1.1 Refugee protection in international law: an overall perspective

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Contents

I. Background

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention[1] are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin. For half a century, they have clearly demonstrated

* The views expressed are the personal views of the authors and may not necessarily be shared by the United Nations or by UNHCR.

1 189 UNTS 150; 606 UNTS 267.

their adaptability to changing factual circumstances. Beginning with the European refugees from the Second World War, the Convention has successfully afforded the framework for the protection of refugees from persecution whether from repressive regimes, the upheaval caused by wars of independence, or the many ethnic conflicts of the post-Cold War era.[2]

International refugee protection is as necessary today as it was when the 1951 Convention was adopted over fifty years ago. Since the end of the Cold War, simmering tensions of an inter-ethnic nature – often exploited by populist politicians – have erupted into conflict and strife. Communities which lived together for generations have been separated and millions of people displaced – whether in the former Yugoslavia, the Great Lakes, the Caucasus, or Afghanistan. The deliberate targeting of civilians and their enforced flight have not only represented methods of warfare but have become the very objectives of the conflict. Clearly, this forced displacement is for reasons which fall squarely within the Convention refugee definition. Yet States in some regions have often been reluctant to acknowledge this at the outset of the crisis and have developed ad hoc, discretionary responses instead.

There are also many longstanding refugee situations resulting from conflicts which have not been resolved with the ending of the Cold War and have taken on a life of their own, often fuelled by the plunder of valuable natural resources and/or illicit trade in small arms.[3] Endemic instability and insecurity often accompany displacement within and from failed States or States where central government only controls part of the territory – hardly offering conditions for safe return.

The displacement resulting from such situations can pose particular problems to host States, especially if they provide asylum to large refugee communities, sometimes for decades. There is thus a real challenge as to how best to share responsibilities so as to ease the burden on any one State unable to shoulder it entirely. There is also a need to put in place burden sharing – not burden shifting – mechanisms which can trigger timely responsibility sharing in any given situation.

Xenophobia and intolerance towards foreigners and in particular towards refugees and asylum seekers have also increased in recent years and present a major problem. Certain media and politicians appear increasingly ready to exploit the situation for their own ends.

In addition, security concerns since the attacks in the United States on 11 September 2001 dominate the debate, including in the migration area, and have at times overshadowed the legitimate protection interests of individuals. A number of countries have, for instance, revisited their asylum systems from a security angle

2 See generally, UNHCR, *The State of the World's Refugees* (Oxford University Press, 2000).

3 See, e.g., UN General Assembly resolution on the role of diamonds in fuelling conflict, UN doc. A/RES/55/56, 1 Dec. 2000; generally also http://www.un.org/peace/africa/Diamond.html. For the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9–20 July 2001, see UN doc. A/CONF.192/15 and http://disarmament.un.org/cab/smallarms/.

and have in the process tightened procedures and introduced substantial modifications, for example, by broadening grounds for detention or reviewing claims for the purpose of detecting potential security risks. In some situations, it has been noticeable that the post-September 11 context has been used to broaden the scope of provisions of the 1951 Convention allowing refugees to be excluded from refugee status and/or to be expelled. The degree of collaboration between immigration and asylum authorities and the intelligence and criminal law enforcement branches has also been stepped up.

The growth of irregular migration, including the smuggling and trafficking of people, presents a further challenge. These developments are in part a consequence of globalization, which has facilitated and strengthened transport and communication networks and raised expectations. In part, the increase in irregular migration can also be viewed as a result of restrictive immigration policies in many industrialized States, which oblige economic migrants and refugees alike to use irregular channels, whether they are in search of a better life or, more fundamentally, freedom from persecution. Visa requirements, carrier sanctions, readmission agreements, the posting of immigration officers abroad and other similar measures are all migration control tools which require proper protection safeguards and procedures if refugees are to be able to reach safety.

More specifically, in terms of the interpretation of the 1951 Convention itself, some States use various complementary forms of protection, which have had the effect in some instances of diverting Convention refugees to lesser forms of protection. When the protection afforded by international human rights instruments is also taken into account, the result is that many States now have several different procedures for determining international protection needs. This in turn raises questions concerning the inter-relationship between international refugee law on the one hand and international humanitarian and human rights law on the other.

Within the asylum procedure, systems in many States face significant challenges in ensuring a proper balance between the need for fairness and for efficiency. Dilemmas abound. How can notions such as safe third countries, and safe countries of origin or indeed accelerated procedures for manifestly unfounded cases, which have been introduced in many jurisdictions, be implemented both efficiently and in a protection-sensitive manner? Are the victims of violence and persecution by non-State actors – militias, paramilitary groups, separatist rebels, bandits, mafia, violent husbands – entitled to protection as refugees in another State? To what extent can the notion of 'persecution' and the 'particular social group' ground in the 1951 Convention refugee definition reasonably be extended to protect women from gender-related violence, not least rape in the context of conflict but also, perhaps, harmful traditional practices, trafficking or domestic violence? If only part of the State of origin is affected by conflict, to what extent are individuals able to relocate to other areas inside that State and how does this affect their claim for refugee protection? What bearing do other conventions such as the 1989 Convention on the Rights of the Child[4] have on asylum procedures and the treatment of refugee children?

Differing approaches within regions have also led States to develop regionally specific legal frameworks for handling refugee claims. Such endeavours can strengthen refugee protection but need at the same time to ensure consistency with the 1951 Convention regime and thereby promote its 'full and inclusive application'.[5] Concepts, such as the safe country of origin or safe third country notions, developed in some regions are sometimes also 'exported' to other parts of the world, which may receive far fewer claims or have less well-developed protection capacities.

Ultimately, the full realization of the international protection regime with the 1951 Convention at its heart hinges on the ability of the international community to find durable solutions to forced displacement situations, whether these be voluntary repatriation, resettlement in a third country, local integration, or a combination thereof. The challenge is how to realize solutions for individuals, as well as for refugee groups, which are both lasting and protection based.

In short, the 1951 Convention and 1967 Protocol are the global instruments setting out the core principles on which the international protection of refugees is built. They have a legal, political, and ethical significance that goes well beyond their specific terms. Reinforcing the Convention as the foundation of the refugee protection regime is a common concern. The Office of the United Nations High Commissioner for Refugees (UNHCR), as the guardian of the Convention, has a particular role to play, but this is a task which requires the commitment of all actors concerned.[6]

II. The structure of the book and the purpose of this overview

The different parts of this book address nine key legal themes of contemporary relevance to the international refugee protection regime and in particular the interpretation of the 1951 Convention. These nine subjects were considered under the 'second track' of the Global Consultations on International Protection,

4 UNGA Res. 44/25, 20 Dec. 1989.

5 See, e.g., European Council, 'Presidency Conclusions', Tampere, Finland, 16–17 Oct. 1999, para. 13.

6 See generally, E. Feller, 'International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future', 83 *International Review of the Red Cross*, Sept. 2001, pp. 581–605; other special journal issues on the occasion of the fiftieth anniversaries of the 1951 Convention and of UNHCR include 14(1) *Revue Québécoise de droit international*, 2001; 10 *Forced Migration Review*, April 2001; and 35 *International Migration Review*, Spring 2001. See also, UNHCR, *The State of the World's Refugees*, above n. 2; G. Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press, 2001); I. C. Jackson, *The Refugee Concept in Group Situations* (Kluwer Law International, The Hague, 1999).

which were launched by UNHCR in 2000 and are outlined in the table on p. xxi of this book.[7] The book is therefore a concrete outcome of the second track and is also specifically mentioned in the Agenda for Protection.[8] The wider political, operational, and other challenges to the refugee protection regime, which were addressed in the third of the three 'tracks' of the Global Consultations, lie outside the scope of this book, which focuses on selected aspects of the legal protection of refugees.[9]

The purpose of this overview is to provide additional background to the debate against which the examination of the nine legal topics developed in this book has proceeded, not least in the context of the 'second track' of the Global Consultations, but also beyond. The overview seeks to highlight the essential tenets of the issues emerging from the background papers and the discussions at the four expert roundtables held on these topics in 2001. At the same time, it attempts to synthe-size possible ways forward on a number of issues, bearing in mind the complex nature of parts of the current debate. It is hoped that this overview can serveasa guide to the reader and provide some further insight into the current thinking on these issues.

In addition to this overview, Part 1 of the book contains a paper on the age- and gender-sensitive interpretation of the 1951 Convention. This indicates some of the ways in which gender equality mainstreaming and age-sensitivity are being or could be implemented to ensure the age- and gender-sensitive application of international refugee law. Part 1 also contains the text of the Declaration adopted at the first ever Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol, which was co-hosted by UNHCR and the Government of Switzerland in Geneva on 12–13 December 2001 as the 'first track' of the Global Consultations.

7 For further details, see also preface by the Director of International Protection, E. Feller, in this volume; UNHCR Global Consultations on International Protection, 'Update', Aug. 2002.

8 UNHCR, 'Agenda for Protection', UN doc. A/AC.96/965/Add.1, 26 June 2002.

9 Background papers written for the 'third track' of the Global Consultations intended to address these issues were UNHCR, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', UN doc. EC/GC/01/4, 19 Feb. 2001; UNHCR, 'The Civilian Character of Asylum: Separating Armed Elements from Refugees', UN doc. EC/GC/01/5, 19 Feb. 2001; UNHCR, 'Practical Aspects of Physical and Legal Protection with Regard to Registration', UN doc. EC/GC/01/6*, 19 Feb. 2001; UNHCR, 'Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations', UN doc. EC/GC/01/7, 19 Feb. 2001; UNHCR and IOM, 'Refugee Protection and Migration Control: Perspectives from UNHCR and IOM', UN doc. EC/GC/01/11, 31 May 2001; UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)', UN doc. EC/GC/01/12, 31 May 2001; UNHCR, 'Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems', UN doc. EC/GC/01/17,
4 Sept. 2001; UNHCR, 'Complementary Forms of Protection', UN doc. EC/GC/01/18, 4 Sept. 2001; UNHCR, 'Strengthening Protection Capacities in Host Countries', UN doc. EC/GC/01/19*, 19 April 2002; UNHCR, 'Voluntary Repatriation', UN doc. EC/GC/02/5, 25 April 2002; UNHCR, 'Local Integration', UN doc. EC/GC/02/6, 25 April 2002; UNHCR, 'Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities', UN doc. EC/GC/02/7,
25 April 2002; UNHCR, 'Refugee Women', UN doc. EC/GC/02/8, 25 April 2002; and UNHCR, 'Refugee Children', UN doc. EC/GC/02/9, 25 April 2002. These documents are available on the UNHCR website, www.unhcr.org.

The nine parts of this book which follow Part 1 each address a key legal issue, namely, *non-refoulement*, illegal entry, membership of a particular social group, gender-related persecution, internal flight, relocation or protection alternatives, exclusion, cessation, family unity and reunification, and UNHCR's supervisory responsibility.

Each of these parts contains, first, the background paper which formed the basis for discussion at the relevant expert roundtable. These papers present the position of the individual refugee law expert. Sometimes a paper advocates one particular interpretation rather than the range of approaches which may exist. The papers do not therefore purport to be a definitive position, but rather are part of a process of taking the debate forward on key issues of interpretation on which opinion and jurisprudence continue to differ. Each paper has been updated in the light of the discussions and major relevant developments since the roundtables and is therefore more comprehensive than the earlier versions posted on the UNHCR website, www.unhcr.org, at the time of the second track of the Global Consultations.

Secondly, each part contains the 'Summary Conclusions' of the expert roundtable concerned which reflect the tenor of the discussion at the roundtable. These do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion on the issue under consideration. Finally, each part contains a list of participants at the roundtable. In the interests of ensuring a fruitful and in-depth discussion of the topics, and in view of funding and space constraints, UNHCR was obliged to limit participation in the expert roundtables. Participants were selected by UNHCR on the basis of their experience of and expertise in these issues. In drawing up the lists for the four roundtables, UNHCR's Department of International Protection reviewed the academic literature on the relevant topics, considered names suggested by governments and non-governmental organizations (NGOs), and consulted UNHCR field offices. Care was taken to ensure a diversity of viewpoints by including experts working in government, as well as NGOs, academia, the judiciary, and the legal profession. Regional and gender balance were also taken into consideration. To broaden discussion and draw on an even wider pool of experts, the discussion papers were posted on the UNHCR website for comments, which were received from States, NGOs, and many individuals.

The second track consultations process, including notably the Summary Conclusions, is already feeding into the policy-making process at the international level. Drawing on this process, UNHCR is in the process of revising, updating and publicizing its guidelines on many of the issues discussed at the roundtables. These are being issued as a series of 'UNHCR Guidelines on International Protection', the first two of which were issued in May 2002, followed by the third in February 2003.[10] These Guidelines are issued pursuant to UNHCR's supervisory role under

10 UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating

its Statute[11] in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol. They are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field. At the regional level, the Summary Conclusions from the second track roundtable meetings have also begun to feed into discussions in other forums. One example concerns the Council of Europe's Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), as is described in greater detail below in section III.C on membership of a particular social group.

III. The nine different topics of the papers and roundtable Summary Conclusions

This section provides a brief outline of each of the nine topics addressed in the papers and expert roundtable meetings. It identifies the significant new issues and understandings which have resulted from the process of analysis, discussion, and synthesis involved in the second track of the Global Consultations. Where relevant, it draws attention to areas where differing interpretations or approaches persist.

A. The scope and content of the principle of *non-refoulement*

Part 2 of this book contains a Legal Opinion by Sir Elihu Laupterpacht QC and Daniel Bethlehem on the scope and content of the principle of *non-refoulement*.It conducts a detailed survey of international and regional human rights and refugee law instruments and standards as they relate to the principle of *non-refoulement*, under both Article 33 of the 1951 Convention and international human rights law, their application by international courts, and their incorporation into national legislation. In our view, this represents a tangible and wide-ranging manifestation of State practice coupled with evidence of *opinio juris*.

Both the Opinion and the Summary Conclusions of the roundtable held in Cambridge, United Kingdom, in July 2001 state that *non-refoulement* is a principle of customary international law.[12] The Declaration of the December 2001 Ministerial

to the Status of Refugees', UN doc. HCR/GIP/02/02, 7 May 2002; UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2)of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', UN doc. HCR/GIP/02/01, 7 May 2002; UNHCR, 'Cessation of Refugee Status under Article 1C(5) and (6)of the 1951 Convention Relating to the Status of Refugees (the "Ceased Circumstances" Clauses)', UN doc. HCR/GIP/03/03, 10 Feb. 2003, available on www.unhcr.org.

11 Statute of the Office of the United Nations High Commissioner for Refugees, A/RES/428 (V), 14 Dec. 1950.

12 See also, e.g., Executive Committee, Conclusion No. 25 (XXXIII), 1982, para. b. A recent article goes as far as to assert that the principle of *non-refoulement* has acquired the status of *jus cogens*.

Meeting mentioned above also affirms the principle of *non-refoulement* as being embedded in customary international law.[13]

The Opinion shows that States' responsibility for their actions encompasses any measure resulting in *refoulement*, including certain interception practices, rejection at the frontier, or indirect *refoulement*, as determined by the law on State responsibility. On this issue, the Opinion brings into the analysis the draft Articles on State responsibility adopted by the International Law Commission of the United Nations on 31 May 2001[14] and endorsed by the General Assembly at the end of that year,[15] demonstrating how they affect State action. Such action may be taken beyond a State's borders or carried out by individuals or bodies acting on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc. These actions are frequently carried out at borders far from public scrutiny, beyond borders in other countries, or on the high seas – the prohibition on *refoulement* applies in all such situations.

In their detailed analysis, Sir Elihu and Bethlehem also make a distinction between rejection, return, or expulsion in any manner whatsoever to torture or cruel, inhuman or degrading treatment or punishment, and such measures which result in return to a threat of persecution on Convention grounds. The former draws on principles of international human rights law and allows no limitation or exception. In the case of return to a threat of persecution, derogation is only permissible where there are overriding reasons of national security or public safety and where the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a third country.

See, J. Allain, 'The *Jus Cogens* Nature of *Non-Refoulement*', 13(4) *International Journal of Refugee Law*, 2001, pp. 533–58.

13 The Declaration acknowledged:

> the continuing relevance and resilience of this international regime of rights and principles [comprising the 1951 Convention, its 1967 Protocol, other human rights and regional refugee protection instruments], including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law.

For the full text of the Declaration, see Part 1.3 of this book.

14 International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', UN doc. A/CN.4/L.602, 31 May 2001. See also, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), ch. 2.

15 In a resolution on 12 Dec. 2001, the UN General Assembly, expressed 'its appreciation to the International Law Commission for . . . the completion of the final draft articles'. See UNGA, 'Report of the International Law Commission on the Work of its Fifty-Third Session', UN doc. A/RES/56/82, 18 Jan. 2002, para. 2.

Since the drafting of the Opinion, the attacks in the United States on 11 September 2001 and their aftermath have led governments to contemplate and/or introduce a range of security measures.[16] Obviously, States have legitimate concerns to ensure that all forms of entry and stay in their territories are not abused for terrorist ends. It is nevertheless essential that more stringent checks at borders, strengthened interception measures, particularly against illegal entrants, and other such measures also include mechanisms to ensure the identification of those with international refugee protection needs. It is therefore, for instance, important that admissibility procedures do not substitute for a substantive assessment of the claim, which could result in the State failing to identify someone in danger of return to persecution.[17]

In the contemporary context, it is worth recalling that the principle of *non-refoulement* also applies with respect to extradition.[18] The 1951 Convention does not in principle pose an obstacle to the extradition and prosecution of recognized refugees in third countries as long as the refugee character of the individual is respected by the third State, as set out in Article 32(2). In this case, the State's obligations towards the refugee would in effect be transferred to the extraditing State. Agreement would therefore need to be reached on return after prosecution has been completed and/or the sentence served (unless of course exclusion, cancellation or cessation arise), so that any danger of indirect *refoulement* is avoided. Extradition requests from the country of origin may, however, be persecutory in intent and therefore require particular scrutiny. If, in a specific case, it is assessed that extradition would amount to return to persecution, prosecution in the country of asylum would be the appropriate response.[19]

Whereas extradition is a response to crimes committed elsewhere, the exception to the *non-refoulement* principle in Article 33(2) of the 1951 Convention could under extraordinary circumstances also come into play in response to crimes committed in the country of refuge. The Convention specifies that refugees have obligations or duties towards the host country. This reflects the necessity that refugees not be

16 See generally, UNHCR, 'Addressing Security Concerns Without Undermining Refugee Protection', Nov. 2001.

17 Ibid., paras. 5–9. See also, UNHCR, 'Regional Workshops in Ottawa, Ontario (Canada) and in Macau', UN doc. EC/GC/01/13, 31 May 2001; UNHCR, 'Refugee Protection and Migration Control: Perspectives from UNHCR and IOM', UN doc. EC/GC/01/11, 31 May 2001; UNHCR, 'Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach', UN doc. EC/50/SC/CRP.17, 9 June 2000; UNHCR, 'Asylum Processes (Fair and Efficient Asylum Procedures)', above n. 9.

18 See generally, Executive Committee Conclusion No. 17 (XXXI), 1980. The issue is also addressed in the paper on the application of the exclusion clauses by G. Gilbert in Part 7.1 of this book.

19 Where a serious crime has been perpetrated, multilateral conventions, including in the anti-terrorism context, have in recent years stipulated a duty to extradite or prosecute. In the post-September 11 context, there is a danger that the increased tendency to depoliticize offences in the extradition context could make persecution considerations secondary in the overall assessment of cases.

seen, and that refugees do not see themselves, as a category outside or beyond the law. While they are a special category of non-nationals, they are bound by the laws of their host country in the same way as others present on the territory. If they transgress the law or infringe public order in their country of asylum, they are fully liable under the relevant domestic laws. While criminal law enforcement measures do not in principle affect their refugee status, Article 33(2) provides an exception to the principle of *non-refoulement*. This means in essence that refugees can exceptionally be returned on two grounds: (1) in cases of a serious threat to the national security of the host country; and (2) in cases where their proven and grave criminal record constitutes a continuing danger to the community. The various elements of these extreme and exceptional circumstances need, however, to be interpreted restrictively. Any ultimate State action will also need to take account of other obligations under international human rights law.[20]

Article 33(2) recognizes that refugees posing such a danger may be expelled in pursuance of a decision reached in accordance with due process of law. In such situations, the danger to the country of refuge must be very serious. In addition, there must be a rational connection between the removal of the refugee and the elimination of the danger, *refoulement* must be the last possible resort to eliminate the danger, and the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement*. In such cases, the procedural safeguards of Article 32 apply, including that States should allow a refugee a reasonable period of time to obtain admission to another country. In view of these safeguards, it is also inappropriate to use this exception to the *non-refoulement* principle to circumvent or short-circuit extradition procedures.

These issues have come under scrutiny in the judgment concerning *Suresh* issued by the Supreme Court of Canada in January 2002.[21] The Court accepted UNHCR's argument in its *factum* before the Court that Article 33 of the 1951 Convention should not be used to deny rights that other legal instruments make available to everyone without exception. It concluded that international law generally rejects deportation to torture, even where national security interests are at stake. In a key passage, the Court ruled:

> In our view, the prohibition in the ICCPR [International Covenant on Civil and Political Rights] and the CAT [Convention Against Torture] on returning a refugee to face a risk of torture reflects the prevailing international norm.

20 For further information, see Human Rights Committee, 'General Comment No. 15: The Position of Aliens under the Covenant', 1986, UN doc. HRI/GEN/1/Rev/5, pp. 127–9, paras. 9–10; Committee on Migration, Refugees and Demography of the Council of Europe Parliamentary Assembly, 'Expulsion Procedures in Conformity with Human Rights and Enforced with Respect for Safety and Dignity', 10 Sept. 2001; Council of Europe Commissioner for Human Rights, 'Recommendation Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders', CommDH/Rec(2001), 19 Sept. 2001, available on http://www.commissioner.coe.int/new/dyn/docs.asp? L=2&S=3.

21 *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada, [2002] SCC 1, 11 Jan. 2002, available at http://www.lexum.umontreal.ca/csc-scc/en/rec/html/suresh.en.html.

> Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the Refugee Convention itself expresses a 'profound concern for refugees' and its principal purpose is to 'assure refugees the widest possible exercise of . . . fundamental rights and freedoms' (Preamble). This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments make universally available to everyone.[22]

The Court recognized 'the dominant status' of the Convention Against Torture in international law as being consistent with the position taken by the Committee Against Torture.[23] It described 'the rejection of state action leading to torture generally, and deportation to torture specifically' as 'virtually categoric', arguing that 'both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests'.[24] Such an assessment could appear to represent a stance that is less than the absolute ban on torture set out in the Convention Against Torture and other human rights instruments. It remains to be seen whether national, regional, or international courts will identify cases where the danger to the State outweighs the threat of torture upon return and how such an approach could be reconciled with the absolute ban on return to torture set out in numerous international human rights instruments (shown for some instruments through consistent interpretation by the relevant treaty monitoring bodies).

Most recently, the Council of Europe in May 2002 opened for signature Protocol No. 13 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances.[25] This new Protocol to the Convention, by barring the death penalty even 'in time of war or of imminent threat of war' (as is excluded from the Protocol No. 6 ban on the death penalty),[26] may further solidify the current jurisprudential understanding of the scope of *non-refoulement*. Jurisprudence under the European Human Rights Convention has generally dealt with the prohibition on return to torture, inhuman or degrading treatment or punishment under Article 3 of that Convention rather than the death penalty. For its part, the European Commission on Human Rights has ruled that it can be a breach of Protocol No. 6 to extradite or expel a person to another State where there is a real risk that the death penalty will be imposed.[27] The eventual entry into force of Protocol No. 13 may and,

22 Ibid., para. 72. 1966 International Covenant on Civil and Political Rights, 999 UNTS 171; 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc. A/RES/39/46.

23 *Suresh* judgment, above n. 21, para. 73.

24 Ibid., para. 76.

25 European Treaty Series (ETS) No. 187 and, for the Convention, ETS No. 5.

26 28 April 1983, ETS No. 114.

27 *Y.* v. *The Netherlands*, Application No. 16531/90, 68 Decisions and Reports 299, 1991; *Aylor Davis* v. *France*, Application No. 22742/93, 76 Decisions and Reports 164, 1994; *Leong Chong Meng* v.

in our view, should have the effect of barring in absolute terms the return of an individual from States Parties to these Protocols to situations where he or she may face the death penalty.

B. Article 31 of the 1951 Convention Relating to the Status of Refugees: illegal entry

Part 3 of this book addresses the question of the interpretation of Article 31 of the 1951 Convention, which codifies a principle of immunity from penalties for refugees who come directly from a territory where their life or freedom is threatened and enter or are present in a country without authorization, as long as they present themselves to the authorities 'without delay' and 'show good cause' for their illegal entry or presence. The background paper by Guy S. Goodwin-Gill examines the origins of the text of this Article, its incorporation into national law, relevant case law, State practice, and the Conclusions of the Executive Committee of the High Commissioner's Programme, as well as international standards relevant to the proper interpretation of Article 31.

Both Goodwin-Gill's paper and the discussions at the November 2001 expert roundtable in Geneva assess the scope and definition of terms in Article 31(1) including, in particular, 'coming directly', 'without delay', 'good cause', and 'penalties'. They conclude that it is generally recognized that refugees are not required to have come directly in the literal sense from territories where their life or freedom is threatened. Rather, Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited through other countries or who are unable to find effective protection in the first country or countries to which they flee. There is also general acceptance that asylum seekers have a presumptive entitlement to the benefits of Article 31 until they are 'found not to be in need of international protection in a final decision following a fair procedure'.[28]

With regard to Article 31(2), this calls upon States not to apply to the movements of refugees within the scope of paragraph 1, restrictions other than those that are 'necessary', and only until their status is regularized locally or they secure admission to another country. In order to ensure that they adhere to the standards set out in Article 31(2), States also need to make 'appropriate provision . . . at the national level to ensure that only such restrictions are applied as are necessary in the individual case, that they satisfy the other requirements of this Article, and that the relevant standards, in particular international human rights law, are taken into

Portugal, Application No. 25862/95, 1995; *Alla Raidl* v. *Austria*, Application No. 25342/94, 1995. See also, N. Mole, *Asylum and the European Convention on Human Rights* (Council of Europe Human Rights Files No. 9 (revised), Strasbourg, 2000), p. 24.

28 Global Consultations on International Protection, 'Summary Conclusions – Article 31 of the 1951 Convention', expert roundtable, Geneva, Nov. 2001, para. 10(g).

account'.[29] Developments in international human rights law mean that any restrictions imposed may be on the basis of an administrative, semi-judicial, or judicial decision, as long as there is an appeal to a judicial body. Participants at the roundtable also agreed that '[t]he power of the State to impose a restriction must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily.'[30]

It is on this basis that the detention of asylum seekers and refugees represents an exceptional measure to be applied in the individual case, where it has been determined by the appropriate authority to be necessary in light of the circumstances of the case. Such a determination needs to be on the basis of criteria established by law in line with international refugee and human rights law. It should therefore not be applied unlawfully nor arbitrarily but only where it is necessary for the reasons outlined in Executive Committee Conclusion No. 44, for example for the protection of national security or public order (for instance, if there is a real risk of absconding). UNHCR's 1999 Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers provide further and updated guidance.[31] Both the Guidelines and the Summary Conclusions affirm generally recognized principles

29 Ibid., paras. 5 and 8. 30 Ibid., para. 11(a).

31 UNHCR, 'Revised Guidelines on the Detention of Asylum Seekers – Revision', 26 Feb. 1999. See also, UNHCR, 'Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice', UN doc. EC/49/SC/CRP.13, 4 June 1999; UNHCR, 'Detention of Asylum-Seekers in Europe', vol. 1 (4), *European Series*, Oct. 1995. In addition to the rights set out in general human rights treaties, relevant standards include the 1955 UN Standard Minimum Rules for the Treatment of Prisoners, Economic and Social Council Res. 663 C (XXIV), 31 July 1957, and 2076 (LXII), 13 May 1977; the 1988 UN 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment'; Commission on Human Rights, 'Report of the Working Group on Arbitrary Detention – Deliberation No. 5 on the Situation of Immigrants and Asylum-Seekers of the Working Group on Arbitrary Detention', UN doc. E/CN.4/2000/4, Annex II, 28 Dec. 1999; Sub-Commission on the Promotion and Protection of Human Rights, 'Resolution on the Detention of Asylum-Seekers', UN doc. E/CN.4/Sub.2/2000/46, 18 Aug. 2000, pp. 66–7. Regional provisions include European Human Rights Convention, Art. 5(1); American Convention on Human Rights 1969, Art. 7(2), OAS Treaty Series No. 35; African Charter on Human and People's Rights 1981, Art. 5, 21 ILM, 58, 1982; Council of Europe, Commissioner for Human Rights, 'Recommendation Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders', CommDH/Rec(2001)1, 19 Sept. 2001. For guidelines issued at the national level, see US Immigration and Naturalization Service, 'Detention Operations Manual' (containing a complete set of Detention Standards), available at http://www.ins.gov/graphics/lawsregs/guidance.htm; Immigration and Refugee Board of Canada, 'Guideline 4: Guidelines on Detention', 12 March 1998, available at http://www.irb.gc.ca/en/about/guidlines/detention/detention_e.htm; Australian Human Rights and Equal Opportunity Commission, 'Immigration Detention Guidelines', March 2000, available at http://www.hreoc.gov.au/human_rights/asylum_seekers/index.html#idc_guidelines/; European Council on Refugees and Exiles (ECRE), 'Research Paper on Alternatives to Detention: Practical Alternatives to the Administrative Detention of Asylum Seekers and Rejected Asylum Seekers', Sept. 1997, available at http://www.ecre.org/policy/research_papers.shtml.

concerning families and children, including that children under eighteen ought in principle not to be detained and that, where families are exceptionally detained, they should not be separated.[32]

Although there has been a tendency in some States to introduce or increase the detention of asylum seekers – often apparently in a move to deter future illegal arrivals – there would nevertheless be merit in examining in greater depth alternatives to detention. As both Goodwin-Gill and the expert roundtable note:

> Many States have been able to manage their asylum systems and their immigration programmes without recourse to physical restraint. Before resorting to detention, alternatives should always be considered in the individual case. Such alternatives include reporting and residency requirements, bonds, community supervision, or open centres. These may be explored with the involvement of civil society.[33]

Moves to promote fair but more expeditious asylum procedures, coupled with the prompt removal of those found not to be in need of international protection, can also reduce the need to resort to detention.

Where States do detain asylum seekers, this should not take place in prison facilities where criminals are held. Minimum procedural standards require that there should be a right to review the legality and the necessity of detention before an independent court or tribunal, in accordance with the rule of law and the principles of due process. Such standards also require that refugees and asylum seekers be advised of their legal rights, have access to counsel and to the judiciary, and be enabled to contact UNHCR.[34]

C. Membership of a particular social group

Part 4 examines the interpretation of the phrase 'membership of a particular social group' contained in the Convention refugee definition in Article 1A(2) of the 1951 Convention.[35] This has been the least clear of the persecution

32 'Summary Conclusions – Article 31 of the 1951 Convention', above n. 28, para. 11(f).

33 Ibid., para. 11(g).

34 Ibid., para. 11(i).

35 Art. 1A(2) of the 1951 Convention reads:

> For the purposes of the present Convention, the term 'refugee' shall apply to any person who: . . .
>
> (2) . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it . . .

grounds in the refugee definition,[36] but in recent years it has found its place alongside the other four Convention grounds (race, religion, nationality, and political opinion), allowing for a full application of the refugee definition. Depending on the particular circumstances of the case and the society of origin, many categories of particular social groups have been recognized, including for example subcategories of women, families, occupational groups, conscientious objectors, or homosexuals.

Two approaches have been developed in common law jurisdictions – the 'protected characteristics' and the 'social perception' approaches. By contrast, in civil law jurisdictions, the reasoning behind particular social group cases tends to be less developed, although the types of group recognized as particular social groups are often similar. The paper by T. Alexander Aleinikoff sets out the development of these two approaches in eight different jurisdictions.

What is known as the 'protected characteristics' approach examines whether a group is united by an immutable characteristic or by a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). By contrast, the 'social perception' approach examines whether or not a group shares a common characteristic which sets it apart from society at large. This latter approach is particularly strongly developed in Australian jurisprudence, while the former has been more emphasized in Canada, the United Kingdom, and the United States.

Analysis under one or other of these two approaches frequently converges, since groups whose members are targeted on the basis of a common immutable or fundamental characteristic are also often perceived as a social group in their societies. Sometimes, however, the two approaches may come to different conclusions, with the result that protection 'gaps' can arise, when either one or another approach is used alone. As Aleinikoff points out, while 'most "protected characteristics" groups are likely to be perceived as social groups, there may also be particular social groups not based on protected characteristics'.[37] It is on this basis that the 'social perception' approach 'moves beyond protected characteristics by recognizing that external factors can be important to a proper social group definition'.[38]

In order to avoid these protection gaps and to bring interpretation into line with the object and purpose of the 1951 Convention, Aleinikoff's paper and the Summary Conclusions of the expert roundtable meeting in San Remo, Italy, in September 2001 suggest a combination of the two approaches. This reconciliatory proposition is reflected in UNHCR's Guidelines on International Protection

36 The ground was added to the Convention refugee definition late in negotiations and does not in fact feature in UNHCR's 1950 Statute.

37 See the paper by T. A. Aleinikoff in Part 4.1 of this book.

38 Ibid.

on membership of a particular social group released in May 2002. These define a particular social group as:

> a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[39]

In assessing whether an applicant claiming membership of a particular social group fulfils the refugee definition, common law courts and tribunals have generally recognized that the persecution or fear of it should not be the sole factor defining membership, even though it may be relevant in determining the visibility of the group in that society. As stated in one leading case:

> [W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.[40]

Similarly, it is widely accepted that an applicant claiming membership of a particular social group does not need to show that the members of that group know each other or associate with one another as a group. Rather, there is no requirement of cohesiveness either in relation to this or any other Convention ground and the relevant inquiry is whether there is a common element that group members share.[41]

In addition to the Guidelines on International Protection mentioned above, the 'second track' Global Consultations on this topic have fed into other processes under way at the regional level. For instance, the Summary Conclusions emerging from the expert roundtable on 'membership of a particular social group' were used as a starting point in discussions on the meaning of the term by a CAHAR working

39 UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group"', above n. 10, para. 11.

40 *Applicant A.* v. *Minister for Immigration and Ethnic Affairs*, High Court of Australia, (1997) 190 CLR 225 at 264; 142 ALR 331, per McHugh J. Note that some civil law jurisdictions have no problem accepting as a particular social group one that is defined by the persecution it suffers.

41 The judgment in *Secretary of State for the Home Department* v. *Montoya*, UK Immigration Appeal Tribunal, Appeal No. CC/15806/2000, 27 April 2001, expresses this position as follows: 'It is not necessary to show that the [particular social group] is a cohesive or organised or interdependent group. Cohesiveness is not a necessary condition (nor indeed a sufficient condition) for the existence of a particular social group.' More generally, the judgment draws on the jurisprudence of various common law countries to set out in some detail issues where jurisprudence is settled.

group of the Council of Europe, in Strasbourg on 14–15 March 2002. Various ideas from the Conclusions were also reflected in the working group's recommendations. This is only one example, but the hope in initiating the Global Consultations was very much that the process should feed into other initiatives, whether at an international, regional, or national level, to establish greater common ground and clarity on key contemporary refugee law matters under the 1951 Convention.

D. Gender-related persecution

Gender and sex are not specifically referred to in the refugee definition but the understanding of how gender is relevant to refugee law has advanced both in theory and in practice over the past decade. Part 5 examines these issues. It is now widely accepted that 'the refugee definition, properly interpreted, can encompass gender-related claims' and that gender 'can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment',[42] as concluded by the September 2001 San Remo expert roundtable on the issue and as is evident in the jurisprudence of many countries.[43]

Integral to this enhanced understanding is a clear distinction between the terms 'gender' and 'sex'. The UNHCR Guidelines on International Protection on gender-related persecution issued in May 2002 reflect this distinction as follows:

> Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related claims may be brought by either women or men, although due to particular types of

42 Global Consultations on International Protection, 'Summary Conclusions – Gender-Related Persecution', San Remo expert roundtable, 6–8 Sept. 2001, paras. 1 and 3. See also, UNHCR symposium on gender-related persecution held in Feb. 1996 which resulted in a special issue of the *International Journal of Refugee Law*, Autumn 1997; UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10.

43 See R. Haines, 'Gender-related persecution'; A. Edwards, 'Age and gender dimensions in international refugee law'; T. A. Aleinikoff, 'Protected characteristics and social perceptions: an analysis of the meaning of "Membership of a Particular Social Group"', in Parts 5.1, 1.2 and 4.1 respectively of this book. Recent publications include W. Kälin, 'Gender-Related Persecution in Swiss Asylum Law', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer Law International, The Hague, 2002); N. Kelley, 'The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress', 13(4) *International Journal of Refugee Law*, 2001, pp. 559–68; K. Musalo and S. Knight, 'Steps Forward and Steps Back: Uneven Progress in the Law on Social Group and Gender-Based Claims in the United States', 13(1/2) *International Journal of Refugee Law*, 2001 pp. 51–70; T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Aldershot, 2000); H. Crawley, *Refugees and Gender – Law and Process* (Jordans, Bristol, 2001).

> persecution, they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex.[44]

Awareness and appreciation of the issues involved has been enhanced by guidelines on gender-related persecution, which have been issued by government agencies and NGOs in a large number of States and which provided a valuable resource in the drafting of the May 2002 UNHCR Guidelines cited above. In some countries, legislation explicitly defines gender-specific persecution as qualifying for refugee status. Sometimes this is done by specifying that the 'membership of a particular social group' ground can include cases involving gender-related persecution.[45] Sometimes legislation states that persecution because of gender and/or sexual orientation can result in the granting of refugee status.[46] In either case, this does not argue for the need of an extra Convention ground per se. Rather, we consider that such specification is added for clarity of interpretation.

The paper by Rodger Haines in this book focuses on how the refugee definition can be interpreted in a gender-sensitive manner in the case of claims made by female asylum seekers. In this respect, it has been instrumental that a vast majority of jurisdictions have recognized that the 1951 Convention covers situations where non-State actors of persecution, including husbands or other family members, inflict serious harm in a situation where the State is unable or unwilling to protect against such harm. As the UNHCR 2002 Guidelines on gender-related persecution state:

> What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. While female and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex . . . There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which

44 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, para. 3. See also, Crawley, *Refugees and Gender*, above n. 43, pp. 6–9.

45 For instance, the Ireland's Refugee Act 1996, section 1, defines membership of a particular social group as including 'persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation'. South Africa's Refugee Act 1998 similarly specifies that members of a particular social group can include persons persecuted because of their gender, sexual orientation, class, or caste.

46 In Switzerland, Art. 3(2) of the 1998 Asylum Act states that 'motives of flight specific to women shall be taken into account'. In Sweden, the Minister of Migration, Asylum and Development Co-operation announced in Jan. 2002 that 1997 legislation would be changed to specify that persons persecuted due to sexual orientation should be given refugee status (rather than complementary protection as previously). In Germany, the Immigration Law approved by the Parliament in March 2002 in section 60 specifically prohibits the *refoulement* of aliens facing persecution because of their gender (in addition to the five Convention grounds).

> inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.[47]

These issues are also examined in Part 1.2 of this book in the paper on age- and gender-sensitive dimensions of international refugee law by Alice Edwards.

It is worth recalling that refugee claims based on sexual orientation also contain a gender element. Indeed, such claims have now been recognized in many common law and civil law jurisdictions.[48] As the 2002 UNHCR Guidelines on gender-related persecution note:

> A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.[49]

Another issue of particular contemporary concern relates to the potential international refugee protection needs of individuals – particularly women and minors – who are trafficked[50] into forced prostitution or other forms of sexual exploitation. Such practices represent 'a form of gender-related violence or abuse that can even lead to death'.[51] They can be considered a form of torture and cruel or inhuman or degrading treatment and can 'impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents'.[52] Trafficked women and minors may also 'face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination'.[53] Such

47 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, para. 9 (footnotes omitted).

48 European Legal Network on Asylum (ELENA), 'Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status', European Council on Refugees and Exiles, London, Sept. 1997.

49 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, para. 16.

50 A distinction is drawn here between smuggling and trafficking, as is made in the two protocols on these issues supplementing the UN Convention Against Transnational Organized Crime, UN doc. A/55/383, Nov. 2000.

51 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, para. 18; UNHCR, 'Refugee Women', above n. 9, paras. 18–19. See also, A. Edwards, 'Resettlement: A Valuable Tool in Protecting Refugee, Internally Displaced and Trafficked Women and Girls', 11 *Forced Migration Review*, Oct. 2001, p. 31, at p. 34.

52 UNHCR Guidelines, ibid.

53 Ibid.

considerations have recently led decision makers in some States to recognize certain victims of trafficking as refugees or grant them complementary protection.[54]

Where asylum claims concern gender-related persecution, an assessment of the role of law in the persecution can be particularly important. For instance, a law may be assessed as persecutory in and of itself, but it may no longer be enforced, in which case the persecution may not live up to the well-founded fear standard.[55] Alternatively, even though a law exists prohibiting a persecutory practice, such as female genital mutilation or other harmful traditional practices, the State may still continue to condone or tolerate the practice, or may not be able to stop it effectively. In such cases, the practice would amount to persecution irrespective of the existence of a law aimed at its prohibition.

Considerable challenges nevertheless remain if the decisions and guidelines on gender-related persecution issued in many States are to be understood and implemented consistently. Strengthened training, commitment, and adequate resources are needed to ensure appropriate safeguards and a gender-sensitive environment are both in place and upheld. One key requirement, for instance, is for women to be enabled to make independent and confidential applications for asylum, without the presence of male family members if they so desire. It is also important for female asylum seekers to be offered legal advice and information about the asylum process in a manner and language they can understand. An increase in the number of trained female staff as evidenced in many asylum systems is a noted improvement. As UNHCR has stated, '[w]ithout these minimum safeguards, the refugee claims of women would often not be heard'.[56]

E. Internal flight, relocation, or protection alternative

From the mid-1980s, a number of countries of asylum have increasingly used the concept known variously as the internal flight, relocation or protection alternative to deny refugee status to claimants who do not have a well-founded fear of persecution throughout the country of origin. This concept, which is addressed in Part 6 of the book, does not explicitly feature in the 1951 Convention, although

54 For examples see the paper by A. Edwards in Part 1.2 of this book.

55 See, *Modinos* v. *Cyprus*, European Court of Human Rights, Series A, No. 259, 16 EHRR 485, 25 March 1993; and more recently, *Secretary of State for the Home Department* v. *Z.*; *A.* v. *Secretary of State for the Home Department*; *M.* v. *Secretary of State for the Home Department*, English Court of Appeal, conjoined appeal of cases nos. C/2001/2766, C/2001/2520, and C/2001/2325, [2002] EWCA Civ 952, 5 July 2002.

56 UNHCR, 'Refugee Women', above n. 9, para. 15. See also, among others, UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', above n. 10, paras. 35–6; Crawley, *Refugees and Gender*, above n. 43, ch. 10; G. Hinshelwood, 'Interviewing Female Asylum Seekers', *International Journal of Refugee Law*, special issue, 1997, pp. 159–64.

it can be said to be inherent within it.[57] For the forty-two States which are party to the 1969 OAU Refugee Convention, the question of internal flight does not in any case arise, since in addition to reiterating the 1951 Convention refugee definition it specifically includes events prompting flight 'in either part or the whole of his country of origin'.[58]

Various approaches to the issue have been developed and have in turn been applied inconsistently both among and within jurisdictions. This is why the issue was included in the second track of the Global Consultations and some progress has been made in establishing a common analytical approach to the questions which internal flight or relocation raises. Many aspects of this issue on which there can now be said to exist some common understanding are set out in the Summary Conclusions of the expert roundtable meeting held in San Remo, Italy, in September 2001 and reproduced in Part 6.2 of this book.

These recognize, for instance, that the 'relevance of considering IPA/IRA/IFA [the internal protection, relocation or flight alternative] will depend on the particular factual circumstances of an individual case'.[59] This may appear obvious, but the corollary is that internal flight or relocation does not represent a procedural shortcut for deciding the admissibility of claims.[60] Rather, there is a need for substantive assessment of claims which raise internal flight questions if these individual circumstances are to be properly assessed.

Another area on which there appears to be a greater measure of agreement is that the complexity of the issues involved in the examination of internal flight or relocation means that this is not appropriately undertaken in accelerated or admissibility procedures. This is the position taken in the European Commission's 2000 Draft Directive on asylum procedures which allows member States to adopt or retain accelerated procedures for claims suspected of being manifestly

57 See e.g., *Rasaratnam* v. *Canada (Minister of Employment and Immigration)*, Federal Court of Canada, [1992] 1 FC 706, [1992] 1 FCJ 706 (CA), 1991; *Thirunavukkarasu* v. *Canada (Minister of Employment and Immigration)*, Canadian Court of Appeal, [1994] 1 FC 589, 10 Nov. 1993.

58 The 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, Art. I(2), defines the term 'refugee' as applying:

> to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order *in either part or the whole of his country of origin or nationality*, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. (emphasis added)

59 Global Consultations on International Protection, 'Summary Conclusions on Internal Protection/Relocation/Flight Alternative', 6–8 Sept. 2001, para. 1. The term 'IPA/IRA/IFA' was adopted at the roundtable meeting to acknowledge the different terms used to describe this notion. The exact label used is less important than the holistic assessment of the circumstances of each individual case.

60 UNHCR, 'Position Paper: Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-called "Internal Flight Alternative" or "Relocation Principles")', Feb. 1999, paras. 2 and 18.

unfounded but explicitly excludes internal flight cases from consideration under such procedures.[61] This represents a positive change from the (non-binding) London 'Resolution on Manifestly Unfounded Claims' approved by European Community Immigration Ministers in 1992 which considered internal flight cases to be manifestly unfounded and declared that they could be assessed under admissibility or accelerated procedures.[62] On this basis, cases involving a possible internal flight/relocation alternative properly need to be considered under the regular asylum procedure.

There is also general recognition (despite some earlier jurisprudence to the contrary)[63] that where return to an alternative region is under consideration the assessment should be forward-looking and examine the situation of the individual upon return. In any such assessment, the original reasons for flight are naturally likely to be indicative of any potential serious difficulties the individual might face if returned. Similarly, there is acknowledgment of the need for actual, physical, safe, and legal accessibility of a specific alternative location.

Differences remain, however, as to the relevance of the agent of persecution – particularly in cases involving non-State actors – where internal flight or relocation questions arise, and as to the conceptual 'home' for the analysis of whether internal flight or relocation is possible. There is also a need for greater clarity regarding the proper application of the 'reasonableness' test used in the majority of jurisdictions to assess the viability of the area of relocation.

In our view, the question of whether or not the agent of persecution is the State or a non-State actor is significant in internal flight or relocation cases. The need to examine a putative internal flight or relocation alternative is only relevant where the fear of persecution is limited to a specific part of the country, outside of which the feared harm cannot materialize. As noted by UNHCR in its 2001 paper on interpreting Article 1: 'In practical terms, this excludes virtually all cases where the feared persecution emanates from or is condoned or tolerated by State agents, as these are normally presumed to exercise authority in all parts of the country.'[64] Such State agents will generally also include local and regional government authorities,

61 European Commission, 'Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', COM(2000) 578 final, 20 Sept. 2000, Art. 28(2)(a). The amended proposal for a Council Directive on this issue presented by the Commission on 18 June 2002, COM(2002) 326 final, p. 15, reorders the provisions on manifestly unfounded applications, and the explanatory memorandum explains that as a result former Art. 28(2)(a) 'is no longer necessary'. The position would thus appear not to have changed from that taken at the first draft.

62 EC Council of (Immigration) Ministers, 'Resolution on Manifestly Unfounded Applications for Asylum', 30 Nov.–1 Dec. 1992, para. 7. See R. Plender (ed.), *Basic Documents on International Migration Law* (Martinus Nijhoff, The Hague, 1999), pp. 474–7.

63 See, H. Storey, 'The Internal Flight Alternative Test: the Jurisprudence Re-examined', 10 *International Journal of Refuge Law*, 1998, p. 499, at pp. 509–11.

64 UNHCR, 'Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001, para. 13 (footnotes omitted).

since they derive their authority from the national government. By contrast, where the fear emanates from non-State actors, consideration of internal relocation will more often be relevant.

With regard to the question of the proper conceptual 'home' within the refugee definition for the assessment of any potential internal flight or relocation alternative, there are different approaches. One views this as part of the analysis of the existence of a 'well-founded fear' of persecution for a Convention reason. Another regards it as part of the analysis of whether the asylum seeker is 'unable, or . . . unwilling to avail himself [or herself] of the protection of that country'.

The latter approach is adopted by the 'Michigan Guidelines on the Internal Protection Alternative' issued in April 1999,[65] and is presented in this book in the paper by James C. Hathaway and Michelle Foster. It has been adopted by the New Zealand Refugee Status Appeals Authority. This proposes a two-stage approach which first ascertains the risk of persecution for a Convention reason in at least one part of the country and then determines the individual's inability or unwillingness to avail him or herself of the protection of the country of origin on the basis of an assessment as to whether the asylum seeker has access to meaningful internal protection against the risk of persecution. Hathaway and Foster then identify four steps to assess whether an internal protection alternative (IPA) is available:

> First, is the proposed IPA accessible to the individual – meaning access that is practical, safe, and legal? Second, does the IPA offer an 'antidote' to the well-founded fear of being persecuted shown to exist in the applicant's place of origin – that is, does it present less than a 'real chance' or 'serious possibility' of the original risk? Third, is it clear that there are no new risks of being persecuted in the IPA, or of direct or indirect *refoulement* back to the place of origin? And fourth, is at least the minimum standard of affirmative State protection available in the proposed IPA?[66]

The more common approach favours a holistic analysis of the refugee claim, in which the different elements of the refugee definition are seen as an interrelated whole.[67] It is only by ascertaining the nature of the persecution feared, including in particular who the agent of persecution is, that it will become clear whether or not internal flight is relevant. If it is, a clear understanding of the nature of the well-foundedness of the feared persecution is intrinsic to an assessment of the viability of any alternative location in the country of origin.

In the understanding of this approach, the conceptual home of the assessment of an internal flight possibility is considered to be part of the examination of the

65 See J. C. Hathaway, 'The Michigan Guidelines on the Internal Protection Alternative', 21(1) *Michigan Journal of International Law*, 1999, p. 131, available on http://www.refugeecaselaw.org/Refugee/guidelines.htm.

66 See the paper by J. C. Hathaway and M. Foster in Part 6.1 of this book.

67 See also section IV of this introduction below.

well-foundedness of the feared persecution element of the refugee definition.[68] Locating the analysis of any putative alternative flight or relocation area here – far from providing 'a basis for pre-emption of analysis of risk in the place of origin altogether' as Hathaway and Foster argue in their conclusion – ensures that any assessment of risk in an alternative location draws on a clear understanding of the validity and basis for the well-founded fear in the area of origin. Such an understanding is thus a crucial element in the effective assessment of whether that – or indeed another – well-founded fear of persecution (whether or not for a Convention reason) or a fear of being forced back to the place of origin exists in the proposed alternative location.

A key tool under this approach in internal flight or relocation cases is whether it is reasonable for the asylum seeker concerned to establish him or herself in the proposed alternative location. This 'reasonableness test', which involves an assessment of the risk of future persecution and whether relocation would expose the individual to undue hardship, has been adopted by the great majority of jurisdictions as the appropriate test in such cases.[69] More generally, the concept of reasonableness is widely understood and applied in other areas of law. Such a test does not in the authors' view 'justif[y] the imposition of what amounts to a duty to hide (for example, by suppressing religious or political beliefs)'.[70] On the contrary, to make such a presumption would be exactly that – unreasonable, not to mention also contrary to basic human rights norms and therefore a misapplication of both the reasonableness test and international law.

For their part, Hathaway and Foster reject the reasonableness test 'in favour of a commitment to assess the sufficiency of the protection which is accessible to the asylum seeker there [in the proposed alternative location]'. Indeed there are elements of reasonableness in Hathaway and Foster's proposed four steps (particularly steps three and four). For instance, does the return of someone to an uninhabitable desert represent return to a location where the minimum standards of affirmative State protection are not met or is it simply unreasonable? Hathaway and Foster themselves suggest that the result is much the same.

Yet there remains a significant difference between the two approaches. Indeed, requiring assessment of whether the State is able and willing to provide protection to the individual concerned in every case, as in the Michigan Guidelines, effectively

68 This is also the position adopted by A. Fortín, 'The Meaning of "Protection" in the Refugee Definition', 12 *International Journal of Refugee Law*, 2001, pp. 548–76.

69 Among those countries adopting the reasonableness test in some form are Australia, Austria, Canada, Germany (in some cases), the Netherlands, Sweden, the United Kingdom, and the United States. Other jurisdictions, apart from the New Zealand Refugee Review Tribunal, adopt various different tests to determine if an internal flight/relocation possibility exists. For further details, see European Legal Network on Asylum, 'The Application of the Concept of International Protection Alternative' (research paper, European Council on Refugees and Exiles, London, 2000).

70 See Hathaway and Foster, conclusion of their paper in Part 6.1 of this book.

adds an additional criterion to the refugee definition. As mentioned above, it is rather in cases involving non-State agents of persecution that a need to examine whether there is a lack of protection arises.

Perhaps the difficulties in defining reasonableness exist because conditions in the country of origin and asylum may differ radically. These differences go to the core of global inequities resulting from instability and conflict, economic inequalities, the imperfect realization of human rights norms, and varying cultural expectations in different parts of the world. Fundamental human rights norms are nevertheless an important yardstick in any assessment of reasonableness, both of whether a well-founded fear would subsist in the alternative location and of whether relocation is practically sustainable in economic and social terms.

The reasonableness test contrasts with the fourth step set out by Hathaway and Foster in their paper. The latter views it as sufficient for the purposes of relocation that the minimum standards of affirmative State protection as set out in Articles 2–33 of the 1951 Convention are deemed to be upheld. This appears to imply that relocation of an individual is a valid consideration where only these minimum rights are respected and to ignore that States have obligations under the international human rights instruments to afford a considerably more comprehensive range of rights to those under their jurisdiction. The effect would appear to be a restrictive understanding of the rights States are obliged to guarantee, which could have the rather incongruous result that a persecuted person would not appear to be entitled to the same level of protection as a fellow citizen.[71]

In effect, the Hathaway–Foster approach seems to equate the responsibility of States to guarantee and safeguard the rights and freedoms of their own citizens, and in particular those who are forcibly displaced within their territories, with the concept of international refugee protection. Recognizing the potential for misunderstanding different notions of protection and its ensuing dangers, the drafters of the Guiding Principles on Internal Displacement[72] were mindful of the need to ensure that there be no specific status attached to internally displaced persons (IDPs). While parallels to refugee law were drawn in certain respects, the drafters were aware of the danger that confining IDPs to a closed status could potentially undermine the exercise of their human rights in a broader sense.

As mentioned above, another standard applied includes the concept of undue hardship, which is broader, since it includes examination of the infringement of fundamental human rights.[73] While there is general agreement that conditions in

71 See, N. Kelley, 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?', 14 *International Journal of Refugee Law*, 2002, p. 4.

72 'Guiding Principles on Internal Displacement', addendum to report submitted to the Commission on Human Rights by the Representative of the Secretary-General for Internally Displaced Persons, Francis Deng, UN doc. E/CN.4/1998/53/Add.2, 11 Feb. 1998.

73 See e.g., the leading *Thirunavukkarasu* case, above n. 57, and *R.* v. *Secretary of State for the Home Department and another, ex parte Robinson*, English Court of Appeal (Civil Division), [1997] 4 All ER

the alternative location should allow the individual concerned to lead a relatively normal life in the context of the country concerned, consensus is lacking when it comes to questions of access to employment, accommodation, or social assistance. Given the divergence in the implementation of economic and social rights in particular in different States around the world, this is where the reasonableness approach recommended in paragraph 91 of the UNHCR *Handbook*[74] comes into play.

One approach proposed by the legal practitioner Ninette Kelley has been to adopt 'a human rights-based approach to "reasonableness"'.[75] She suggests that, if it is found that there is a reasonable chance the persecutor will not persecute the asylum seeker in the alternative location, it should be determined 'whether meaningful protection is otherwise available in that area'. She proposes that the appropriate benchmark for such a determination should be 'whether the claimant's basic civil, political, and socio-economic human rights, as expressed in the refugee Convention *and other major human rights instruments*, would be protected there'.[76] This would not result in too formulaic a framework and would at the same time avoid too loose an interpretation of the 'reasonableness' criteria.

In the light of these considerations, the intention in the UNHCR Guidelines on International Protection on the internal flight or relocation alternative currently in preparation is to provide clearer guidance on these and related issues, by drawing on recent discussions and developments to flesh out the guidelines first produced in February 1999. Further clarification as to how the reasonableness test should be applied will it is hoped assist the majority of States that apply this test to do so more fairly and consistently.

F. Exclusion

Part 7 of the book addresses the exclusion clauses contained in Article 1F of the 1951 Convention. The proper application of the exclusion clauses has been an issue of concern for some time.[77] This is so both in the context of the identification and exclusion of *génocidaires* from among the refugees from the Rwandan genocide in 1994 and in the context of industrialized States' asylum policies and their concern to limit access of those not deserving of refugee protection to the benefits of the 1951 Convention. The proper application of the exclusion clauses

210, 11 July 1997, which both use the phrase 'undue hardship'. See also, Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined', above n. 63, at p. 527.

74 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), para. 91.

75 Kelley, 'Internal Flight/Relocation/Protection Alternative: Is it Reasonable?', above n. 71, at p. 36.

76 Ibid. (emphasis added).

77 See e.g., UNHCR, 'The Exclusion Clauses: Guidelines on Their Application', 1 Dec. 1996; 'Exclusion from Protection', 12 *International Journal of Refugee Law*, special supplementary issue, 2000.

has also come into focus as a result of parallel moves to ensure that perpetrators of major human rights crimes do not enjoy impunity. In particular, such moves include the establishment of the international criminal tribunals for the former Yugoslavia and for Rwanda in the 1990s, and more recently that of the International Criminal Court. Concerns about exclusion have been heightened since the attacks in the United States on 11 September 2001, as States have turned increased attention to these clauses in a move to ensure that terrorists are not able to abuse asylum channels.

The 1951 Convention is very clear on the issue: certain acts are so grave that they render their perpetrators undeserving of international protection and the refugee framework should not stand in the way of serious criminals facing justice.[78] The refugee definition is so framed as to exclude from the ambit of the Convention persons who have committed particularly serious offences. If properly applied, the Convention does not therefore offer safe haven to serious criminals. Indeed, the rigorous application of the exclusion clauses ensures the credibility of individual asylum systems.

When the interpretation and application of Article 1F were discussed at the expert roundtable meeting in Lisbon, Portugal, in May 2001, the participants found that this should take an 'evolutionary approach', and draw on developments in other areas of international law since 1951.[79] The meeting examined contemporary understandings of behaviour at the core of the exclusion clauses, while promoting in tandem a sensitive application that takes account of international legal developments in other fields, including notably in the areas of international criminal law, international human rights, and international humanitarian law. The participants also considered the exclusion clauses to be of an exceptional nature and that they should be applied scrupulously and restrictively in view of the potentially serious consequences of exclusion for the individual concerned.

The three different sets of crimes contained in Article 1F are analyzed in greater depth in the paper by Geoff Gilbert. They represent an exhaustive list. They concern an individual who has committed, first, 'a crime against peace, a war crime, or a crime against humanity', secondly, 'a serious non-political crime [committed] outside the country of refuge prior to his [or her] admission to that country as a refugee', and, thirdly 'acts contrary to the purposes and principles of the United Nations'.

Interpretation of Article 1F(b) concerning serious non-political crimes has been the area on which State practice varies the most, and is therefore the subject of closest scrutiny. The definition of a 'serious' offence needs to be judged against international standards, taking into account factors such as the nature of the act, the actual

78 See UNHCR, 'Addressing Security Concerns Without Undermining Refugee Protection', Nov. 2001.

79 Global Consultations on International Protection, 'Summary Conclusions – Exclusion from Refugee Status', Lisbon expert roundtable, 30 May 2001, para. 2.

harm inflicted, the form of criminal procedures used, the nature of the penalty and whether most jurisdictions would consider the act in question as a serious crime. Its interpretation is also linked to the principle of proportionality, the question being whether the consequences – eventual return to persecution – are proportionate to the type of crime that was committed. The updated UNHCR Guidelines on International Protection on the application of the exclusion clauses[80] propose that a serious crime refer to a capital crime or a very grave punishable act. This would include homicide, rape, arson, and armed robbery. In relation to the meaning of 'non-political', the 'predominance' test is used in most jurisdictions to help determine the nature of the crime in question, that is, whether the offence could be considered to have a predominantly political character. The motivation, context, methods, and proportionality of a crime to its objectives are important factors in evaluating its political nature.[81]

One important issue in assessing cases raising exclusion issues is the need to maintain a clear distinction between Article 1F and other Articles of the Convention, including in particular Article 33(2). The latter concerns the future risk that a recognized refugee may pose to the host State. It involves the withdrawal of protection from *refoulement* for refugees who pose a serious danger to the community in the host State, for example, as a result of particularly heinous crimes committed there and their potential for repetition. With respect to the interpretation of the term 'danger to the security of the country', the Supreme Court of Canada, in its January 2002 judgment in the *Suresh* case, stated that '[t]he threat must be "serious", grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm'.[82]

Exclusion and expulsion remain two different processes, although States in their practice generally emphasize the desire to expel or remove excluded persons from their territory, rather than resort to prosecution. In some cases, this may create a tension with applicable international human rights law.[83] With the increasing expansion of international and universal criminal jurisdiction, this problem may become progressively resolved.

The complexity of the issues exclusion cases raise is a key reason for their examination to be maintained in the regular asylum procedure, or in the context of a specialized exclusion unit, rather than at the admissibility stage or in accelerated

80 UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', forthcoming 2003.

81 One case considered on appeal providing further clarification on the interpretation of the term 'serious non-political crime' and adjudicated since the completion of the paper by G. Gilbert concerns *Minister for Immigration and Multicultural Affairs* v. *Daljit Singh*, High Court of Australia, [2002] HCA 7, 7 March 2002.

82 *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, above n. 21 and analysis in the text there.

83 For relevant international human rights law provisions applying *non-refoulement* as a component of the prohibition on torture or cruel, inhuman, or degrading treatment, see the paper by Lauterpacht and Bethlehem in Part 2.1 of this book, paras. 6–10.

procedures. This ensures an individualized decision is made in keeping with due process standards by a competent authority with appropriate expertise in refugee and criminal law. Obviously, the question of the applicability of the exclusion clauses does not arise in each and every asylum case. While there is no need for a rigid formula requiring separate, consecutive consideration of inclusion and exclusion factors, the reasons why refugee protection may be needed as well as reasons why the claimant may not deserve it need to be considered together in a holistic assessment. It would be possible, for instance, for exclusion to come first in the case of indictments by international tribunals in clear-cut Article 1F(c) cases or in the case of appeal proceedings where the focus of the examination lies on the applicability of the exclusion clauses.

G. Cessation

Like exclusion, the cessation clauses contained in Article 1C of the 1951 Convention and examined in Part 8 of this book have come under increased scrutiny in recent years. In part, this has resulted from the ending of a number of refugee situations after the end of the Cold War, as well as from a concern to realize durable solutions especially in the context of protracted refugee situations, and from the evolution of standards for and a stress on voluntary repatriation as the durable solution sought by the majority of refugees. While not necessarily the same, cessation in the context of large-scale influxes and the ending of temporary protection caused considerable debate in the 1990s.

Against this background, the paper by Joan Fitzpatrick and Rafael Bonoan[84] examines the experience and proper application of the cessation clauses. These concern both Article 1C(1)–(4) of the 1951 Convention based on a change in personal circumstances – re-availment of national protection, re-acquisition of nationality, acquisition of a new nationality, and re-establishment in the country of origin – as well as those based on ceased circumstances under Article 1C(5)–(6). In relation to the former, Fitzpatrick and Bonoan identify 'voluntariness, intent and effective protection' as crucial in any assessment and stress the importance of 'careful analysis of the individual's motivations and of assessment of the bona fides and capacities of State authorities'.

It is, however, on ceased circumstances cessation that States have focused particular attention, even though they have generally rarely invoked these clauses. This

84 This paper has been drawn together from two separate papers by these authors, which were presented at the expert roundtable on cessation in Lisbon in May 2001: J. Fitzpatrick, 'Current Issues in Cessation of Protection under Article 1C of the 1951 Refugee Convention and Article I.4 of the 1969 OAU Convention'; R. Bonoan, 'When is Protection No Longer Necessary? The "Ceased Circumstances" Provisions of the Cessation Clauses: Principles and UNHCR Practice, 1973–1999'.

has been not least because of the administrative costs involved, the possibility that an individual may in any case be entitled to remain with some other status, and/or a preference for naturalization under Article 34 of the 1951 Convention. Indeed, cessation is not to be equated with or viewed as triggering automatic return. It can, for instance, also be an administrative formality whereby responsibility is transferred from the authorities dealing with refugee matters to another department within a government dealing generally with immigration issues.

Drawing on the practice of both UNHCR and States, the background paper and the Summary Conclusions of the expert roundtable held in Lisbon in May 2001 indicate substantial agreement that change in the country of origin needs to be of a 'fundamental, stable and durable character' if the cessation clauses are to be invoked.[85] The Summary Conclusions also recommend that the assessment examining the application of the general cessation clauses should include 'consideration of a range of factors including human security, the sustainability of return, and the general human rights situation', and suggest that refugees themselves be involved in procedures and processes to make such an assessment.[86]

Another issue of contemporary concern is the question of exceptions to any general declaration of cessation. One exception is that on the basis of 'compelling reasons arising out of previous persecution' as referred to in Article 1C(5) and (6). This is now well established in State practice as extending beyond the actual terms of this provision to apply to refugees under Article 1A(2) of the 1951 Convention. In such circumstances, the best State practice in keeping with the spirit of the Convention allows for the continuation of refugee status, although States sometimes accord such individuals subsidiary statuses, which may not necessarily provide a secure legal status or preserve 'previously acquired rights' as stipulated by the Executive Committee.[87] Other exceptions involve those for whom return is prohibited under human rights treaties, including those who would suffer serious economic harm if repatriated. There may also be strong humanitarian reasons for not applying cessation to refugees whose long stay in the host country has resulted in strong family, social, and economic ties. This exception is recognized in State practice through the granting of long-term residence status to such individuals.

Cessation in relation to situations of mass influx which overwhelm individual asylum processes has also been an area where States have sought to develop practice, including notably in the European Union's Directive on temporary protection approved in August 2001.[88] Where access to the asylum procedure has been

85 Executive Committee, Conclusion No. 69 (XLIII) 1992, para. b.

86 Global Consultations on International Protection, 'Summary Conclusions – Cessation of Refugee Status', Lisbon expert roundtable, 3–4 May 2001, paras. 10 and 12.

87 Executive Committee, Conclusion No. 69, above n. 85, para. e.

88 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.

suspended for the duration of temporary protection, it is now widely recognized that those affected by the ending of temporary protection must be allowed to apply for asylum if they wish and must also be able to validate compelling reasons arising out of past persecution. A recent example concerns the case of Kosovo Albanian refugees who had fled to Albania between April 1998 and May 1999, whose temporary status was revoked by the Albanian authorities in March 2002. The ending of temporary protection was coupled with the possibility for individuals to apply for asylum. It also provided for assisted repatriation by UNHCR for those wishing to return home.[89]

A final issue where clarity is lacking in the practice of some States concerns the situation where cessation concepts are applied at the stage of procedures to assess asylum claims. This is particularly complex in cases where the individual clearly left the country of origin as a refugee, applied for asylum but his or her case is only examined after a protracted period of time, during which circumstances have changed considerably in his or her country. Where there may be fundamental changes in the country of origin during the course of the asylum procedure, it is the authorities which bear the burden of proving such changes are fundamental and durable.[90]

UNHCR has updated its guidance on the cessation clauses in the light of the discussions which have taken place in the context of the second track of the Global Consultations and the wealth of material UNHCR has received in response to this background paper.[91] The focus of the update will need to be a balanced one – flexible and yet in accordance with the fundamental tenets underlying the rationale of the cessation clauses.

H. Family unity and refugee protection

Part 9 of the book addresses the scope of the right to family unity and how family reunification can be used to implement that right. The basis for this right is found in Recommendation B of the Final Act of the 1951 Conference of Plenipotentiaries which affirms among others that 'the unity of the family . . . is an essential right of the refugee'.[92] It is also based on provisions of international human rights

89 Albanian National Commission for Refugees, 'National Commission for Refugee Revokes the Status of Temporary Protection for the Remaining Kosovars', press release, 29 March 2002.

90 Global Consultations on International Protection, 'Summary Conclusions – Cessation of Refugee Status', above n. 86, para. 27.

91 See above n. 10.

92 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. There is no mention of a right to family unity per se in the 1951 Convention itself, except obliquely in Art. 12(2) requiring States Parties to respect 'rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage' and in Art. 24 mentioning a right on a par with nationals to family allowances and other related social security as may

and international humanitarian law which apply to all human beings regardless of their status. In the case of refugees, the responsibility to uphold this right falls also in part on the country of asylum, since, unlike voluntary migrants, refugees cannot be expected to reunite in their country of origin.

The paper on this topic by Kate Jastram and Kathleen Newland examines the scope of the right to family unity for refugees and asylum seekers in international law. In doing so, it draws not only on relevant State practice and academic literature but also on the experience of UNHCR in the field and with resettlement cases, the latter on the basis of information provided by UNHCR field offices and the resettlement section at UNHCR headquarters in Geneva. The paper gives examples of practical experience and dilemmas faced by UNHCR, for instance, when refugee families seek to reunify.

One issue concerns the question of 'derivative status', whereby family members accompanying someone who is recognized as a refugee are also granted refugee status or a similarly secure status with the same rights. In the light of increased awareness of gender-related and child-specific forms of persecution, the Summary Conclusions of the roundtable held in Geneva in November 2001 also affirm that 'each family member should be entitled to the possibility of a separate interview if he or she so wishes and principles of confidentiality should be respected'.[93]

Moves by States to expel or deport one member of an intact refugee family already in a country of asylum can also affect family unity. In such cases, the State must balance a number of rights and considerations, which restrain its margin of action if it wishes to separate a family. Deportation or expulsion could constitute an interference with the right to family unity unless this is justified in accordance with international standards. The European Court of Human Rights found such an interference in the case of *Amrollahi* v. *Denmark* (Application No. 56811/00, judgment of 11 July 2002) and set out criteria to be taken into consideration in making such an assessment. The case concerned an Iranian national, who had deserted from the Iranian army and fled to Denmark. Granted first temporary and then permanent residence, he had married a Danish woman with whom he had two children. Upon his conviction for drug trafficking, however, the Danish authorities sought to expel him in the interests of the prevention of disorder and crime and on the grounds that he did not have a well-founded fear of persecution in Iran. The Court found his expulsion to be in accordance with the law but that, since it was *de facto* impossible for him and his family to continue their life together outside Denmark, it would

be offered to nationals. See also at the regional level, Council of Europe, Committee of Ministers, Recommendation No. R (99) 23 to member States on family reunion for refugees and other persons in need of international protection, 15 Dec. 1999; Council of Europe, Committee of Ministers, Recommendation Rec(2002)4 on the Legal Status of Persons Admitted for Family Reunification, 26 March 2002; European Commission, 'Amended Proposal for a Council Directive on the right to family reunification', COM(2002) 225 final, 2 May 2002, ch. V.

93 Global Consultations on International Protection, 'Summary Conclusions – Family Unity', Geneva expert roundtable, Nov. 2001, para. 7.

be disproportionate to the aims pursued and in violation of the right to respect for family life.

The definition of the family towards which the State has obligations is an issue where cultural practices and expectations differ and where State practice varies. As noted in the Summary Conclusions:

> The question of the existence or non-existence of a family is essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, and economic and emotional dependency factors. For the purposes of family reunification, 'family' includes, at the very minimum, members of the nuclear family (spouses and minor children).[94]

In sum, family reunification can be seen as a practical way of implementing the right to family unity, since this can otherwise become disrupted as a result of flight. The Conclusions of the November 2001 expert roundtable in Geneva affirm 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'.[95] In some cases, where family members are dispersed in different countries of asylum, it may, however, prove difficult to agree on criteria as to where family reunification should ultimately take place. This is an area for further international standard setting. Indeed, if families are kept together or are able to reunite, this greater stability significantly enhances refugees' ability to become self-reliant and thus promotes the full realization of durable solutions.

I. UNHCR's supervisory responsibility

The question of UNHCR's supervisory role under the UNHCR Statute in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol has received heightened attention in recent years, not least because it was felt that implementation of the 1951 Convention is not adequate or is lacking in many parts of the world and that strengthened international supervision could ensure better norm compliance. Part 10 of this book examines these issues and the paper by Walter Kälin identifies a variety of different contemporary approaches to the monitoring of compliance with international treaties, particularly in the area of human rights. In addition, he outlines a number of supervisory systems which have evolved in other subject areas under the responsibility

94 Ibid., para. 8. For the particular situation of separated children and family unity, see UNHCR, 'Refugee Children', above n. 9, paras. 4–9.

95 'Summary Conclusions – Family Unity', above n. 92, para. 5. See also, UNHCR, 'Refugee Women', above n. 9, paras. 14–17.

of international organizations, including systems evolved by the International Labour Organization, the International Narcotics Control Board, and the Organization for Economic Cooperation and Development. Identifying some of the problems of replicating existing mechanisms, Kälin sets out options both for more radical reforms and for a 'light' version to enhance monitoring of the implementation of the 1951 Convention in a manner that is complementary to UNHCR's own supervisory responsibility. The Summary Conclusions of the expert roundtable held in Cambridge in July 2001 draw on this analysis and also present a number of possible approaches.

As far as UNHCR is concerned, the organization has adopted certain organizational practices, which aim to realize this objective and basic function without jeopardizing operational effectiveness on the ground. Integral to the success of these practices is the organization's capacity to monitor State practice (including jurisprudence), to analyze it, and to intervene where necessary to redress a situation to counter negative developments. These practices, which are widely accepted as extending to a broad range of intervention and advocacy activities have, generally, met with the acquiescence of States whose cooperation is a necessary precondition for the effective exercise of any supervisory function. These practices, coupled with States' acceptance, also form the backdrop to the basic (operational) framework of UNHCR's supervisory role.

A recent example of such practices concerns the consolidation and updating of existing UNHCR guidelines and legal position papers as a series of Guidelines on International Protection, the first of which were issued in May 2002.[96] This more systematic presentation flows directly from the organization's supervisory responsibility. It thus follows a tradition of advising the authorities, courts, and other bodies on the interpretation and practical application of the provisions of international refugee instruments. In a sense, the Guidelines on International Protection, although the outcome of lengthy consultations with many actors across the globe in the context of the second track of the Global Consultations, are but a beginning. The next step is implementation, which requires commitment as well as understanding of the complex issues involved.

UNHCR's supervisory role needs, however, to be strengthened further. In enhancing supervision, it is crucial to bear in mind the lessons learned from the human rights mechanisms where the proliferation of different supervisory mechanisms has led to duplication, compartmentalization, and coordination problems, thus undermining to some extent their effectiveness. This needs to be avoided in the refugee context. Indeed this was very much echoed in a roundtable delegates' meeting held on 13 December 2001 in the context of the Ministerial Meeting in Geneva, which favoured flexible, creative approaches rather than more rigid structures. One proposal made at that time was to resuscitate a reconfigured

96 See above n. 10. *Ibid.* for Guidelines on cessation issued in February 2003.

Sub-Committee on International Protection of the Executive Committee to provide a forum for all the parties most interested in international protection issues to address them in a systematic, detailed, and yet dynamic way.[97] Whatever further model or arrangement finally emerges in the area of international refugee protection, it will need to build on the existing structure (which is UNHCR) and advance the achievements that have already been made.[98]

IV. Protection from persecution in the twenty-first century

Over the last fifty years, the development of international refugee and human rights law has helped spearhead a revolution in the overall international legal regime. Before that, the way a State treated its citizens was regarded as an internal matter over which it had sovereign control. If a State violated the rights of foreigners on its territory, the State of nationality could intervene to provide its nationals with diplomatic or consular protection. As for refugees, there was a protection vacuum and it was necessary to create a specific regime of rights for them. The underlying broader international framework of international protection predates the establishment of UNHCR, not least because of the various legal and institutional arrangements that preceded the creation of UNHCR and the adoption of the 1951 Convention.[99] It draws heavily on different sources of international law and has evolved generally over time from the idea of international protection as a surrogate for consular and diplomatic protection to include broader notions of human rights protection.

With the strengthening of these protections, the individual has come to be recognized as the inherent bearer of human rights. The failure or inability of the country of origin to fulfil its responsibility to safeguard human rights has become a matter of international concern and responsibility, even of humanitarian intervention. Today, the institution of international refugee protection, whilst unique in the international legal system, is embedded in the broader international human rights protection regime and also generally linked to effective forms of international cooperation.[100] In recognition of this situation, courts in various jurisdictions have increasingly declared the Convention to be a living instrument capable

97 Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 'Chairperson's Report on Roundtable 1 "1951 Convention and 1967 Protocol Framework: Strengthening Implementation"', 13 Dec. 2001.

98 See also, Agenda for Protection, above n. 8, p. 7; UNHCR, 'The Forum', 20 Oct. 2002; UNHCR, '"Convention Plus": Questions and Answers', 20 Jan. 2003.

99 Indeed, the preamble to the 1951 Convention expressly refers to the desirability of revising and consolidating previous international agreements and of extending 'the scope of and the protection accorded by such instruments'.

100 V. Türk, 'UNHCR's Supervisory Responsibility', 14(1) *Revue Québécoise de Droit International*, 2001, p. 135 at p. 138.

of affording protection to refugees in a changing international environment.[101] Its core elements – the refugee definition and the principle of *non-refoulement* – remain as valid today as ever. They need to be interpreted in the light of these international legal developments, not only when assessing asylum claims but also in related areas such as immigration or extradition.

There continue of course to be varying interpretations in different jurisdictions as to whom international protection should be extended and as to what constitutes persecution under the 1951 Convention. Indeed, the Convention, like other international instruments, does not prescribe specific conduct as long as the required result is reached. This book represents part of a process intended to establish greater common ground in the interpretation of the Convention by States, their courts, and decision makers, as well as to identify areas where further work is needed. Apart from anything else, more consistent interpretation of the Convention in different jurisdictions can be expected to reduce the incentive for onward secondary movement which varying interpretations may represent.

A comprehensive analysis of the different elements of the refugee definition as evidenced in the different jurisdictions is beyond the scope of this overview. It may nevertheless be useful to make some brief observations regarding the core, interrelated issues of fear of persecution and lack of protection in their contemporary context as the Convention embarks upon another half-century.

With regard to the term 'persecution', a legal definition of persecution for the purposes of refugee status determination exists neither in the 1951 Convention nor elsewhere in international law.[102] This being said, it is true that persecution is now defined in the 1998 Statute of the International Criminal Court but it is clearly limited there to persecution for the purposes of defining a crime of a particularly serious nature which warrants international criminal jurisdiction and which is one amongst crimes of a similar type contained in the Statute of the International Criminal Court.[103] As such, it does not therefore have any relevance to defining persecution in refugee law. Conversely, though, it is possible to deduce from the various crimes contained in the Statute the conclusion that their victims are often refugees, which would indicate the breadth of the notion of persecution in the refugee law context.

The fact that 'persecution' is not legally defined has presented a problem for some and been of legal significance to others. Those for whom this poses a problem have attempted to define it, for instance, as being 'the sustained or systemic violation of basic human rights demonstrative of a failure of state protection', or even more

101 See e.g., R. v. *Uxbridge Magistrates' Court and Another, ex parte Adimi*, English High Court (Divisional Court), [1999] Imm AR 560, 29 July 1999; Refugee Appeal No. 71462/99, New Zealand Refugee Status Appeals Authority, 27 Sept. 1999; R. v. *Secretary of State for the Home Department, ex parte Adan;* R. v. *Secretary of State for the Home Department, ex parte Aitseguer (conjoined appeals)*, UK House of Lords, [2001] 2 WLR 143, 19 Dec. 2000.

102 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), p. 66.

103 See Statute, UN doc. A/CONF.183/9*, Art. 7(2).

simply as serious harm plus the failure of State protection.[104] Recent legislation in Australia[105] as well as the European Commission's Draft Directive on those qualifying for refugee status or other subsidiary protection[106] has also sought to define persecution.

Those who like us consider the lack of definition to be indicative of the deeper rationale behind the very interpretation of persecution see in attempts to define it a risk that could limit a phenomenon that has unfortunately shown itself all too adaptable in the history of humankind. The lack of a legal definition of persecution 'is a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution should be encompassed by the term'.[107] As UNHCR's paper on interpreting Article 1 notes:

> The on-going development of international human rights law subsequent to the adoption of the 1951 Convention has helped to advance the understanding, expressed in the UNHCR *Handbook*, that persecution comprises human rights abuses or other serious harm, often but not always with a systematic or repetitive element. While it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of itself (though particularly egregious forms undoubtedly will be so considered), a persistent pattern of consistent discrimination will usually, on cumulative grounds, amount to persecution and warrant international protection.[108]

Another issue relates to the meaning of the word 'protection' in the phrase 'is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. Some commentators view such protection as referring to the protection of the individual's fundamental rights and freedoms ordinarily provided inside the

104 See J. C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), pp. 104–5; Refugee Women's Legal Group, *Gender Guidelines for the Determination of Asylum Claims in the UK*, July 1988, p. 5. This approach has been adopted by courts in various jurisdictions, such as *Canada (Attorney General)* v. *Ward*, Supreme Court of Canada, [1993] 2 SCR 689; *R.* v. *Immigration Appeal Tribunal and Another, ex parte Shah; Islam* v. *Secretary of State for the Home Department*, House of Lords, [1999] 2 AC 629; *Minister for Immigration and Multicultural Affairs* v. *Khawar*, High Court of Australia, [2002] HCA 14, 11 April 2002, at para. 115.

105 Australian Migration Legislation Amendment Act (No. 6) 2001, Sept. 2001, which amends the Migration Act 1958 so that, among other things, it does not apply Art. 1A(2) of the 1951 Convention in cases where a person has a well-founded fear of persecution 'for one or more of the reasons mentioned in that Article unless: (a) that reason is the essential and significant reason . . . for the persecution; and (b) the persecution involves serious harm to the person; and (c) . . . systematic and discriminatory conduct'. The Act also gives examples of instances of such 'serious harm'.

106 European Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', COM(2001) 510 final, 12 Sept. 2001, Arts. 11 (the nature of persecution) and 12 (the reasons for persecution).

107 UNHCR, 'Interpreting Article 1', above n. 64, para. 16.

108 Ibid., para. 17 (footnotes omitted). See also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), paras. 50–3.

country of origin. This approach views protection provided by the international community as 'fundamentally a form of surrogate or substitute protection' for the national protection States should provide.[109] In this view, 'in addition to identifying the human rights potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of "persecution" must also comprehend scrutiny of the State's ability and willingness effectively to respond to that risk'.[110] The case law of a range of common law jurisdictions has attributed considerable importance to this view,[111] although it has also been noted that '[t]his somewhat extended meaning may be, and has been, seen as an additional – though not necessary – argument in favour of the applicability of the Convention to those threatened by non-State agents of persecution'.[112]

Other authors, including ourselves, have argued that the protection referred to in the refugee definition refers only to the diplomatic or consular protection available to citizens who are outside the country of origin.[113] Changing its meaning has the danger of importing human rights doctrine (such as exhaustion of local remedies) into the refugee law context in an inappropriate manner and adding *de facto* an additional, more restrictive requirement to the refugee definition, which is at variance with international law. As the UNHCR paper on interpreting Article 1 states:

> Textual analysis, considering the placement of this element, at the end of the definition and following directly from and in a sense modifying the phrase 'is outside his country of nationality', together with the existence of a different test for stateless persons, suggests that the intended meaning at the time of drafting and adoption was indeed external protection. Historical analysis leads to the same conclusion. Unwillingness to avail oneself of this external protection is understood to mean unwillingness to expose oneself to the possibility of being returned to the country of nationality where the feared persecution could occur.[114]

109 Hathaway, *The Law of Refugee Status*, above n. 104, p. 135. 110 Ibid., p. 125.

111 See e.g., *Zalzali* v. *Canada (Minister of Employment and Immigration)*, Canadian Federal Court of Appeal, 27 ACWS 3d 90, 30 April 1991; and, more recently, the judgments of Lord Lloyd of Berwick in *Adan* v. *Secretary of State for the Home Department*, UK House of Lords, [1999] 1 AC 293 at 304C–E; *Horvath* v. *Secretary of State for the Home Department*, UK House of Lords, [2000] 3 WLR 379, 6 July 2000.

112 UNHCR, 'Interpreting Article 1', above n. 64, para. 36 (footnotes omitted). Most recently, McHugh and Gummow JJ of the Australian High Court found that '[t]he "internal" protection and "surrogacy" protection theories as a foundation for the construction of the Convention add a layer of complexity to that construction which is an unnecessary distraction': *Khawar* case, above n. 104, para. 73.

113 See the *Handbook*, paras. 97–100, with respect to this phrase, which, though they are not explicit on the point, provide only examples relating to diplomatic or consular protection. For a detailed account of the drafting and subsequent history of this element of the definition, see also, Fortín, 'The Meaning of "Protection"', above n. 68.

114 UNHCR, 'Interpreting Article 1', above n. 64, para. 35 (footnotes omitted). See also, Fortin, 'The Meaning of "Protection"', above n. 68.

The UNHCR paper argues that the two approaches are, in effect, not contradictory, adding: 'Whichever approach is adopted, it is important to recall that the definition comprises one holistic test of interrelated elements. How the elements relate and the importance to be accorded to one or another element necessarily falls to be determined on the facts of each individual case.'[115] Walter Kälin has likewise sought to bridge the gap between these approaches by arguing that the 'unable to avail himself' clause of the refugee definition:

> has lost much of its original meaning as the function of diplomatic and consular protection has fundamentally changed since the 1951 Convention was drafted. Although such protection remains important in many regards, it has lost its original function of securing basic rights to aliens at a time when international human rights were virtually non-existent . . .
>
> These changes [the emergence of international human rights law] provide strong reasons for an interpretation of the text of Article 1A(2) . . . giving the notion of 'protection' in the 'unable to avail himself' clause an extended meaning that also covers internal protection. This presents a logical extension of the original idea of the drafters of the 1951 Convention that regarded persecution and lack of protection as the two core requirements of the refugee definition.[116]

In the interest of establishing common ground between these differing interpretations of the term 'protection' in the refugee definition, it is also significant that a recent judgment by the High Court of Australia adopted the composite interpretation favoured by UNHCR and Kälin. The Court found that there is both a broader and a narrower sense in which the term protection should be viewed. Gleeson CJ ruled:

> [A]ccepting that, at that point of the Article [1A(2)], the reference is to protection in the narrower sense, an inability or unwillingness to seek diplomatic protection abroad may be explained by a failure of internal protection in the wider sense, or may be related to a possibility that seeking such protection could result in return to the place of persecution. During the 1950s, people fled to Australia from communist persecution in Hungary. They did not, upon arrival, ask the way to the Hungarian Embassy.[117]

115 UNHCR, 'Interpreting Article 1', above n. 64, para. 37.

116 W. Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect', 15 *Georgetown Immigration Law Journal*, 2001, No. 3, pp. 427–8. International law experts have questioned the assertion that developments in international human rights law have rendered diplomatic protection obsolete, thus pointing towards the need for both forms of protection. For its part, the International Law Commission's 'First Report on Diplomatic Protection' warns that '[t]o suggest that universal human rights conventions . . . provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy'. See, Special Rapporteur, J. R. Dugard, 'First Report on Diplomatic Protection', International Law Commission, 52nd session, UN doc. A/CN.4/506, 9 March 2000, paras. 10–32 at para. 25.

117 *Khawar* case, above n. 104, para. 22.

In a related area – that of non-State agents of persecution – which was a significant issue of contention in the 1990s, efforts to establish an interpretation consistent with the object and purpose of the 1951 Convention have begun to show some positive signs of convergence in State practice. Such cases can relate, for instance, to situations where a State is unwilling to extend protection to certain segments of the population (as recent jurisprudence on gender-related persecution shows) or where it condones/tolerates the persecution of such persons. These cases may also concern persecution in a situation where a State is too weak and hence unable effectively to guarantee respect for human rights throughout its territory. Recent developments in France, Germany, and Switzerland, three key States which had not recognized the concept in all its various permutations, suggest that there is a move towards acceptance that those with a well-founded fear of persecution by non-State actors come within the 1951 Convention refugee definition.[118] Within the European Union, the European Commission's Draft Directive on the refugee definition states clearly that it is immaterial whether the persecution stems from State or non-State actors.[119]

V. Conclusion

The various aspects of the interpretation of the 1951 Convention examined in this edited collection reveal the breadth of practice and experience in interpreting the 1951 Convention which exists in different jurisdictions. Such variations do not necessarily present problems as long as the obligations contained in the Convention are upheld, although there is of course value in fostering clearer common understandings of interpretative issues, as the papers and documents in this book seek to do. Ultimately, international refugee law is less an exact science than a regime that needs to be responsive to individual circumstances.

In our view, there are dangers in trying to incorporate too rigid and formulaic a framework into the interpretation of the refugee definition. As the High Court of Australia has recognized: 'There are particular components in the relevant definition. However, they must not mislead the decision-maker into atomising

118 See V. Türk, 'Non-State Agents of Persecution', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer Law International, The Hague, 2002), pp. 95–109; Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect', above n. 115; the contributions by W. Kälin, R. Marx, and M. Combarnous on persecution by non-State agents in International Association of Refugee Law Judges, *The Changing Nature of Persecution*, fourth conference, Berne, Switzerland, Oct. 2000, pp. 43, 60 and 75 respectively, available at http://www.ark-cra.ch/iarlj/EN/E_cnt_main1.htm. In Germany, the Immigration Law signed into law by the Federal President on 20 June 2002 specifically states that those persecuted by non-State agents for one of the Convention grounds qualify for refugee status. This law was subsequently rescinded by the Federal Constitutional Court for reasons of formality.

119 European Commission, Proposal for a Council Directive on minimum standards for qualification and status as refugees, above n. 106, Art. 11(2)(a).

the concept in the Convention. It must be considered as a whole.'[120] A fixed paradigm cannot take account of the diversity of human experience and ever-changing circumstances. Hence the need for a holistic assessment responsive to the particular situation of the individual concerned. The 1951 Convention provides the broad framework, which is embedded in the overall context of international law, and in particular in international human rights law and international humanitarian law. Executive Committee Conclusions, UNHCR guidelines, and State practice, including jurisprudence, provide more concrete indications as to how individual cases could and should be dealt with – but each case is necessarily unique.

The different topics examined in this book also need to be seen in the context of the broader contemporary refugee challenges outlined briefly at the start of this overview. The effectiveness of international refugee protection in years to come hinges on the ability of States and the international community to address these challenges whether they involve strategies to separate armed elements in refugee camps, to manage complex migration flows, or to realize durable solutions to the plight of refugees. These initiatives are in turn part of the intricate mosaic of international cooperation which needs to be strengthened if the international community is to address wider economic, social, and political problems in refugee-producing countries, global inequities, small arms trade, and so on, which can all lead to the forced displacement of populations within and beyond national borders. To succeed, such international cooperative endeavours require the involvement of all actors, from governments, civil society, international organizations, the legal profession, and NGOs to refugees themselves.

It is in this spirit that the Global Consultations have sought to inject new energy into the development of international refugee protection and thereby counter unwarranted trends at the national and even regional levels. Comprehensive solutions through which the burdens and responsibilities of hosting refugees are more equitably shared ultimately lie at the international level, even though regional cooperation efforts can also serve to strengthen protection. As noted by the chair of the Refugee Affairs Appeal Board of South Africa:

> Regional refugee protection schemes have become a trend throughout the world. While there are positive benefits to ensuring that neighbouring countries meet the standards set out in international refugee law, we must be careful not to create regional 'fortresses' . . . If implemented properly, regional refugee protection programs in Africa and elsewhere could

120 *Chen Shi Hai* v. *Minister for Immigration and Multicultural Affairs*, High Court of Australia, (2000) 170 ALR 553, (2000) 201 CLR 293, 13 April 2000, para. 53, citing *Applicant A.* v. *Minister for Immigration and Ethnic Affairs*, above n. 40, (1997) 190 CLR 225 at 257 per McHugh J, who ruled: '[A]n instrument is to be construed as a whole and . . . words are not to be divorced from their context or construed in a manner that would defeat the character of the instrument'.

> strengthen the rights of refugees while reducing irregular movement and illegal immigration.[121]

From the legal point of view there is a real benefit to be gained from the greater interaction of international refugee law with other branches of the law, including most notably international and regional human rights and international humanitarian law. One example of the importance of such interaction concerns internally displaced persons, who cannot rely on international refugee law since they have not crossed an international border. The 1998 Guiding Principles on Internal Displacement[122] can be seen as 'a breakthrough in recognizing the importance and value of seeing the relationship between these three branches of international law [international humanitarian, human rights, and refugee law] and drawing on the strengths of each'.[123] Developments in international criminal law in recent years, which have made considerable strides towards bringing perpetrators of crimes against humanity and war crimes to justice, also point towards the possibility of ending impunity for at least some of the crimes which can oblige people to flee.

In conclusion, it is perhaps fitting to remember the context in which the complex legal issues raised in this book operate. What better words to choose than the opening statement at the December 2001 Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol made by President Vaira Vike-Freiberga of Latvia, who fled her country as a child after the Second World War:

> No one leaves their home willingly or gladly. When people leave their earth, the place of their birth, the place where they live, it means that there is something very deeply wrong with the circumstances in their country. And we should never take lightly this plight of refugees fleeing across borders. They are signs, they are symptoms, they are proof that something is very wrong somewhere on the international scene. When the moment comes to leave your home, it is a painful choice . . . It can be a costly choice. Three weeks and three days after my family left the shores of Latvia, my little sister died. We buried her by the roadside and were never able to return and put flowers on her grave.
>
> And I like to think that I stand here today as a survivor who speaks for all those who died by the roadside – some buried by their families and others not. And for all those millions across the world today who do not have a voice, who cannot be heard. They are also human beings, they also suffer, they also

121 A. Arbee (Chairperson, Refugee Affairs Appeal Board, South Africa), 'The Future of International Protection', in *The Changing Nature of Persecution*, above n. 118, p. 271 at p. 274.

122 See above n. 72.

123 R. Brett and E. Lester, 'Refugee Law and International Humanitarian Law: Parallels, Lessons and Looking Ahead', 83 *International Review of the Red Cross*, Sept. 2001, p. 713 at p. 714. See also, S. Jaquemet, 'The Cross-Fertilization of International Humanitarian Law and International Refugee Law', 83 *International Review of the Red Cross*, Sept. 2001, p. 651.

have their hopes, their dreams and their aspirations. Most of all, they dream of a normal life . . .

I entreat you . . . when you think about the problem of refugees to think of them not in the abstract. Do not think of them in the bureaucratic language of 'decisions' and 'declarations' and 'priorities' . . . I entreat you, think of the human beings who are touched by your decisions. Think of the lives who wait on your help.[124]

124 Vaira Vike-Freiberga, President of Latvia and former refugee, opening statement to Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, Geneva, 12 Dec. 2001.