 14.

⁶⁴ UNHCR *Resettlement Handbook*, Chapter 4.6.5.

⁶⁵ UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 13.

⁶⁶ See, e.g., *African Charter on Human and Peoples' Rights*, 1981, article 18(4) 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs', and article 29(1) 'The individual shall also have the duty ... to respect his parents at all times, to maintain them in case of need.' *American Convention on Human Rights*, 1969, article 32 'Every person has responsibilities to his family.'

⁶⁷ UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 16.

the family, and who wish to live together.⁶⁸ Economic and emotional ties should be given the same weight in reunification as relationships based on blood ties or legally sanctioned unions.⁶⁹

G. 1951 Convention refugees and others: what status is needed in order to invoke the right to family unity or reunification?

Formal recognition of refugee family unity is rooted in the Final Act of the Conference of Plenipotentiaries that adopted the 1951 Refugee Convention. Refugees recognized under the 1951 Convention are in the most advantageous position with respect to family unity or reunification, even given the variation in treatment seen. However, with the increasing use of complementary forms of protection in some parts of the world, even for those who fit the 1951 Convention definition, family unity or reunification possibilities have the potential to become even more dependent on State discretion than on refugees' rights.

1. OAU/Cartagena refugees

The OAU Convention governing the Specific Aspects of Refugee Problems in Africa does not make specific reference to family unity or reunification. Many of its signatories are bound, however, by international and regional human rights and humanitarian law treaties with provisions relating to family unity and reunification. More importantly, in the situations of mass influx envisaged by the OAU Convention, there is no individual status determination because the objective circumstances in the country of origin make the need for protection obvious and/or because the country of asylum is not able to conduct such an examination due to the large number of people involved. There should not, therefore, be an issue of derivative status. Family members, whether together or separated, should be, and in the normal course are, extended recognition on a *prima facie* basis.

Like the OAU Convention, the Cartagena Declaration guides countries in their response to mass influx, when refugee status is granted on a group basis. The Cartagena Declaration further acknowledges family reunification as a fundamental principle that should be the basis for humanitarian treatment in the country of asylum.

Legal issues arise when one member of a family is recognized as a *prima facie* refugee in one country, while another family member who flees to a country of asylum that does not employ an OAU type definition is not recognized as a refugee. If the country with the more expansive refugee definition does not provide for family reunification, then there is often no possibility for reunification in the country with the

⁶⁸ *Commentary to the Additional Protocols, quoted in Secretariat of the Inter-Governmental Consultations, Report on Family Reunification: Overview of Policies and Practices in IGC Participating States (1997), 357.*

⁶⁹ UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 1 c).

less inclusive definition, since that family member may be considered only an asylum seeker, or a beneficiary of a subsidiary form of protection.

2. Complementary forms of protection

Complementary protection refers to various types of status granted to people whose claims under the 1951 Refugee Convention have been rejected after an individual determination, but who have nevertheless been found to be in need of international protection, e.g., under article 3 of the Convention against Torture or under the OAU/Cartagena definition outside Africa or Central America.⁷⁰ Standards of treatment vary; however, beneficiaries of complementary protection are entitled to respect for their fundamental human rights.

The principle of derivative status should be observed where complementary protection has been granted. A number of countries extend family reunification rights to beneficiaries of complementary protection. However, some countries that offer complementary forms of protection do not allow family reunification. The United States, for example, does not provide for family reunification for persons protected under the Convention against Torture. This is problematic, not least because return is not necessarily envisaged as a durable solution for a person at risk of torture. That some 1951 Convention refugees are erroneously granted only complementary protection is also a concern in countries where there is a wide disparity in family reunification possibilities between the two categories.

3. Responses to mass influx

Mass influx situations present State authorities with the need to preserve or restore family unity in the midst of what are often chaotic events. Given the prevalence of family separation in mass influx, keeping or bringing family members together poses enormous practical problems.⁷¹ Whether in a refugee camp or spontaneous settlement in rural or urban areas, the members of a family, very broadly defined, should be permitted to stay together and helped to find each other.

Registration designed to identify separated families,⁷² tracing, assistance with communication and transportation, and similar measures may help relatives within a mass of refugees to re-establish a family group. In camps for Kosovar refugees in Macedonia, a telephone center allowed refugees to try to establish the location of missing relatives; in Rwanda, bus circuits allowed parents to visit centers for separated children in search of

⁷⁰ UNHCR Global Consultations Third Track meeting, 'Complementary Forms of Protection', 4 September 2001. UNHCR Standing Committee, 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime': UN doc. EC/50/SC/CRP.18, 9 June 2000.

⁷¹ With respect to the Rwandan exodus, e.g., see ICRC/UNHCR/UNICEF/IFRCRCS Joint Statement on the Evacuation of Unaccompanied Children from Rwanda, 27 June 1994; M. Merkelbach, 'Reuniting children separated from their families after the Rwandan crisis of 1994: the relative value of a centralized database' (2000) 82 *IRRC* 351 – 366; C. Petty, 'Family tracing and reunification – safeguarding rights and implementing the law' (1996) 4 *International Journal of Children's Rights* 165 – 176.

⁷² UNHCR Global Consultations Third Track meeting, 'Practical Aspects of Physical and Legal Protection with Regard to Registration,' 19 February 2001.

their children. When a refugee settlement must be moved (away from a volatile border region for example) or consolidated as camp populations decline, care should be taken to ensure that all members of a household are able to move together. Particularly in situations of mass influx, those working to maintain or restore family unity should make the maximum use of refugees' self-help efforts.

Separated children require special attention in order to be reunited with their parents or guardian and siblings as soon as possible. Tracing efforts should begin immediately when a separated child is identified, both through the comparison of records on separated children and on parents whose children are missing, and through an active investigation of the child's experience and identity. While attempts to locate the child's family proceed, arrangements for care by more distant relatives or foster families must be concluded and carefully monitored from the perspective of protection as well as the best interests of the child.

Most separated children do in fact have parents or other relatives who are willing and able to care for them and can be located through diligent tracing. Therefore, adoption or alternative arrangements for long-term care should never be contemplated during an emergency, and should only be pursued when exhaustive tracing has proved unsuccessful.⁷³ Decisions about reunification with parents or other relatives when tracing has been successful, or about alternative arrangements when it has not, should always be based on the best interests of the child.⁷⁴

Other legal issues include addressing family separations caused when male family members are refused entry or are separated from other refugees on suspicion that they are combatants (see section III.H.I. below), maintaining the confidentiality of tracing information, and securing permission to reunite families across or even within countries of asylum.

In situations of mass influx, at least some of the people involved will fall within the 1951 Convention refugee definition. However, States sometimes respond with a provisional form of protection known as temporary protection when the number of people precludes individual status determination. In principle, all family members present should receive the same temporary protected status, and there should not be an issue of derivative status. The Executive Committee has specifically concluded that respect for family unity is a 'minimum basic human standard' in situations of large-scale influx⁷⁵

⁷³ *Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption*, 1993; 'Recommendations Concerning the Application to Refugee Children and other Internationally Displaced Children of the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption', 1994. Executive Committee Conclusion No. 88(L) 1999 (c).

⁷⁴ *Convention on the Rights of the Child*, 1989, article 3; UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva, 1994), chapter 10; Executive Committee Conclusion No. 47 ((XXXVIII) 1987).

⁷⁵ Executive Committee Conclusion No. 22 ((XXXII) 1981 (II.B.2.(h))).

and has called for family reunification for persons benefiting from temporary protection.⁷⁶

Temporary protection is premised on a brief sojourn in the country of asylum, followed by return as the durable solution when conditions permit. Conditions of treatment for temporary protection vary, and the rules governing family unity are far from uniform. In the United States, for example, temporary protection does not permit family reunification. However, most of the countries that participated in the Humanitarian Evacuation Program for Kosovar refugees selected people for evacuation to a particular country on the basis of family ties there, and the agencies that administered the program were scrupulous about maintaining family unity in the process. In contrast, people who arrived spontaneously from Bosnia or Kosovo and were given temporary protected status in European countries faced an inconsistent patchwork of possibilities for family reunification. In a positive development, the recently concluded European Union directive on temporary protection⁷⁷ requires Member States to reunite from within the European Union core family members as well as unmarried partners if the State has similar treatment for them in its aliens law, and allows them to reunite close dependent family members. Family members who are not in the European Union but wish to be reunited with a sponsoring relative will be able to do so on a showing that they are in need of protection.

4. Asylum seekers

Asylum seekers are almost nowhere accorded access to family reunification, although members of a family who have been compelled to seek asylum in different countries should be allowed to pursue their claims together in a single country.⁷⁸ Separation during the pendency of the claim is particularly problematic since the length of proceedings in many countries causes tremendous hardship, particularly when children are apart from parents.⁷⁹ Resettlement is also difficult since resettlement countries often feel that the country where one family member has an application pending should accept the remaining family members.

⁷⁶ Executive Committee Conclusion No. 15 (XXX) 1979 (e): 'States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted.'

⁷⁷ European Union *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, article 15.

⁷⁸ ECRE, 'Position on Refugee Family Unification' (July 2000).

⁷⁹ Two separated children, recognized by UNHCR in a country outside the European Union as mandate refugees have been trying to reunite with their mother in a European Union Member State since 1997. Their father has recently been recognized as a refugee in another EU country, allowing the children to be referred for resettlement. UNHCR field office e-mail to the authors, 25 June 2001.

The terms of the Dublin Convention⁸⁰ permit a State to request that an asylum application be heard in the country where the applicant has close ties, but such transfers are rare. There should, at a minimum, be a means to reunite members of the same family who are seeking asylum in various countries since this will shorten their period of separation and make better use of scarce State resources for adjudication.

5. Internally displaced persons

Family separation is a feature of internal, as well as external, displacement. In Angola, for example, two-thirds of the approximately 3.8 million internally displaced people are under age fifteen. Many of these children are separated from their families, and are at great risk of forced recruitment and abduction. While reunification does not involve problems of obtaining admission to another country, legal issues can arise when freedom of movement is limited. In Angola, combatants have refused to allow civilians to move from areas of conflict to safer areas.

The growing recognition of State responsibility for family reunification in situations of internal displacement is another indication of the progressive development of this norm in international law.⁸¹

H. Reconciling competing norms

1. Exclusion

How should the principles and practices of family unity/reunification be applied in cases of actual or potential exclusion? The Refugee Convention provides that persons meeting the definition found in article 1A may nevertheless be excluded from protection if they fall with the categories specified in article 1F.⁸² It should be noted that even in situations of mass influx, where status is granted on a group basis, exclusion may be carried out only after an examination of the individual case. The situation of the family members must also be determined on a case-by-case basis.

When the principal applicant is found to meet the refugee definition, but is excludable, the claims of other family members must be examined closely not only in light of the reasons giving rise to the principal applicant's claim or their own independent

⁸⁰ *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Community*, 1990. See also, A. Klug, 'The Humanitarian Clause of the Dublin Convention and Family Protection' (1999).

⁸¹ *African Charter on the Rights and Welfare of the Child*, 1990, article XXV(2)(b), 'States Parties shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.' See also, *Guiding Principles on Internal Displacement* presented to the United Nations Commission on Human Rights, 1998, Principle 17(3).

⁸² See G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses', background paper for the UNHCR Global Consultations Expert Roundtable, Lisbon (2001) and the Summary Conclusions for that meeting.

reasons, but also in light of their risk in being related to someone who took part in an excludable act. In other words, there is no derivative status of excludability.

However, family members if recognized cannot ‘overcome’ excludability of the initial principal applicant, i.e., each member of the family must be admissible in his or her own right.⁸³ A variation on the problem is if a member of the family is excludable, but the principal applicant is not. A practical question arises as to whether the principal applicant should return with the excludable member, bearing in mind that both may be at risk upon return due to the activities of the excludable member. Given the compelling cases that can arise, particularly in the context of resettlement, some UNHCR offices have expressed the need for more detailed guidelines for those situations where the principles of family unity and the exclusion clause conflict.⁸⁴

The impact of exclusion on family unity and reunification⁸⁵ underscores the need to address the overly expansive interpretation of the exclusion grounds under the Refugee Convention and/or other immigration-related grounds of inadmissibility, which results in families being split, or kept apart, due to a minor infraction on the part of one member. If such minor crimes are (wrongly) considered to invoke exclusion or inadmissibility, humanitarian considerations suggest that the bar to entry be waived, at least when it would result in the separation of core family members. This is particularly the case when the grounds of exclusion or inadmissibility relate to falsified travel documents or other immigration violations, due to the need of refugees to resort to such means to escape their countries and find protection. In Canada, for example, there have been cases of families traveling with false documents who became separated in transit. The wives and children were able to enter and were recognized as refugees. The husbands’ applications for reunification were denied, due to their use of falsified travel documents.⁸⁶ In view of increased interception efforts on the part of a number of countries, and the corresponding increase in people smuggling, such cases will become more numerous and will pose more serious challenges to countries of asylum and resettlement in arriving at durable solutions.

⁸³ UNHCR Standing Committee, ‘Family Protection Issues’: UN doc. EC/49/SC/CRP.14, 4 June 1999, paragraph 9.

⁸⁴ One example given was of a family whose principal applicant was excludable. The spouse was, however, in need of urgent medical assistance and resettlement on medical grounds. Should no one in the family be resettled with possible serious medical consequences for the spouse, or should the family be split, with everyone except the principal applicant resettled, or should the entire family be resettled? UNHCR field office e-mail to the authors, 6 August 2001.

⁸⁵ Executive Committee Conclusion No. 7 (XXVIII) 1977 (b).

⁸⁶ In one case, involving a Sri Lankan family, the Immigration Appeal Section of the Immigration and Refugee Board found no humanitarian or compassionate reasons for reversing the negative decision. In another case, involving an Iranian family, a pardon was obtained for the criminal conviction for using false documents, which enabled the reunification visa to be issued.

2. Separation of armed elements

Separation of armed elements should be differentiated from exclusion, although it is a necessary preliminary step in many situations of large-scale influxes.⁸⁷ In principle, family unity can be maintained if the family members concerned lay down their arms, thus reconciling the two principles, or at least putting the choice with the combatant. However, it is difficult to determine when a combatant has truly become an ex-combatant, so that his presence threatens neither his family nor the humanitarian nature of the refugee camp.

In situations of armed conflict, families are generally safer if they are not with combatants. Experience has shown that when armed elements are not separated, unarmed family members of armed elements can become hostages, or at least be at great risk of military and armed attacks, and forced recruitment, including of children.

3. Migration control

As noted earlier, family reunification plays a prominent role in migration to receiving States. Refugee family reunification is, however, a relatively limited part of this phenomenon. The challenge for States is to balance their migration concerns with their humanitarian obligations in a manner more suited to protecting families (and rights) and less likely to exacerbate the problem of unauthorized arrivals that they are trying to address.

It is common knowledge that because of the lack of legal means to enter many countries of asylum, many husbands (it is usually, although not always, the husband) will leave their wives and children at home or in a country of first asylum in order to attempt the journey alone.⁸⁸ If he is stopped in a country of transit, he is often unable to return to the country of first asylum. The family is usually left in desperate straits. The only legal possibility for reunification then becomes resettlement, a lengthy and expensive process, which is difficult for the separated family members and resource-intensive for UNHCR, NGOs, and the affected governments.⁸⁹ It also distorts the resettlement process by directing resources away from other protection concerns in order to solve family reunification problems that States have, to some extent, brought upon themselves.

The gender implications of this common scenario are that since the women and children are left behind in the country of origin or transit, they are at greater risk from a protection perspective, not only because of their fear of persecution but also because they

⁸⁷ UNHCR Global Consultations Third Track meeting, "The Civilian Character of Asylum: Separating Armed Elements from Refugees", 19 February 2001.

⁸⁸ Cost is a related factor, which goes up with the distance, difficulty and illegality of the journey. Asylum seekers advised one UNHCR office, for example, that the going rate to be trafficked from the Russian Federation to Central or Western Europe is US\$3000-5000 per person. E-mail from UNHCR field office to authors, 6 August 2001.

⁸⁹ The numbers involved are not small. For example, there are at present approximately 1500 family members in Indonesia awaiting resettlement in order to be reunited with other family members.

are now a female-headed household. To make matters worse, they are unable to work toward a durable solution, since they cannot initiate family reunification efforts and can therefore play at best only a passive role in the procedure, unless they too expose themselves to the dangers of clandestine travel.⁹⁰

Reunification, even when successful, often takes much longer than refugees expect because of the length of asylum procedures for the principal applicant and resettlement/reunification/immigration procedures for the family thereafter. The passage of time alone is damaging to the family, and costly to States. Some husbands ‘disappear’ or stop transferring funds back to their families, which causes an increase in the numbers of stranded family members requiring financial and social assistance. After one or two years living as a single mother in difficult conditions without the means to support her family adequately, a woman may decide to return to the country of origin, even if it is not safe. Her risk in returning may be heightened in traditional communities by suspicions of her sojourn abroad without her husband, and she may face persecution or worse for her perceived immoral behavior.⁹¹ Long waiting periods also increase the risk of family members becoming victims of traffickers.

In a different and all too common scenario, a child arrives alone in a country of asylum. These compelling cases can be extremely complex. In some instances, desperate parents have sent children abroad for their own protection, for example, to avoid forced recruitment. In other cases, the parents are hoping for a better life for their child, or for themselves, and have not necessarily acted in the child’s best interests by sending him or her alone. Some children are escaping from their families in situations that may well qualify them for refugee status, for example in cases of forced marriage or female genital mutilation. In still other cases, the child was already separated from his or her family in the country of origin or a country of transit.

The obligation to resolve these cases in the best interests of the child, whether or not he or she is recognized as a refugee, requires States to undertake a careful investigation into the facts and circumstances of each child and family. Some countries do not allow separated children recognized as refugees to apply for family reunification with their parents, in part to discourage parents from sending children abroad. Some States that do have provisions for parents to join a minor child impose conditions on reunification so unrealistic as to virtually eliminate the possibility—for example by requiring that minor children meet the income requirements of a sponsor of joining relatives. Children in this situation face an unacceptable choice: either to return to a place where they fear persecution, or to endure long-term separation from their parents. A State’s fear of ‘anchor children’ being used to open a path for the immigration of a family does not justify denial of family reunification to a child who has been found to have a legitimate claim to refugee status, nor does it comport with international obligations to act in the best interests of the child.

⁹⁰See, e.g., Refugee Council of Australia, ‘Position on Family Unity and Family Reunification’ (August 2001), paragraph 7.

⁹¹E-mail from UNHCR field office to authors, 3 August 2001.

Some interception efforts include screening for protection purposes, with resettlement as the durable solution. The intercepting country generally tries to find other countries to offer the necessary resettlement spaces to the refugees thus identified. Leaving aside the question of whether such schemes are a positive example of balancing migration concerns with protection responsibilities, or of burden-sharing, it should be recognized that at least some of the intercepted refugees will have family ties in the country they were trying to reach and should be allowed to proceed to join their relatives.

III. State practice: legislation and case law

A. Legislation relating to family unity and reunification

The States comprising UNHCR's Executive Committee, and the Office itself, have drawn attention to the need to lay a firm foundation for family unity and reunification in domestic legislation.⁹² Such provisions are an important method of implementing international standards and represent the best practice in a rights-based approach to protection of the refugee family.

1. States with provisions relating to refugee family unity and reunification

The States that have incorporated family unity and reunification principles have done so with a variety of legislative and administrative provisions.⁹³ The basic elements can be as elegantly simple as the law in Bosnia and Herzegovina:

'Refugee status shall in principle be extended to the spouse and minor children as well as other dependants, if they are living in the same household. Entry visas shall be provided to such dependents of persons to whom asylum has been granted.'⁹⁴

Alternatively, the elements can be as complicated as those in U.S. law, which provides three different channels for family reunification of refugees: a priority system that gives refugees with relatives in the United States preferential access to resettlement if

⁹² Executive Committee Conclusion No. 85 (XLIX) 1998 (x); UNHCR 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 1.b): 'This requires that States take measures, including national legislative efforts, to preserve the unity of the family. It also requires corollary measures to reunite families that have been separated, through programmes of admission, reunification and integration.'

⁹³ See Secretariat of the Inter-Governmental Consultations, *Report on Family Reunification: Overview of Policies and Practices in IGC Participating States* (1997) for a summary of policies in Australia, Belgium, Canada, Denmark, Finland, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, the United Kingdom, and the United States. See also, UNHCR, *Integration Rights and Practices with Regard to Recognized Refugees in the Central European Countries*, European Series, Vol. 5, No. 1 (2000), Chapter VI, 'Family Unity and Reunification' for a comparative analysis of policies in and country profiles of Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia.

⁹⁴ Bosnia and Herzegovina Law on Immigration and Asylum, article 54. The Refugee Act of Iraq, No. 51-1971, article 11.3, is even more succinct: 'The person who has been accepted as a refugee in Iraq shall be allowed to bring his/her family members legally recognized as dependents.'

they themselves are found to have a well-founded fear of persecution⁹⁵; a visa program for relatives of refugees that is based on derived status and does not require the joining relatives to demonstrate a fear of persecution; and normal family immigration procedures available to all permanent residents, a status normally available to refugees one year after resettlement in the United States.

Unrealistic or overly rigid documentation requirements are a widespread problem. While States have legitimate concerns about fraud, it must be recalled that refugees are often not in a position to obtain documents such as passports or marriage, divorce, birth and death certificates. Women and girls from some refugee-producing countries, such as Afghanistan, are much less likely than males to possess valid travel documents. In Belarus, for example, which has family unity provisions in its national legislation, there have been several cases of childless married couples who were requested to provide documentary proof of their marriage.

Some States require a refugee to have been resident for a certain amount of time, or to have attained a certain status, before they are allowed to apply for family reunification. In Canada, where derivative status is not recognized, administrative procedures have been designed to ensure family unity. However, potential obstacles in the process abound: the refugee must first obtain permanent resident status, one requirement of which is a valid passport which many refugees do not have and cannot obtain; family members who are in the host country with the refugee but were not recognized in their own right have no legal status during the administrative processing period, so, for example, children are not entitled to attend school; the processing fees are out of reach for many refugees; if the deadline for refugee family unity processing is missed, the only recourse is to file under regular immigration categories which are more restrictive; medical conditions may be imposed, and security checks must be conducted. The cumulative effect of these cumbersome bureaucratic procedures and in some cases unrealistic requirements is that many refugees wait many years for family reunification, or even for a secure status for family members already with them. One consequence is that many children ‘age out’ and are no longer eligible, thus creating further obstacles to family reunification.

A In many States, an interim status, such as persons who have been granted Exceptional Leave to Remain in the United Kingdom, conveys no right to family reunification, although the British Home Office will consider an application after a person has held this status for four years-- less in especially serious ‘compassionate’ circumstances. Applicants must show but they have the means to support and accommodate relatives without recourse to public funds. Most ELR holders may be granted indefinite leave to remain after four years, which status carries the same entitlements and requirements for family reunification.

In an attempt to deter people smuggling, Australia bars family reunification for a period of two and one-half years, even with spouses and minor children, for recognized

⁹⁵ Of the three family-based priorities (P3, 4, and 5), only the P3 category is currently in use, and that only for six countries, all in Africa.

refugees who entered without authorization. Nor can these refugees visit their families in a third country, since they would lose their right to re-enter the host country. This policy is clearly in violation of international treaty obligations, and is only questionably effective: one obvious risk is that it could serve to encourage the family members outside to use a smuggler themselves to attempt to join the family member already present. It also has a negative impact on the protection situation in other countries. Family members waiting in transit countries are at increased risk, since their limited periods of allowable legal residence are generally much shorter than two and one-half years.

2. States with general immigration provisions relating to family unity and reunification

Some type of legislative arrangement for family unity is preferable to none. However, immigration provisions are generally not adequate in the refugee context. Maintaining or restoring refugee family unity involves an obligation of protection, an orientation toward durable solutions, and a humanitarian commitment to rebuilding refugees' lives, none of which is normally a part of regular immigration programs.⁹⁶ In the absence of refugee-related legislative or administrative provisions it is difficult to speak of a rights-based approach to family unity and reunification.

In addition to the obstacles noted in the preceding section, additional problems arise in addressing refugee family issues through immigration laws. Many of these provisions have restrictive criteria based on types of blood lineage or legal relationships, legal status and length of stay of the petitioner in the host country, numerical limitations, and in some cases, the integration potential of the family member.⁹⁷ In many countries, there are income and/or residential accommodation requirements for the refugee in order to sponsor a more 'distant' relative such as an aged parent; some countries impose these requirements even for core family members. In some countries, recognized refugees face difficulties in obtaining residence permits required to petition for reunification with nuclear family members.

State discretion in dealing with the refugee family is too often exercised in an arbitrary manner inconsistent with international legal principles. The following examples of problematic practices are taken from Germany, but can also be found in other countries: entry visas for family members are sometimes denied by missions erroneously or without explanation; family separation itself is no longer regarded as a sufficient humanitarian reason to justify reunification; income and accommodation requirements are rigidly enforced without inquiry into the individual circumstances and resources of the family; valid passports and original documents are required despite their unavailability; refugees are advised to attempt to reunite with family members in a

⁹⁶ UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 8.

⁹⁷ UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement, 20-21 June 2001, paragraph 7.

different country of asylum; and applications for reunification are used to re-examine and sometimes revoke the status of the principal applicant.⁹⁸

3. States with no domestic provisions

Refugee family unity and reunification is not considered a priority in some States and so policies and procedures have not been put into place. UNHCR offices in such countries attempt to establish procedures with local authorities to find solutions to such issues on a case-by-case basis. One office reports that ‘such endeavors are indeed time consuming and there is a constant fear of running into a protracted situation.’⁹⁹ In some countries, such as Ecuador, with a small caseload (6 spouses reunited last year) and an open, flexible and expeditious policy on the part of the government, family reunification proceeds smoothly.

In States where there is no procedure established for family reunification, family members generally must apply at a diplomatic mission. If there is not one in the country where they are residing, they must mail their applications to a mission elsewhere. This greatly increases the length, difficulty and expense of the process.

In countries where UNHCR conducts status determination, it promotes family unity through status determination procedures and family reunification processing. With respect to status determination, experience suggests that the best practice is to establish a specific procedure for claims based on family unity with a recognized refugee already in the country of asylum. First, such claims need to be adjudicated quickly for protection purposes and to restore family unity; second, the vast majority of them are manifestly founded and can be examined expeditiously.¹⁰⁰

⁹⁸ The following recent cases from other countries, all concerning reunification of recognized refugees with nuclear family members, are drawn from UNHCR field office e-mails to the authors. (1) An Afghan woman with two daughters was recognized as a refugee in a country of asylum; her husband and their two sons were in a country of transit. Their first application to join the wife and daughters was erroneously rejected on financial grounds, which under that country’s legislation apply only to regular immigration cases, not to refugees. UNHCR branch offices in both countries had to intervene to correct the error. Their second application was then denied because the husband and wife had different family names, although this is the common and well-known tradition in their country. Both UNHCR offices again intervened to clarify. Entry visas were finally issued after a one-year delay (18 July 2001). (2) An Afghan man was recognized as a refugee in a country of asylum. His wife applied for family reunification from her country of first asylum, submitting full documentation including their marriage certificate and a copy of her husband’s identification. The asylum country’s mission erroneously denied the application, questioning, without any reason given, whether the husband had in fact been recognized as a refugee. UNHCR offices in both countries had to intervene. The visa was eventually issued after a seven-month delay (18 July 2001). (3) An Iraqi married couple were recognized as refugees. They applied for reunification with their two adolescent children, who were in a transit country. The country of asylum moved to revoke the father’s refugee status. UNHCR offices in both countries have intervened. The UNHCR office in the country of transit recognized the children as refugees in their own right, not on family unity grounds. UNHCR is now investigating the possibilities for resettlement of the parents and children in a new country of asylum (3 August 2001).

⁹⁹ UNHCR field office e-mail to the authors, 24 June 2001.

¹⁰⁰ The UNHCR Regional Office in Cairo takes such an approach.

Refugee claimants approaching UNHCR offices should be informed of the possibility of applying for the benefit of the principle of family unity without going through the standard status determination procedure. In order to identify fraudulent claims, it is important to have objective criteria relating to socioeconomic and personal considerations, and membership of the same household, to determine dependency. Following interviews with both the principal applicant and the newly arrived dependent, the dependent will either be added to the file and enjoy derivative status, or will be denied. A negative decision on the basis of family unity cannot be appealed. However, the rejected dependent may submit an application within the framework of the standard status determination procedure.

In countries where the government does not officially recognize UNHCR mandate status, it generally will also fail to acknowledge mandate refugee status of a close family member as a basis for the issuance of a visa or residence permit, thus closing off the possibility for reunification. Resettlement becomes the only legal option available for a durable solution.

B. Case law

The authors found little case law on refugee family unity, perhaps revealing the insufficiency of the domestic legal basis for the exercise of this right in many countries, or the inability of refugees to obtain access to the courts.

In Canada, administrative and judicial authorities generally reject the principle of family unity in the context of refugee status determination.¹⁰¹ As a result, there are cases of one spouse and a dependent child being granted refugee status while the other spouse is not,¹⁰² or one parent being recognized but the dependent children are not¹⁰³, or even a child being recognized but the parents and other siblings are not.¹⁰⁴ The leading Federal Court case on the issue rejected family unity as a basis for recognizing the family member's claim, and instead analyzed the claim in terms of article 1A of the 1951 Convention, specifically membership in a particular social group consisting of the family.¹⁰⁵ Family unity or reunification is provided for in an administrative procedure, which is subject to a number of potential problems, or in other forms of discretionary relief.

In contrast, a Russian court recently overturned the denial of refugee status to the unmarried adult dependent sister of a refugee, specifically citing the situation of single women and the notion of extended family in the refugee's country of origin. The applicant had lived with her brother, had fled with him, and had applied for asylum with

¹⁰¹ See, e.g., *Reflex*, Issue 133, March 1, 2000, CRDD M99-04586 et al.; *Reflex* Issue 110, March 3, 1999, CRDD A97-00353 et al.; *Reflex*, Issue 94, July 6, 1998, CRDD V95-01655 et al.

¹⁰² *Y.S.C. (Re)* (1998) CRDD No. 26 (Quicklaw).

¹⁰³ *I.P.A. (Re)* (1999) CRDD No. 286 (Quicklaw); *H.Z.G. (Re)* (1999) CRDD No. 226 (Quicklaw); *M.V.J. (Re)* (1998) CRDD NO. 114 (Quicklaw).

¹⁰⁴ *M.M.L., J.E.L. et al.* (2000), DSSR, M99-09766/67/68/69/70/71, MA0-04506/7/8; *P.F.F. et al.* (2001) DSSR, M99-09536, MA0-02016/7/8/9.

¹⁰⁵ *Castellanos v. Canada (Solicitor General)*, (1995) 2 F.C. 190 (FCTD) (Quicklaw).

him. The brother and members of his nuclear family had been recognized, while the sister's application was denied. The court acknowledged in dicta that the sister had her own well-founded fear of persecution based on the brother's persecution, but also heard testimony on the roles of women and the family in the country of origin, and based its decision firmly on the principle of family unity.¹⁰⁶

Under French case law, minor children benefit from the principle of family unity provided they were minors when they arrived in France.¹⁰⁷

C. The interaction of regional instruments with domestic law

All regional human rights systems have provisions relating to protection of the family. The African law is the most developed in terms of treaty provisions¹⁰⁸, while the European case law has given the clearest indication that the sovereign right to determine who can be admitted to a country is circumscribed by the right to family unity.¹⁰⁹

Efforts in the European Union to agree on how to implement the right to family reunification have yet to bear fruit. The amended proposal for a Council directive¹¹⁰ correctly provides more favorable treatment in some respects for refugee families as compared to migrant families, yet also gives rise to concern in a number of other respects.¹¹¹ It appears that only reunification with members of the nuclear family (spouse and minor children) will be mandatory, while same sex couples, unmarried partners, couples in a customary marriage, and members of the extended family will be able to reunite only as a matter of State discretion. A few States would like to set the maximum age for reunification with children as low as twelve. Further negotiations on the proposal will need to be monitored carefully to ensure that it sets a positive benchmark for implementation of the right.

V. State practice: implementation and administrative procedures

¹⁰⁶ *Ms. YY v. Moscow and Moscow Region Immigration Control Department*, Civil Case No. 2-3688, Moscow Central Administrative District Zamoskvoretsky Municipal Court (10 May 2001).

¹⁰⁷ Commission de Recours des Réfugiés, 23/2/95, *Beus*; Commission de Recours des Réfugiés, 3/3/95, *Malenga*.

¹⁰⁸ *African Charter on Human and Peoples' Rights*, 1981, article 18; *African Charter on the Rights and Welfare of the Child*, 1990, article XVIII.

¹⁰⁹ The European Court of Human Rights has decided in two non-refugee cases that a State must allow family reunification if it is the only way to achieve family unity. *Gul v. Switzerland*, 19 February 1996, No. 53/1995/559/645; and *Ahmut v. Netherlands*, 28 November 1996, No. 73/1995/579/665.

¹¹⁰ Commission of the European Communities Amended Proposal for a Council Directive on the Right to Family Reunification, Brussels 10.10.2000 COM (2000) 624 Final, 1999/0258 (CNS).

¹¹¹ See, e.g., ECRE's 'Position on Refugee Family Reunification' (July 2000); Caritas Europa-Migration Commission/Churches' Commission for Migrants in Europe/Commission of the Bishops' Conferences of the European Community/International Catholic Migration Commission/Jesuit Refugee Service Europe's 'Position on the Amended EU Commission Proposal for a Council Directive on the Right to Family Reunification' (November 2000).

Even in States with specific provisions relating to family unity or reunification, protracted and complicated procedures cause tremendous hardship to the affected families¹¹² and demand inordinate human resources from UNHCR and other organizations assisting them.¹¹³ As with many matters of high principle, with family unity the devil is in the details of implementation. Despite the framework provided by international law, States reluctant to accept alien entrants have left themselves an ample margin to equivocate on the actual mechanisms for family protection. The previous sections have shown that national refugee, asylum, and immigration legislation in many cases presents obstacles to family unity for refugees. Legislation often leaves room for considerable administrative discretion, however, which may work in favor of or against refugee families hoping to reunite.

A. Application procedures

Diplomatic missions abroad are often unaware of or indifferent to the provisions of national refugee law. One country's legislation provides that asylum applications may be lodged at an embassy abroad and that refugee status is automatically to be given on request to the refugee's spouse and minor children; however, its diplomats routinely refuse to deal with them.¹¹⁴ Another country permits its embassy staff to refer urgent protection cases for resettlement but finds that this channel is almost never used. UNHCR field offices are frequently called upon to intervene in cases where family unity petitions have been denied incorrectly according to the laws or regulations of the country to which entry is sought. Rectifying such decisions requires close cooperation among the field offices in two or more countries where separated relatives reside.

Some States, including the Nordic countries, require applications for reunification to be initiated at a diplomatic mission abroad. If there is no embassy or consulate in the first country of asylum, this can cause further difficulty and delays as long-distance

¹¹² 'In daily contact with persons of concern we are confronted with the distressing effects of the broken family unity for the refugees who often fall into deep depression particularly, as is often the case, when the separation from the spouse and children is protracted and there is very limited/no possibility of communication.' E-mail from a UNHCR field office to the authors, 6 August 2001. 'The process of reunification takes a long time, which sometimes causes the situation where the [refugees] lose hope.' E-mail from a UNHCR field office to the authors, 27 July 2001. *See also*, Refugee Council of Australia, 'Position on Family Unity and Family Reunification' (August 2001), which includes a number of compelling cases of separated refugee families, all clients of RCOA member organizations.

¹¹³ Excerpts from four UNHCR field office e-mails to the authors: '[Branch Office X] is trying to use any possible intervention of other HCR offices in the concerned countries and Red Cross with regard to obstacles occurring with family reunification cases. There has been strong support from them but nonetheless the overall problems are still here' (25 June 2001). 'Family reunification from [country Y is] at times ... a quite long and sometimes very bureaucratic procedure demanding quite considerable staff resources in order to follow up on individual cases, liaising with Embassies, etc., ...' (6 August 2001). 'UNHCR really spends time with refugees/nationals to explain them the family reunification procedure, insisting on the fact that it takes time, and on what kind of assistance they can expect from us' (10 July 2001). 'In view of the number of shortcomings and practical obstacles that we regularly face in [country Z] with regard to family reunification cases, we are looking forward to the discussions and conclusions at the expert roundtable in November' (18 July 2001).

¹¹⁴ UNHCR field office e-mail to the authors, July 18, 2001

communications and shipment of documents takes place. Refugees' families who are not resident in or near the capital city find the requirement for multiple interviews and presentation of documents at an embassy slows the process of reunification and is very costly. Other countries require that the sponsoring relative initiate the application process. This is usually a more satisfactory process, although communication with the waiting family and with the appropriate consular officials may be difficult.

A number of countries require that applications for family reunification be made when an asylum seeker crosses the border or when a refugee first applies for resettlement—both times when the person applying may not fully understand the application procedure. If the application isn't lodged at that time, the family is unlikely to be allowed to reunify. However, in some cases a petition filed at the border may allow a refugee's relative to circumvent more elaborate and time-consuming requirements that apply if the application is made from abroad. For example, in Poland, an alien may enter on the basis of an invitation from a family member, show his/her passport and visa, and apply for refugee status at the point of entry. The Border Guards control post may make a quick decision based on Article 44 of the Aliens Law, which guarantees refugee status to family members staying with a refugee in Poland.¹¹⁵

Access to information about family reunification procedures is a common problem. Refugees themselves often do not know where to obtain information on family reunification procedures or how to determine the status of their applications. There is often confusion as to who in the family (those abroad or those in country) should initiate the proceedings, what institution is responsible for effecting family reunification (Embassies, UNHCR, ICRC, NGOs, etc.) what is required to complete the application, and where sources of information and financial assistance may be found. In general, accurate information about application requirements—and the requisite forms, fee payments, documentation, and so forth-- is easier to access in the country where family unification is sought. Family reunification would be facilitated by permitting a relative already resident in that country to initiate procedures. Consulates and UNHCR field offices should disseminate information about family reunification procedures to eligible people.

Most countries permit minor children to join parents who have been recognized as refugees under the 1951 Convention. Cumbersome procedures, however, have been known to consume so much time that minor children 'age out' of reunification possibilities before their processing is complete. For the purposes of family reunification, a child who is below the age of majority when his or her case is filed should be permitted to complete the process and join family members regardless of his or her age at completion.

B. Processing delays

Refugee family members often experience lengthy delays in obtaining entry visas from consular offices. Particularly in diplomatic missions in countries in proximity to

¹¹⁵ UNHCR Branch Office Warsaw, e-mail to the authors, June 28, 2001

significant refugee flows, the processing of such applications by national authorities has typically been slow. One country's mission reported in the summer of 2001 a six-month waiting period before initial interviews could be carried out in Damascus and a one-year wait in Islamabad. After an application had been submitted in this case, it was not unusual for authorities to take up to a year to process the application and reach a decision.¹¹⁶ During the processing period, the family members are often out of legal status and thus face additional protection problems. The strain on their financial resources may also be considerable.

The processing for family reunification visas to the United States based on derivative status (VISAS 92 and 93) is currently very slow both because of limited processing capacity in the consulates in the countries where most applications originate, and because the number of applications has increased dramatically in recent years.¹¹⁷

Together with the need to obtain travel documents and money for the travel costs (which are most often funded by UNHCR when the refugee family cannot afford it), these factors have resulted in considerable delays, sometimes years, in the procedure.

Delays tend to feed upon themselves, as medical screening results go out of date and must be repeated, the validity of fingerprints expires, and so forth. Processing delays are particularly serious in cases involving children, especially unaccompanied children. All such cases should be expedited in every way possible.

C. High costs

In general, financial difficulties present the most persistent obstacle to family reunification. Some countries require refugees to meet certain income requirements (equal to the minimum wage in one case; to 125% of the poverty level for certain avenues of family unification in another). Another State makes family reunion formally conditional on the applicant having accommodation of a sufficient size (although in practice refugees are expected to be exempt from this requirement at least as far as spouse and minor children are concerned). In many states, however, immigration laws requiring certain levels of income, housing, etc, are not applied to refugees. The draft European Union Directive on Family Reunification would harmonize the EU member States' practice to this standard.

Certain States impose per capita fees on applications for reunification, which many refugees find difficult to pay. Australia has made it possible for the spouse and children of refugees to enter under the humanitarian program, which does not require expensive application fees, rather than under the family reunion program, which can require fees in excess of \$3000 for two children, according to the Refugee Council of Australia.¹¹⁸ (The disadvantage of this change is that the waiting periods are growing for a visa under the

¹¹⁶ UNHCR field office e-mail to the authors, July 25, 2001

¹¹⁷ Telephone interview with Bureau of Population, Refugees and Migration, US Department of State, October 3, 2001.

¹¹⁸ "Position on Family Unity and Family Reunification", Refugee Council of Australia, August, 2001.

humanitarian program.) In Canada, if a refugee fails to file for permanent resident status for him/herself and immediate family members within 180 days of being granted asylum (which application involves substantial fees), the remaining alternative is to file for sponsorship after obtaining permanent residence. At that stage, sponsored family members must demonstrate an ability to remain independent of social welfare, and the sponsor must undertake to support the sponsored relatives for 10 years.

Another set of expenses that refugee families in pursuit of reunification may face arises from required medical tests. In some cases these are screening tests for infectious diseases or to establish that the refugee family members will not impose burdens on the public health systems of the countries to which they hope to move. More States seem to be concluding, however, that it is not appropriate to deny family unity to refugees on health grounds, and this would clearly seem to be a desirable international standard.

There is an increasing tendency to use DNA testing to confirm family relationships among refugees and the people with whom they seek reunification, owing to concerns about fraudulent claims. DNA testing is expensive, and refugees are expected to pay for the tests themselves by many potential receiving States. The requirement for DNA testing is also a source of considerable delays in processing applications. States that require such testing should routinely fund the tests.

The costs of obtaining documents, traveling to present petitions, and securing visas are often prohibitive, as is the cost of tickets. UNHCR, ICRC, IOM, and some NGOs provide assistance in some cases to family members who would otherwise be unable to travel. In some cases, States waive normally required fees for refugees, a practice that should be encouraged.

D. Detention

In a number of countries that routinely detain asylum seekers who arrive without proper documentation, families are separated in detention. Separate facilities for men, women and children sometimes permit very little interaction among family members. One country follows these practices even for cases that have been granted mandate refugee status by UNHCR, until UNHCR finds a durable solution for them.¹¹⁹ Another country, under criticism for conditions in a detention center that did house families together, responded by releasing women and children into a supervised release program while keeping the men in detention as an assurance against flight. Detention practices are one of the rare areas in which States commonly take positive actions that divide intact families.

VI. Recommendations

A. Beneficiaries

¹¹⁹ UNHCR field office e-mail to the authors, June 24, 2001.

1. States should enact legislation expressly implementing the right to family unity and reunification for 1951 Convention refugees, OAU Convention refugees, UNHCR mandate refugees, and beneficiaries of subsidiary or temporary forms of protection.
2. Unauthorized entry should not preclude family unity or reunification, nor should requests for family reunification be used to re-examine the principal applicant's claim or status. Interception procedures should allow for asylum in the intercepting country if the refugee has family members there.
3. Members of a single family who have applied for asylum in different countries should be permitted to reunite and consolidate their claim in one country if determination of the claim has been pending, or is expected to take longer than, six months.

B. Criteria

4. States should adopt a broad and flexible interpretation of the family, recognizing economic and emotional dependency factors, as well as cultural variations. Families should be understood to include spouses; minor children until at least age 18; fiancé(e)s; those in a customary marriage; long-term cohabitants, including same sex couples; dependent unmarried children of any age; dependent relatives in the ascending line; other dependent relatives, and other dependent members of the family unit, including foster children. Under no circumstances should minors 'age out' of the process. The relevant age will be determined by the time when the sponsoring relative obtained status, not the time of the approval of the application for reunification.
5. Requirements pertaining to income, employment, accommodation, length of stay, health status, etc., should be specifically waived for refugee families. Grounds of exclusion or inadmissibility should be construed as narrowly as possible, with waivers available to allow reunification of close family members who have committed infractions (such as use of fraudulent documents) that do not imply a danger to the community.
6. Family members should be allowed to join the refugee from a country of origin, transit, first asylum, or permanent asylum. Compensatory burden sharing between countries should be considered if significant numbers are involved to the detriment of a certain State. Separated children should be able to enjoy reunification with their families in the country where they have found asylum if it is in their best interest to do so.

C. Implementation

7. States should establish streamlined and standardized administrative procedures to ensure family unity and reunification, with expedited procedures for cases involving separated children.

8. Situations of mass influx require registration and tracing, family-based interim care, and reunification followed by monitoring for protection concerns and the best interests of the child. Family unity information should be included in registration protocols and numbering systems, including when separating armed elements.

9. States should allocate adequate resources for staffing, training, tracing, travel costs, fees waivers, testing requirements, and other costs related to family unity and reunification.

10. Asylum seeking families should not normally be detained. If they must be detained, families should be housed together in individual family units. Families should not be split by detaining one member as insurance against the flight of other family members.

11. Reunification should take no longer than six months. If the case is not resolved in that time period, the family member should receive temporary permission to enter the country of asylum while pending issues are resolved.

12. Family members arriving spontaneously to join a recognized refugee should be allowed to opt into a fast-track family unity procedure. Those denied under this procedure would be allowed to lodge an application in the regular refugee status determination procedure.

13. States should maintain flexibility in documentation requirements, by allowing affidavits and other evidence in place of unavailable documents. Travel documents should be provided by the country where reunification will take place. If such a document is not available, the country of asylum and any countries of transit should accept a travel document from ICRC or UNHCR. Travel documents and visas should be issued free of charge.

14. Scientific testing should be done only in exceptional circumstances and with the consent of the refugee and family member, in the context of an interview process. The results should remain confidential, and the costs should be borne by the entity requesting the test. Refusal to submit to testing should not automatically result in denial of reunification.

15. UNHCR should, in consultation with States, NGOs and other international organizations, expand its guidelines on various aspects of family unity and reunification, including its relationships to exclusion and to irregular movements, by drawing on best practices in a variety of situations. UNHCR should also compile procedures for reunification to/from each country, with contact points in government agencies, UNHCR offices, ICRC, NGOs, and other international organizations.