

Refugees

A. Introduction and definition of ‘refugee’

The Universal Declaration of Human Rights provides in Article 14 that ‘[e]veryone has the right to seek and to enjoy in other countries asylum from persecution’.¹ Refugee status is one of the ways that asylum from persecution is granted. The most commonly known and accepted definition of ‘refugee’ comes from the 1951 Geneva Convention Relating to the Status of Refugees (1951 Convention).² The 1951 Convention defines a refugee as a person who ‘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 . . . is unable or, owing to such fear, is unwilling to return to it’.³ The Convention focused on refugees from events surrounding World War II in Europe and thus placed both geographical limitations and temporal limits (that is, before 1 January 1951) on its definition.

The inclusion of the date limitation in Article 1A(2) of the 1951 Convention indicates that the Convention was created for the protection of refugees from both World Wars. Persecution, however, did not cease after 1951. Refugees continued to emerge from different parts of the world, so the Protocol Relating to the Status of Refugees was adopted. Article 1(2) of the Protocol provides that the definition of the term ‘refugee’ shall be applied within the meaning of Article 1 of the 1951 Convention, but the words ‘as a result of events occurring before 1 January 1951’ were omitted. Accordingly, the Protocol expands the definition to include refugees emerging from any event before or after 1951. Since the Protocol essentially adopted and extended the Convention’s protection,⁴ these States parties have committed themselves to granting the protections provided in

¹ Universal Declaration of Human Rights, GA res 217A (III) at 71, (1948) UN Doc A/810.

² Convention Relating to the Status of Refugees, 189 UNTS 150, entered into force 22 April 1954 (hereinafter 1951 Convention).

³ *Ibid.*, art 1, para A(2).

⁴ See Protocol Relating to the Status of Refugees, 606 UNTS 267, entered into force 4 October 1967, art 1, para 1; see also Carlos Ortiz Miranda, ‘Toward a Broader Definition of Refugee: 20th Century Development Trends’ (1990) 20 *Cal W Int’LLJ* 315, 319.

the 1951 Convention. While there are a few countries, such as Turkey, that continue to adhere only to the Convention's geographical and temporal limitations, most countries (144 in January 2007) have ratified the Protocol relating to the Status of Refugees that removes those limitations.

Although the right to seek asylum, as prescribed in the Universal Declaration, is principally implemented by the Convention Relating to the Status of Refugees⁵ and the Protocol Relating to the Status of Refugees,⁶ the right to asylum is, however, articulated in several other global and regional treaties, declarations, and instruments such as the Charter of Fundamental Rights of the European Union; the Organization of American States' (OAS) Cartagena Declaration on Refugees⁷ (OAS Declaration); and the Organization of African Unity's (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention). Indeed, the right to seek and enjoy asylum is a well-established principle of international law.

To be eligible for protection under the 1951 Convention a person must be recognized as a 'refugee'. Persons are 'refugees' if they meet four requirements: (1) they must have a well-founded fear of persecution; (2) the persecution feared must be based on one of five reasons (race, religion, nationality, membership of a particular social group, or political opinion); (3) they must be outside their country of nationality, or, if they are stateless, they must be outside their country of habitual residence; and (4) they must be unable to return or, owing to their fear, unwilling to avail themselves of the protection of that country.

Well-founded fear of persecution

The term 'well-founded fear of persecution' contains the subjective element of 'fear' and the objective criterion of whether this fear is 'well-founded'.⁸ The subjective element takes into account the individual's frame of mind, which is strongly influenced by his or her personal and family background; his or her membership in a particular racial, religious, or political group; and his or her own interpretation of the situation and personal experience. These factors must be taken into consideration when determining whether the applicant subjectively fears persecution.⁹

The requirement that the fear must be well-founded complements the subjective element. It serves the purpose of evaluating whether the applicant's concern

⁵ Convention Relating to the Status of Refugees, n 2 above.

⁶ Protocol Relating to the Status of Refugees, n 4 above.

⁷ Cartagena Declaration on Refugees, 22 November 1984, 'Annual Report of the Inter-American Commission on Human Rights' (1984-5) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-3.

⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/1P/4/Eng/REV.2, para 38 [hereinafter *UNHCR Handbook*].

⁹ *Ibid.*, para 41.

has an objective basis, and thus excludes those persons whose fears are obviously exaggerated or irrational.¹⁰ In determining whether the applicant's fear is well-founded, States parties must take into account the personal and family background of the applicant, as well as his or her background, influence, wealth, and/or outspokenness.¹¹

In order to demonstrate the objective basis for an individual's fear of persecution in her home country, she may present evidence of the human rights violations occurring there for individuals with similar characteristics. For example, a union leader from Colombia might qualify under the definition of refugee by presenting information about killings, torture, and disappearances of union leaders.

The UNHCR notes that while States parties are required to evaluate the applicants' personal circumstances, States parties may take into account the general situation in the country of origin.¹² The 1951 Convention states that the individual's application need not be based on that person's own personal experience. Any persecution suffered by friends or relatives may justifiably raise a fear that the applicant may soon become a victim.¹³ Additionally, under the 1951 Convention, past persecution is certainly a strong indication that the applicant's fear is objectively well-founded.

A central issue in the determination of refugee status is how to define what treatment qualifies as persecution. Article 33 of the 1951 Convention affords some help in that it provides that threats aimed at the individual's life or freedom on account of the five grounds enumerated in Article 1, constitute persecution. Most States parties have accepted this definition as the necessary core of persecution.¹⁴ The UNHCR further suggests that 'other serious violations of human rights... would also constitute persecution'.¹⁵ Accordingly, persecution includes arbitrary killing, detention, disappearance, and torture. The UK House of Lords has approved the view of Professor James Hathaway in stating that 'persecution' may include 'the sustained or systemic failure of State protection in relation to one of the core entitlements which has been recognised by the international community'.¹⁶ In other words, any serious human rights violation under the Universal Declaration or the Human Rights Covenants, for example, may qualify as 'persecution'.

¹⁰ Gunnell Stenberg, *Non-Expulsion and Non-Refoulement: The Prohibition Against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees* (Almqvist and Wiksell International, 1989) 51.

¹¹ *UNHCR Handbook*, n 8 above, paras 41, 43.

¹² *Ibid*, para 42.

¹³ *Ibid*, para 43.

¹⁴ Stenberg, n 10 above, at 48.

¹⁵ *UNHCR Handbook*, n 8 above, para 51.

¹⁶ *Horvath v Secretary of State* [2001] 1 AC 489. The 'core entitlements' would certainly include at minimum the non-derogable rights protected by Art 4 of the International Covenant on Civil and Political Rights, art 4, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, (1966) UN Doc A/6316, 999 UNTS 171, entered into force 23 March 1976.

Neither the 1951 Convention nor the UNHCR, however, specify the minimum level of severity that a treatment or situation must achieve in order to qualify as persecution, as opposed to mere harassment. The task of determining the dividing line between persecution and harassment is left to the States. As a result, jurisprudence of the different countries lacks coherence and consistency.¹⁷ Hence, Professor Joan Fitzpatrick criticizes:

Unfortunately, the elasticity of the definition of persecution depends upon the political will of States Parties implementing the Convention. In an era of retrenchment and fear of incurring unbounded obligations, the pattern at least in Western Europe, is not adaptive to new exigencies for forced migrants but an insistence on outdated and restrictive definitions of persecution.¹⁸

The difficulty in defining the minimum level of severity which treatment must reach to qualify as persecution is similar to the task of defining a minimum level for inhuman or degrading treatment.

While the Convention against Torture provides for protection from 'official' torture, the 1951 Convention does not mention whether the persecutor has to be an agent of a State, or whether persons will also be protected from abuse by private actors. Scholars and States parties have concluded that acts of private groups should also qualify as persecution if governments are unable or reluctant to suppress such acts.¹⁹ In such situations, applicants may be unable to avail themselves of governmental protection, even if the government itself has not been the agent of persecution. Likewise, the UNHCR concluded:

Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.²⁰

Grounds for persecution

The 1951 Convention identifies five reasons for persecution, which would qualify an individual to be considered a refugee. Persecution must be based on one of the five specified grounds: race, religion, nationality, political opinion, or membership of a particular social group. The term 'race' in the 1951 Convention is considered to be applicable whenever a person is persecuted because of his ethnic origin. Professor Goodwin-Gill suggests that the broad definition of the 1965 Convention on the Elimination of All Forms of Racial Discrimination,²¹ which

¹⁷ Guy S Goodwin-Gill, *The Refugee in International Law* 2nd edn (Clarendon Press, 1996) 67.

¹⁸ Joan Fitzpatrick, 'Revitalizing the 1951 Convention' (1996) 9 *Harv Hum Rts J* 229, 240.

¹⁹ Goodwin-Gill, n 17 above, at 73; Atle Grahl-Madsen, *The Status of Refugees in International Law* (AW Sijthoff, 1972) 191.

²⁰ *UNHCR Handbook*, n 8 above, para 65.

²¹ International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, entered into force 4 January 1969 [hereinafter Race Convention].

includes all discrimination based on 'race, colour, descent, or national or ethnic origin',²² should also be applicable for the purposes of the 1951 Convention.²³ The Convention on the Elimination of All Forms of Racial Discrimination (Race Convention) defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Persecution for reasons of a person's religion can take forms such as 'prohibition of membership of a religious community, of worship in private or public, of religious instruction, or serious measures of discrimination imposed on a person because they practice their religion or belong to a particular religious community'.²⁴ In regard to persecution on the ground of religion, the authoritative United Nations High Commissioner for Refugees (UNHCR) *Handbook* has observed:

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, *eg* serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities. . . .

Persecution for 'reasons of religion' may assume various forms, *eg* prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community. . . .

The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. . . . In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

Persecution on grounds of nationality is interpreted to include membership of particular ethnic, religious, cultural, and linguistic communities.²⁵ Persecution for lack of nationality (ie for being stateless) would also be included under this ground.²⁶ The Human Rights Committee has dealt with several cases in which discrimination on the basis of nationality was alleged. For example, in *Karakurt v*

²² Race Convention, n 21 above, art 1.

²³ Goodwin-Gill, n 17 above.

²⁴ UNHCR, *Handbook*, n 8 above, para 72; see also Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA res 36/55, 36 UN GAOR Supp (No 51) at 171, (1981) UN Doc A/36/684.

²⁵ *Ibid* at 45.

²⁶ Grahl-Madsen Vol 2, n 19 above, at 219.

Austria,²⁷ a Turkish national complained that he was holding an open-ended residence permit in Austria, and had been elected by his fellow workers to a work-council, but was removed from his elected position because of an Austrian law that restricted membership to Austrian nationals. The Human Rights Committee found that there had been discrimination on the basis of nationality.

Persons can obtain refugee status if they are persecuted on account of their expressed or implied political opinion. 'Political opinion' is one of the most commonly cited bases for asylum or refugee applications. In the 1992 case of *Elias-Zacarias*,²⁸ the US Supreme Court held that a guerrilla organization's coercion to join its organization does not necessarily constitute persecution on account of political opinion. In the case, Elias-Zacarias testified that he would be subject to persecution if he returned to his native Guatemala. He described how guerrillas had forced their way into his home and requested that Elias-Zacarias and his parents join their organization. When they refused, the guerrillas promised to return. Elias-Zacarias testified that he believed joining the organization would subject him to retaliation by the government. The Court rejected the asylum claim because the political opinion in question was not that of the applicant, but rather, that of the guerrilla organization (the persecutor). In response, Elias-Zacarias had argued that failure to join the guerrillas was itself tantamount to expressing a political opinion, but the Court was not persuaded, holding instead that Elias-Zacarias had failed to show evidence sufficient to establish persecution for political opinion. Other courts have been more willing to accept such claims of 'imputed' political opinion. For example, the US Court of Appeals for the 9th Circuit in *Cordon-Garcia v INS*²⁹ ruled that imputed political opinion could be found where 'one party to a conflict insists to the victim that the victim is aligned with the other side'.

The UNHCR defines a 'particular social group' as a number of persons who have similar backgrounds, habits, or social status.³⁰ The notion of 'a particular social group' is broader than the other grounds for refugee status and, as Professor Goodwin-Gill notes, 'possesses an element of open-endedness potentially capable of expansion in favor of a variety of different classes susceptible to persecution'.³¹ Reliance on the notion of a 'particular social group' has increased considerably since the phrase was included in the 1951 Convention. For example, Kurdish wives of politically active men were granted asylum in Germany for being members of a particular social group based on family membership.³² These women had not been politically active themselves, so membership of a political

²⁷ *Mümtaz Karakurt v Austria*, Communication No 965/2000, (2002) UN Doc CCPR/C/74/D/965/2000.

²⁸ *Sangha v INS*, 103 F.3d 1482 (9th Cir 1997).

²⁹ *Cordon-Garcia v INS*, 204 F.3d 985 (9th Cir 2000).

³⁰ *UNHCR Handbook*, n 8 above, para 77.

³¹ Goodwin-Gill, n 17 above, at 48.

³² Judgment of 2 July 1985, No 9 C 35.84, Bundesverwaltungsgericht [Federal Administrative Court].

group could not be established as a reason for their persecution. In another case a German Court also granted asylum to a Polish operator of a funeral home who had been persecuted by the Polish Government due to his involvement in a private enterprise.³³ The granting of asylum was based on the applicant's membership to the particular social group of private business owners.

Gender-based grounds for persecution

Because the 1951 Convention does not explicitly include gender-based persecution as a basis for refugee status, women seeking protection from such persecution were not initially considered eligible for protection under the Convention. Indeed, it was not until the early 1990s that Canada became the first country to recognize that women may suffer from gender-specific forms of persecution that should be accepted under the 1951 Convention. Over time, however, countries such as Australia, Sweden, the United Kingdom, and the United States began recognizing that women suffering from gender-based violence can, indeed, be considered refugees.

Given that the 1951 Convention does not mention gender-based persecution as a basis for refugee status, the notion of a 'particular social group' has been especially important for women. Women have qualified as refugees if they are members of social groups such as victims of 'honor' crimes, female circumcision, and sexual violence.³⁴ For example, a woman from Trinidad who had been abused by her husband for more than 15 years and had received insufficient protection from the police in Trinidad was granted asylum in Canada on the basis of her 'membership of the social group of Trinidadian women subject to wife abuse'.³⁵

³³ Judgment of 29 March 1985, No 17 K 10.343/83 Verwaltungsgericht Gelsenkirchen [Gelsenkirchen Administrative Court]; summarized in Maryellen Fullerton, 'A Comparative Look at Refugee Status Based on Persecution due to Membership in a Particular Social Group' (1993) 26 *Cornell Int'l LJ* 505, 532.

³⁴ It should be noted that women have been particularly successful securing refugee status when they have suffered from sexual violence during conflict situations. It should also be noted that, in general, it has traditionally been difficult to persuade countries of asylum to recognize domestic violence as a form of persecution unless an applicant can demonstrate that the government has failed to protect women from violence in the home. The BIA denied asylum in *Matter of R-A*, 22 I & N Dec 906 (BIA 1999), in which a woman from Guatemala applied for asylum claiming that abuse by her husband constituted persecution on account of membership in a particular social group or political opinion. The decision was vacated in 2001 by the Attorney General for reconsideration under proposed regulations regarding gender-based asylum claims. In 2003, however, with the regulations still not adopted, the case was certified to the Attorney General, after which the Department of Homeland Security concluded that the applicant had established statutory eligibility for asylum and requested the Attorney General to remand the case to the BIA with instructions to grant asylum without opinion or to postpone a precedent decision until the proposed regulations had been adopted. In early 2005 the Attorney General ignored the request to remand for a grant of asylum without opinion and instead again remanded the case to the BIA for reconsideration in light of the same proposed regulations. This proposed rule has been in the final stage of the rule-making process since the end of the comment period on 22 January 2001.

³⁵ *Meyers v MEI* (1992) [1993] 1 FC 154, 97 DLR (4th) 729, 150 NR 60 (FCA). In *Re Fauziya Kasinga*, 21 I & N Dec 357, Interim Decision (BIA) 3278 (1996) further held that the practice of female genital mutilation can be the basis for a grant of asylum.

Outside country of nationality

According to the 1951 Convention a person must be 'outside the country of his nationality'³⁶ in order to qualify as a refugee. Accordingly, internally displaced persons cannot qualify as refugees because, in most cases, persons can only obtain international protection from persecution when they are outside of their country of nationality and thus no longer subject to the jurisdiction of their home country.³⁷ Stateless persons must be unable or unwilling to return to their country of habitual residence and the persecution feared by the applicant must relate to that country. Similarly, Article 1(2) of the 1951 Convention provides that persons who have multiple nationalities must show a well-founded fear that they would be persecuted in all of these countries.³⁸

It is not necessary, however, for an individual to have possessed the requisite fear of persecution at the time of the border crossing. For example, if a student from the Central African Republic was residing in France in 2003 when there was a coup in her country and she feared political persecution if she returned, she would qualify as a refugee (sometimes known as a refugee '*sur place*'). Similarly, if a country such as Yugoslavia (which had included Bosnia, Croatia, Macedonia, Montenegro, and Slovenia) broke up during a Yugoslavian traveler's holiday in the Greek islands and he was fearful of religious persecution upon return to Belgrade, he would ordinarily qualify for refugee status in Greece. If an individual has dual nationality or has been firmly resettled in a third country, however, that person would not qualify as a refugee.

Unavailability of protection

Applicants for refugee status must be unable or unwilling to avail themselves of the protection of their country of origin. Unavailability of protection refers to an objective situation.³⁹ For example, one Romanian woman met the unavailability of protection requirement of the 1951 Convention after she appealed to police for protection from her physically abusive husband. She was informed by the police that they 'could not get involved because she and her husband were a married

³⁶ 1951 Convention, n 2 above, art 1.

³⁷ There are exceptional cases in which persons have been granted international protection while inside their country of citizenship. One example of such an exception is the Vietnamese Orderly Departure Program, which was established as an agreement between 26 countries and the Socialist Republic of Vietnam. The Orderly Departure Program processed Vietnamese citizens for admission to the US as immigrants, parolees, and refugees, from within Vietnam at a location in Ho Chi Minh City. The Orderly Departure Program processed over 500,000 Vietnamese citizens for admission to the US. See United States Department of State Bureau of Population, Refugees, and Migration, *Refugee Admissions Program for East Asia*, Embassy of the United States, Japan, available at <<http://www.state.gov/g/prm/rls/fs2004/28212.htm>>.

³⁸ See *UNHCR Handbook*, n 8 above, para 106.

³⁹ See *ibid*, para 97.

couple, and that they would only get involved if [her physical abuse] was connected to a crime'.⁴⁰ Unwillingness, although a subjective state of the applicant's mind, is generally justified by the objective finding that the fear of persecution is 'well-founded'.⁴¹

Grounds for exclusion

If an individual meets the basic definition of a refugee, his or her claim for refugee or asylum status may still fail because of 'cessation' and 'exclusion' clauses in the Convention and Protocol Relating to the Status of Refugees. A refugee ceases to qualify if he or she voluntarily returns to his or her country of nationality or previous residence and accepts its protection, for example, by re-acquiring nationality or establishing a home there. It is also possible for a refugee or asylee to lose status if the circumstances leading to his or her departure cease to exist. Accordingly, an individual is excluded from being considered a refugee/asylee if he or she is firmly resettled in the country where he or she presently resides; if he or she has 'committed a crime against peace, a war crime, or a crime against humanity';⁴² 'has committed a serious non-political crime outside the country of refuge'⁴³ prior to admission to that country as a refugee; or 'has been guilty of acts contrary to the purposes and principles of the United Nations'.⁴⁴ For example, a former military officer from Sudan, who was involved in the war crime of killing civilians in his own country and then fled that country for fear of persecution for one of the five specified grounds, could not qualify as a refugee or asylee in Denmark or any other country that has ratified the Convention and Protocol Relating to the Status of Refugees.

Regional definitions of refugees

While the 1951 Convention provides the best-known and accepted definition of 'refugee', it is certainly not the only definition of this term. The OAS's Cartagena Declaration on Refugees (Cartagena Declaration)⁴⁵ and the OAU's Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)—while largely replicating some of the 1951 Convention's definition of refugees—also provide a broader definition.

⁴⁰ (1998) UN Doc E/CN.4/1998/54, § III C. Indeed, '[a]lthough domestic violence is estimated to be widespread [in Romania], many authorities and doctors, invoking Romania's strong family tradition, refuse to consider it a serious issue'. *Ibid.*

⁴¹ *UNHCR Handbook*, n 8 above, para 100.

⁴² 1951 Convention, n 2 above, art 1, para F(a).

⁴³ *Ibid.*, para F(b).

⁴⁴ *Ibid.*, para F(c).

⁴⁵ Cartagena Declaration on Refugees, n 7 above.

The OAU Convention, for example, defines a refugee according to the criteria outlined in the 1951 Convention, but also assigns the term ‘refugee’ to persons who ‘owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or 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’.⁴⁶ As one scholar has noted ‘[b]ecause [the OAU Convention’s definition of “refugee”] calls for an . . . inquiry into the conditions prevailing in the refugee’s country of origin, it is better suited for mass movements of refugees than the subjective test in the 1951 Convention, because it would permit the granting of refugee status to groups of refugees without necessarily subjecting each person to individual screening’.⁴⁷

In much the same manner, the OAS Declaration ‘[contains many] elements of the [1951 Convention] . . . [but also] includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’.⁴⁸ It should be noted, however, that the Commonwealth of Independent States, a confederation comprised of twelve of the former Soviet Union’s fifteen States, has adopted the refugee definition outlined in the 1967 Refugee Protocol⁴⁹ as a working definition.⁵⁰

B. The rights of refugees

In Articles 12 through 30, the 1951 Convention delineates the rights to which a person is entitled after a State party has recognized him or her as a refugee. These rights can be said to fall into at least four categories: (1) rights which guarantee refugees the same privileges as nationals in a host country; (2) rights obligating host countries to treat refugees as it treats nationals of other States; (3) rights granting refugees the best possible treatment which is not less favorable than the host country’s treatment of non-citizens; and (4) rights granting refugees the same treatment as a host country’s non-citizens. The difficulty, of course, is in enforcing these rights in practice.

⁴⁶ Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, entered into force 20 June 1974, art 1, para 2.

⁴⁷ Paul Kuruk, ‘Asylum and the Non-Refoulement of Refugees: The Case of the Missing Shipload of Liberian Refugees’ (1999) 35 *Stan J Int’l L* 313, 326 (citations omitted).

⁴⁸ Cartagena Declaration on Refugees, n 7 above, para 3.

⁴⁹ Protocol Relating to the Status of Refugees, n 4 above.

⁵⁰ Commonwealth of Independent States, *Collection of Documents, UNHCR Almaty 1998*, UNHCR, available at <<http://www.unhcr.bg/cis/n07.pdf>>.

As to the first category of refugee rights, States parties to the 1951 Convention agree to grant refugees the same privileges as its own nationals, generally, in regards to: (1) free exercise of religion and religious education; (2) access to elementary education; (3) access to public relief and assistance; (4) protection provided by social security; (5) free access to the courts, including legal assistance; (6) equal treatment by taxing authorities; (7) protection of literary, artistic, and scientific work; and (8) protection of intellectual property, such as inventions and trade names.

In regards to the second category of refugee rights, States parties to the 1951 Convention agree to grant refugees within its borders the ‘most favourable treatment accorded to nationals of a foreign country, in the same circumstances’⁵¹ with regards to: (1) the right to belong to trade unions; (2) the right to belong to other non-political nonprofit organizations; and (3) the right to engage in wage-earning employment.

With respect to the third category of refugee rights, States parties to the 1951 Convention are obligated to ‘accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens’⁵² with regards to: (1) the right to own property; (2) the right to practice a profession; (3) the right to self-employment; (4) access to housing; and (5) access to higher education.

Concerning the final category of refugee rights, States parties to the 1951 Convention are also obligated to ‘accord to refugees the same treatment as is accorded to aliens generally’⁵³ in regards to refugees’ right to: (1) choose their place of residence; (2) move freely within the country; and (3) be exempt from reciprocity. In addition to the human rights discussed in this section, refugees are also entitled to the human right of *non-refoulement*.⁵⁴

The 1951 Convention does not provide for an international body to supervise its implementation. Although Article 38 of the Convention on Refugees provides that disputes between States parties relating to its interpretation may be brought before the International Court of Justice, no procedure for individual complaints is available. The provisions of the 1951 Convention, however, serve in most countries as the primary basis for domestic asylum and refugee law. Hence, despite the lack of an international body, individuals should be able to bring their petitions to domestic courts or administrative agencies. Professor Fitzpatrick has pointed out that the degree of protection granted depends largely on the ‘political will’ of the States parties, since the criteria for determining

⁵¹ 1951 Convention, n 2 above, arts 15, 17.

⁵² Ibid, arts 13, 18, 19, 21, and 22.

⁵³ Ibid, art 7, para 1.

⁵⁴ The right of *non-refoulement*, which is discussed in detail in Chapter 6 on rejected asylum seekers, generally provides that all persons enjoy the right not to be deported to a country where they may be subjected to persecution.

‘refugee status’ under Article 1(2) are so elastic that much discretion is left to the States parties in implementing the provisions of the Convention on Refugees.⁵⁵ While the 1951 Convention and Protocol impose primary obligations on its States parties to comply with the treaty, the UNHCR has a role in advising governments regarding their compliance. Further, the Executive Committee of the High Commissioner’s Programme (EXCOM) regularly promulgates conclusions and recommendations in regard to the protection of refugees. These conclusions and recommendations may be generally applicable or relevant to situations in particular countries. They do not, however, ‘name names’ or speak directly to specific countries or situations.

C. Protections for refugees

The main advocate of international protection for refugees is the Office of the UN High Commissioner for Refugees. The UNHCR is the principal institution responsible for protecting and assisting refugees and asylum seekers.⁵⁶ The UN General Assembly resolution 428(V) of 14 December 1950⁵⁷—otherwise known as the UNHCR statute—established the mandate, mission, and purpose of the UNHCR:

The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.⁵⁸

Given this mandate, the UNHCR has responsibility for the entire life-cycle of refugee situations, ‘from early warning and contingency planning, to the protection of and assistance to refugees, to the achievement of durable solutions to the plight of the refugees and other persons of concern to the High Commissioner, including returnees and internally displaced persons’.⁵⁹ To fulfill the organization’s operational mandate, the UNHCR cooperates with other UN agencies

⁵⁵ Joan Fitzpatrick, ‘Revitalizing the 1951 Convention’ (1996) 9 *Harv Hum Rts J* 229, 240.

⁵⁶ UNHCR, ‘UNHCR: The Mandate and the Organization’, in *An Operations Management Handbook for UNHCR’s Partners* (2003) 1.

⁵⁷ Statute of the Office of the United Nations High Commissioner for Refugees, GA res 428 (V), annex, 5 UN GAOR Supp (No 20) at 46, (1950) UN Doc A/1775 [hereinafter UNHCR Statute].

⁵⁸ *Ibid*, para 1.

⁵⁹ UNHCR, n 56 above, at 28.

to assist refugees. These include the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the International Bank for Reconstruction and Development (IBRD), the World Food Programme (WFP), and the World Health Organization (WHO).⁶⁰ The UNHCR also works with numerous other private and public organizations on both national and international levels.

Since the UNHCR's founding in the early 1950s, the role and operations of the organization have evolved considerably.⁶¹ When the organization began operations, the UNHCR's activities focused primarily on resettling refugees in the aftermath of World War II, but meeting the material needs of these refugees was seen largely as the responsibility of countries of asylum.⁶² The operational role of the UNHCR, however, has evolved considerably as the nature of refugee situations has changed. In the late 1950s and during the 1960s, 'the focus of UNHCR's activities turned from Europe towards developing countries[; t]his shift was prompted by the refugee [crises] resulting from the process of decolonization, primarily in Africa.'⁶³ With the world's more substantial refugee flows taking place in developing countries, the UNHCR began coordinating material assistance for refugees. This coordination has become one of the organization's principal functions.⁶⁴ By the early 1970s decolonization had subsided but many regional conflicts erupted which created large-scale refugee movements. In recent years:

[T]he General Assembly and the United Nations Secretary-General have called upon UNHCR with increasing frequency to protect or assist particular groups of internally displaced persons who have not crossed an international border but are in a refugee-like situation inside their country of origin. For example, in 1991, the Secretary-General asked UNHCR to assume the role of lead United Nations agency for humanitarian assistance to the victims of the conflict in the former Yugoslavia. By 2002, UNHCR was assisting some five million internally displaced persons in Africa, the Balkans, the former Soviet Union, Colombia, Sri Lanka, East Timor, Afghanistan and other locations.⁶⁵

Although the UNHCR does not always directly provide humanitarian assistance to persons that fall within the organization's mandate, the UNHCR often plays a leading role in coordinating private and public organizations, as well as States, to provide material assistance for 'persons of concern to the UNHCR',⁶⁶

⁶⁰ UNHCR, n 56 above, at 24.

⁶¹ *Ibid.*, at 4–6.

⁶² *Ibid.*, at 4.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at 5.

⁶⁶ These persons include asylum seekers, refugees, internally displaced persons, and forced migrants, as well as other persons who qualify for protection under the UNHCR's mandate.

and during humanitarian emergency situations.⁶⁷ In addition to promoting durable solutions, promulgating conclusions and recommendations in regard to the protection of refugees, and providing and coordinating material relief, the UNHCR also works to encourage ratification of, and compliance with, the 1951 Convention, the 1967 Protocol, the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness.⁶⁸

Despite the UNHCR's role in providing and coordinating for humanitarian material assistance, it is important to bear in mind that '[t]he underlying goal of UNHCR's assistance remains the facilitation of . . . durable solutions.'⁶⁹ Indeed, durable solutions, as opposed to temporary relief, remain the only *true* mechanism for securing the long-term protection of refugees. The UNHCR works for three durable solutions for refugees. These durable solutions include voluntary repatriation to countries of origin, integration into countries of asylum, and resettlement in third countries.

Durable solutions and the role of States

While States are often held culpable for the creation of situations giving rise to refugees, they often deserve credit for providing lasting protection for refugees. Indeed, while the UNHCR can facilitate and help to coordinate durable solutions to the plight of refugees, durable solutions are ultimately implemented by States. To be sure, States are the primary provider of lasting solutions for refugees and responsibility for whether or not refugees ultimately find long-term protection ultimately rests with States.

Voluntary repatriation

Given optimal circumstances the voluntary repatriation of refugees to States of origin is generally considered the preferred durable solution. The UNHCR advocates for an integrated voluntary repatriation process which involves the 'four Rs'—repatriation, reintegration, rehabilitation, and reconstruction: '[t]his approach brings together humanitarian and development actors and funds [and [t]he aim is that greater resources [are] allocated to create a conducive environment inside the countries of origin so as to, not only prevent the recurrence of mass outflows, but also facilitate sustainable repatriation.'⁷⁰ The 'four Rs' approach

⁶⁷ (1992) UN Doc A/RES/47/105, para 19. See also (1992) UN Doc A/RES/47/105; (1981) UN Doc A/RES/36/125; (1991) UN Doc A/RES/46/106.

⁶⁸ An in-depth explication of the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness, is available in Chapter 4 on stateless persons.

⁶⁹ (1992) UN Doc A/RES/47/105, para 19.

⁷⁰ UNHCR Core Group on Durable Solutions, *Framework for Durable Solutions for Refugees and Persons of Concern* (2003) 5.

to repatriation—which often links governments with development actors (for example the UNDP, the World Bank, UNICEF), bilateral aid agencies, and the donor community⁷¹—is being applied to the refugee situations in Afghanistan, Eritrea, Sierra Leone, and Sri Lanka.⁷²

In 2005, there were fifteen voluntary repatriation movements which each involved more than 1,000 refugees.⁷³ In all, approximately 1.1 million refugees repatriated voluntarily to their country of origin.⁷⁴ During 2002, over 2.4 million refugees repatriated (the greatest level of repatriation since 1994).⁷⁵ The 3.5 million refugees repatriated in 2002 and 2003 represents an ‘almost unprecedented level of voluntary repatriation, mainly due to the return of more than 2.6 million Afghans from Pakistan and the Islamic Republic of Iran’.⁷⁶

Table 4 illustrates the main countries of voluntary repatriation in 2007.⁷⁷

Table 4. Main countries of voluntary repatriation in 2007.

Country of return (origin)	Total
Afghanistan*	1,958,000
Angola	87,500
Sierra Leone	76,000
Burundi	53,300
Bosnia and Herzegovina	41,700
Rwanda	38,600
Somalia	32,100
Timor-Leste	31,900
Liberia	21,900
Eritrea	19,700

Source: Table data assembled from Statistical Yearbook 2002: Trends in Displacement, Protection and Solutions (2004) 27

⁷¹ Ibid.

⁷² Ibid.

⁷³ UNHCR, *2005 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers and Other Persons of Concern to UNHCR* (2006) 5 [hereinafter *2005 Global Refugee Trends*].

⁷⁴ Ibid. In contrast 734,000 refugees repatriated voluntarily in 2006—one-third less than in 2005. UNHCR, *2006 Global Refugee Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (2007) 8, available at <<http://www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf>>.

⁷⁵ UNHCR, ‘Displacement and Durable Solutions’ in *Statistical Yearbook 2002: Trends in Displacement, Protection and Solutions* (2004) 26, 27.

⁷⁶ UNHCR, *2003 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers and Other Persons of Concern to UNHCR* (2004) 4 [hereinafter *2003 Global Refugee Trends*].

⁷⁷ See *Statistical year book 2002: Trends in Displacement, Protection and Solutions* (2004) 27.

Although the repatriation of refugees to countries of origin is the preferred solution for refugees, repatriation is often not a realistic option. For a number of reasons, States may be unwilling to receive and repatriate citizens. Frequently, the circumstances of large-scale exoduses during times of conflict inhibit the State's ability to verify the citizenship of refugees after they have fled the State. Also, the conflict which created the refugee situation may have resulted in the destruction of citizenship records or the administrative resources need to establish citizenship. Additionally, a large influx of former refugees may put a large economic burden on an already fragile State dealing with the aftermath of a large-scale conflict. Sometimes, however, States may simply lack the political will to repatriate citizens, especially when refugees are wholly unwanted due to their membership in a particular religious, ethnic, political, or cultural group which may represent an unwelcome political or social contingent among a population.

In addition to a State's unwillingness to repatriate citizens, refugees may also not want to return to their country of origin, especially if the conflict situation has not completely subsided. Furthermore, even if a conflict situation in a country of origin has been defused, refugees may not believe reports that a stable and safe environment exists in the country they fled. Refugees may also understandably resist repatriation in an effort to avoid people and places which trigger traumatic memories associated with acts of violence perpetrated in their country of origin.

Local integration

When circumstances make repatriation unfeasible or impracticable, other durable solutions to refugee situations—such as local integration or resettlement—should be pursued. Local integration allows refugees to integrate into their country of first asylum. Local integration, which is an economic, as well as a socio-cultural and legal process, is an important durable solution.⁷⁸ Economic integration which leads to self-sufficiency 'may be achieved when refugees are allowed access to land or the labour market, supported by income-generation projects'.⁷⁹ Indeed, if local integration is to be durable, refugees must cease to require humanitarian assistance. As one Liberian refugee living in Ghana remarked:

Being a refugee doesn't mean that I am helpless and in need of assistance. I want UNHCR to know that... I am a refugee... but I don't want one dollar of their help... Give me economic opportunity so that I can help myself. That's all I ask.⁸⁰

In addition to economic integration, locally integrated refugees must be socially assimilated if the integration is to be durable. If this social assimilation is to occur, nationals in local communities need to accommodate to the presence of refugees

⁷⁸ UNHCR, n 75 above.

⁷⁹ *Ibid.*, at 29.

⁸⁰ Shelly Dick, 'Liberians in Ghana: Living Without Humanitarian Assistance' (UNHCR, New Issues in Refugee Research Working Paper No 57, 2002), 29.

and refugees must acclimate to their new life.⁸¹ This accommodation and acclimatization should be based on non-exploitation and non-discrimination.⁸² Through naturalization, refugees enjoy the full legal protection of the host country and acquire an effective nationality. In addition, if the legal aspect of local integration is to occur fully, refugees must ultimately be granted naturalization in order to receive the full protection of the host country.

Although the nature and degree of refugee integration is often difficult to assess, some States do document the naturalization of refugees.⁸³ For example in 2002, thirteen countries of asylum informed the UNHCR of the naturalization of some 19,000 refugees.⁸⁴ Armenia and the Russian Federation, which locally integrated the largest number of refugees in 2002, naturalized 9,055 and 4,163 refugees, respectively.⁸⁵

Resettlement

Resettlement is the third durable solution the UNHCR advocates. Resettlement is an important durable solution for refugees when repatriation to their countries of origin is not possible and when countries of temporary asylum are unable or unwilling to provide long-term protection. According to the UNHCR, '[r]esettlement concerns the organized transfer of refugees from countries of temporary asylum to third countries for the purpose of permanent settlement'.⁸⁶

Given that few countries are willing to accept refugees for resettlement and that repatriation is the preferred durable solution for refugee situations, few refugees are resettled each year. From 1993 to 2002, the UNHCR facilitated the resettlement of almost 270,000 refugees.⁸⁷ This statistic indicates that 'for every 1,000 refugees who have been repatriated since 1993, only 18 have been resettled'.⁸⁸ Since the majority of refugees at any one time are usually concentrated in a few countries, and since these few countries are usually developing countries, resettlement is a way for developed countries to share the burden of protecting refugees:

In Australia, Canada, New Zealand and the United States, refugee resettlement constitutes an intrinsic component of the national immigration programme. Candidates for these resettlement programmes are either refugees selected by UNHCR as part of an agreed quota or persons selected on the basis of national criteria by the host country.⁸⁹

Additionally, developed countries are the main recipients of resettled refugees. For example, the United States, Canada, Australia, Norway, and Sweden were

⁸¹ UNHCR, n 75 above, at 29.

⁸² *Ibid.*

⁸⁴ *Ibid.*

⁸⁶ *Ibid.*, at 27.

⁸⁸ *Ibid.*

⁸³ *Ibid.*

⁸⁵ *Ibid.*

⁸⁷ *Ibid.*, at 28.

⁸⁹ *Ibid.*

responsible for resettling 96% of the refugees resettled in 2006.⁹⁰ The United States, alone, accepted 57% of the nearly 71,700 refugees resettled in 2006.⁹¹

Temporary refugee protection

The Executive Committee of the UNHCR, in Conclusion No 22 of 1981,⁹² emphasized that during situations of mass exodus, countries were obligated to provide, at the very minimum, temporary protection to *prima facie* refugees.⁹³ Temporary protection describes a range of (usually informal) practices which typically result in 'group-based protection when the determination of an individual's status proves impossible'⁹⁴ and the expansion of protection for 'forced migrants who cannot satisfy the criteria under the 1951 Convention'.⁹⁵

Temporary protection, which 'gained surprising prominence during the 1990s as a response to forced migration',⁹⁶ is often necessary and can lead to increased protection of human rights. When individual refugee status determination systems are overloaded, temporary protection may be a reasonable response to mass influxes in a second country. Indeed, since developing countries often do not have the administrative resources to determine whether every person fleeing a State during a mass exodus is a refugee, temporary protection allows otherwise hesitant States to provide protection for forced migrants without obligating these States to immediately respond to an erupting situation by granting displaced persons long-term assistance. For example, during the 1956 flight from Hungary, receiving States offered temporary protection to groups of forced migrants, provided that third States consented to eventually receiving the refugees for resettlement.⁹⁷ The adaptability and appeal of temporary protection was also exemplified by the Humanitarian Evacuation Programme, which in 1999 airlifted Kosovar refugees to safe European States.⁹⁸ The Kosovo refugee example restored faith that mass influxes can truly be temporary and thus invigorated enthusiasm for temporary protection.⁹⁹ As illustrated by the above examples of Hungary and Kosovo, temporary protection can serve as an intermediate step on the path to resettlement (as shown by the Hungarian example) or voluntary repatriation (as shown by the example of Kosovo) and thus facilitate the eventual realization of a durable solution.

⁹⁰ UNHCR, n 74 above; see also 2003 Global Refugee Trends, n 76 above.

⁹¹ *Ibid.*

⁹² Addendum to the Report of the United Nations High Commissioner for Refugees, UN GAOR, 36th Sess, Supp No 12A at 18, (1981) UN Doc A/36/12/Add.1.

⁹³ Joan Fitzpatrick, 'Flight From Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations' (1994) 35 *Va J of Int'l L* 13, 54.

⁹⁴ Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 *Am J of Int'l L* 279, 281.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, at 280.

⁹⁷ *Ibid.*, at 283.

⁹⁸ *Ibid.*, at 280.

⁹⁹ *Ibid.*

Despite its positive aspects, temporary protection has drawbacks. For example, many human rights advocates justifiably feel ‘that informal and discretionary [temporary protection] may dislodge refugee protection from the realm of enforceable human rights’.¹⁰⁰ To be sure, it is often the case that ‘[temporary protection] is offered as a diluted substitute protection for Convention refugees . . . [and thus] represents a threat to the 1951 refugee regime’.¹⁰¹ Indeed, persons who would qualify as Convention refugees are often only granted temporary protection when a longer-term solution would be more appropriate, because ‘[t]he circumstance of arriving as part of a mass influx, rather than the cause of flight, frequently determines whether asylum or temporary protection will be offered’.¹⁰²

Often, developed States inappropriately decide to provide only temporary protection in order to minimize the financial burden that often accompanies durable refugee solutions, even when these States have the means to provide durable solutions. Further, there are often large political incentives for politicians to offer temporary protection when a long-term solution might be more appropriate:

States, especially those under pressure from domestic constituencies preoccupied with migration, hope that TP will help them save costs on status determination, reduce social and economic benefits to asylum seekers, resist full integration of those who are granted asylum, and prioritize their rapid repatriation. TP may assist democratic states in mediating competing public demands that asylum not be a back door to immigration but that humanitarian ideals be sustained. Yet states also remain skeptical about formalizing temporary protection, since international TP obligations might expand the numbers of forced migrants eligible for legal protection against repatriation and pledges of international solidarity may create unpredictable and politically costly future burdens.¹⁰³

According to the late Professor Joan Fitzpatrick, several ‘states with developed systems for refugee determination and substantial absorptive capacity now channel certain [persons] into schemes for temporary protection, with the avowed aim of facilitating their eventual repatriation by preventing them from developing the links that transform refugees into permanent immigrants’.¹⁰⁴

As can be seen, temporary protection can be a double-edged sword: it can offer adaptable and timely protection to groups fleeing crises situations, but it also stands to erode the more durable and robust protections of the individual protection mechanisms outlined in the 1951 Convention.

¹⁰⁰ Fitzpatrick, n 94 above, at 281.

¹⁰¹ *Ibid.*

¹⁰² Fitzpatrick, n 93 above, at 17.

¹⁰³ Fitzpatrick, n 94 above, at 281.

¹⁰⁴ *Ibid.*

D. Refugee populations around the world

According to the UNHCR,¹⁰⁵ there were over 9.9 million recognized refugees at the end of 2006. These refugees, of course, were not all recognized on a case-by-case basis through State implementation of the 1951 Convention and 1967 Protocol. Indeed, the roughly 9.9 million refugees recognized by the UNHCR held a variety of legal statuses and were recognized via individual and *prima facie* (group) recognition processes. The legal status of the refugees counted by the UNHCR at the end of 2003 were as follows: roughly 4 million were recognized by State mechanisms implementing the 1951 Convention and its 1967 Protocol; roughly 2 million were recognized as refugees according to the OAU Convention; and roughly 1.3 million persons were recognized as refugees under the UNHCR Statute.¹⁰⁶ Given these numbers, the UNHCR estimates that 38% of the refugee population under UNHCR care has been granted protection under the 1951 Convention and/or protocol, 16% were granted refugee status under the 1969 OAU Convention, and 13% were granted status under the UNHCR Statute. Additionally, of the total refugee population counted by the UNHCR, 5.4 million (or roughly 64%) were recognized as refugees via *prima facie* recognition processes, while only 2.0 million (about 24%) were recognized through individual recognition processes. Hence, although the most widely promulgated definition of refugee is decidedly individual, the majority of refugees recognized worldwide were determined to be refugees via a group recognition process.

Drastic differences in the use of refugee status determination mechanisms are found in different regions of the world. Indeed, in Africa the overwhelming majority (84%) of refugees were *prima facie* refugees in 2003. Likewise, the UNHCR Asia and Pacific, and CASWANAME¹⁰⁷ Bureaus reported that 83% and 76% of refugees in their respective territories were *prima facie* refugees. These figures are quite high when compared to Europe and the Americas, 'where most refugees have been granted refugee status following individual screening'.¹⁰⁸ For example, in Europe only 31% of refugees were *prima facie* refugees. In the Americas only 1% were *prima facie* refugees. In part, these stark regional differences in refugee recognition mechanisms can be explained in terms of general resources. Refugee status determination on a case-by-case basis is resource intensive and the characteristics of refugee situations (ie mass displacement due to conflict or famine versus individual asylum) often preclude

¹⁰⁵ UNHCR, *2006 Global Refugee Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (2007) 5, available at <<http://www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf>>; see also *2005 Global Refugee Trends*, n 73 above, at 6.

¹⁰⁶ *Ibid*; UNHCR Statute, n 57 above.

¹⁰⁷ *2003 Global Refugee Trends*, n 76 above, at 5. The CASWANAME Bureau handles UNHCR operations in Central Asia, South West Asia, North Africa, and the Middle East.

¹⁰⁸ *2003 Global Refugee Trends*, n 76 above, at 5.

individual recognition mechanisms.¹⁰⁹ In addition to large differences in group versus individual refugee determination processes, there are large regional differences in the number of recognized refugees living within each region. For example, the UNHCR's Africa and CASWANAME regions each hosted 30% of the worldwide refugee population, while the Americas hosted only 6% of the refugee population in 2003.

Since the majority of refugees have left their States as part of mass exoduses and entered neighboring second States, and since a small percentage of refugees are resettled, it is often true that regions with the greatest amount of conflict and human rights abuses host the greatest number of refugees. The notion that regions most vulnerable to human rights abuses host the greatest number of refugees is consistent with the available data. At the end of 2003, the two main countries of asylum were Pakistan and the Islamic Republic of Iran¹¹⁰—countries which arguably have checkered human rights records. Other countries of asylum hosting significant refugee populations include Germany (hosting 960,400 refugees), the Republic of Tanzania (649,800 refugees), the United States (452,500 refugees), China (299,400 refugees), and Serbia and Montenegro (291,400 refugees).

Table 5. The top 10 countries of refugee origin and asylum in 2003.¹¹¹

Rank	Countries of Origin		Countries of Asylum	
	Country	No of refugees	Country	No of refugees
1	Afghanistan	2,136,000	Pakistan	1,124,300
2	Sudan	606,200	Islamic Republic of Iran	984,900
3	Burundi	531,600	Germany	960,400
4	DR Congo	453,400	(Rep. of) Tanzania	649,800
5	Palestinians	427,800	United States	452,500
6	Somalia	402,200	China	299,400
7	Iraq	368,400	Serbia and Montenegro	291,400
8	Viet Nam	363,200	United Kingdom	276,500
9	Liberia	353,300	Saudi Arabia	240,800
10	Angola	323,600	Armenia	239,300

Source: Table data assembled from UNHCR, 2003 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers and Other Persons of Concern to UNHCR (2004) 3.

¹⁰⁹ Ibid, at 9.

¹¹⁰ At the end of 2003, Pakistan had 1,124,300 refugees, accounting for roughly 12% of refugees worldwide and the Islamic Republic of Iran had 984,900 refugees or roughly 10.5% of refugees worldwide. Ibid, n 76 above, at 3.

¹¹¹ Ibid.

E. The plight of refugees

Since the end of the Cold War, there has been a decline in governments' enthusiasm to aid refugees. One reason for this decline is that many countries no longer see refugees as having strategic ideological or geopolitical value.¹¹² During the Cold War era, refugee flows were often directly or indirectly linked to Cold War conflicts.¹¹³ For example, throughout the Cold War:

Receiving states had a reason to open their doors: a desire to siphon off refugees from those states that supported the opposing ideology. Receiving countries could use population flows 'to discredit both the government or country of origin and to bolster the image of countries granting them asylum'.¹¹⁴

For many of the countries indirectly or directly involved in the Cold War, refugee programs were often linked to pressing foreign policy concerns¹¹⁵ and thus received higher priority and greater funding than such programs receive at present. Indeed, in light of the post-Cold War decline in enthusiasm to aid refugees, '[r]eceiving states talk less about the human rights of the uprooted and more about their own rights... [such as] their right to protect their own culture and standard of living from... foreign intruders'.¹¹⁶ States are also much more likely to have security concerns with refugee programs.¹¹⁷ With the end of the Cold War, potential host countries for refugees can no longer rely upon the clear-cut ideological positions of refugees to decide who should receive their aid.¹¹⁸

In light of the economic declines and the accompanying concerns of potential host countries, formal recognition as a refugee by no means signals the end of the refugee's problems. To be sure, many refugees experience insufficient water supplies, inadequate medical and mental health facilities, and generally unfavorable conditions. For example, undernourishment and epidemics of nutrition-related sicknesses¹¹⁹ are a particularly prevalent problem in refugee camps because aid for refugees is often inadequate, undependable, and erratic.¹²⁰ A survey conducted in the Belu District of West Timor¹²¹ during late December 1999 found that

¹¹² BS Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' (1993) 5 *Int'l J Refugee L* 443, 444, cited in Julie Mertus, 'The State and the Post-Cold War Refugee Regime: New Models, New Questions' (1998) 20 *Mich J Int'l L* 59.

¹¹³ *Ibid.*, at 65.

¹¹⁴ *Ibid.*, at 66 (citations omitted).

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, at 67 (citations omitted).

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, at 67.

¹¹⁹ Common nutrition-related sicknesses or diseases include night-blindness, scurvy, pellagra, and beri-beri. These sicknesses are caused by lack of vitamins. Barbara Harrell-Bond, 'Are refugee camps good for children?' (2001) *J of Humanitarian Assistance*, available at <<http://www.jha.ac/articles/u029.htm>>.

¹²⁰ *Ibid.*

¹²¹ West Timor is part of the Indonesian province of Nusa Tenggara Timur.

nearly 25% of refugee children under 5 years of age were suffering from moderate to acute malnutrition.¹²² These results were quite startling given that the UN considers a malnutrition rate at or above 15% to be a nutritional emergency.¹²³ The survey—which was conducted by UNICEF and the Indonesian Ministry of Health—also observed a prevalence of respiratory infections and diarrhea among young children. These health problems negatively affect nutrition.

One reason for the destitute conditions of many refugees is that developing countries—which host most of the world's refugees—often cannot fully provide for the needs of refugees fleeing from traumatic human rights abuses. For example, at the beginning of 2002 Pakistan hosted almost 2.2 million refugees (more refugees than any other country),¹²⁴ yet from 1998 to 2002, Pakistan hosted, 'on average, 4,500 refugees per 1 USD GDP [1 US \$ Gross Domestic Product] per capita'¹²⁵ and accommodated 'the highest number of persons of concern to UNHCR in relation to its economic capacity'.¹²⁶ These statistics, of course, translate into unfavorable living conditions. For instance, in 2001, UNHCR officials visited the Jalozi refugee camp near Peshawar, Pakistan, and found many refugees sleeping in dilapidated structures stitched together from plastic bags and pieces of clothing and supported by sticks.¹²⁷ In May of the same year, summer temperatures rose above 110 degrees Fahrenheit and more than twenty-five children at the camp died of dehydration and heatstroke during a two-week period.¹²⁸ During this same period, the UNHCR began conducting health inventories of refugees in the camp. Out of roughly 5,800 refugees, 4,000 were found to be in need of urgent assistance.¹²⁹ In such cases, and when the resources needed for mere subsistence are so scarce, it is highly unlikely that the psychological and educational needs of refugees will be met.

Although conditions at the Jalozi refugee camp were particularly critical, the camp—which was created by massive conflict-related exoduses—is generally illustrative of the worst refugee camps in developing countries.¹³⁰ In many cases, however, culpability for poor conditions at refugee camps cannot be placed

¹²² UNHCR, 'Quarter of refugee children in West Timor malnourished' UNHCR Website, available at <<http://www.unicef.org/newsline/00pr03.htm>>.

¹²³ Ibid.

¹²⁴ Bela Hovy, *Statistical Yearbook 2002: Trends in Displacement, Protection and Solutions* (2004).

¹²⁵ Ibid, at 9.

¹²⁶ Ibid, at 9.

¹²⁷ UNHCR, 'Transfer of refugees from squalid Jalozi camp set to begin as UNHCR's top official in Afghanistan arrives in Kabul', UNHCR Website, available at <<http://www.unhcr.org/cgi-bin/texis/vtx/doclist>>.

¹²⁸ UNHCR, 'Pakistan: Jalozi aid up, but concerns remain', UNHCR Website, available at <<http://www.unhcr.org/news/NEWS/3b052dcd1.htm>>.

¹²⁹ UNHCR, 'Pakistan: 80,000 now in squalid Jalozi camp', UNHCR Website, available at <<http://www.unhcr.org/news/NEWS/3ae6b82b8.html>>.

¹³⁰ The Jalozi refugee camp was primarily inhabited by Afghans who had fled the drought and conflict in their home country. UNHCR, n 127 above.

squarely on the shoulders of host countries. As has been mentioned, many host countries are developing and still accommodate refugees, despite the concomitant economic burden, when more developed countries turn them away. Host countries often tolerate the presence of refugee camps—and refugees often endure camp life—because such camps are seen as temporary solutions which will eventually give way to more durable solutions. Unfortunately, though, refugees may find themselves living in camps for long periods of time waiting for a durable solution to materialize. For example, if a host country is not willing to integrate and naturalize a given refugee,¹³¹ a third country is unwilling to accept the refugee for resettlement, and conditions in a country of origin fail to improve, then the refugee's only option may be to remain in a camp that was created for only 'temporary' habitation. A Human Rights Watch report published in 2000 detailed the situation of some 22,000 Rohingya¹³² refugees from Myanmar (Burma), many of whom have spent nearly a decade living in refugee camps in Bangladesh. Regrettably, a durable solution for many of the Rohingya who fled Myanmar as part of a 1991–2 mass exodus has not been found.¹³³ Although the government of Bangladesh continually promoted repatriation, the underlying causes of the refugees' flight persisted, and 'other Rohingya... continued to leave Arakan to seek asylum in Bangladesh'¹³⁴ 'at the same time as refugees [were] returning from Bangladesh to [Myanmar]'.¹³⁵ Just as repatriation proved to be an unworkable durable solution, attempts to facilitate local integration also failed. As '[t]he most densely populated country on earth',¹³⁶ the Bangladeshi 'government [was] acutely aware of... sensitivities surrounding land allocation and population pressure and... unequivocally rejected all recommendations of local integration'.¹³⁷ Finally, there has been little opportunity for the resettlement of Rohingya living in Bangladesh, leaving many Rohingya with no option but to remain in so-called temporary refugee camps.

Additionally, host countries often force refugees to repatriate before homeland conditions have adequately improved.¹³⁸ For example, during the mid to late 1990s, the UNHCR found that the Bangladeshi Government had forcibly

¹³¹ Susan F Martin and Andrew I Schoenholtz, 'Asylum in Practice: Successes, Failures, and the Challenges Ahead' (2000) 14 *Geo Immigr LJ* 589.

¹³² According to Rohingya leaders, the 'Rohingya are an ethnically distinct group, descendants of the first Muslims who began migrating to northern Arakan State[, Myanmar] in the eighth century, though they also say that they are a mix of Bengalis, Persians, Moghuls, Turks, and Pathans who came to [northern Arakan, Myanmar]...'. Zama Coursen-Neff, 'Living in Limbo: Burmese Rohingyas in Malaysia', Human Rights Watch, available at <<http://www.hrw.org/reports/2000/malaysia/>>.

¹³³ Human Rights Watch, 'Burmese Refugees in Bangladesh: Still no Durable Solution', Human Rights Watch Website, available at <<http://www.hrw.org/reports/2000/burma/index.htm>>.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

repatriated hundreds of Rohingyas back to Myanmar. Such involuntary repatriation compels refugees to relive the persecution that they had originally fled. Hence, no international body currently endorses involuntary repatriation as a viable durable solution.

Another difficulty encountered by refugees is racism and xenophobia. In developing countries, local populations may resent the fact that refugees receive free food, education, and health care from the international community, while they receive almost no services from their own government. Additionally, in both developed and developing countries, refugees are blamed for their host countries' ills, and during times of national conflict or public emergency, refugee rights are often the first to be violated. In the aftermath of the September 2001 attacks on the United States, the UNHCR became 'seriously concerned over the all-too-common tendency to link asylum seekers and refugees to crime and terrorism'.¹³⁹ Specifically, the UNHCR was concerned that the unwarranted link between refugees and terrorism would result in the withdrawal of refugee status on the basis of ethnicity, nationality, religion, or political affiliation.¹⁴⁰ The UNHCR was also concerned that unjustifiable links between refugees and terrorism would persuade States not to 'maintain their resettlement programs at promised levels, particularly for certain ethnic groups or nationalities'.¹⁴¹

Unfortunately, the UNHCR's fears were quite justified as anti-terrorism legislation enacted in response to the September 2001 attacks resulted in the rapid scaling back of refugee rights in the United States.¹⁴² For example, security procedures under Operation Liberty Shield¹⁴³ permitted the secret deportation and arbitrary detention of foreign nationals, including refugees, from countries with active terrorist organizations.¹⁴⁴ Given that the provisions for closed deportation hearings outlined in Operation Liberty Shield largely targeted refugees and other foreign nationals, such hearings would, in the United States, 'contradict[] Article 16(2) of the 1951 Convention, which states that "[a] refugee shall enjoy in the Contracting State... the same treatment as a national in matters pertaining to access to the courts".¹⁴⁵

¹³⁹ UNHCR, 'Ten refugee protection concerns in the aftermath of Sept. 11', UNHCR Website, available at <<http://www.unhcr.org/new/NEWS/3bd5469b7.html>>.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Lori Adams, 'UN Report: Refugee Rights in the US Scaled Back by Recent Anti-Terrorism Legislation: Are We Violating the United Nations 1951 Convention?' (2003) 19 *NYL Sch J Hum Rts* 807.

¹⁴³ US Department of Homeland Security, 'Operation Liberty Shield', available at <http://www.dhs.gov/xnews/releases/press_release_0115.shtm>, cited in *ibid.* Operation Liberty Shield was quietly discontinued in April 2003. Human Rights First, Asylum Protection News 15, 'Operation Liberty Shield Quietly Terminated, Future of Detained Asylum Seekers Still Unclear', available at <http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_15.htm>.

¹⁴⁴ Adams, n 142 above, at 810. It should be noted, however, that such policies would have failed to stop the September 11th attacks, since none of the perpetrators were refugees or asylum seekers.

¹⁴⁵ Ibid, at 815.

F. The vulnerability of refugee women and girls

During the past decade, armed conflicts in the Balkans, Central Africa, West Africa, and elsewhere have been characterized by high levels of sexual violence that has targeted civilian women and girls—many of whom are fleeing violence. During flight from combat zones and human rights abuses, refugee women are at risk of sexual violence and other forms of exploitation as they try to negotiate a safe passage across borders for themselves and their children. Refugee women and girls in transit risk sexual violence from border guards, immigration officials, military groups, male refugees, and traffickers—especially if they have been separated from their family during flight. Because trafficking flourishes in environments created by the breakdown of law and order, a country is more likely to become a source of trafficking victims after sudden political change, economic collapse, civil unrest, or armed conflict. Women and girls who are victims of international trafficking are often forced into prostitution or brothels that service military forces stationed nearby.

Women refugees and asylum seekers fleeing from one dangerous situation can find themselves in new situations of risk. For example, thousands of Bhutanese women living in refugee camps in Nepal—many for more than a decade—have been forced to confront not only the hardship of life in refugee camps, but also the injustice of blatant gender-based violence and discrimination. Hundreds of refugee women and girls have reported rape, sexual assault, polygamy, trafficking, domestic violence, and child marriage in the camps.¹⁴⁶ The women suffer domestic violence, are not assured of their safety, and often do not obtain their share of humanitarian aid because of discriminatory refugee registration procedures and inadequate protection measures.¹⁴⁷ The registration system also prevents married refugee women from applying for repatriation or rations independently of their husbands and prohibits them from registering children not fathered by a refugee.¹⁴⁸

In 2002 the Office of the UN High Commissioner for Refugees documented the sexual exploitation of women and children by humanitarian workers in refugee camps located in Guinea, Liberia, and Sierra Leone. According to one UNHCR investigative report, several humanitarian workers extorted sexual favors from refugee women and children in exchange for ration cards, transport, medicine, and other services.¹⁴⁹ Sexual abuse of refugees by humanitarian workers has also been reported in Democratic Republic of the Congo¹⁵⁰ and Nepal.¹⁵¹

¹⁴⁶ Human Rights Watch, 'Trapped by Inequality: Bhutanese Refugee Women in Nepal' (2003).

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ UNHCR and Save The Children—UK, *Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone* (2002).

¹⁵⁰ 'UN Troops Buy Sex from Teenage Refugees in Congo Camp' *London Independent*, 25 May 2004.

¹⁵¹ Press Release, Amnesty International, 'Nepal: Sexual Abuse Reports Highlight Plight of Bhutanese Refugees' (22 November 2002) (on file with the author).

G. Conclusion

The global refugee regime is at risk. Major threats to the regime include: (1) the replacement of durable solutions with temporary protection; (2) the failure of developed countries to share the burden of protecting and caring for refugees; and (3) the unnecessary scaling back of refugee rights in response to the September 2001 terrorist attacks.

As to the first threat, the danger exists that temporary protection will be increasingly used as a watered-down substitute for the protections provided by the 1951 Convention and Protocol¹⁵² and that temporary protection will displace traditional refugee protections from the sphere of enforceable human rights.¹⁵³ It is increasingly the case that persons who would qualify as Convention refugees are only granted temporary protection because such limited protection allows governments to decrease the financial burden of refugees by eliminating the costs of status determination, reducing economic and social benefits to refugees, and encouraging rapid repatriation.¹⁵⁴

Regarding the second threat, refugees' needs are often not met because developed countries are not doing their 'fair share' for the protection of refugees. Between 1992 and 2001, developed countries hosted less than 30% of the world's refugees,¹⁵⁵ despite the fact that these countries control the overwhelming majority of the world's wealth. The protection of refugees is the collective responsibility of all States. Equitable distribution of the responsibility inherent in the protection of refugees is not only in keeping with principles of international solidarity, burden-sharing, and international cooperation,¹⁵⁶ it is a practical necessity since the developing countries which host most refugees usually cannot fully meet the numerous needs of refugees fleeing from traumatic human rights abuses. Unfortunately, however, the UNHCR has had little success with its efforts to increase the number of countries accepting refugees for resettlement. For example, 'the number of countries accepting resettled refugees decreased from 14 in 2001 to 11 in 2002'.¹⁵⁷

Finally, and with regard to the third threat, the completely unfounded tendency to associate refugees with crime and terrorism stands to erode the rights of refugees. The association of refugees with crime and terrorism often 'incites

¹⁵² Fitzpatrick, n 94 above.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ Jeff Crisp, 'A New Asylum Paradigm? Globalization, Migration and the Uncertain Future of the International Refugee Regime' *New Issues in Refugee Research*, Working Paper 100 (UNHCR, 2003).

¹⁵⁶ World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Programme of Action, Agenda item 9, adopted 8 September 2001 in Durban, South Africa, (2001) UN Doc A/CONF.189/5.

¹⁵⁷ UNHCR, n 75 above, at 29.

racism and xenophobia[,]... [provokes] serious protection worries[,]... vilifies refugees in the public mind[,] and exposes persons of particular races or religions to discrimination and hate-based harassment'.¹⁵⁸ Such associations, which have only been strengthened by recent US anti-terrorism legislation, 'inflict[] further suffering on individuals who have already risked their lives to escape persecution and violence, including terrorism, in their countries of origin'.¹⁵⁹ Since the 1951 Convention was carefully constructed to exclude perpetrators of serious crimes (such as terrorists),¹⁶⁰ refugees have—by definition—suffered from acts of persecution and terrorism, but have not perpetrated such acts.¹⁶¹

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¹⁵⁸ UNHCR, n 139 above.

¹⁵⁹ Adams, n 142 above.

¹⁶⁰ UNHCR, note 139 above.

¹⁶¹ *Ibid.*

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