

9.1 Family unity and refugee protection

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* This paper benefited from the input of numerous UNHCR field offices.

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I. Introduction

The family is universally recognized as the fundamental group unit of society and as entitled to protection and assistance from society and the State. The right to family life is recognized in universal and regional as well as in many national legal instruments. The right to family unity is inherent in the right to family life. This right applies to all human beings, regardless of their status.

Few human rights instruments, however, are explicit about how and where this right is to be effected in relation to families that have been separated across international borders. For refugees and those who seek to protect them, the right to family unity implies a right to family reunification in a country of asylum, because refugees cannot safely return to their countries of origin in order to enjoy the right to family life there. The integrity of the refugee family is both a legal right and a humanitarian principle; it is also an essential framework of protection and a key to the success of durable solutions for refugees that can restore to them 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.

This paper, after introducing the issues that arise in discussions of family unity (section II) and examining the role of the family in refugee protection (section III),

reviews the position of the refugee family in international law, both in relation to the right to family unity and the issue of family reunification (section IV). It then examines how these legal norms have been reflected in State practice, through the legal framework on the one hand (section V), and policy and practice on the other (section VI). The paper concludes by reviewing the emerging consensus on family reunification as a right of refugees (section VII).

II. Refugee family unity in context

Although the right to seek and enjoy asylum in another country is an individual human right,¹ 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 Refugees² linked a protection regime premised on the individual’s fear of persecution to the refugee’s family in a strongly worded recommendation in the Final Act of the diplomatic conference that adopted the Convention. In Recommendation B, the conference 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’.³ The States that are members of the Executive Committee of UNHCR have repeatedly emphasized the importance of family unity and reunification.

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, as recognized by UNHCR’s Executive Committee, in calling for ‘programmes to promote the self-sufficiency of adult [refugee] family members so as to enhance their capacity to support dependent family members’.⁴

Implementation of the right to family unity in the refugee context requires not only that the State refrain from actions that would disrupt an intact family, but

1 ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’ Universal Declaration of Human Rights, UNGA Resolution 217 A (III), 10 Dec. 1948 (hereinafter ‘Universal Declaration’), Art. 14(1).

2 Convention Relating to the Status of Refugees, 1951, 189 UNTS 150 (hereinafter ‘1951 Convention’).

3 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN doc. A/CONF.2/108/Rev.1, 26 Nov. 1952, Recommendation B.

4 Executive Committee, Conclusion No. 88 (L), 1999, para. b(v), ‘Protection of the Refugee’s Family’.

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 programmes 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.'⁵

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.

Given current concerns of governments about migration control, it is perhaps not surprising that implementation of the right to family unity is fraught with obstacles. 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, but the actions of States are sometimes at odds with acknowledged obligations. 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.⁶

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. 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.

5 UNHCR, 'Background Note: Family Reunification in the Context of Resettlement and Integration', Annual Tripartite Consultations on Resettlement between UNHCR, resettlement countries, and non-governmental organizations (NGOs), Geneva, 20–21 June 2001, para. 1(e).

6 Organization for Economic Cooperation and Development, Continuous Reporting System on Migration (SOPEMI), *Trends in International Migration* (Annual Report, OECD, Paris, 2001), pp. 20–1 and *passim*.

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, for example, 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.⁷ If they are stopped in a country of transit, they are often unable to return to the country of first asylum. The families concerned are usually left in desperate straits. Barring the possibility of reunification in the country of transit or first asylum, where the level of protection afforded may not be sufficient, the only legal means of reunification then becomes resettlement, a lengthy and expensive process, which is difficult for the separated family members and resource-intensive for UNHCR, non-governmental organizations (NGOs), and the affected governments.⁸ 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 it is primarily women and children who are left behind in the country of origin or transit, they are at greater risk from a protection perspective. This is not only because of their fear of persecution in the country of origin but also because they are then without the support of male family members. To make matters worse, they are unable to work towards a durable solution, since they cannot initiate family reunification procedures and can therefore play at best only a passive role in the procedure, unless they too expose themselves to the dangers of clandestine travel.⁹

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, since the likelihood of social problems and even family breakdown is higher with longer periods of separation and this may result in increased costs for States in welfare and other support services. In some cases, husbands eventually 'disappear' or stop

7 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 was US\$3,000–5,000 per person. E-mail from UNHCR field office to authors, 6 Aug. 2001.

8 The numbers involved are not small, e.g. there are at present approximately 1,500 family members in Indonesia awaiting resettlement in order to be reunited with other family members.

9 See e.g., Refugee Council of Australia, 'Discussion Paper on Family Unity and Family Reunification', Aug. 2001, available on <http://www.refugeecouncil.org.au/position082001.htm>, section 7. See also, G. Sadoway, 'Canada's Treatment of Separated Refugee Children', 3 *European Journal of Migration and Law*, 2001, pp. 348–50.

transferring funds back to their families, either of which causes an increase in the numbers of stranded family members requiring financial and social assistance. In other cases, 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 about her sojourn abroad without her husband, and she may face persecution or even death for her perceived immoral behaviour.¹⁰ Long waiting periods also increase the risk of family members becoming victims of traffickers.

In a different and all too common scenario, a child may arrive 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 by armed groups. 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, such as Canada and Poland, do not allow unaccompanied and 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 relating to family reunification and the best interests of the child.

Some States' efforts to intercept illegal migrants 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

10 E-mail from UNHCR field office to authors, 3 Aug. 2001.

refugees will have family ties in the country they were trying to reach and should be allowed to proceed to join their relatives there.

In addition to migration control concerns, in some countries there is still a lack of information or awareness of State responsibilities regarding family unity. 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 right to family unity in the refugee context is defeated.¹¹

In other countries, legal or administrative structures are lacking. For example, a refugee law enacted in Romania in 2001 lacked 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 2001 law, which instead required that all applicants for asylum appear in person on the territory of the country.¹²

Resource constraints also have an impact on refugee 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 accommodation 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, although it is becoming less common for States to exercise this option.¹³

11 See, e.g., Estonia's Law on Refugees, 9 July 1997, ch. I (General Provisions), Art. 5, 'Granting Asylum', para. 3 (unofficial translation, accessed on 1998 UNHCR RefWorld CD-ROM, Legal Information, REFLEG, Estonia).

12 Ordinance 102/2000 on the Status and Regime of Refugees in Romania, Nov. 2000, ch. II, section 1, Art. 7(1). Law 323/2001 approving this Ordinance was approved by the Romanian parliament in June 2001 and entered into force on 27 June 2001. Since then, the absence of procedures to effect family reunification has been remedied at least in part by a Feb. 2002 ordinance permitting the National Refugee Office to receive applications for family reunification and to issue travel documents for those permitted to reunite with their families to the relevant embassy or consulate abroad allowing them to enter on a family visa (Romanian Ministry of Interior and the Ministry of Foreign Affairs, Order No. 213/A/2.918, 11 Feb. 2002). There remain concerns that the new ordinance applies only to those with refugee status, not complementary statuses, does not contain a waiver for visa and/or travel fees for persons in need, and only applies to nuclear family members. The ordinance also presupposes the existence of original documents necessary to verify the relationship, which may not be readily available or could endanger those concerned if applied for.

13 For example, in Australia in 2001, a refugee man set himself ablaze (and later died) outside the parliament building after his wife and children, one of whom was disabled, 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: *Sydney Morning Herald*, 3 April 2001. The US may bar entrants who suffer from infectious diseases such as HIV/AIDS or tuberculosis, unless they can qualify for a waiver based on three criteria: private medical insurance, no danger to public health or safety, and commitment to avoid spreading the disease. There is, however, a

In the light of heightened security concerns following the 11 September 2001 terrorist attacks in the United States, family reunification procedures have become stricter and more protracted as more concrete evidence of family relationships and identity are demanded.¹⁴ Background checks on family members are already a common source of delays in processing family reunification cases. Given that many refugees come from regions in turmoil that may also harbour terrorists, intense scrutiny is bound to be directed towards people trying to enter western States through all channels, including asylum systems and family reunification programmes. Use of the exclusion clauses of the 1951 Convention may become more prevalent to prevent entry of relatives who are suspected of terrorist or criminal involvement.

III. 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. Such strategies include sending a politically active adult into hiding, helping a son to escape forcible recruitment by militia forces, or 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

¹⁴ ‘Special Medical Case Management Program’ (SMCMP) in the US Resettlement Program, which provides government funding to communities to assist with the medical care and management of refugees living with HIV/AIDS. This programme is available both to family reunion cases and to ‘free cases’ (SMCMP, interview with programme manager at Immigration and Refugee Services of America, 23 May 2002).

¹⁴ See generally, UNHCR, ‘Addressing Security Concerns without Undermining Refugee Protection’, Nov. 2001.

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 at risk of 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 caregivers and dependants is commonly replicated in the methods used to provide 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 as well as protection reasons, but also find that it makes the task of distributing assistance easier. Both within the context of organized assistance programmes and outside them, the family is for many refugees the most reliable means of assistance and may spread its resources along channels of mutual obligation that can 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 programmes 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 years,¹⁵ but specific provisions for the elderly are much less developed.¹⁶ While minor children are almost universally permitted to reunify with parents, elderly relatives face greater obstacles both in principle and in practice. Some States limit family reunification possibilities to spouses and minor children, while others accept aged 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.¹⁷ The vulnerability of elderly refugees, and elderly relatives left behind by refugees, should be recognized in the criteria governing eligibility for family reunification.

15 See e.g., UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR, Geneva, 1994), ch. 10; UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum', 1 Feb. 1997; Separated Children in Europe Programme (a joint initiative of UNHCR and International Save the Children Alliance), 'Statement of Good Practice', Oct. 2000; Action for the Rights of Children, CD-ROM resource pack, Aug. 2001; UN General Assembly, 'Protection and Assistance to Unaccompanied and Separated Refugee Children', UN doc. A/56/333, 7 Sept. 2001.

16 See Standing Committee of the Executive Committee, 'The Situation of Older Refugees', UN doc. EC/48/SC/CRP.39, 14 Aug. 1998; Standing Committee of the Executive Committee, 'Older Refugees: Looking Beyond the International Year of Older Persons', UN doc. EC/50/SC/CRP.8, 7 Feb. 2000; and more generally, Helpage International, 'Older People in Disasters and Humanitarian Crises: Guidelines for Best Practice', 2000, available on <http://www.helpage.org/dev/images/pdfs/bpg.pdf>.

17 See Secretariat of the Inter-Governmental Consultations, 'Report on Family Reunification: Overview of Policies and Practices in IGC Participating States', March 1997, p. 420.

B. Durable solutions

An intact family unit is an invaluable asset to refugees in the process of achieving durable solutions to refugees' plight, whether this be through voluntary 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.

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 an unaccompanied/separated child with parents in an unstable country of origin where conflict could resume at any time, or to 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.¹⁸ 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? No matter what the circumstances are, the right to family unity and reunification applies in voluntary repatriation situations, and both the country of origin and the country of asylum must ensure that it is respected.

In situations of local integration, questions may arise for instance as to when an adolescent, who may have spent all of his or her life in a country of asylum, should be able to choose to remain there, even when the rest of the family is returning to their country of origin. Conversely, how can it be ensured that all the members of a refugee household living together in a country of first asylum are given permission to settle in that country? To what extent should other relations be permitted to join them from another asylum country or the country of origin? Experience has shown that giving refugees the opportunity to sustain 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 who have been unable to leave the country of origin. Most of the countries that cooperate with UNHCR through resettlement programmes for refugees will accept an entire household unit together from a country of first asylum or, in limited cases on humanitarian grounds, 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

¹⁸ Inter-Agency Guidelines on Separated Children, including a section on long-term durable solutions, are currently being finalized.

June 2001 Annual Tripartite Consultations on Resettlement between UNHCR, resettlement countries, and NGOs endorsed 'flexible and expansive' definitions of the family that are 'culturally sensitive and situation specific'.¹⁹

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 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 by States can lead to unnecessary hardship. For example, a refugee family from Sudan with four children was granted visas to a resettlement country, but four days before departure the woman gave birth. This fifth child had to stay behind in the refugee camp because there was no visa and it took more than four months to resolve the case.²⁰

The importance for resettled refugees of family unity and reunification is widely acknowledged. It was emphasized strongly at an international conference on the reception and integration of resettled refugees, held in Sweden in April 2001.²¹ 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.

IV. The refugee family in international law

In surveying the right to family unity for refugees in international law, it is important to distinguish between family unity and family reunification, and also between close family members and more distant ones. It is important, as well, to differentiate between 1951 Convention refugees, persons benefiting from other types of protection, and asylum seekers. This section briefly sets out the right of family unity under international law, then examines its application in the refugee context. It follows the same approach for family reunification, then discusses which family members may benefit, and where and when the right must be implemented.

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

20 Refugee Council of Australia, 'Discussion Paper', above n. 9, p. 6.

21 See J. Fredriksson, 'Protecting the Family: Challenges in Implementing Policy in the Resettlement Context', background paper prepared for the UNHCR international conference on the reception and integration of resettled refugees, hosted by the Swedish National Integration Office, Norrköping, Sweden, 25–27 April 2001. See also more generally, International Conference on the Reception and Integration of Resettled Refugees, 'Proceedings Report', 25–27 April 2001, Norrköping, Sweden.

A. Family unity

The right of the family to live as an integral whole is protected by a variety of internationally recognized rights under both international human rights law and international humanitarian law. As the foundation, there is universal consensus that, as the fundamental unit of society, the family is entitled to respect and protection.²² A right to family unity is inherent in recognizing the family as a 'group' unit: if members of the family did not have a right to live together, there would not be a 'group' to respect or protect.²³ In addition, the right to marry and found a family²⁴ includes the right to maintain a family life together.²⁵ The right to a shared family life is also drawn from the prohibition against arbitrary interference with the family²⁶ and from the special family rights accorded to children under international law.²⁷

Over the past fifty years, States have shown an increasing willingness to extend the scope of their responsibilities with respect to the family at both the international and regional levels. States have undertaken a duty, for example, not only to protect but also to assist and support the family.²⁸ States have agreed

22 The Universal Declaration, above n. 1, Art. 16(3), International Covenant on Civil and Political Rights, 1966, 999 UNTS 171 (hereinafter 'ICCPR'), Art. 23(1), and American Convention on Human Rights or 'Pact of San José, Costa Rica', 1969, Organization of American States (OAS) Treaty Series No. 35 (hereinafter 'ACHR'), Art. 17(1), each state: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' African Charter on Human and Peoples' Rights, 1981, 21 ILM, 1982, p. 58, Art. 18(1), states: '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.' European Social Charter, 1996 (ETS 163, revising the 1961 European Social Charter), Art. 16, states: 'The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.'

23 Human Rights Committee (hereinafter 'HRC'), 39th Session, 1990, General Comment No. 19 on Article 23(5).

24 Universal Declaration, above n. 1, Art. 16(1); ICCPR, above n. 22, Art. 23(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, European Treaty Series No. 5 (hereinafter 'ECHR'), Art. 12; ACHR, above n. 22, Art. 17(2).

25 HRC, General Comment No. 19, above n. 23, para. 5. See also, 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, 'Position on the Amended EU Commission Proposal for a Council Directive on the Right to Family Reunification', Nov. 2000, para. 2.3; and E. F. Abram, 'The Child's Right to Family Unity in International Immigration Law,' 17(4) *Law and Policy*, 1995, p. 407.

26 Universal Declaration, Art. 12; ECHR, Art. 8; ICCPR, Art. 17; ACHR, Art. 11(2); Convention on the Rights of the Child, 1989, UNGA Res. 44/25, 20 Dec. 1989 (hereinafter 'CRC'), Art. 16.

27 CRC, Arts. 3, 9, and 10.

28 International Covenant on Economic, Social and Cultural Rights, UNGA Res. 220 A (XXI), 16 Dec. 1966, 993 UNTS 3 (hereinafter 'ICESCR'), Art. 10(1), reads: '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 . . .'. The African Charter on Human and Peoples' Rights, above n. 22, Art. 18(2), reads: 'The State shall have the duty to assist the family . . .'. The African Charter

to special provisions protecting the unity and promoting the reunification of families affected by armed conflict,²⁹ and those with a member working in a foreign country.³⁰ States have recognized the common responsibilities of both men and women as parents, irrespective of their marital status, thus underscoring their right and responsibility to participate equally in the upbringing and development of their children.³¹ Most notably, States have agreed with unprecedented speed and unanimity³² to an extensive codification of children's rights, including their right to live with their parents.³³

Perhaps because the right to family unity is also well established under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, it has been suggested that outside Europe there is no universally applicable express right to family unity or reunification that overrides the sovereign right of States to decide whether and on what terms non-nationals may enter

on the Rights and Welfare of the Child, 1990, UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), vol. II, pp. 65–83, Art. XVIII(1), reads: '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.' See also, CRC, fifth preambular paragraph.

29 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287, Arts. 25, 26, 49(3), and 82(2); Additional Protocol I, 1977, 1125 UNTS 4, Arts. 74 and 75(5); Additional Protocol II, 1977, 1125 UNTS 610, Art. 4(3)(b).

30 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, UN doc. A/RES/45/158 (hereinafter 'Migrant Workers' Convention'), Art. 44(1), reads: '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.' As of 31 Dec. 2002, this Convention had nineteen of the twenty ratifications required to enter into force.

31 Convention on the Elimination of All Forms of Discrimination Against Women, 1979, 1249 UNTS 13 (hereinafter 'CEDAW'), Art. 5(b), reads: '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 . . .'; Art. 16(1) reads: 'States Parties shall . . . ensure . . . (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children . . .'; CRC, Art. 18(1) states that: '[B]oth parents have common responsibilities for the upbringing and development of the child . . .'. See also, HRC, General Comment No. 28 on Article 3, UN doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 25.

32 The CRC had 191 States Parties as of 9 April 2002. By comparison, CEDAW, above n. 31, had 168; the Convention on the Elimination of All Forms of Racial Discrimination, 1965, 660 UNTS 195, had 162; the ICCPR had 148; the ICESCR had 145; the 1951 Convention and/or its 1967 Protocol had 144; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, A/RES/39/46, 10 Dec. 1984 (hereinafter 'Torture Convention'), had 128.

33 CRC, Art. 9(1), reads: 'States Parties shall ensure that a child shall not be separated from his or her parents against their will.' See also, African Charter on the Rights and Welfare of the Child, above n. 28, Art. XIX(1), which reads: '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.' The Vienna Declaration and Programme of Action from the UN World Conference on Human Rights, 1993, 32 ILM 1661, 1993, 14 *Human Rights Law Journal*, 1993, p. 352, para. 21, reads: '[T]he child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection.'

or stay. Family unity in this view is instead an admirable but non-binding humanitarian ‘principle’. Such a position fails to take into account, however, the extensive and unequivocal rights and standards which apply to all individuals and are found in international treaty law, specifically the International Covenant on Civil and Political Rights (together with the General Comments and Views of the Human Rights Committee), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child (together with the Concluding Observations on State Reports of the Committee on the Rights of the Child), and the 1949 Geneva Conventions and their Additional Protocols. The question of the right to family unity as customary international law is outside the scope of this paper, but there is in addition a strong argument to be made to that effect.³⁴

To be sure, no one would submit that the right to family unity in the refugee context is as straightforward as, say, the right of the refugee to be free from torture. The rights on which family unity is based are often qualified, with provisions for the State to limit the right under certain circumstances. It should be noted, however, that the most important, and sometimes only, ‘qualifier’ is the imperative to act in the best interests of the child. The right to family unity for refugees intersects with the right of States to make decisions on the entry or stay of non-nationals. The right to family unity is also shaped by the nature of the family relationship involved, with minor dependent children and their parents having the strongest claim. These complexities do not detract from the existence of the right; rather they indicate that it must be carefully elucidated from a legal, and not a political, perspective. Scholarly inquiry is overwhelmingly devoted to analysis of the scope of the right, not denial of its existence.³⁵

34 For example, a federal district court in the US, which is not a State Party to the CRC, recently ruled that the government must take into account customary international law principles regarding the best interests of the child in the case of an immigrant man slated for deportation for a criminal offence, who was also the father of a seven-year-old US citizen daughter. *Beharry v. Reno*, US Dist. Ct., Eastern District of New York, 2002 US Dist. Lexis 757, 8 Jan. 2002.

35 See e.g., C. S. Anderfuhren-Wayne, ‘Family Unity in Immigration and Refugee Matters: United States and European Approaches’, 8(3) *International Journal of Refugee Law*, 1996, p. 347 at p. 354, which reads: ‘Hence, under both US and European laws the right to family unity is a limited one.’ See also, H. Lambert, ‘The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion’, 11(3) *International Journal of Refugee Law*, 1999, p. 427 at p. 431: ‘[F]amily reunion is considered a basic human right. . . .’, and p. 428: ‘Thus, the right enshrined in article 8 [of the ECHR] is not an absolute right for individuals, but it does impose certain obligations on States.’ See additionally, J. Apap and N. Sitaropoulos, ‘The Right to Family Unity and Reunification of Third Country Migrants in Host States: Aspects of International and European Law’, in *Proceedings of the First European Congress for Specialist Lawyers in the Area of Immigration and Asylum in Europe (Odysseus Network)*, Brussels 1–2.12.2000 (Bruylant, Brussels, 2002, forthcoming); Abram, above n. 25. For a somewhat differing view, see P. J. van Krieken, ‘Family Reunification’, in *The Migration Acquis Handbook* (ed. P. J. van Krieken, T. M. C. Asser Press, The Hague, 2001), p. 116.

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

There is a general appreciation that refugee law principles, even those with a textual basis in the 1951 Convention such as *non-refoulement* (Article 33), exclusion (Article 1F), and non-penalization for illegal entry (Article 31), must be interpreted in light of the evolution of international law and State practice in the past half-century.³⁶ The 1951 Convention itself provides that nothing in it shall impair any rights or benefits granted to refugees apart from the Convention.³⁷

The need for a contextual analysis is even greater with respect to refugee family unity and reunification, which are not mentioned in the 1951 Convention. Since the right to family unity has developed in general international law, it cannot be limited by provisions, or lack thereof, in the refugee field. The right to family unity applies to all human beings, regardless of their status.³⁸ A perspective broader than that of the 1951 Convention is essential to understanding the scope and content of the right to family unity for refugees.³⁹ The Human Rights Committee, for example, clearly includes refugees in discussing the need for appropriate measures ‘to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons’.⁴⁰ It also follows that the right to family unity for refugees is not dependent on the State concerned being a party to the 1951 Convention.

The absence from the 1951 Convention of a specific provision on family unity does not mean that the drafters failed to see protection of the refugee family as an obligation. It should be noted at the outset that the 1951 Convention does provide protection for the refugee family in a number of Articles.⁴¹ In addition, refugees’ ‘essential right’ to family unity was the subject of a recommendation approved unanimously by the Conference of Plenipotentiaries that adopted the final text of the 1951 Convention. This reads:

36 Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Art. 31(3). On these three issues, see respectively the Legal Opinion by E. Lauterpacht and D. Bethlehem, the paper on exclusion by G. Gilbert, and the paper on Article 31 by G. S. Goodwin-Gill, Parts 2.1, 7.1, and 3.1 respectively, in this volume.

37 1951 Convention, Art. 5.

38 See e.g., HRC, 27th session, 1986, General Comment No. 15 on the Position of Aliens under the Covenant, para. 7.

39 G. S. Goodwin-Gill, ‘Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities’, in *Children on the Move: How to Implement their Right to Family Life* (eds. J. Doek, H. van Loon, P. Vlaardingerbroek, Martinus Nijhoff, The Hague, 1996), p. 97.

40 HRC, General Comment No. 19, above n. 23, para. 5.

41 The 1951 Convention, Art. 4, refers to refugees’ ‘freedom as regards the religious education of their children’; Art. 12(2) provides that ‘rights attaching to marriage, shall be respected; Art. 22 concerns the public education of children in elementary school and beyond’; Art. 24 concerns family allowances and other related social security as may be offered to nationals; para. 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.

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.⁴²

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.⁴³ 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'.⁴⁴

While the recommendation is non-binding, its characterization of family unity as an 'essential right' at this early stage of the development of international human rights law is evidence of the drafters' object and purpose in formulating the 1951 Convention, and should be read in conjunction with the goal expressed in the Convention's preamble to assure refugees the widest possible exercise of their fundamental rights and freedoms.

The States which are members of UNHCR's Executive Committee have shared this purpose and carried it forward. Executive Committee Conclusions have repeatedly emphasized the importance of State action to maintain or re-establish refugee family unity, beginning with the first Conclusion adopted in 1975.⁴⁵ The Executive Committee has also situated the issue of family unity squarely in its proper international law context. Particularly significant in this regard was the acknowledgment of the importance of the Convention on the Rights of the Child to the legal framework for protecting refugee children and adolescents.⁴⁶ The Executive

42 Final Act, above n. 3, Recommendation B.

43 P. Weis (ed.), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* (Cambridge University Press, 1995), p. 380.

44 *Ibid.*, p. 381 (statement of the representative of the UK).

45 See Executive Committee, Conclusions Nos. 1 (XXVI), 1975, para. f. See also, Conclusions Nos. 9 (XXVIII), 1977; 24 (XXXII), 1981; 84 (XLVIII), 1997; 85 (XLIX), 1998, paras. u-x; 88 (L), 1999.

46 Executive Committee, Conclusion No. 84 (XLVIII), 1997, fourth preambular paragraph.

Committee has also encouraged all States to adopt legislation implementing ‘a right to family unity for all refugees, taking into account the human rights of the refugees and their families’.⁴⁷ It should be recalled that Executive Committee conclusions are the consensus outcome of deliberations by sovereign States most interested in and affected by refugee problems, that is, by States which are not necessarily even party to the 1951 Convention and/or Protocol.⁴⁸

Although an explicit right to family unity in the refugee context is not found in the 1951 Convention itself, it, 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*.

1. *Family unity and derivative or other status*

Refugee family unity in practice means that States should not separate an intact family and should take measures to maintain the family as a unit. At the point of refugee status determination, it means that accompanying family members of a recognized refugee should as a result also receive refugee status, sometimes called derivative status, or a similarly secure status with the same rights.⁴⁹

Failure to ensure family unity can lead to many problems. In Canada, for example, administrative and judicial authorities generally reject the concept of family unity in the context of refugee status determination.⁵⁰ As a result, there are cases of one spouse and a dependent child being granted refugee status while the other spouse is not,⁵¹ or one parent being recognized while the dependent children are not,⁵² or even a child being recognized but the parents and other siblings are not.⁵³ 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.⁵⁴

47 Executive Committee, Conclusion No. 85 (XLIX), 1998, para. x (emphasis added).

48 P. van Krieken, ‘Cairo and Family Reunification’, 42(2)–(3) *AWR Bulletin: Quarterly on Refugee Problems*, 1995, p. 62, notes that Executive Committee Conclusions are not a result of UNHCR’s ‘wishful thinking’.

49 Executive Committee, Conclusions Nos. 88 (L), 1999, para. b(iii); 85 (XLIX), 1998, para. v; 47 (XXXXVIII), 1987, para. h; and 24 (XXXII), 1981, para. 8. See also, UNHCR, ‘Background Note’, above n. 5, para. 5.

50 See e.g., M99-04586 et al., Moss, Convention Refugee Determination Division (CRDD), 21 Dec. 1999, *ReFLex* (digest of Canadian immigration and refugee law decisions), issue No. 133, 1 March 2000; A98-00594 et al., Kagedan, Showler, CRDD, 9 Dec. 1998, *ReFLex* issue No. 110, 3 March 1999; V95-01655 et al., Lalonde, CRDD, 6 May 1998, *ReFLex*, issue No. 94, 6 July 1998. *ReFLex* is available at <http://www.irb.gc.ca/en/decisions/reflex/index.e.htm>.

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

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

53 Sadoway, ‘Canada’s Treatment of Separated Refugee Children’, above n. 9, pp. 376–8 and cases cited therein.

54 *Castellanos v. Canada (Solicitor General)*, Federal Court (Trial Division), 2 FC 190 (Quicklaw), 1995.

Family unity or reunification in Canada is instead provided for in an administrative procedure, but 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 Canada with the refugee but who were not recognized in their own right have no legal status during the administrative processing period; 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.

There are a number of ways to accomplish family unity goals in status determination procedures. Either all family members over a certain age, such as fifteen, may be interviewed, or a ‘principal applicant’ may be designated. With increasing awareness of the prevalence of gender-related persecution⁵⁵ and child-specific forms of harm, it is now understood that the principal applicant need not necessarily be the male head of household.⁵⁶ All members of the family are entitled to an individual hearing.⁵⁷ Respect for this right becomes crucial if the claim of the first family member is rejected. In any case, as soon as one member of the family has been found to have a valid claim, the others should be granted derivative refugee status.

It is worth noting that the principle of a derivative or otherwise refugee-linked status operates only in favour of recognition, not in favour 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.⁵⁸

2. *Family unity and the ‘internal flight alternative’*

One issue that may arise in status determination is the possibility of the claimant being able to return to a different area of the country of origin, the so-called internal flight alternative.⁵⁹ An integral part of this analysis, if indeed there is a safe area

55 See the papers by R. Haines on Gender-related persecution and by A. Edwards on Age and gender dimensions in international refugee law in this book.

56 UNHCR, ‘Background Note’, above n. 5, para. 6; UNHCR Standing Committee, ‘Family Protection Issues’, UN doc. EC/49/SC/CRP.14, 4 June 1999, para. 10.

57 Executive Committee, Conclusion No. 88 (L), 1999, para. b(iii).

58 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992) (hereinafter ‘UNHCR, *Handbook*’), para. 185.

59 See Part 6.1 of this book by J. C. Hathaway and M. Foster; UNHCR, ‘Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called “Internal Flight Alternative” or “Relocation Principle”’, 1999.

in the country, is whether it would be reasonable to expect the claimant to relocate there. One factor to be taken into account is the importance of maintaining family unity.⁶⁰ Since international law requires State protection of the family, even against threats from non-State actors,⁶¹ and prohibits in particularly strong terms the involuntary separation of children from their parents,⁶² it is not reasonable to ask that a person in need of protection relocate internally at the cost of separation from close family members.

3. *Family unity and exclusion*

In cases of actual or potential exclusion from refugee status under Article 1F of the 1951 Convention,⁶³ the situation of each family member must be determined on an individual basis. When one family member 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 excludable family member's claim or their own independent 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 exclusion.

If recognized, family members cannot, however, 'overcome' the exclusion of another family member. That is to say, each member of the family in such cases must be non-excludable in his or her own right.⁶⁴ A practical question arises as to whether the admissible family member should return to the country of origin 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, UNHCR should consider developing more detailed guidelines for situations where the principles of family unity and the exclusion clause conflict.⁶⁵

The impact of exclusion on family unity underscores the need to ensure there is not an overly expansive interpretation of the exclusion grounds under the 1951 Convention and/or other immigration-related grounds of inadmissibility, as this can result in families being split, or kept apart, due to a minor infraction on the part of one member. This is particularly an issue in countries, such the United States and Canada, where legislation subsumes concepts from both Article 1F and Article 33(2)

60 UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001, para. 13.

61 HRC, 32nd Session, 1988, General Comment No. 16 on Article 17, para. 1.

62 CRC, Art. 9(1). See also, Abram, above n. 25, pp. 417–21.

63 See Gilbert, above n. 36.

64 Standing Committee, 'Family Protection Issues', above n. 56, para. 9.

65 One example given was of a family with one excludable spouse. The other spouse was, however, in need of urgent medical assistance and resettlement on medical grounds. In these circumstances, 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 Aug. 2001.

of the 1951 Convention into a single stage in the process which allows claims to be denied without full consideration of the merits.⁶⁶ Grounds of exclusion or inadmissibility should be construed as narrowly as possible. If 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 close family members. This is particularly the case when the grounds of 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 view of the increased interception efforts on the part of a number of countries, and the corresponding increase in people smuggling, such cases can be expected to become more numerous and are likely to pose more serious challenges to countries of asylum and resettlement in arriving at durable solutions.

4. *Family unity and expulsion*

With regard to the deportation or expulsion⁶⁷ of one member of an intact refugee family already in a country of asylum, a number of rights and considerations must be balanced, which together place a heavy burden on the State wishing to separate the family. If the family member is a refugee or otherwise in need of international protection, there are the protections against *refoulement* found in international and regional treaty law, as well as customary international law.⁶⁸ Limitations on State power to expel are found in Article 32 of the 1951 Convention and Article 13 of the International Covenant on Civil and Political Rights, while in 1977 UNHCR's Executive Committee expressed its concern over the serious consequences expulsion may have for family members.⁶⁹

For example, the Human Rights Committee recently found that Australia's proposed removal of the stateless (formerly Indonesian) parents of a thirteen-year-old Australian citizen would violate a number of provisions of the International Covenant, including freedom from arbitrary or unlawful interference with the family, the entitlement of the family to protection by the State, and the right of the child to protection without discrimination.⁷⁰ The Committee noted that Australia

66 See also the paper on exclusion by G. Gilbert in Part 7.1 of this volume, section IV.D, 'The relationship between Article 1F and Article 33(2)'. In North America, the terms 'admissible' and 'non-excludable' are used interchangeably, whereas in Europe admissibility procedures do not, at least in theory, involve a substantive assessment of the claim but determine whether a claim will be considered in substance in the country where it has been made or whether another State is responsible for doing so.

67 The HRC has stated that Art. 13 of the ICCPR is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. HRC, General Comment No. 15, above n. 38, para. 9.

68 See, Lauterpacht and Bethlehem, above n. 36.

69 Executive Committee, Conclusion No. 7 (XXVIII), 1977, para. b.

70 HRC, *Winata and Li v. Australia*, Communication No. 930/2000, UN doc. CCPR/C/72/D/930/2000, 16 Aug. 2001, para. 8.

is under an obligation to ensure that violations of the Covenant in similar situations do not occur in the future.⁷¹

The greatest protection for families threatened with separation through deportation is found in the Convention on the Rights of the Child. This requires in Article 9 that States ‘shall ensure that a child *shall* not be separated from his or her parents against their will, except when . . . such separation is *necessary for the best interests of the child*’ (emphasis added). The *only* exception allowed therefore is when separation is necessary for the best interests of the child. In sharp contrast to the International Covenant, which prohibits only ‘arbitrary and unlawful’ interference with the family (Article 17(1)), and the European Convention on Human Rights, which provides a number of exceptions to the prohibition on interference with family life (Article 8(2)), the Convention on the Rights of the Child does not recognize a public interest to be weighed against the involuntary separation of the family. As pointed out by Abram:

Thus, a competent state authority may decide to deport a parent in accordance with municipal law for carefully weighed and relevant reasons, yet the separation of the child from the parent may violate the state’s obligations and the child’s right to family unity under article 9.⁷²

In addition to the near-universal adherence to the Convention on the Rights of the Child, a binding treaty, State commitment to family unity as expressed in Article 9 has recently been reiterated at the political level by the Commission on Human Rights.⁷³

On the regional level, Article 8 of the European Convention on Human Rights provides protection from deportation or expulsion under certain circumstances. There is not yet an Article 8 decision concerning a refugee claimant, since such claims are often decided under Article 3 and do not address the question of interference with family life,⁷⁴ but there have been a number of cases relating to long-term residents and second-generation immigrants.

The European Court of Human Rights must first satisfy itself that there is a ‘private and family life’ within the meaning of Article 8. The category of the ‘family’ that can claim protection is broader than that under the Convention on the Rights of the Child, since a minor child–parent relationship is not necessarily required.⁷⁵ Same-sex relationships may also be protected, although under the rubric of private,

71 *Ibid.*, para. 9. 72 Abram, above n. 25, p. 418.

73 Commission on Human Rights, Resolution 2001/75 on the Rights of the Child, UN doc. E/CN.4/2001/75, para. 11(c). Commission on Human Rights, Resolution 2000/85 on the Rights of the Child, UN doc. E/CN.4/2000/85, para. 15(d).

74 Lambert, above n. 35, p. 448. For recent analyses of ECHR Art. 8 jurisprudence in the refugee context, see Lambert, above n. 35, as well as Apap and Sitaropoulos, above n. 35, and Anderfuhren-Wayne, above n. 35.

75 *Marckx v. Belgium*, for example, recognized the ties between near relatives such as grandparents and their grandchildren as being included in family life, Series A, No. 31, 27 April 1979.

rather than family, life.⁷⁶ The Court then determines whether there is an interference with the right to respect for private and family life. If so, it will examine whether the interference can be justified as necessary in a democratic society under Article 8(2). The jurisprudence of the Court recognizes a wide margin of appreciation for the State in applying the terms of this Article and it has declined to specify guiding criteria. Instead, claims are balanced on a case-by-case basis.

The Court distinguishes between aliens seeking to avoid family separation as a result of expulsion and aliens seeking entry for the purposes of family reunion. In cases involving expulsion of long-term residents, the Court has balanced the individual's rights against the community's interests at the later stage of determining whether removal was 'necessary in a democratic society', instead of at the earlier stage of determining whether there is an interference with the right to respect for family life. This approach places a greater burden of justification on States, and the Court has tended to side with the aliens wishing to prevent family separation.⁷⁷

C. Family reunification

Family reunification across borders is shaped, but not entirely defined, by the State's sovereign power to control the entry of non-nationals. As with the right to family unity, there has been a progressive development in the international law of family reunification over the past fifty or so years. It is now widely recognized that the State has an obligation to reunite close family members who are unable to enjoy the right to family unity elsewhere.

1. *Family reunification in international law*

The most detailed family unification provisions in general international law are found in international humanitarian law. The Fourth Geneva Convention of 1949 devoted considerable attention to the problems of 'families dispersed owing to the war'.⁷⁸ In addition to provisions aimed at maintaining family unity during internment⁷⁹ or evacuation,⁸⁰ the Fourth Geneva Convention provides for mechanisms such as family messages,⁸¹ tracing of family members,⁸² and registration of

76 *X. and Y. v. UK*, European Commission on Human Rights, Application No. 9369/81, Admissibility Decision of 3 May 1983.

77 E.g., *Berrehab v. The Netherlands*, Application No. 10730/84, judgment of 21 June 1988; *Moustaquim v. Belgium*, Application No. 12313/86, judgment of 25 Jan. 1991.

78 Fourth Geneva Convention, 1949, above n. 29, Art. 26. See also, Abram, above n. 25, pp. 413–14; and S. Jaquemet, *Refugees in Armed Conflict: International Humanitarian Law and Refugee Protection* (UNHCR, Geneva, draft, 1999), pp. 102–7.

79 Fourth Geneva Convention, 1949, above n. 29, Art. 82. 80 *Ibid.*, Art. 49.

81 *Ibid.*, Art. 25. 82 *Ibid.*, Art. 140.

children⁸³ to enable family communication and, 'if possible', reunification. By the time of the first Additional Protocol in 1977, States were willing to strengthen their responsibility towards separated families by accepting the obligation to facilitate family reunification 'in every possible way'.⁸⁴

Family reunification also featured in the 1975 Helsinki Accords, albeit in the form of a principle and not an obligation. Long-standing Cold War tensions and Western concern with Soviet bloc violations of the right to leave one's country encouraged the link between family reunification and freedom of movement to such an extent that, in 1989, States participating in a meeting of the Conference on Security and Cooperation in Europe (CSCE) agreed to decide family reunification applications in normal practice within three months.⁸⁵ Such alacrity would be welcome in today's political climate.

2. *Family reunification in international human rights law*

As noted above, the Human Rights Committee has made it clear that refugees are included in the International Covenant's family protection provisions and that their right to family reunification may under some circumstances give rise to a State obligation outweighing its interest in control of borders.⁸⁶ Under the migrant workers convention, not yet in force, States shall 'take measures that they deem appropriate' to facilitate reunification.⁸⁷ The relatively wide margin of discretion retained by States in the case of migrant workers is perhaps not surprising, since States can justifiably expect them to return to their home countries if they wish to reunify, although in practice they can face numerous obstacles in doing so.

The core of the right to family reunification in international human rights law is found in the Convention on the Rights of the Child, Article 10(1) of which codifies the right to family reunification for minor children and their parents as follows:

83 *Ibid.*, Art. 50.

84 Additional Protocol I, 1977, above n. 29, Art. 74. In addition to the provisions cited above, see also Protocol II, 1977, above n. 29, Art. 4(3)(b).

85 Abram, above n. 25, pp. 414–15.

86 HRC, General Comment No. 19, above n. 23, para. 5.

87 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, above n. 30, Art. 44, reads:

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.

In accordance with the obligations of States Parties under article 9, paragraph 1 [a child shall not be separated from his or her parents against their will], 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 . . .

Several elements of this provision are worthy of note.⁸⁸ First, the explicit link to Article 9 of the Convention means that the obligation there imposed to ensure the unity of families within the State also determines the State's action regarding families divided by its borders. Secondly, while the obligation to allow departure draws on the well-established right to leave any country, one of the Convention's achievements is the recognition of the commonsense corollary of departure: that family reunification may require a corresponding duty to allow entry. Thirdly, children and parents have equal status in a mutual right; either may be entitled to join the other. Unaccompanied and 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. Nor is it sufficient that the child be with only one parent in an otherwise previously intact family; the right is to be with both parents.

Finally, the obligation of States to deal with family reunification requests in a 'positive' manner in effect means *affirmative* action. This formulation is considerably stronger than language commonly used to allow significant State discretion, such as 'consider favourably', 'take appropriate measures', or 'in accordance with national law'. The only limitation allowed is the one permissible under Article 9(1), if reunification would not be in the best interests of the child, or when the reunification will occur in another country. While Article 10 does not expressly mandate approval of a reunification application, it clearly contemplates that there is at least a presumption in favour of approval.⁸⁹ Although Anderfuhren-Wayne asserts that States enjoy 'extensive discretion' under Article 10,⁹⁰ she does not say what the basis for that discretion would be; van Krieken acknowledges that Article 10 does not 'leave much room for machination and manipulation'.⁹¹

States cannot maintain generally restrictive laws or practices regarding the entry of aliens for reunification purposes without violating the Convention on the Rights of the Child. As pointed out by Abram:

A state cannot as a matter of law or policy determine that family reunification for a category of sundered families will take place somewhere else in the world, and that family unity will be respected only by ushering the local child or parent to the airport. There is no true observation of a right

88 For a fuller discussion of the CRC, see Abram, above n. 25, pp. 421–5.

89 Vienna Convention on the Law of Treaties, Art. 31(1).

90 Anderfuhren-Wayne, above n. 35, p. 351. 91 Van Krieken, 2001, above n. 35, p. 123.

if that right cannot be realized except abroad. States do not normally have the power to ensure the realization of a right outside of their own jurisdiction. A policy to reject most requests of any category of persons to enter a country for the purposes of family reunification, except under restrictive conditions or exceptional circumstances, violates the Convention.⁹²

That a small number of States have made reservations to the reunification provision provides additional confirmation that the Convention indeed imposes a general duty to allow entry for family reunification purposes.⁹³ Anderfuhren-Wayne observes that State practice is not uniform, although failures to allow reunification are more properly seen as violations of the right, not evidence that there is no right.⁹⁴ They are certainly treated as such by the Committee on the Rights of the Child. The Committee has indeed used almost peremptory language in this regard, recommending for example that Australia introduce legislation and policy reform ‘to *guarantee* that children of asylum seekers and refugees *are* reunified with their parents in a speedy manner’.⁹⁵

Finally, as with the right to family unity, scholars are generally in agreement that there is at present a right under international law to family reunification.⁹⁶ It has also been characterized as a self-evident corollary to the right to family unity⁹⁷ and the right to found a family,⁹⁸ and has been linked to freedom of movement.⁹⁹ While there may be different ways to describe the antecedents of the right, it should also be noted on a practical level that many observers feel existing instruments provide an adequate and appropriate legal framework, at least for reunification of unaccompanied/separated children and their parents. The problem in their

92 Abram, above n. 25, pp. 423–4.

93 Abram, above n. 25, p. 424; Goodwin-Gill, above n. 39, p. 103. Some eight States have made reservations which may affect the application of Art. 10, the most notable of which, not otherwise covered by the family reunification jurisprudence of the European Court of Human Rights, are Japan and New Zealand.

94 Anderfuhren-Wayne, above n. 35, pp. 351–2.

95 Committee on the Rights of the Child, Concluding Observations on Australia, UN doc. CRC/C/15/Add.79, 10 Oct. 1997, para. 30.

96 In addition to Abram, above n. 25, see e.g., Apap and Sitaropoulos, above n. 35, section 2: ‘An express right to family reunification is uniquely enshrined in Article 10.1 of the [CRC].’ See also, R. Perruchoud, ‘Family Reunification’, 27(4) *International Migration*, 1989, p. 519. See also, the Summary Conclusions of the Expert Roundtable discussed later in this paper.

97 See e.g., HRC, General Comment No. 15, above n. 38, para. 5. See also, Executive Committee, Conclusion No. 24 (XXXII), 1981, para.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.’

98 HRC, 39th session, 1990, General Comment No. 19, above n. 23, para. 5. See also, XIIIth Round Table on Current Problems in International Humanitarian Law, Conclusions on Family Reunification, International Institute of Humanitarian Law, 1988, para. 2.

99 See Abram, above n. 25, p. 415.

view lies not with the lack of international standards, but rather with their implementation.¹⁰⁰

The few who see the right as still being in development have not made a persuasive or up-to-date case refuting the significance of the Convention on the Rights of the Child. Anderfuhren-Wayne, for example, writing in 1996, notes the importance of reunification rights and the need for more specific international provisions regarding them, but cites only a 1988 report that predates adoption of the Convention.¹⁰¹ In van Krieken's view, the concept of reunification 'is now slowly being codified'.¹⁰² His 2001 article is, however, as he notes, based on and often identical to a 1995 piece,¹⁰³ which he in turn notes is based on a 1993 paper.¹⁰⁴ His main objection seems to be the failure of the 1994 UN Conference on Population and Development to agree to express language on 'the right to family reunification' and its decision instead to use the formulation 'consistent with Article 10 of the Convention on the Rights of the Child and all other relevant internationally recognized human rights instruments'.¹⁰⁵ This suggests, however, that, if the Convention on the Rights of the Child created a right to family reunification, then the Conference endorsed it. The non-binding declaration of an international conference cannot in any event modify the binding provisions of an international treaty.

3. *Family reunification and the European Court of Human Rights*

As noted in section IV.B.4 above, the European Court of Human Rights distinguishes between family separation through removal and family reunification through entry, and takes a more restrictive approach to the latter.¹⁰⁶ In cases involving aliens seeking entry to join family members, the Court balances the individual's rights against the community's interests at the earlier stage of determining whether there is an interference with the right to respect for family life. To assess interference, the Court examines whether there are obstacles to having a normal family life elsewhere, usually the country of origin. For asylum seekers, the possibility of leading a normal life in the country of origin cannot be presumed.

100 C. Petty, 'Family Tracing and Reunification – Safeguarding Rights and Implementing the Law', *4 International Journal of Children's Rights*, 1996, p. 174, citing in particular the lack of sanctions for enforcement.

101 Anderfuhren-Wayne, above n. 35, p. 351 and accompanying n. 19.

102 Van Krieken, above n. 35, p. 120 and van Krieken, above n. 48, p. 52.

103 Van Krieken, above n. 35, p. 128 and accompanying n. 23.

104 Van Krieken, above n. 48, p. 52 and accompanying n. 5.

105 Van Krieken, above n. 35, p. 129; and van Krieken, above n. 48, p. 61.

106 Although, as Lambert, above n. 35, p. 442, points out, it is regrettable that the Court has not said why it observes such a distinction. Any refusal to allow entry, especially to a child, suggests a strong expectation that the parent will have to return to the country of origin, if family unity is to be achieved.

The Court has tended to uphold State refusals to allow entry,¹⁰⁷ even in *Gül v. Switzerland*, which concerned the son of a holder of a temporary humanitarian permit.¹⁰⁸ Although *Gül* is disappointing, it should be limited to its facts. The Court appeared satisfied that Mr Gül, who had withdrawn his asylum appeal as a requirement for the issue of the humanitarian permits he and his wife had been granted, was not in fact at any kind of risk in Turkey and had indeed visited his sons there on several occasions, including one evidenced by a story in the local newspaper.¹⁰⁹ The importance of *Gül*, *Ahmut v. The Netherlands*, and *Sen*¹¹⁰ is rather the Court's analysis of the possibility of family life 'elsewhere', which leaves an opening for refugees and other persons in need of international protection seeking family reunion, since they are not able to return to their country of origin.

D. The right to family reunification in the refugee context

Recognition as a refugee gives rise to a prima facie reason to admit the refugee's close family members to the country of asylum. Reunification in a country of asylum is the only way to assure the right to family unity for refugees, who cannot by definition return to their country of origin. Despite problems in implementation of this right, it is generally accepted in State practice.¹¹¹ As noted above with respect to a right to family unity, there is no specific reference to family reunification in the 1951 Convention.¹¹² The right arises from the interaction of the 1951 Convention with other law.

There are, in addition, some family reunification principles pertaining specifically to those in need of international protection that have been codified in conventions on the rights of children,¹¹³ in regional protection instruments in Europe and

107 See e.g., *Abdulaziz, Cabales and Balkandali v. UK*, Application Nos. 9214/80, 9473/81, and 9474/81 (spouses seeking entry), 28 May 1985.

108 *Gül v. Switzerland*, Application No. 53/1995/559/645, 19 Feb. 1996.

109 See, Council of Europe, 'Asylum and the European Convention on Human Rights', Human Rights Files No. 9 (revised), 2000, p. 49.

110 See above n. 108; *Ahmut v. The Netherlands*, Application No. 73/1995/579/665 (minor child seeking to join father who was a dual national of the Netherlands and Morocco), 28 Nov. 1996; *Sen v. The Netherlands*, Application No. 31465/96 (allowing entry of Turkish-born daughter to join parents and siblings legally resident in the Netherlands), 21 Dec. 2001.

111 Lambert, above n. 35, p. 449.

112 Although, if reunification was not allowed at all, this would arguably be a violation of Art. 12 of the 1951 Convention.

113 CRC, Art. 22(2), provides: '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, above n. 28, Art. XXIII(2), provides: 'States 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.'

Central America,¹¹⁴ and in provisions relating to internally displaced persons.¹¹⁵ UNHCR's Executive Committee has also addressed the issue of refugee family reunification on a number of occasions.¹¹⁶

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

1. *Degrees of relationship*

The existence of a family is a question of fact, to be determined on a case-by-case basis. There is no one single, internationally accepted definition of the family, and international law recognizes a variety of forms.¹¹⁷ Certainly the 'nuclear' family is the most widely accepted for family unity and reunification purposes.¹¹⁸ In the

114 EU 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, OJ 2001 L212/12, 7 Aug. 2001 (hereinafter EU Temporary Protection Directive), Art. 15. Council of Europe, Committee of Ministers, Recommendation No. (2001) 18, 27 Nov. 2001, on subsidiary protection, para. 6, and Council of Europe, Committee of Ministers, Recommendation No. R(2000)9, 3 May 2000, on temporary protection, para. 4, both refer to Council of Europe, Committee of Ministers, Recommendation No. R(99)23, 15 Dec. 1999, on family reunion for refugees and other persons in need of international protection. Council of Europe Parliamentary Assembly, Recommendation 1327 (1997), 24 April 1997, on the protection and reinforcement of the human rights of refugees and asylum seekers in Europe, para. 8.vii.(o)–(q). The Cartagena Declaration on Refugees, 1984 (see UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), vol. II, pp. 206–11), Conclusion III (13) reads:

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.

115 African Charter on the Rights and Welfare of the Child, above n. 28, Art. XXV(2)(b), provides: '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 UN Commission on Human Rights, 1998, Principle 17(3).

116 Executive Committee, Conclusions Nos. 1 (XXVI), 1975, para. f; 9 (XXVIII), 1977; 24 (XXXII), 1981; 84 (XLVIII), 1997; 85 (XLIX), 1998, paras. u–x; 88 (L), 1999. See also, UNHCR, *Handbook*, above n. 58, para. 186.

117 See e.g., HRC, General Comment No. 28, above n. 31, para. 27; HRC, General Comment No. 19, above n. 23, para. 2; HRC, General Comment No. 16, above n. 61, para. 5. See also, Apap and Sitaropoulos, above n. 35, section 1, and more generally, G. van Bueren, 'The International Protection of Family Members' Rights as the 21st Century Approaches', 17(4) *Human Rights Quarterly*, 1995, pp. 733–40.

118 See e.g., Council of Europe Committee of Ministers, Recommendation on family reunion for refugees, above n. 114, para. 2. See also, Lambert, above n. 35, p. 430; van Krieken, above n. 35, p. 122; and A. Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment', 11(4) *International Journal of Refugee Law*, 1999, p. 653.

European context, the European Commission's amended proposal for a Council Directive on the right to family reunification would also include unmarried partners living in a durable relationship with the applicant, if the legislation of the Member State concerned treats such a relationship as corresponding to that of married couples.¹¹⁹

Despite this widespread agreement, it is nevertheless important to be aware of the impact of cultural differences regarding, for example, what constitutes a bona fide marriage. Some 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 attempts to circumvent resettlement criteria and perhaps also abusive of the partners in an arranged marriage, although such marriages may represent normal custom and practice in the country of origin.¹²⁰

Beyond the core members of the refugee family, there is great variation in the treatment afforded the larger sphere of family relationships. The Executive Committee has shown a willingness by States to promote 'liberal criteria', with a view to 'comprehensive reunification of the family'.¹²¹ There is also extensive support on the European level for a wider acceptance of other family members, including the elderly, infirm, or otherwise dependent.¹²² At the national level, 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.¹²³ In Canada, fiancés, parents, and grandparents may be in the family class, which has stricter criteria than for immediate family, but not siblings, cousins, aunts or uncles. The processing priorities of the US refugee resettlement programme include parents as well as spouses

119 Commission of the European Communities, 'Amended Proposal for a Council Directive on the Right to Family Reunification', Brussels, COM (2000) 624 final, 1999/0258 (CNS), 10 Oct. 2000, Art. 5.1(a).

120 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, sometimes well after the legally binding document has been signed before the court. E-mail from UNHCR field office to the authors, 22 July 2001.

121 Executive Committee, Conclusion No. 88 (L), 1999, para. b(ii).

122 Council of Europe Parliamentary Assembly, Recommendation 1327 (1997), above n. 114, para. 8.vii(o); European Commission, Amended Proposal for a Council Directive on the Right to Family Reunification, COM (2000) 624 final, 10 Oct. 2000, Art. 5.1(d)–(e). For jurisprudence of the European Court of Human Rights, see Lambert, above n. 35, pp. 435–6.

123 *S.A.K. v. Moscow and Moscow Region Immigration Control Department*, Civil Case No. 2-3688, Moscow Central Administrative District, Zamoskvoretsky Municipal Court, 10 May 2001.

and unmarried children in the highest family priority (priority three), but only six nationalities were eligible for consideration in this category in fiscal year 2001. Lower processing priorities include more distant relatives such as grandparents, siblings, aunts, and uncles, but have not been open to any nationality for several years. Derivative status is open only to spouses and unmarried minor children. In practice, however, dependent members of extended families may be considered under what is known as the p-3 (priority three) designation. Refugees who become legal permanent residents or citizens may apply to sponsor more distant relatives for immigration, although the waiting periods for extended family members may be very long.¹²⁴

States 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, but 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 towards a Western norm where adult children are not responsible for their parents and that policy-makers should therefore not base decisions on an outmoded concept of cultural relativism favouring the extended family.¹²⁵ 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 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.¹²⁶

Given the range of variations on the notion of family, a flexible approach is needed.¹²⁷ In UNHCR's view, States should adopt a pragmatic interpretation of the family, recognizing economic and emotional dependency factors, as well as cultural variations. Families should be understood to include spouses; those in a customary marriage; long-term cohabitants, including same sex couples; and minor children until at least age eighteen.¹²⁸ Under no circumstances should minors 'age out' of the process. The relevant age should be determined by the time when the sponsoring relative obtained status, not the time of the approval of the application for reunification. Under appropriate circumstances, family members such as dependent unmarried children of any age; dependent relatives in the ascending line; other

124 E. A. Dewey, Assistant Secretary of State for Population, Refugees and Migration, US Department of State, in response to question following testimony before the Subcommittee on Immigration, US Senate Judiciary Committee, 12 Feb. 2002.

125 Van Krieken, above n. 35, p. 118.

126 Apap and Sitaropoulos, above n. 35, section 1; Anderfuhren-Wayne, above n. 35, p. 360.

127 UNHCR, 'Background Note', above n. 5, para. 14.

128 The Council of Europe's Committee of Ministers, Recommendation Rec(2002)4, 26 March 2002, defines a child as anyone below the age of eighteen unless, under the law applicable to the child, majority is attained earlier.

dependent relatives, and other dependent members of the family unit, including foster children, as well as fiancé(e)s should be reunited.¹²⁹

2. *Dependency*

A useful limiting factor recognized by many States in determining whether more distant family members should be reunited is dependency. While there is no internationally agreed definition of the term, UNHCR's operational definition is that a dependent person is someone who relies for his or her existence substantially and directly on another person, in particular for economic reasons, but also taking emotional dependency into consideration.¹³⁰ Sending remittances back to the country of origin might address financial dependency in some cases, but would not of course suffice to replace the emotional and practical aspect of the family relationship. The principle of dependency recognizes that, in most cases, the family is composed of more than its nuclear members.¹³¹ 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, and are owed a duty of protection and care by their children.¹³²

3. *Ties of affection or mutual support*

Refugee families, more so than many others, are likely to be melded from the remnants of conventional families. While some would argue that only the family as it existed before departure should be recognized for reunification purposes, the reality is that very often new families arise out of the refugee experience. 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 the family, and who wish

129 UNHCR Division of International Protection, *Resettlement Handbook* (revised ed., Geneva, April 1998), ch. 4.6.7(b).

130 *Ibid.*, ch. 4.6.5. 131 UNHCR, 'Background Note', above n. 5, para. 13.

132 See, e.g., African Charter on the Rights and Welfare of the Child, above n. 28, Art. XXXI: 'The child . . . shall have the duty (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in cases of need . . .'. African Charter on Human and Peoples' Rights, above n. 22, Art. 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 Art. 29(1): 'The individual shall also have the duty . . . to respect his parents at all times, to maintain them in case of need.' ACHR, above n. 22, Art. 32: 'Every person has responsibilities to his family.' American Declaration of the Rights and Duties of Man, 1948, OAS Resolution XXX, Art. XXX: 'it is the duty of children to honor their parents always and to aid, support and protect them when they need it'.

to live together.¹³³ Economic and emotional ties should be given the same weight in reunification as relationships based on blood ties or legally sanctioned unions.¹³⁴

F. Family unity and reunification for 1951 Convention refugees and for others in need of protection: where and when?

The right to family unity and reunification is universally applicable. As noted above, formal recognition of family unity in the refugee context is rooted in the Final Act of the Conference of Plenipotentiaries that adopted the 1951 Convention.¹³⁵ Since the right arises from international human rights law, however, it is not dependent on the formal status of the persons seeking it.¹³⁶ The question, then, is not whether the right to family unity and reunification is applicable to various categories of persons, but which State(s) must act to ensure the right. The following discussion is organized by category of claimant for ease of analysis, not because of any hierarchy of entitlement.

1. 1951 Convention refugees

Refugees recognized under the 1951 Convention are usually in the most advantageous position with respect to family unity or reunification, even given the variation in treatment described below. Since reunification cannot occur in the country of origin, the country of asylum must give effect to the right, at least for close family members.

2. Organization of African Unity and Cartagena refugees

The OAU Refugee Convention¹³⁷ does not make specific reference to family unity or reunification. The body of African human rights law, however, is a rich source for family rights, including the only regional convention on the rights of the child.¹³⁸ With respect to family unity, the situations of mass influx envisaged by the OAU Refugee Convention generally do not involve individual status determination because the objective circumstances in the country of origin make the need

133 *Commentary to the Additional Protocols*, quoted in Secretariat of the Inter-Governmental Consultations, *Report on Family Reunification*, above n. 17, p. 357.

134 UNHCR, 'Background Note', above n. 5, para. 1(c).

135 See section I above and, for the full text of Recommendation B of the Final Act, see the text at n. 42.

136 CRC, Arts. 2 and 22; HRC, General Comment No. 15, above n. 38, para. 1. Related provisions in humanitarian law require the existence of armed conflict before they are applicable.

137 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 3.

138 African Charter on Human and Peoples' Rights, above n. 22; African Charter on the Rights and Welfare of the Child, above n. 28.

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 or other status. All family members, whether together or separated, should be, and in the normal course are, extended recognition on a prima facie basis.

Reunification can become complicated when one member of a family is recognized as a prima facie refugee in one country, while another family member flees to a country of asylum that does not employ an OAU-type definition and is not recognized as a refugee. If the country with the more expansive refugee definition does not provide for family reunification, there may be no possibility for reunification in the country with the less inclusive definition, since that family member may be considered only an asylum seeker, or a beneficiary of a subsidiary form of protection.

Like the OAU Convention, the 1984 Cartagena Declaration¹³⁹ guides countries in their response to mass influx, when refugee status is granted on a group basis. The Cartagena Declaration specifically acknowledges family reunification as a fundamental principle that should be the basis for humanitarian treatment in the country of asylum.

3. *Complementary forms of protection*

Complementary protection refers to various types of status granted to people whose claims under the 1951 Convention have been rejected after an individual determination, but who have nevertheless been found to be in need of international protection, for example, under Article 3 of the Convention Against Torture or under the OAU/Cartagena definition outside Africa or Central America.¹⁴⁰ Standards of treatment vary, but beneficiaries of complementary protection are entitled to respect for their fundamental human rights including the right to family unity and reunification. The justification for refugee family reunification in a country of asylum derives from the refugee's situation in not being able to return home, and not from the text of 1951 Convention itself. Persons in an analogous situation of inability to return home should benefit from the same application of the right in the country of asylum.

A number of countries extend family reunification rights to beneficiaries of complementary protection. The Committee of Ministers of the Council of Europe specifically recommends that family reunion provisions relating to refugees should apply,¹⁴¹ but some countries have yet to ensure the right to reunification. The

139 Cartagena Declaration on Refugees, above n. 114.

140 UNHCR, 'Complementary Forms of Protection', UN doc. EC/GC/01/18, 4 Sept. 2001. UNHCR, 'Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime', UN doc. EC/50/SC/CRP.18, 9 June 2000.

141 Council of Europe, Committee of Ministers on subsidiary protection, above n. 114, para. 6.

United States, for example, does not provide for family reunification with persons protected under the Convention Against Torture.¹⁴² 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.¹⁴³

4. *Responses to mass influx*

The right to family unity applies in situations of mass influx. Such situations present State authorities with the challenge of preserving family unity in the midst of chaotic and terrifying events. Given the prevalence of family separation in situations of mass influx, keeping or bringing family members together poses enormous practical problems.¹⁴⁴ Whether in a refugee camp or in a situation of spontaneous settlement in rural or urban areas, the members of a family, very broadly defined, should be permitted to stay together and be helped to find each other.

Registration designed to identify separated families,¹⁴⁵ tracing, assistance with communication and transportation, and similar measures may help relatives within a large refugee population to re-establish a family group. Action should be taken as soon as possible, as prospects for reunification diminish as time goes by. In camps for Kosovo Albanian refugees in the former Yugoslav Republic of Macedonia, a telephone centre allowed refugees to try to establish the location of missing relatives; in Rwanda, bus circuits allowed returnee parents to visit centres for unaccompanied/separated children in search of 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.

Unaccompanied and separated children require special attention in order to be reunited with their parents or guardian and siblings as soon as possible.¹⁴⁶ Tracing

142 Pub. L. 105-277, 112 Stat. 2681-822, Oct. 1998.

143 Van Krieken, above n. 48, pp. 61-2.

144 With respect to the Rwandan exodus, see e.g., International Committee of the Red Cross, UNHCR, UN Children's Fund (UNICEF), and International Federation of Red Crescent and Red Cross Societies (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', 82 *International Review of the Red Cross*, 2000, pp. 351-66; Petty, above n. 100, pp. 165-76.

145 UNHCR, 'Practical Aspects of Physical and Legal Protection with Regard to Registration', UN doc. EC/GC/01/6*, 19 Feb. 2001. Executive Committee, Conclusion No. 91 (LII), 2001, para. a, also acknowledges 'the importance of registration as a tool of protection, including [for] family reunification of refugees and identification of those in need of special assistance'.

146 UNHCR, *Refugee Children*, above n. 15, ch. 10.

efforts should begin immediately an unaccompanied/separated child is identified, both through the comparison of records on unaccompanied/separated children and those 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 unaccompanied and 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.¹⁴⁷ 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.¹⁴⁸

In situations of mass influx, where the majority of the people seeking international protection will fall within the 1951 Convention refugee definition but individual status determination is not possible, States usually respond by recognizing them as refugees on a prima facie basis or by granting a form of protection known as temporary protection. In principle, all family members present should receive the same prima facie refugee status or temporary protected status. The Executive Committee has specifically concluded that respect for family unity is a 'minimum basic human standard' in situations of large-scale influx¹⁴⁹ and has called for family reunification for persons benefiting from temporary protection.¹⁵⁰

Temporary protection represents an emergency tool in situations of mass influx, which often suspends individual determination of refugee status and the identification of the appropriate durable solution. It can sometimes result in extended periods in the country of asylum and there is an emerging consensus on the need for prompt reunification during temporary protection. The recent European Union Directive on temporary protection requires member States to reunite from within

147 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993, effective since 1 May 1995. See UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), vol. I, pp. 356–69 and <http://www.hcch.net/e/conventions/menu33e.html>. See also, Hague Conference on Private International Law, Special Commission, 'Recommendation 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', 21 Oct. 1994; Executive Committee, Conclusion No. 88 (L), 1999, para. c.

148 CRC, Art. 3; UNHCR, *Refugee Children*, above n. 15, ch. 10; Executive Committee, Conclusion No. 47 (XXXVIII), 1987.

149 Executive Committee, Conclusion No. 22 (XXXII), 1981, para. II.B.2(h).

150 Executive Committee, Conclusion No. 15 (XXX), 1979, para. 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.'

the EU close family members, as well as unmarried partners if the State has similar treatment for the latter in its aliens law, and allows them to reunite other close dependent family members. Family members who are not in the EU but wish to be reunited with a sponsoring relative will be able to do so on showing that they are in need of protection.¹⁵¹

In the United States, temporary protected status (TPS) does not permit family reunification.¹⁵² This is perhaps because the protection is in the nature of a deferred deportation, and is not the same as temporary protection programmes elsewhere. It is available only to persons already in the United States when their country is designated as experiencing ongoing conflict or natural disasters. Those present in the United States without family members presumably chose to travel without them in the first place. This reasoning, however, does not address the inability of the TPS beneficiary to reunite with his or her family by returning home. It should be noted that most of the countries that participated in the Humanitarian Evacuation Programme for Kosovo Albanian refugees in 1999, including the United States, selected people for evacuation primarily on the basis of family ties in the receiving country, although the definition of family ties was not uniform. The agencies that were implementing the programme attempted to maintain family unity in the process, with considerable success after the first chaotic days.

5. *Asylum seekers*

Since a decision has not yet been made as to the legal status of asylum seekers, it may be difficult to determine where they should enjoy the right to family unity and reunification, or which State bears responsibility for giving effect to it. If asylum determination systems were prompt and efficient, this lack of clarity would cause few problems, but asylum systems are notoriously neither prompt nor efficient, and the length of proceedings in many countries causes tremendous hardship, particularly when children are apart from parents.¹⁵³

The obvious answer is to expedite asylum determinations, but this worthy goal seems always to recede into the distance. There is, fortunately, a general recognition at least in principle that unaccompanied and separated children should benefit from expedited procedures, but such measures do not even begin to address the right to family reunification of children left in a country of origin or transit; no State has suggested expedited procedures for asylum-seeking parents separated from

151 EU Temporary Protection Directive, above n. 114, Art. 15.

152 US Immigration and Nationality Act, as amended (INA), section 244, 8 Code of Federal Regulations (CFR), section 244.2.

153 For example, 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 an EU Member State since 1997. Their father was recently 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.

their children. Resettlement of children separated from their parents and remaining in the country of origin or transit is also difficult since resettlement countries often feel that the country where a family member has an application pending should accept the remaining family members.

Some limited steps have been taken to address the situation. Under the terms of the Dublin Convention, in situations where an asylum seeker has a close family member in an EU State who is a refugee recognized under the 1951 Convention, it is that State which is responsible for assessing the application.¹⁵⁴ Unfortunately, given the length of proceedings and the consequent delays in reunification, family members in different States whose asylum applications are ongoing are not covered.¹⁵⁵

Proposals presented by the European Commission for a revised Dublin Convention strengthen the provisions on family unity.¹⁵⁶ They add further criteria including that, where an asylum seeker is an unaccompanied minor, responsibility for considering the claim should lie with the member State where there is a member of his or her family who is able to take charge of him or her. There is no stipulation as to the formal status of the other family member. Another criterion allocates responsibility for assessing the claim to a member State where there is another family member who is an asylum seeker and who is awaiting a decision under the normal procedure, as opposed to this only being possible for a recognized refugee.

The Parliamentary Assembly of the Council of Europe has recommended that members of the same family be allowed to reunite during status determination procedures.¹⁵⁷ The European Council on Refugees and Exiles has also recommended that members of a family who have been compelled to seek asylum in different countries be allowed to pursue their claims together in a single country.¹⁵⁸

It is understandable that States are not eager to process reunification applications for asylum seekers whose asylum applications they are having difficulty processing. Given the scarcity of State resources, however, it would be helpful to pursue possibilities for reuniting members of the same family seeking asylum in various countries, particularly if determination of the claim has been pending for, or is expected to take longer than, six months. The grouping together of at least potentially

154 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community (Dublin Convention), 1990, OJ 1997 L254, 19 Aug. 1997, p. 1, Art. 4. All EU member States are party to the Convention.

155 Hurwitz, above n. 118, p. 653, where other situations are examined in greater detail.

156 European Commission, 'Proposal for a Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National', COM (2001) 447 final, 26 July 2001 (hereinafter 'Dublin II Proposal'), especially preamble paras. 6 and 7 and Arts. 5–8.

157 Council of Europe Parliamentary Assembly, Recommendation 1327 (1997), above n. 114, para. 8.vii(p).

158 European Council on Refugees and Exiles (ECRE), 'Position on Refugee Family Reunification', July 2000.

related claims, witnesses, and evidence would be more cost effective than parallel procedures in different jurisdictions and, as recognized by the European Commission, would be likely to result in more consistent decision making.¹⁵⁹

6. *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 the age of 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, problems 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 can be seen in the evolution of language from the 1977 Additional Protocol II, which refers to ‘all appropriate steps’ to ‘facilitate’ reunion, to the stronger and more detailed provision of the 1990 African Charter on the Rights and Welfare of the Child, which calls for ‘all necessary measures’ to ‘trace and re-unite’.¹⁶⁰

V. State practice: the legal framework

A. The legal framework for the right to family unity and reunification

UNHCR’s Executive Committee and UNHCR itself have drawn attention to the need to implement the right to family unity and reunification in domestic legislation.¹⁶¹ The Committee on the Rights of the Child has also recommended to a number of asylum States, including Australia, Finland, Kenya, and Norway, that such a framework be established or improved.¹⁶² Such provisions are an important

159 European Commission, ‘Dublin II Proposal’, above n. 156, p. 13.

160 Additional Protocol II to the Geneva Conventions, above n. 29, Art. 4(3)(b): ‘all appropriate steps shall be taken to facilitate the reunion of families temporarily separated.’ African Charter on the Rights and Welfare of the Child, above n. 28, Art. 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’, above n. 115, Principle 17(3).

161 Executive Committee, Conclusion No. 85 (XLIX), 1998, para. x; UNHCR ‘Background Note’, above n. 5, para. 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.’

162 Committee on the Rights of the Child, ‘Concluding Observations on Australia’, above n. 95, para. 30. Committee on the Rights of the Child, ‘Concluding Observations on Finland’, UN doc. CRC/C/15/Add.132, 16 Oct. 2000, paras. 37–8. Committee on the Rights of the

method of implementing international standards and represent the best practice in a rights-based approach to protection of the refugee family. States should enact legislation expressly implementing the right to family unity and reunification for refugees and other persons in need of international protection.

In the European Union, a harmonized legal framework for implementing the right to family reunification will come into being upon conclusion of the amended proposal for a Council directive.¹⁶³ This document correctly provides more favourable treatment in some respects for refugee families as compared to migrant families, yet also gives rise to concern in a number of other respects.¹⁶⁴ 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, though the age may be higher for refugee children. Further negotiations on the proposal will need to be monitored carefully to ensure that it sets a positive benchmark for implementation of the right to family reunification.

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

States that have incorporated family unity and reunification principles have done so with a variety of legislative and administrative provisions.¹⁶⁵ The basic elements can be simply stated, as in 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 dependants of persons to whom asylum has been granted.¹⁶⁶

Child, 'Concluding Observations on Kenya', UN doc. CRC/C/15/Add.160, 7 Nov. 2001, para. 56. Committee on the Rights of the Child, 'Concluding Observations on Norway', UN doc. CRC/C/15/Add.126, 28 June 2000, paras. 32–3.

163 European Commission, 'Amended Proposal for a Council Directive on the Right to Family Reunification', above n. 122.

164 See, e.g., ECRE, 'Position on Refugee Family Reunification', above n. 158; Caritas Europa-Migration Commission and other NGOs, 'Europe's Position on the Amended EU Commission Proposal for a Council Directive on the Right to Family Reunification', above n. 25.

165 See Secretariat of the Inter-Governmental Consultations, *Report on Family Reunification*, above n. 17, for a summary of policies in Australia, Belgium, Canada, Denmark, Finland, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, the UK, and the US. See also, UNHCR, 'Integration Rights and Practices with Regard to Recognized Refugees in the Central European Countries', *European Series*, vol. 5, No. 1, 2000, ch. VI, 'Family Unity and Reunification', for a comparative analysis of policies in and country profiles of Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia.

166 Bosnia and Herzegovina, Law on Immigration and Asylum, 1999, Art. 54. The Refugee Act of Iraq, No. 51-1971, Art. 11.3, is even more succinct: 'The person who has been accepted

More complicated formulations can be found, for example, in US law, which provides three different channels for refugee family reunification. First, a priority system gives some refugees with relatives in the US preferential access to resettlement if they themselves are found to have a well-founded fear of persecution.¹⁶⁷ Secondly, a visa programme for relatives of refugees is based on derived status and does not require the joining relatives to demonstrate a fear of persecution. Thirdly, regular family immigration procedures are available to all permanent residents, a status normally available to refugees one year after resettlement in the United States.¹⁶⁸

Unrealistic or overly rigid documentation requirements are a widespread problem in applying family unity and reunification laws. 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.¹⁶⁹

States should maintain flexibility in documentation requirements, by allowing affidavits and other evidence in place of unavailable documents. A positive finding of identity in the course of status determination should be conclusive for reunification purposes. The country of asylum, upon recognition of refugee status, should provide travel documents to the refugee and all family members present. If travel documents are not available for family members, the country of asylum and any countries of transit should accept a travel document from the International Committee of the Red Cross (ICRC). Travel documents and visas should be issued free of charge.

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. States should confer permanent resident status upon recognition of refugee status and corresponding rights to family reunification.

In many States, an interim status, such as the United Kingdom's 'exceptional leave to remain' (ELR), conveys no right to family reunification, although the UK Home Office will consider an application after a person has held this status for four

as a refugee in Iraq shall be allowed to bring his/her family members legally recognized as dependants.'

167 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. INA, section 207, 8 CFR section 207.

168 INA, sections 207(c)(2) and 208(b)(3), 8 CFR section 207.7 and 8 CFR section 208.20; INA, section 209, 8 CFR section 209.

169 Law of the Republic of Belarus on Refugees, 1995, Art. 10, procedure of status determination of foreigners as refugees. See also, Decree of the President of the Republic of Belarus, No. 229, 24 Nov. 1994, Art. 10: 'On the Approval of Regulations of the Procedure Granting Asylum to Foreign Citizens and Stateless Persons'.

years – less in especially serious ‘compassionate’ circumstances. Applicants must show 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, although those with indefinite leave to remain still have to meet the support and accommodation tests in order to bring their relatives to join them.¹⁷⁰

In an attempt to deter people smuggling, Australia has effectively barred family reunification for recognized refugees who enter without authorization.¹⁷¹ Nor can these refugees visit their families in a third country, since they would lose their right to re-enter Australia. This policy is clearly in violation of Australia’s treaty obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, as well as the 1951 Convention, 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.

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.¹⁷²

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

Some type of legislative arrangement for ensuring family unity and reunification is preferable to none, but immigration provisions are generally not adequate in the refugee context. Implementing the right to family unity and reunification in the refugee context involves an obligation of protection, an orientation towards durable solutions, and a humanitarian commitment to rebuilding refugees’ lives, none of which is normally a part of regular immigration programmes.¹⁷³ 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 that takes into account the different situations of refugees and migrants.

170 See Immigration Directorate, ‘Instructions’, Dec. 2000, ch. 11, section 2, exceptional leave to enter/remain, settlement, and family reunion, Art. 1 4.3.

171 Migration Amendment Regulations 1999 (No. 12) and 1999 (No. 243); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, Part 4. Under this legislation, since Sept. 2001, an asylum seeker arriving independently in Australia who has spent seven days or more in a country where she or he could have sought and obtained effective protection, who is recognized as a refugee, only receives a series of temporary three-year visas. He or she is thus never able to gain secure residency or travel documents, or to reunite with his or her family in Australia. See also, US Committee for Refugees, *Sea Change: Australia’s New Approach to Asylum Seekers* (US Committee for Refugees, Washington DC, Feb. 2002).

172 See also the paper on Article 31 by G. S. Goodwin-Gill in Part 3.1 of this volume.

173 UNHCR, ‘Background Note’, above n. 5, para. 8.

In addition to the obstacles noted in the preceding section, additional problems arise in addressing refugee family issues through immigration legislation. 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.¹⁷⁴ 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 close 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 different country of asylum; and applications for reunification are used to re-examine and sometimes revoke the status of the principal applicant.¹⁷⁵

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

¹⁷⁴ Ibid., para. 7.

¹⁷⁵ Two recent cases from other countries concerning reunification of recognized refugees with nuclear family members are drawn from UNHCR field office e-mails to the authors. In the first case, 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 on 18 July 2001. In the second case, 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.

to such issues on a case-by-case basis. One UNHCR office reports that ‘such endeavours are indeed time consuming and there is a constant fear of running into a protracted situation’.¹⁷⁶ In others, such as Ecuador, with a small caseload (six spouses reunited in 2000) 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; secondly, the vast majority of them are manifestly founded and can be examined expeditiously.¹⁷⁷ States should consider implementing a similar system.

Refugee claimants should be informed of the possibility of applying for family reunification 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 dependant, the dependant 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, although the rejected dependant may submit an asylum 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 of the family. Resettlement then becomes the only legal option available for a durable solution.

VI. State practice: implementation and administrative procedures

Even in States with specific provisions relating to family unity or reunification, protracted and complicated procedures cause tremendous hardship to

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

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

the affected families¹⁷⁸ and demand inordinate human resources from UNHCR and other organizations assisting them.¹⁷⁹ 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, which may work either in favour of or against refugee families hoping to reunite.

States should establish streamlined and standardized administrative procedures to ensure family unity and reunification, with expedited procedures for cases involving unaccompanied and separated children. States should allocate adequate resources for staffing, training, tracing, travel costs, fees waivers, testing requirements, and other costs related to family unity and reunification.

A. Application procedures

Diplomatic missions abroad are often unaware of or indifferent to the provisions of national refugee law. For instance, the United States 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.

178 '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 Aug. 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, 'Discussion Paper', above n. 9, which includes a number of compelling cases of separated refugee families, all clients of Refugee Council of Australia member organizations.

179 Excerpts from three 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 Aug. 2001. 'UNHCR really spends time with refugees/nationals to explain to 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.

Some States, including the Nordic countries, require applications for reunification to be initiated at a diplomatic mission abroad, as is generally also the case in countries with no family reunification procedure (outlined in section V.A.3 above). If there is no embassy or consulate in the first country of asylum, this can cause further difficulty and delays as long-distance communications and shipment of documents takes place. Refugees' families who are not resident in or near the capital city find that 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 is not lodged at that time, the family is unlikely to be allowed to reunify. In some cases, however, 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, if an application for refugee status on the basis of family reunification is not lodged at the border, the family is effectively unable to make use of Article 44 of the 1997 Act on Aliens, which accords refugee status to family members living with a refugee in Poland. In practice, however, family reunification often takes place on a more informal basis, since an ordinance to the Act stipulates that responsible authorities should, according to existing possibilities, help the family to attain the right to enter Poland.¹⁸⁰

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 find out the status of their applications. There is often confusion as to who in the family (those abroad or those in country) should initiate such proceedings, what institution is responsible for effecting family reunification (embassies, UNHCR, ICRC, NGOs), 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. Permitting a relative already resident in that country to initiate procedures would facilitate family reunification. 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

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

been known to consume so much time that minor children 'age out' of reunification possibilities before their processing is complete. To avoid this problem, which can have serious consequences for the family concerned, best practice permits a child who is below the age of majority when his or her case is filed 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 significant refugee flows, the processing of such applications by national authorities has typically been slow. One country's mission reported in mid-2001 a six-month waiting period before initial interviews could be carried out in Damascus, Syria, and a one-year wait in Islamabad, Pakistan. 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.¹⁸¹ Given the processing delays, family members' legal status can often lapse and they 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.¹⁸²

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 and separated 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

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

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

requirements (equal to the minimum wage in one country of asylum; to 125 percent of the 'poverty level' for certain avenues of family unification in another country of asylum). 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 the 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 amended proposal for a Council Directive on the right to family reunification would harmonize the EU member States' practice to this standard.¹⁸³ Requirements pertaining to income, employment, accommodation, length of stay, and health status should be specifically waived for refugee families.

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 eligible for family reunification to enter under the humanitarian programme, which does not require expensive application fees, rather than under the family reunion programme, which can require fees in excess of A\$3,000 for two children, according to the Refugee Council of Australia.¹⁸⁴ (The disadvantage of this change is that the waiting periods are growing for a visa under the humanitarian programme.) In Canada, if a refugee fails to file for permanent resident status for him or herself and immediate family members within 180 days of being granted asylum (which application involves payment of 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 ten 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 many potential receiving States expect refugees to pay for the tests themselves. The requirement for DNA testing is also a source of considerable delays in processing applications. A better approach would be to carry out scientific testing only in exceptional

183 European Commission, 'Amended Proposal for a Council Directive on the Right to Family Reunification', above n. 122.

184 Refugee Council of Australia, 'Discussion Paper', above n. 9.

circumstances 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, at least in those cases where the tests confirm the relationship alleged by the refugee. Refusal to submit to testing should not automatically result in denial of reunification.

The costs of obtaining documents, travelling to present petitions, and securing visas are often prohibitive, as is the cost of tickets. UNHCR, ICRC, the International Organization for Migration (IOM), and some NGOs provide assistance in some cases to family members who would otherwise be unable to travel. In some cases, States waive fees for refugees, which are otherwise normally required, 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.¹⁸⁵ When Australia was under criticism, not least by the Human Rights Committee and the Committee on the Rights of the Child, for conditions in a detention centre that did house families together, it responded by releasing women and children into a supervised release programme while keeping the men in detention as an assurance against flight.¹⁸⁶ Detention practices are one of the rare areas in which States commonly take direct actions that divide intact families.

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.

VII. Conclusion

In November 2001, a group of judges, practitioners, NGO representatives, government officials, and academic experts met to take stock of international law on family unity and family reunification issues, as part of UNHCR's Global Consultations on International Protection. The roundtable reached a nearly unanimous

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

186 HRC, 'Concluding Observations on Australia', UN doc. A/55/40, 24 July 2000, para. 3. Committee on the Rights of the Child, 'Concluding Observations on Australia', above n. 95, para. 20.

consensus that ‘a right to family unity is inherent in the universal recognition of the family as the fundamental group unit of society’.¹⁸⁷ Since this right is embedded in human rights instruments and humanitarian law, the experts noted, it applies to all human beings, including refugees. They concluded that ‘[r]espect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated’.¹⁸⁸

For families separated by voluntary movement, States may argue that declining to admit family members does not violate the right to family unity because migrants have the option to enjoy family unity in the country of origin. Even in such cases, the legal admission of a migrant for long-term residence implies an obligation to make it possible for that person to exercise his or her right to family life. For refugees, however, the option of family unity in the country of origin does not exist until the point when they are able to repatriate in safety and dignity, or until such fundamental and durable changes have occurred in the country of origin that cessation of their refugee status may be invoked.

Since refugee families frequently become separated owing to the circumstances of their flight, their right to family unity often can be realized only through family reunification in a country of asylum. Thus, the right to family reunification resides at the intersection of established human rights law, humanitarian law, and refugee law. The specifics of the implementation of this right, however, vary greatly among countries. It would help to cut through the resulting inconsistency if UNHCR were to compile procedures for reunification to and/or from any given country, and provide the appropriate contact points in government agencies, UNHCR offices, ICRC, NGOs, and other international organizations. UNHCR should also, in consultation with States, NGOs, and other international organizations, expand its guidelines on various aspects of family unity and reunification, including its relationship to exclusion and to irregular movements, by drawing on the best practices in a range of settings and situations. It is then up to States to draw on these resources to establish more humane and expeditious rules for the protection and restoration of refugee family unity and – most importantly – to implement them with consistency and compassion.

187 UNHCR Global Consultations on International Protection, Summary Conclusions on Family Unity, Geneva Expert Roundtable, 8–9 Nov. 2001.

188 *Ibid.*