



60
YEARS

 **UNHCR**
The UN Refugee Agency

A Compilation of
Summary Conclusions
from UNHCR's
Expert Meetings

Commemorating the Refugee and Statelessness Conventions

2010-2011



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Division of International Protection

The summary conclusions contained in this compilation are presented in chronological order, and each is followed by a list of meeting participants. The formatting of some of the original documents has been modified for this publication, for consistency reasons. This publication is available electronically in UNHCR's Refworld database at: <http://www.unhcr.org/refworld/docid/4f461d372.html>.

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Commemorating the Refugee and Statelessness Conventions

Foreword

The year 2011 marked the 60th anniversary of the 1951 Convention relating to the Status of Refugees (1951 Convention) and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness (1961 Convention). As part of the commemoration of these milestones, the Office of the United Nations High Commissioner for Refugees (UNHCR) hosted, together with various partners, a series of expert meetings to reflect on and to advance some of the key protection challenges of the twenty-first century.

Eight expert meetings were held between May 2010 and November 2011 addressing statelessness doctrine and various contemporary issues pertaining to the refugee protection regime and forced displacement. Each of the meetings brought together senior subject-matter experts from a range of backgrounds, including governments, international organizations, non-governmental organizations, policy institutes and academia. The conclusions of the commemorative expert meetings will inform UNHCR's protection strategy in the coming years.

The results of the expert meetings also informed the deliberations at the landmark ministerial-level event held on 7 and 8 December 2011 in Geneva, the culmination of UNHCR's commemorations efforts. Bringing together 155 countries, including 72 Ministers, this Ministerial Meeting gave States the opportunity to formalize their accession to relevant conventions and to make concrete pledges of commitment to address specific forced displacement and/or statelessness issues.

Expert Meetings – Statelessness

UNHCR's statelessness mandate encompasses efforts to identify, prevent and reduce statelessness, as well as to protect stateless persons. UNHCR's commemorations presented an opportunity to breathe new life into both the 1954 Convention relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention, and to seek a range of solutions to address the ongoing plight of the world's stateless.

Three specific expert meetings were held on the topic of statelessness:¹

- *The Concept of Stateless Persons under International Law* (Prato, Italy, 27–28 May 2010) (co-sponsored by the European Commission);
- *Statelessness Determination Procedures and the Status of Stateless Persons* (Geneva, Switzerland, 6–7 December 2010) (co-sponsored by the European Commission and the Open Society Justice Initiative); and
- *Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children* (Dakar, Senegal, 23–24 May 2011) (co-sponsored by the Open Society Justice Initiative).

The principal objective of these expert meetings was to lay the groundwork for the drafting of authoritative guidelines on the interpretation and application of the 1954 and 1961 Conventions. Once issued, the guidelines will shape UNHCR's operational and technical efforts to enhance progress on addressing statelessness, alongside States and other stakeholders.

The statelessness expert meeting series also contributed to raising awareness and creating momentum to address statelessness more broadly. The 2011 Ministerial Meeting saw a “quantum leap” in commitments to resolve statelessness, demonstrated by the record number of States that acceded to one or both of the statelessness conventions in 2011 and the more than 50 States that made pledges on statelessness. UNHCR looks forward to building on these achievements and the dynamic established during the commemorations year in defining and planning its future work on statelessness issues.

¹ In addition, statelessness issues also featured in the expert meetings in Bellagio on climate change and in Geneva on alternatives to detention, discussed below.

Expert Meetings – Refugee Protection and Forced Displacement

In the area of refugee protection and forced displacement, five expert meetings were convened on important issues facing the international community, 60 years after the adoption of the 1951 Convention:

- *Climate Change and Displacement* (Bellagio, Italy, 22–25 February 2011) (with the support of the Rockefeller Foundation);
- *Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law* (Arusha, Tanzania, 11–13 April 2011) (co-organized with the International Criminal Tribunal for Rwanda);
- *Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons* (Geneva, Switzerland, 11–12 May 2011) (co-organized with the Office of the High Commissioner for Human Rights);
- *International Cooperation to Share Burdens and Responsibilities* (Amman, Jordan, 27–28 June 2011); and
- *Refugees and Asylum-Seekers in Distress at Sea* (Djibouti, 8–10 November 2011).

Each of these meetings provided an opportunity to analyze and encapsulate key contemporary protection challenges. Significantly, the expert meetings also led to the endorsement of concrete tools and mechanisms for follow-up by UNHCR, States and other stakeholders.

The Bellagio meeting on *Climate Change and Displacement* noted that the majority of displacement caused by or related to climate change is likely to be internal. However, some international (“external”) displacement will also occur. The meeting recommended that States, in conjunction with UNHCR, explore the development of a global guiding framework or instrument to address such external displacement. With respect to internal climate change-related displacement, while the Guiding Principles on Internal Displacement were considered to already provide sufficient normative guidance, further efforts on dissemination and operationalization are required. Another area of work highlighted was the need to better define parameters for planned relocation of populations affected by climate change, including for small island and low-lying coastal States. The results of the Bellagio meeting fed into the “Nansen Principles”, adopted at the Nansen Conference on Climate Change and Displacement in Oslo in June 2011.²

² The Nansen Principles are available at: http://www.regjeringen.no/upload/UD/Vedlegg/Hum/nansen_prinsipper.pdf.

The Geneva roundtable on *Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons* formed part of a broader strategy to make alternatives to detention more visible within the protection work of UNHCR and its partners, and to find concrete options for governments to reduce their reliance on detention. There is no evidence that detention deters irregular migration or discourages people from seeking asylum; conversely, high compliance rates can be achieved when people are released to proper supervision and alternative facilities. As follow-up, UNHCR is working on a global strategy on detention which will include revised guidelines and a detention monitoring manual for field staff. Alternatives to detention will feature as an important part of this strategy. Similarly, the findings of the Arusha meeting on *Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law* on the multifaceted linkages between international criminal law and forced displacement will impact on the revision of UNHCR's Guidelines on International Protection No. 5: Application of the Exclusion Clauses.³

The Amman meeting on *International Cooperation to Share Burdens and Responsibilities* was an important first step in looking at ways that international cooperation can be enhanced as part of responses to a range of different displacement situations. Participants endorsed the development of a common framework, consisting of a "set of understandings" on international cooperation to support the framing of specific cooperative arrangements, and an "operational toolbox" to facilitate the development of bilateral and multilateral agreements. This was the subject of a follow-up meeting in Djibouti on *Refugees and Asylum-Seekers in Distress at Sea*. The meeting approved a Model Framework for Cooperation following rescue at sea incidents involving asylum-seekers and refugees. It will form part of the Amman "toolbox". UNHCR is now exploring the implementation of this Model Framework in certain regions.

Against this background, I am pleased to introduce this compilation of summary conclusions from this historic series of expert meetings. I hope that States, UNHCR colleagues and other stakeholders will make use of this compilation in defining protection priorities and strategies in 2012 and beyond.

Volker Türk

Director

Division of International Protection

May 2012

³ UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <http://www.unhcr.org/refworld/docid/3f5857684.html>.

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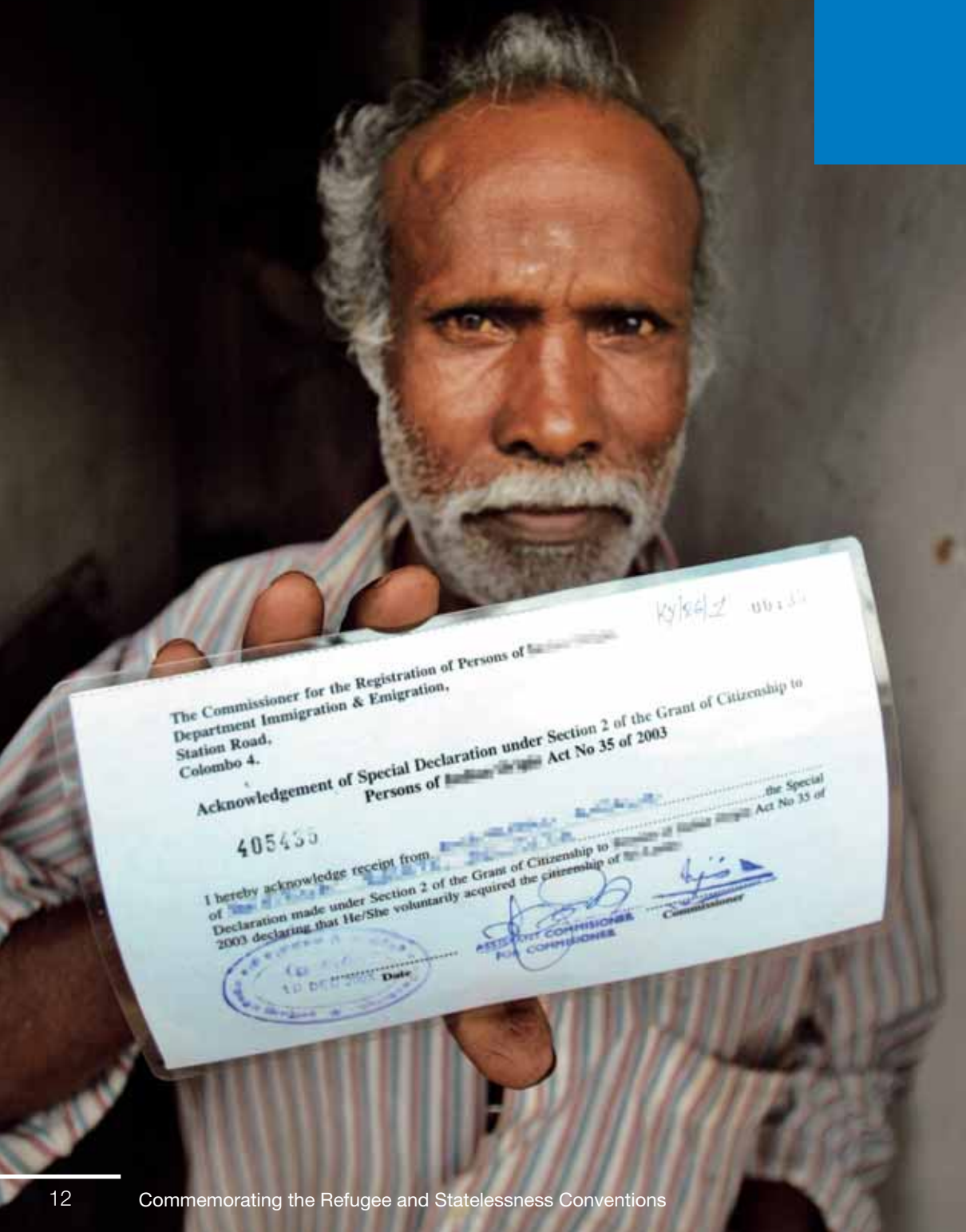
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 Station Road,
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Acknowledgement of Special Declaration under Section 2 of the Grant of Citizenship to
 Persons of *Kykeel* Act No 35 of 2003

405435

I hereby acknowledge receipt from
 of *Kykeel*
 Declaration made under Section 2 of the Grant of Citizenship to
 2003 declaring that He/She voluntarily acquired the citizenship of *Kykeel*
 the Special
 Act No 35 of

10 DECEMBER
 Date

[Signature]
 ASSISTANT COMMISSIONER
 FOR IMMIGRATION
 COMMISSIONER

Expert
MeetingPrato, Italy
27–28 May 2010The Concept of
Stateless Persons
under International Law

Summary Conclusions*

The Office of the United Nations High Commissioner for Refugees (UNHCR) convened an expert meeting on the concept of stateless persons under international law in Prato, Italy, from 27-28 May 2010. Co-sponsored by the European Commission, this was the first in a series of meetings organized by UNHCR in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness (1961 Convention).**

Two discussion papers were prepared for the meeting.*** The 24 participants came from 16 countries and included experts from governments, NGOs, academia, the judiciary, the legal profession and international organizations.

The meeting allowed for a wide-ranging discussion which focused on stateless persons as defined in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention) (sometimes termed *de jure* stateless persons), before turning to the concept of *de facto* statelessness. The meeting reviewed principles of customary international law, general principles of international law and treaty standards, national legislation, administrative practice and judgments of national courts. It also took into account decisions of international tribunals and treaty monitoring bodies as well as scholarly writing.

* The numbering of headings and paragraphs of these summary conclusions has been modified for this publication for consistency reasons. The original version is available at: <http://www.unhcr.org/refworld/docid/4ca1ae002.html>.

** UNHCR convened a series of expert meetings on statelessness doctrine in the context of the 50th anniversary of the 1961 Convention on the Reduction of Statelessness. The objective of the discussions was to prepare for the drafting of guidelines under UNHCR's statelessness mandate on the following issues: the definition of a "stateless person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons; the concept of *de facto* statelessness; procedures for determining whether a person is stateless; the status (in terms of rights and obligations) to be accorded to stateless persons under national law; and the scope of international legal safeguards for preventing statelessness among children or at birth.

*** R. Mandal, *The definition of 'Stateless Person' in the 1954 Convention relating to the Status of Stateless Persons: Article 1(1) – The Inclusion Clause*; H. Massey, *UNHCR and De Facto Statelessness*, UNHCR, Legal and Protection Policy Research Series, LPPR/2010/02, April 2010, available at: <http://www.unhcr.org/refworld/docid/4bbf387d2.html>. Professor Guy Goodwin-Gill of Oxford University also provided a written contribution, the conclusions of which were presented in summary form during the meeting.

The following summary conclusions do not represent the individual views of each participant or necessarily of UNHCR, but reflect broadly the understandings emerging from the discussion.

Stateless Persons as defined in the 1954 Convention and International Law

General considerations

1. In interpreting the statelessness definition in Article 1(1) of the 1954 Convention, it is essential to keep in mind the treaty's object and purpose: securing for stateless people the widest possible enjoyment of their human rights and regulating their status.
2. The International Law Commission has observed that the definition of a stateless person contained in Article 1(1) is now part of customary international law.
3. The issue under Article 1(1) is not whether or not the individual has a nationality that is effective, but whether or not the individual has a nationality at all. Although there may sometimes be a fine line between being recognized as a national but not being treated as such, and not being recognized as a national at all, the two problems are nevertheless conceptually distinct: the former problem is connected with the rights attached to nationality, whereas the latter problem is connected with the right to nationality itself.
4. The definition in Article 1(1) applies whether or not the person concerned has crossed an international border. That is, it applies to individuals who are both inside and outside the country of their habitual residence or origin.
5. Refugees (under the 1951 Convention relating to the Status of Refugees (1951 Convention) the extended definitions in relevant regional instruments and under UNHCR's international protection mandate) may also, and frequently do, fall within Article 1(1). If a stateless person is simultaneously a refugee, he or she should be protected according to the higher standard which in most circumstances will be international refugee law, not least due to the protection from *refoulement* in Article 33 of the 1951 Convention.
6. While the definition of a "stateless person" should be interpreted and applied in a holistic manner, paying due regard to its ordinary meaning, it may also be helpful to examine its constituent elements.
7. When applying the definition it will often be prudent to look first at the question of "State" as further analysis of the individual's relationship with the entity under consideration is moot if that entity does not qualify as a

“State”. In situations where a State does not exist under international law, the persons are *ipso facto* considered to be stateless unless they possess another nationality.

Meaning of “not considered as a national...under the operation of its law”

8. “National” should be given its ordinary meaning of representing a legal link (nationality) between an individual and a particular State.
9. For the purposes of the 1954 Convention, “national” is to be understood by reference to whether the State in question regards holders of a particular status as persons over whom it has jurisdiction on the basis of a link of nationality. Several participants were of the view that in practice it is difficult to differentiate between the possession of a nationality and its effects, including, at a minimum, the right to enter and reside in the State of nationality and to return to it from abroad, as well as the right of the State to exercise diplomatic protection. Otherwise, according to this view, nationality is emptied of any content.
10. Article 1(1) does not require a “genuine and effective link” with the State of nationality in order for a person to be considered as a “national”. The concept of “genuine and effective link” has been applied principally to determine whether a State may exercise diplomatic protection in favour of an individual with dual or multiple nationalities, or where nationality is contested. It is therefore possible to be a “national” even if the State of nationality is one in which the individual was neither born nor habitually resides. The relevant criterion is whether the State in question considers a person to be its national.
11. A State may have two or more categories of “national” not all necessarily enjoying the same rights. For the purposes of the definition in Article 1(1), these persons would still be regarded as nationals of the State and therefore not stateless.
12. Whether an individual actually is a national of a State under the operation of its law requires an assessment of the viewpoint of that State. This does not mean that the State must be asked in all cases for its views about whether the individual is its national in the context of statelessness determination procedures.
13. Rather, in assessing the State’s view it is necessary to identify which of its authorities are competent to establish/confirm nationality for the purposes of Article 1(1). This should be assessed on the basis of national law as well as practice in that State. In this context, a broad reading of “law” is justified, including for example customary rules and practices.
14. If, after having examined the nationality legislation and practice of States with which an individual enjoys a relevant link (in particular by birth on the territory, descent, marriage or habitual residence) – and/or after having checked as appropriate with those States – the individual concerned is not

found to have the nationality of any of those States, then he or she should be considered to satisfy the definition of a stateless person in Article 1 (1) of the 1954 Convention.¹

15. “Under the operation of its law” should not be confused with “by operation of law”, a term which refers to automatic (*ex lege*) acquisition of nationality.² Thus, in interpreting the term “under the operation of its law” in Article 1(1), consideration has to be given to non-automatic as well as automatic methods of acquiring and being deprived of nationality.
16. The Article 1(1) definition employs the present tense (“who is...”) and so the test is whether a person is considered as a national at the time the case is examined and not whether he or she might be able to acquire the nationality in the future.
17. In the case of non-automatic modes of acquisition, a person should not be treated as a “national” where the mechanism of acquisition has not been completed.
18. The ordinary meaning of Article 1(1) requires that a “stateless person” is a person who is not considered a national by a State regardless of the background to this situation. Thus, where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national for the purposes of Article 1(1) – rather, it is the position under domestic law that is relevant. The alternative approach would lead to outcomes contrary to the ordinary meaning of the terms of Article 1(1) interpreted in light of the 1954 Convention’s object and purpose. This does not, however, prejudice any obligation that States may have not to recognize such situations as legal where the illegality relates to a violation of *jus cogens* norms.³
19. There is no requirement for an individual to exhaust domestic remedies in relation to a refusal to grant nationality or a deprivation of his/her nationality before he or she can be considered as falling within Article 1(1).
20. The definition in Article 1(1) refers to a factual situation, not to the manner in which a person became stateless. Voluntary renunciation of nationality does not preclude an individual from satisfying the requirements of Article 1(1) as there is no basis for reading in such an implied condition to the definition of “stateless person”. Nonetheless, participants noted that diverging approaches have been adopted by States. It was also noted that the manner in which an individual became stateless may be relevant to his or her treatment following recognition and for determining the most appropriate solution.

¹ Foundlings are an exception. In the absence of proof to the contrary, foundlings should be presumed to have the nationality of the State in whose territory they are found as set out in Article 2 of the 1961 Convention on the Reduction of Statelessness.

² See, for example, 1961 Convention on the Reduction of Statelessness, Articles 1, 4 and 12.

³ A *jus cogens* norm (or a peremptory norm of general international law) is a rule of customary international law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. Examples of such norms are the prohibition on the use of force by states and the prohibition on racial discrimination.

21. The consequences of a finding of statelessness for a person who could acquire nationality through a mere formality are different from those for a person who cannot do so and a distinction should be drawn in the treatment such persons receive post-recognition. On the one hand, there are simple, accessible and purely formal procedures where the authorities do not have any discretion to refuse to take a given action, such as consular registration of a child born abroad. On the other hand, there are procedures in which the administration exercises discretion with regard to acquisition of nationality or where documentation and other requirements cannot reasonably be satisfied by the person concerned.

Meaning of “by any State”

22. Given that Article 1(1) is a negative definition, “by any State” could be read as requiring the possibility of nationality to be ruled out for every State in the world before Article 1(1) can be satisfied. However, the adoption of an appropriate standard of proof would limit the States that need to be considered to those with which the person enjoys a relevant link (in particular by birth on the territory, descent, marriage or habitual residence).
23. The meaning of “State” should be based on the criteria generally considered necessary for a State to exist in international law. As such, relevant factors are those found in the Montevideo Convention on Rights and Duties of States (permanent population, defined territory, government and capacity to enter into relations with other States) coupled with other considerations that have subsequently emerged (effectiveness of the entity in question, right of self-determination and the consent of the State which previously exercised control over the territory in question).
24. Whether or not an entity has been recognised as a State by other States is indicative (rather than determinative) of whether it has achieved statehood.
25. Where an entity’s purported statehood appears to have arisen through the use of force, its treatment under Article 1(1) will raise issues regarding the obligations of third States with regard to breaches of *jus cogens* norms.
26. In keeping with the current state of international law, whilst an effective central government is critical for a new State to emerge, an existing State that no longer has such a government because of civil war or other instability can still be considered as a “State” for the purposes of Article 1(1).
27. The position of so-called “sinking island States” raises questions under Article 1(1), as the permanent disappearance of habitable physical territory, in all likelihood preceded by loss of population and government, may mean the “State” will no longer exist for the purposes of this provision. However, the situation is unprecedented and may necessitate progressive development of international law to deal with the preservation of the identity of the communities affected.

De facto Stateless Persons

28. The participants broadly agreed that some categories of persons hitherto regarded as *de facto* stateless are actually *de jure* stateless, and therefore particular care should be taken before concluding that a person is *de facto* stateless rather than *de jure* stateless. This is particularly important as there is an international treaty regime for the protection of stateless persons as defined in Article 1(1) of the 1954 Convention and to prevent and reduce statelessness (most notably the 1954 and 1961 Conventions). However, there is no similar regime for *de facto* stateless persons. A number of participants referred to gaps in the existing international protection regime that affect *de facto* stateless persons in particular. On the other hand, some participants expressed the view that the concept of *de facto* stateless persons is problematic. Reference was made in particular to some extremely broad interpretations of the term.

Definition of “*de facto* statelessness”

29. *De facto* statelessness has traditionally been linked to the notion of effective nationality⁴ and some participants were of the view that a person's nationality could be ineffective inside as well as outside of his or her country of nationality. Accordingly, a person could be *de facto* stateless even if inside his or her country of nationality. However, there was broad support from other participants for the approach set out in the discussion paper prepared for the meeting which defines a *de facto* stateless person on the basis of one of the principal functions of nationality in international law, the provision of protection by a State to its nationals abroad.
30. The definition is as follows: *de facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality.
31. It was agreed that there are many *de facto* stateless persons who are not refugees, contrary to the presumption that was widely held in the past. While refugees who formally possess a nationality are *de facto* stateless, participants indicated that it was not useful to refer to them as such because this could create confusion.
32. It was also agreed that a person who is stateless in the sense of Article 1(1) of the 1954 Convention cannot be simultaneously *de facto* stateless.

⁴ The Final Act of the 1961 Convention links the two when it recommends that “persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality”.

Valid reasons for being unwilling to avail oneself of protection

33. The existing universal and regional refugee protection instruments reflect the current consensus of States on what constitute “valid reasons” for refusing the protection of one’s country of nationality.⁵ Persons who refuse the protection of the country of their nationality when it is available and who do not fall under one or more of the aforementioned instruments are not *de facto* stateless.
34. Persons who do fall within the scope of the aforementioned instruments should be granted the protection foreseen by those instruments, rather than any lesser form of protection that a particular State may decide to accord to *de facto* stateless persons generally.

Inability to avail oneself of protection

35. Being unable to avail oneself of protection implies circumstances that are beyond the will/control of the person concerned. Such inability may be caused either by the country of nationality refusing its protection, or by the country of nationality being unable to provide its protection because, for example, it is in a state of war and/or does not have diplomatic or consular relations with the host country.
36. Some persons who are unable to avail themselves of the protection of the country of their nationality may qualify for protection under the 1951 Convention/1967 Protocol⁶ or one of the three regional refugee or subsidiary protection instruments.⁷ However, there may also be situations where denial of protection does not constitute persecution.⁸
37. Inability to avail oneself of protection may be total or partial. Total inability to avail oneself of protection will always result in *de facto* statelessness. Persons who are unable to return to the country of their nationality will also always be *de facto* stateless even if they are otherwise able in part or in full to avail themselves of protection of their country of nationality while in the host country (i.e. diplomatic protection and assistance). On the other

⁵ See, in particular, the 1951 Convention/1967 Protocol relating to the Status of Refugees, the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees, and Council Directive 2004/83/EC of the European Union on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

⁶ For example, as stated in paragraph 98 of UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status*, lack of protection may sometimes itself contribute to fear of persecution: “denial of protection [by the country of nationality] may confirm or strengthen the applicant’s fear of persecution, and may indeed be an element of persecution.”

⁷ See note 5, above.

⁸ As stated in paragraph 107 of UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* regarding applicants for refugee status who have dual nationality: “There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals ... As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of reply within reasonable time may be considered a refusal.”

hand, persons who are able to return to their country of nationality are not *de facto* stateless, even if otherwise unable to avail themselves of any form of protection by their country of nationality in the host country.

Undocumented migrants

38. Irregular migrants who are without identity documentation may or may not be unable or unwilling to avail themselves of the protection of the country of their nationality. As a rule there should have been a request for, and a refusal of, protection before it can be established that a person is *de facto* stateless. For example, Country A may make a finding that a particular individual is a national of Country B, and may seek to return that individual to Country B. Whether or not the individual is *de facto* stateless may depend on whether or not Country B is willing to cooperate in the process of identifying the individual's nationality and/or permit his or her return. Thus, prolonged non-cooperation including where the country of nationality does not respond to the host country's communications can also be considered as a refusal of protection in this context.

Treatment of *de facto* stateless persons

39. While *de facto* stateless persons are covered by international human rights law, there is no specific treaty regime addressing the international protection needs of those who do not fall within the universal and regional refugee protection instruments. Certain recommendations as to the treatment of *de facto* stateless persons have been made in the Final Acts of the 1954 and 1961 Conventions⁹ and in Recommendation CM/Rec(2009)13 on the Nationality of Children adopted by the Committee of Ministers of the Council of Europe.¹⁰

De facto stateless persons and UNHCR's mandate

40. The extent to which *de facto* stateless persons who do not fall within its refugee mandate qualify for the Office's protection and assistance is largely determined by UNHCR's mandate to prevent statelessness. It was noted that unresolved situations of *de facto* statelessness, in particular over two or more generations, may lead to *de jure* statelessness.

UNHCR

September 2010

⁹ The Final Act of the 1961 Convention "*Recommends* that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality". Note that the Recommendation in the Final Act of the 1954 Convention does not apply to all *de facto* stateless persons, but only to those persons who are *de facto* stateless because they are considered as having valid reasons for renouncing the protection of the State of which they are a national.

¹⁰ The Recommendation reads as follows "With a view to reducing statelessness of children, facilitating their access to a nationality and ensuring their right to a nationality, member states should: [...] 7. treat children who are factually (*de facto*) stateless, as far as possible, as legally stateless (*de jure*) with respect to the acquisition of nationality.

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Expert
MeetingGeneva, Switzerland
6–7 December 2010Statelessness
Determination Procedures
and the Status of
Stateless Persons

Geneva

Summary Conclusions

The Office of the United Nations High Commissioner for Refugees (UNHCR) convened an expert meeting on stateless determination procedures and the status of stateless persons in Geneva, Switzerland, from 6–7 December 2010. Co-sponsored by the European Commission and the Open Society Justice Initiative, this was the second expert meeting on statelessness doctrine organized in the context of the 50th anniversary of the 1961 Convention on the Reduction of Statelessness (1961 Convention)¹.

The expert meeting focused on two practical prerequisites for ensuring the protection of stateless persons: the mechanisms for determining who is stateless; and the status and appropriate standards of treatment for stateless persons once they are recognized as such under national law. Two discussion papers were prepared for the meeting.* Thirty-five participants from 18 countries with experience in government, NGOs, academia, the judiciary, the legal profession and international organizations contributed to the rich debate.

Although the 1954 Convention relating to the Status of Stateless Persons (1954 Convention) does not prescribe a particular means for determining statelessness, a few States have legislated formal procedures to this end, including by integrating determination of statelessness into existing administrative procedures. Many more States are confronted with situations of statelessness and are being increasingly required to make determinations on nationality – or statelessness – of persons on their territory. At the time of writing, 65 States are party to the

¹ UNHCR convened a series of expert meetings on statelessness doctrine in the context of the 50th anniversary of the 1961 Convention on the Reduction of Statelessness. The objective of the discussions was to prepare for the drafting of guidelines under UNHCR's statelessness mandate on the following issues: the definition of a "stateless person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons; the concept of *de facto* statelessness; procedures for determining whether a person is stateless; the status (in terms of rights and obligations) to be accorded to stateless persons under national law; and the scope of international legal safeguards for preventing statelessness among children or at birth.

* R. Mandal, *Procedures for Determining whether a Person is Stateless*; R. Mandal, *What Status Should Stateless Persons Have at the National Level?*

1954 Convention and there is limited State practice regarding statelessness determination procedures and statelessness status. While this expert meeting examined these questions with particular emphasis on how to improve State parties' application of the 1954 Convention, the discussion also explored the pertinence of 1954 Convention standards for non-State parties. In this context, it was emphasized that the finding that an individual is stateless constitutes a juridically relevant fact.

A significant distinction emerged between two different contexts, the first consisting of countries – many industrialized – that host stateless persons who are predominantly, if not exclusively, migrants or of migrant background; and the second consisting of countries that have *in situ* stateless populations (i.e. those that consider themselves to already be “in their own” country²). All participants agreed on the importance of improving protection of stateless persons in both of these contexts. At the same time it was acknowledged that the means by which this is achieved will differ depending on the circumstances of specific populations and countries.

The discussions during this meeting frequently invoked obligations in international human rights law beyond those contained in the 1954 Convention – particularly with respect to guaranteeing a child's right to a nationality as enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). However, it was underscored that the scope of those obligations will be discussed in greater detail in the third expert meeting of this series.

The following summary conclusions do not necessarily represent the individual views of participants or necessarily those of UNHCR, but reflect broadly the key understandings and recommendations that emerged from the discussion.

² This terminology was adopted taking into account Article 12(4) of the International Covenant on Civil and Political Rights and the manner in which this provision has been interpreted by the Human Rights Committee (General Comment 27).

Statelessness Determination Procedures

The necessity for determination procedures

1. The 1954 Convention establishes a standard of treatment which can only be applied by a State party if it knows who the recipients of this treatment should be. As such, it is implicit in the 1954 Convention that States parties identify who qualifies as a stateless person under Article 1 of the Convention for the purpose of affording them the standard of treatment set forth in the Convention. The identification of stateless persons may occur in procedures which are not specifically designed for this purpose. This would be appropriate where such procedures are linked to grant of residence, as is the practice in a number of States. In the absence of such provisions in aliens or immigration laws, a procedure which is aimed at determining statelessness enhances a State's ability to fulfil its obligations under the 1954 Convention.
2. Recognition as a stateless person is not a substitute for acquisition of nationality. In the case of stateless persons *in situ*, where there is a realistic prospect of acquisition of citizenship in the near future, it may be inappropriate to conduct a determination of whether they are stateless, in particular where this could delay a durable solution (i.e. the grant of nationality).

Design and location of statelessness determination procedures

3. Determination procedures should be simple and efficient, building to the extent possible on existing administrative procedures that establish relevant facts. Some State practice has, for instance, integrated determination of statelessness in procedures regulating residency rights.
4. In principle, statelessness determination procedures should be conducted on an individual basis. Nevertheless, there may be occasions where determination of status on a group or *prima facie* basis may be appropriate, relying on evidence that members of the group satisfy the stateless person definition in Article 1 of the 1954 Convention.
5. States that wish to establish a statelessness determination procedure may consider placing this procedure within a government authority appropriate not only to the national legal and administrative context, but also one that reflects the profile of the stateless population in the country in question, i.e. whether stateless persons are present predominantly in a migration or *in situ* context. Relevant bodies may include citizenship, immigration or asylum authorities, though in some States these issues may be handled by a single entity. Where stateless persons are present predominantly in their "own country," the solution for those individuals *in situ* will generally be acquisition of the nationality of that country and the State body responsible

for citizenship would likely be the most appropriate entity, subject to the considerations set out in paragraph 2 above.

6. As some stateless persons are also refugees, certain States parties to the 1954 Convention who are also party to the 1951 Convention relating to the Status of Refugees may wish to fuse statelessness and refugee determination proceedings. The advantages of a fused procedure include avoiding the extra costs of establishing a separate administrative procedure to deal with statelessness given the relatively low number of statelessness cases compared to refugee cases and building on the relevant expertise and knowledge already developed by authorities involved in refugee status determination. Other States might prefer to separate the procedures for determining refugee status and statelessness. The advantages of a separate procedure include awareness-raising about statelessness and developing specialization and expertise within the authority concerned as statelessness raises many issues that are distinct from those considered in refugee status determination.
7. Regardless of where a statelessness determination procedure is placed within the State structure, it is recommended that States provide specialized training on nationality laws and practices, international standards and statelessness to officials responsible for making statelessness determinations. States, in cooperation with UNHCR and non-governmental organisations, should raise awareness about and publicize the existence of statelessness determination procedures to enhance stateless persons' access to these mechanisms.
8. Under its mandate for statelessness UNHCR can assist States which do not have the capacity or resources to put in place statelessness determination procedures, by conducting determinations itself if necessary and as a measure of last resort. It can also play an advisory role in developing or supporting State procedures.
9. The meeting emphasized one of the underlying principles of international refugee protection: In all circumstances, States must ensure that confidentiality requirements for applications by refugees who may also be stateless are upheld in a statelessness determination procedure. Thus any contact with the authorities of another country to inquire about the nationality status of an individual claiming to be stateless should only take place after any refugee claim has been rejected after proper examination (including the exhaustion of any legal remedies). Every applicant in a statelessness determination procedure should be informed at the outset of the right to raise refugee-related concerns ahead of any enquiries made with foreign authorities.

Procedural safeguards

10. In order to ensure fairness and efficiency, statelessness determination procedures must ensure basic due process guarantees, including the right to an effective remedy where an application is rejected. States should facilitate to the extent possible access to legal aid for statelessness claims. Any administrative fees levied on statelessness applications should be reasonable and not act as a deterrent to stateless persons seeking protection.
11. Where an individual has an application pending in a statelessness determination procedure, any removal/deportation proceedings must be suspended until his or her application has been finally decided upon.

Questions of proof

12. A determination should be made on the basis of all the available evidence.
13. The 1954 Convention requires proving a negative: establishing that an individual is not considered as a national by any State under the operation of its law. Because of the challenges individuals will often face in discharging this burden, including access to evidence and documentation, they should not bear sole responsibility for establishing the relevant facts. In statelessness determination procedures, the burden of proof should therefore be shared between the applicant and the authorities responsible for making the determination. It is incumbent on individuals to cooperate to establish relevant facts. If an individual can demonstrate, on the basis of all reasonably available evidence, that he or she is evidently not a national, then the burden should shift to the State to prove that the individual is a national of a State.
14. Determination procedures should adopt an approach to evidence which takes into account the challenges inherent in establishing whether a person is stateless. The evidentiary requirements should not be so onerous as to defeat the object and purpose of the 1954 Convention by preventing stateless persons from being recognized. It is only necessary to consider nationality in relation to States with which an individual applicant has relevant links (in particular by birth on the territory, descent, marriage or habitual residence).
15. While possession of a passport may raise a presumption of nationality, this is rebuttable as some countries issue “passports of convenience” to individuals who are not their nationals.
16. Determining statelessness requires an examination of the practice as well as the law in relation to nationality in the relevant State(s). As such, it is essential that the determining official has access to credible, accurate, and contemporary information. This may be gleaned from a variety of sources – governmental and non-governmental – and cooperation between States and other actors in setting up reliable database(s) of nationality laws and practice should be encouraged.

Contacting foreign authorities

17. Information provided by foreign authorities is sometimes of central importance for determinations on statelessness. However, contact with such authorities does not need to be sought in every case, in particular where there are already adequate elements of proof. Under no circumstances should contact be made with authorities of a State against which an individual alleges a well-founded fear of persecution unless it has definitively been concluded that he or she is not a refugee or entitled to a complementary form of protection.
18. Flexibility may be necessary in relation to the procedures for making contact with foreign authorities to confirm whether or not an individual is its national. Some foreign authorities will only accept inquiries that come directly from another State while others are only open to contact from individuals. In some cases UNHCR's assistance in making contact with, and obtaining a response from, foreign authorities may be necessary and the Office should offer its support in this regard as appropriate.
19. When contacting foreign authorities, States may set time-limits for a response as it is in the interest of both States and stateless applicants that statelessness determination proceedings be expeditious. However, some cases might present particularly complex circumstances that will require more time for resolution. Additional time may be warranted, in particular where there is evidence that an individual may in fact be a national of a specific State but has yet to receive official attestation of this.
20. In some instances the lack of response of foreign authorities may be evidence that an individual is not considered a national of that country.

Status of Stateless Persons at the National Level

21. Whether or not an individual is stateless is a matter of fact, and recognition of an individual's statelessness is declaratory of that fact.
22. International human rights law applies to stateless persons irrespective of their legal status in the country in which they find themselves.

Individuals awaiting determination

23. States should ensure that provision is made in line with the relevant provisions of the 1954 Convention and international human rights law for the needs of persons awaiting determination of their statelessness status. States should afford applicants for statelessness determination a minimum set of rights (including work, education, healthcare and housing rights), subject to this being consistent with the requirements of the 1954 Convention and the norms on non-discrimination contained in international human rights law. States should take particular care to avoid the arbitrary detention of applicants for statelessness status and consider alternatives to detention pending determination of statelessness status.

Individuals recognized as stateless

24. For stateless individuals within their own country, as opposed to those who are in a migration context, the appropriate status would be one which reflects the degree of attachment to that country, namely, nationality.
25. When States recognize individuals as being stateless, they should provide such persons with a lawful immigration status from which the standard of treatment envisaged by the 1954 Convention flows. Having a lawful status contributes significantly to the full enjoyment of human rights.
26. In some cases stateless persons may have a right of residence in the State pursuant to international human rights law, for example under Article 12 of the ICCPR. Current practice demonstrates that most States with determination procedures grant a status in national law, including the right of residence, upon recognition, often in the form of fixed-term, renewable residence permits.
27. While the 1954 Convention does not explicitly prescribe a right of residence to be accorded upon a person's recognition as stateless, granting such a right is reflected in current State practice to enable stateless individuals to live with dignity and in security. Participants agreed that this approach is the best means of ensuring protection of stateless persons and upholding the 1954 Convention. Without such status, many stateless persons may be deprived of the protection of the Convention. Nonetheless, it was also discussed whether in a limited set of circumstances it may not be necessary to provide for residence upon recognition. One view was that this would be

the case for stateless persons in a migration context who can immediately return to a State of former habitual residence where they enjoy permanent residence as well as the full range of civil, economic, social and cultural rights and have a reasonable prospect of acquiring nationality of that State. Similarly, while a form of protection (including some kind of immigration status), may be necessary in the short term, grant of residence may not be necessary where an individual can acquire or re-acquire nationality of another State within a reasonable period of time through simple, accessible and purely formal procedures, where the authorities do not have any discretion to refuse to take the necessary action.

28. States should facilitate family reunification for recognized stateless persons who receive a right of residence.

Stateless individuals who are recognized as refugees

29. If a stateless person is simultaneously a refugee, he or she should be protected according to the higher standard which in most circumstances will be the standard of treatment foreseen under international refugee law (supplemented by international human rights law). Thus, where a stateless individual qualifies for asylum as a refugee under national law and this is more favourable in substance compared to the immigration status awarded to stateless persons, States should accord such individuals refugee status or the rights which flow from such status.

Determination Procedures in States that are not Party to the 1954 Convention

30. States that are not party to the 1954 Convention are nonetheless bound by provisions of international human rights law to respect the rights of stateless persons within their territory (for example, the prohibition against arbitrary detention pursuant to Article 9(1) of the ICCPR and the obligation to ensure that every child has a nationality pursuant to Article 24(3) of the ICCPR and Article 7(1) of the CRC). Statelessness is, therefore, a juridically relevant fact in this context. Moreover, non-party States may find it useful to establish statelessness determination procedures and a number have actually done so. In addition, such States may find helpful guidance in the provisions of the 1954 Convention with respect to their response to statelessness, for example, with regard to the provision of identity and travel documents to stateless persons.

UNHCR
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Summary of Deliberations

UNHCR organized an expert roundtable on climate change and displacement, which was held in Bellagio, Italy, from 22 to 25 February 2011, with the support of the Rockefeller Foundation. The discussion was informed by a number of research papers.¹ Participants included 19 experts from 15 countries, drawn from governments, NGOs, academia and international organizations. The roundtable is one in a series of events organized to commemorate the 60th anniversary of the 1951 Convention relating to the Status of Refugees (1951 Convention) and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness.²

The following summary does not necessarily represent the individual views of participants or of UNHCR, but reflects broadly the themes, issues and understandings emerging from the discussion.

¹ See, S. Park, *Climate Change and the Risk of Statelessness: The Situation of 'Sinking Island States'*, April 2011; J. McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, April 2011; K. Warner, *Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations*, April 2011; R. Zetter, *Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks*, Refugee Studies Centre Research Report, February 2011.

² For more information and documentation on the commemorations see, www.unhcr.org/commemorations.

Main messages

- Displacement is likely to be a significant consequence of global climate change processes of both a rapid and slow-onset nature, but there is a need for better understanding and research of these processes as well as the impacts and scale of displacement related to climate change.
- Responses to climate-related displacement need to be guided by the fundamental principles of humanity, human dignity, human rights and international cooperation. They need furthermore to be guided by consent, empowerment, participation and partnership and to reflect age, gender and diversity aspects.
- While the 1951 Convention and some regional refugee instruments provide answers to certain cases of external displacement related to climate change, and these ought to be analyzed further, they are limited.
- The terms of “climate refugee” and “environmental refugee” should be avoided as they are inaccurate and misleading.
- There is a need to develop a global guiding framework or instrument to apply to situations of external displacement other than those covered by the 1951 Convention, especially displacement resulting from sudden-onset disasters. States, together with UNHCR and other international organizations, are encouraged to explore this further. Consideration would need to be given to whether any such framework or instrument ought also to cover other contemporary forms of external displacement.
- The Guiding Principles on Internal Displacement, as a reflection of existing international law, apply to situations of internal displacement caused by climate-related processes. Thus, there is no need for a new set of principles in relation to internal displacement in the context of climate change.
- Although designed to address internal displacement, the Guiding Principles on Internal Displacement contain a number of principles that may be applicable in external displacement situations. In addition, there are other relevant standards – for example, those developed in response to mass influx of refugees – which could be considered.
- Climate-related displacement – both internal and external – is likely to take different forms and to require diverse responses at national, sub-regional, regional and international levels to address the specificities of different situations, guided by basic universal principles.
- National legislation, policies and institutions are central to developing appropriate responses to both the internal and external dimensions of climate-related displacement.
- Pre-existing regional and sub-regional governance forums and arrangements, including mechanisms promoting free movement, could be explored further to determine the extent to which they apply to climate-related displacement and migration.
- In relation to small island and/or low-lying coastal States, the legal presumption of continuity of statehood needs to be emphasized and the notion and language that such States will “disappear” (i.e., lose their international legal personality) or “sink” ought to be avoided.
- Migration is widely acknowledged as a rational adaptation strategy to climate change processes and needs to be supported as such.
- Given the magnitude of the issues involved, there is a need for a collaborative approach based on principles of international cooperation and burden and responsibility sharing. UNHCR’s expertise on the protection dimensions of displacement makes it a particularly valuable actor.

Setting the Scene

1. It is widely acknowledged that climate change will – over the short- and long-term – lead to an increase in the severity of droughts, land degradation, desertification, salinization, riverbank and coastal erosion, sea-level rise and the intensity of floods, tropical cyclones and other geophysical events. This in turn will impact crop yields and food production, water supplies, health, livelihoods and human settlements.³ An impact of particular concern is the potential for human displacement and migration.
2. The impacts of climate change also interact with several global mega-trends, such as population growth, human mobility, urbanization, as well as food, water and energy insecurity. Climate change acts as an impact multiplier and accelerator. While it is not likely to be the sole or the primary cause, climate change can be a factor in triggering migration and displacement. While the precise scale, location and timing of such movements are uncertain, there is growing evidence that they will be substantial and will increase in years to come. The majority of movement is predicted to be internal. However, some international migration and displacement are inevitable and may also increase over time. There is growing certainty that, as the climate system warms, developing nations, and the most vulnerable communities and populations, will be the worst affected.
3. Future climate-related displacement, whether internal or external, is likely to be characterized by multiple causality, such as conflict and loss of livelihoods. The “tipping point” for a disaster is not just a physical one; in fact the social “tipping point” often occurs much earlier and can trigger a decision to leave one’s community.
4. In responding to displacement, it is important to recall the impact – and not solely the causes – of displacement, on those forced to leave their communities or countries. Although climate change seems to be increasing the frequency of certain kinds of disasters, notably hydro-meteorological disasters, the rights of all those affected by natural or human-made disasters need to be upheld. Thus it is neither appropriate nor necessary to develop different standards for those displaced by non-hydro-meteorological events. Furthermore, the voices of those displaced or threatened with loss of home or livelihood must be heard and taken into account in any discussions on these subjects.
5. The 1992 United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol of 1997 neither address displacement nor migration explicitly. These instruments focus on climate change mitigation and adaptation, and related funding and support mechanisms. However, the Cancun Agreements of 2010 invite all parties to undertake adaptation action, including “measures to enhance understanding, coordination and

³ IPCC, *Fourth Assessment Report: Climate Change*, 2007.

cooperation related to national, regional and international climate change induced displacement, migration and planned relocation.”⁴ This provision may facilitate funding support for such actions relating to displacement, as and when formulated by governments.

6. There are few fora at the multilateral level that are currently considering climate-related displacement in its various dimensions, especially the protection-related dimensions of affected populations. Protection concerns that arise in relation to climate-related displacement need to be considered in the framework of existing international and regional laws and institutions. The International Law Commission (ILC), for example, is engaged in drafting articles on the protection of persons in the event of disasters,⁵ and this is likely to be relevant in the climate change context. The ILC has already confirmed, for example, the relevance of long-standing elementary principles of international law to climate-related displacement. These principles include those of humanity and human dignity, while the principle of international cooperation merits further consideration. Issues pertaining to climate-related displacement should be considered in the future work of the ILC draft articles and related comments. The ILC is encouraged to pursue consultations with key humanitarian actors in this area.

⁴ Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1, 15 March 2011, para. 14 (f).

⁵ All documentation related to the ILC’s work on the Protection of Persons in the Event of Disasters is available at: http://untreaty.un.org/ilc/guide/6_3.htm.

External Displacement, Particularly Protection Responses to Sudden-Onset Disasters

Global framework

7. There is a range of international and regional instruments that may provide responses to various forms of external displacement related to climate change. However, these instruments only cover a limited group of displaced persons. They generally have not been applied to persons who are forced or compelled to cross an international border because of natural disasters, or who cannot return as a result of such events, either temporarily or permanently. Nor do they apply to people who cannot return because their land has become uninhabitable as a result of the long-term effects of climate change.
8. The 1951 Convention, as amended by its 1967 Protocol, remains the primary refugee protection instrument and the principle of *non-refoulement*, upon which it is based, is considered a norm of customary international law.⁶ It was recognized that the terms “climate refugees” and “environmental refugees” are not accurate or useful nomenclatures and should, therefore, be avoided. At the same time, it is clear that the 1951 Convention may apply in specific situations, for instance, where “victims of natural disasters flee because their government has consciously withheld or obstructed assistance in order to punish or marginalize them on one of the five [Convention] grounds.”⁷ These actions may take place during armed conflicts, situations of generalized violence, public disorder or political instability, or even in peacetime.
9. Similarly, some regional refugee instruments, such as the 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees, extend the definition of a “refugee” to persons fleeing “events seriously disturbing public order”, which may equally apply to persons fleeing sudden-onset disasters. However, this position has yet to be fully tested. Nonetheless, it has become common practice or custom in some regions to offer temporary protection to persons who cross an international border to escape the effects of natural disasters.

⁶ Declaration of States Parties to the 1951 Convention and or the 1967 Protocol Relating to the Status of Refugees, pmbl para. 4, UN Doc. HCR/MMSP/2001/09, 16 January 2002, available at: <http://www.unhcr.org/refworld/docid/3d60f5557.html>.

⁷ UNHCR, *Forced Displacement in the Context of Climate Change: Challenges for States under International Law*, Submission to the 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, 20 May 2009, pp. 9–10.

10. International human rights law also establishes the basis for a number of forms of complementary protection, yet only a few rights are currently recognised as giving rise to an obligation of *non-refoulement*. In the present context, the most relevant rights are the prohibition on return to a real risk of arbitrary deprivation of life, or to inhuman or degrading treatment. It remains to be seen whether flight from the impacts of climate change could meet the threshold set in existing human rights jurisprudence. Nonetheless, at the national level, the practice of a diverse number of countries in granting some form of permission to remain to persons fleeing natural disasters supports an understanding that such persons are in need of international protection, even if only temporarily.
11. Additionally, a large number of countries provide various forms of “humanitarian” or other statuses to persons who, at the time of a natural disaster, were already within their jurisdiction but cannot be returned to their countries of origin owing to the destruction caused by the natural disaster. This shows a trend at the national level to accept such persons on an individual basis.
12. In order to develop a more coherent and consistent approach to the protection needs of people displaced externally due to sudden-onset disasters, it was suggested that States in conjunction with UNHCR develop a guiding framework or instrument. Such discussions will need to consider whether any such framework or instrument would address other forms of displacement that equally fall outside the scope of application of the 1951 Convention or any regional instrument, such as victims of the indiscriminate effects of generalized violence, extreme socio-economic deprivation, or persons facing serious humanitarian concerns within mixed migration flows, including stranded migrants.⁸
13. Although drafted in the context of internal displacement, the Guiding Principles on Internal Displacement, which reflect and consolidate existing international law, might provide a useful template for the treatment of and assistance for those displaced externally. While it was recognised that their provisions could not be adopted wholesale, some may be relevant, or may apply *mutatis mutandis*, to persons displaced externally. This would obviously require further examination.
14. In mass influx situations, States have already acknowledged minimum obligations to ensure admission to safety, respect for basic human rights, protection against *refoulement* and safe return when conditions permit to the country of origin.⁹ In an analogous situation where persons are in distress at sea, States have accepted time honoured duties to come to their rescue.¹⁰

⁸ UNHCR, *High Commissioner's Dialogue, Closing Remarks*, 2010 Dialogue on Protection Gaps and Responses, Palais des Nations, Geneva, 9 December 2010, available at: <http://www.unhcr.org/4d0732389.html>.

⁹ See, Executive Committee of the High Commissioner's Programme, Conclusion No. 22 (XXXII) (1981), *Protection of Asylum-Seekers in Situations of Large-Scale Influx*.

¹⁰ See, e.g., International Convention for the Safety of Life at Sea of 1974 and the International Convention on Maritime Search and Rescue of 1979.

15. Protection and assistance responses to externally displaced persons must be informed by fundamental principles of humanity, human dignity, human rights and international cooperation. Such responses need also to be guided by consent, empowerment, participation and partnership. They must equally take into account particular vulnerabilities and protection needs based on age, gender, disability and other forms of diversity. Climate change may further have particular impacts for indigenous peoples as well as nomadic and other mobile communities.

Regional level

16. In situations of large-scale disasters leading to mass external displacement it will be important to rely on burden- and responsibility-sharing arrangements, including through the development of comprehensive regional approaches. Responses to these types of events may require consideration and implementation of arrangements such as emergency humanitarian evacuation, temporary protection or third-country resettlement.

National level

17. In some situations of external displacement following natural disasters or other sudden-onset events, a practical response would be for States to grant admission and some form of provisional, interim or temporary stay, either on an individual or group basis. In other situations, or for some individuals, migration schemes could also address people's needs. For example, extending stay permits granted on work, study or family grounds for those already abroad, or establishing new visa categories or regimes, could be explored.
18. If return proves not possible in the medium to longer term, a more stable basis to remain and incremental improvement in standards of treatment will become necessary.

Internal Displacement, including Protection Responses to Sudden-Onset as well as Slow-Onset Disasters

Global framework

19. The Guiding Principles on Internal Displacement reflect and consolidate existing international law and expressly apply to situations of “natural and human-made disasters.”¹¹ They thus broadly cover persons displaced internally (IDPs) by sudden-onset disasters linked to climate change and/or variability as well as those displaced internally by such slow-onset disasters as drought, desertification and salinization. There is, therefore, no need for a new set of principles in relation to climate-related internal displacement.
20. Further, the “IASC Operational Guidelines on the Protection of Persons in situations of Natural Disasters” offer important directions to those involved in efforts to prevent, respond to and support recovery after disasters; as does the “Global Protection Cluster Working Group Handbook for the Protection of Internally Displaced Persons”. There nonetheless remain many gaps in protection delivery at the field level, including in relation to the security and safety of affected communities, particularly women, children, older persons and persons with disabilities; access to emergency treatment and other health services; replacement of identity documentation; access to shelter; and services, programmes and resources for rehabilitation and reconstruction.

Regional and sub-regional frameworks and responses

21. Guided by the examples of the 2009 African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, the 2006 Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons and the Association of South East Asian Nations’ 2005 Agreement on Disaster Management and Emergency Response, the potential for regional and sub-regional legal, policy and operational frameworks to address regional specificities in climate-related displacement ought to be explored further. Regional forums could provide the mechanisms for the coordination of humanitarian assistance, planned relocation or migration schemes, or to address broader development goals. In addition, regional forums could be a channel to access adaptation funding under the climate change funding mechanisms.

¹¹ Guiding Principles on Internal Displacement, definition, introductory para. 2.

National standards and implementation

22. While the Guiding Principles on Internal Displacement have contributed to the establishment of laws and policies in many countries, more work is needed to disseminate them to relevant government institutions and civil society actors, and to operationalize their application in appropriate ways, including through national legislation, policies and institutions.

Institutional responses

23. Different institutions – at international and national levels – are tasked with responding to the needs of IDPs, including those whose displacement is prompted by the effects of climate change. It was acknowledged that UNHCR has particular expertise in the protection dimensions of displacement within the framework of the global cluster approach and the Inter-Agency Standing Committee and in collaboration with other international organizations.
24. A range of actors will need to be engaged to address various issues, including the prevention of the causes of displacement, as well as the needs of those affected in post-emergency and/or return or relocation phases. Where return is possible, measures need to be taken to facilitate the planned return of communities, including the rehabilitation of areas damaged by disasters and the establishment of systems for the recovery of property and/or compensation for loss. A basic principle, as reflected in the “World Bank Operational Policy on Involuntary Resettlement 4.12 (updated 2007)”, is that the standard of living of those relocated should be at least as high as it was before displacement. Engagement with development actors will be more important than ever.
25. As recognized in the UNFCCC process, planned relocation and/or migration of communities affected by climate change are key adaptation strategies. Incorporating displacement-specific policies into the international climate regime could be explored, including by strengthening the Cancun Agreements relating to issues of integration and relocation.

Principles guiding any planned relocation of populations affected by climate change

26. Any decisions to relocate individuals or communities internally need to ensure the effective participation of the displaced. Decisions about where, when and how to relocate communities need to be sensitive to cultural and ethnic identities and boundaries to avoid possible tension and conflict. They also need to safeguard livelihoods, traditions, access to land, and respect for land rights and inheritance. The interests of persons with particular vulnerabilities – e.g., the elderly, indigenous people, ethnic minorities and persons with disabilities – need to be recognized at all stages in any relocation process. Participation of all persons must be based on principles of equality, respect and diversity. Moreover, leadership and decision-making roles for women need to be ensured.

Small Islands and Low-Lying Coastal States at Risk of Sea-Level Rise and Whole-Nation Displacement

27. Many small island and/or low-lying coastal States are particularly vulnerable to the impacts of climate change, including whole-nation displacement. These impacts include loss of coastal land and infrastructure due to erosion, inundation, sea-level rise and storm surges; an increase in the frequency and severity of cyclones, creating risks to life, health and homes; loss of coral reefs, with attendant implications for food security and the ecosystems on which many islanders' livelihoods depend; changing rainfall patterns, leading to flooding in some areas, drought in others and threats to fresh water supplies; salt-water intrusion into agricultural land; and extreme temperatures.¹²
28. Over time, their cumulative effects – when compounded by pre-existing pressures such as overcrowding, unemployment, poor infrastructure, pollution, environmental fragility, etc. – may render these territories uninhabitable. In this sense, climate change may provide a “tipping point”. In particular, a lack of fresh water supplies, as the water lens shrinks, will be a primary reason why people cannot remain in the longer term. It is therefore likely that the large majority of the population will have had to leave long before the land is submerged by sea-level rise.
29. Like climate change processes themselves, movement away from small island and/or low-lying coastal States is likely to be slow and gradual, although some events such as cyclones or king tides may, in the interim period, trigger more sudden, but probably temporary (and internal), movements.
30. It has been suggested that some small island and/or low-lying coastal States may cease to exist owing to sea-level rise and the impacts of this on the State and its people. Noting that there is a general presumption of continuity of statehood and international legal personality under international law, it was confirmed that statehood is not lost automatically with the loss of habitable territory nor is it necessarily affected by population movements. The language of “disappearing” or “sinking” islands ought to be avoided.

¹² *Otin Taai Declaration: A Statement and Recommendations from the Pacific Churches' Consultation on Climate Change*, Tarawa, Kiribati, March 2004.

31. Nonetheless, there are profound humanitarian and protection issues that remain to be addressed, and the international community is encouraged to examine policy, legal, operational, humanitarian and resource responses. It is a particularly complex area, which is likely to require various strategies and responses. These may include adaptation measures, such as planned relocation and/or migration. Any measures put forward to affected communities should respect their rights to self-determination. Also in this context, States may have a responsibility to protect their populations, which may entail in turn the mobilization of relevant regional and international organizations, arrangements and resources.
32. The planned relocation of whole populations or communities may in some cases be necessary. Any relocation plans need to ensure the enjoyment of the full range of relevant rights and a secure status for those relocated. Particular attention would need to be given to rights to enjoy and practice one's own culture and traditions and to continue to exercise economic rights in their areas or countries of origin. In particular, individuals ought to have access to information about the reasons and procedures for their movement and, where applicable, on compensation and relocation.¹³ They have a right to participate in the planning and management of any planned movement and to enjoy their rights to life, dignity, liberty, security and self-determination. Additionally, the needs and interests of host communities need to be respected and carefully balanced in this process.

Regional Mechanisms and Their Role in Managing Displacement/Migration Caused by Slow-Onset Disasters

33. Slow-onset disasters, such as extreme drought, are another consequence of climate change processes that necessitate protection responses. While they may be distinct from rapid-onset extreme weather events, slow-onset disasters can cause catastrophic disruption to society, the economy and the environment of one or more countries. The manifestation of slow-onset climate change processes may also increase the frequency and severity of other environmental disasters.¹⁴
34. The predicted scale, magnitude and impact of displacement and migration caused by slow-onset events is likely to exceed the capacity of a single national jurisdiction. In such situations, inter-governmental organizations

¹³ Guiding Principles on Internal Displacement, Principles 7–9.

¹⁴ See, further, Barbados Programme of Action, which has identified 14 agreed priority areas and different actions in the context of responses to climate change and the threats to low-lying coastal States in the Caribbean, in United Nations General Assembly, *Report on Global Conference on the Sustainable Development of Small Island Developing States*, October 1994. pp. 9–10, http://climatelab.org/Barbados_Programme_of_Action.

that are part of regional integration arrangements can play an important role in helping affected national jurisdictions to coordinate their actions in managing displacement events of regional significance.

35. Further, the limited human, technical and financial resources of developing States makes it especially important to pool those resources through regional cooperation and institutions in order to avoid duplication and to achieve complementarity of assistance.
36. Some regional integration groupings possess many useful mechanisms that can serve as vehicles for the design and implementation of programmes for the assistance and protection of persons whose livelihoods are affected by climate processes. Free movement agreements such as those of the Economic Union of the Organization of Eastern Caribbean States and the Caribbean Single Market and Economy or the Economic Community of West African States, are examples of integration arrangements that can promote the assimilation of displaced persons and migrants into the society and economy of a receiving country.
37. International organizations, including in particular the United Nations, can also play key roles in assisting affected States to develop efficient and effective assistance mechanisms. The programming, administrative and implementation capacities of those countries can further be improved with the support of member nations and other donors.
38. More specifically, UNHCR, the International Organization for Migration (IOM), the International Labour Organization (ILO) and other relevant international organizations, can:
 - Support regional and sub-regional organizations to implement regional approaches, including the development of relevant expertise, the design and implementation of early warning systems, vulnerability assessments and adaptation strategies.
 - Improve access to financial and technical resources for developing States and/or strengthen the capacity of regional bodies to respond to the needs of persons displaced by climate-related events.
 - Coordinate regional efforts at the political and technical levels to build adaptive capacity within countries in the first instance.
 - Assist countries in developing bilateral agreements that would ensure appropriate safeguards are in place for those individuals/communities that choose to migrate either in anticipation of, or due to, the manifestations of slow-onset climate related disasters.
 - Support the design and implementation of migration programmes within and outside an affected country or region.

Migration as an Adaptation Strategy

39. Pre-emptive movement is a rational adaptation response.¹⁵ Although migration has long been a natural human adaptation strategy to environmental variability, the legal (and sometimes physical) barriers to entry imposed by States today considerably restrict the ability of many persons to access migration options. Anticipating and planning for such movement can avoid disruption, loss of property and loss of life, as well as sudden influxes of persons moving spontaneously.
40. For many, migration represents an adaptation strategy to climate change and needs to be supported as such. Migration is a particularly complex phenomenon as it is often temporary, circular and/or seasonal. At the same time, it is important to recognize that most people do not want to leave their communities and those who are unable to leave may be particularly vulnerable. Adaptation strategies must thus support both those who leave and those who stay.

Research

41. Many areas in relation to climate-related displacement remain to be studied, including further empirical research on: vulnerability to displacement; adaptation, relocation and migration responses; regional and national governance schemes; and the inter-linkages between climate change, conflict and displacement.

International Cooperation and Shared State Responsibilities

42. The primary, albeit non-exclusive, duty and responsibility of States is to prevent and protect people from displacement, mitigate its consequences, provide protection and humanitarian assistance and find durable solutions. The context of climate change, however, raises particular questions around shared State responsibilities and international cooperation.
43. As climate change is a global phenomenon, and climate-related displacement will affect many countries, collaborative approaches and partnerships based on principles of international cooperation and burden and responsibility sharing are called for.

UNHCR
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¹⁵ For more detail, please see IOM, *Policy Brief on Migration, Climate Change and Environment* (2009), available at: <https://www.iom.int/envmig>.

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Expert Meeting

Arusha, Tanzania
11–13 April 2011

Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law

Summary of Deliberations

The Office of the United Nations High Commissioner for Refugees (UNHCR) and the International Criminal Tribunal for Rwanda (ICTR) organized an expert meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, which was held in Arusha, Tanzania, from 11 to 13 April 2011.

The discussion was informed by a number of research papers.¹ Participants included 34 experts from 24 countries, drawn from governments, NGOs, academia and international organizations. Among those attending were delegates from the Office of the High Commissioner for Human Rights (OHCHR), the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Committee of the Red Cross (ICRC), the Special Tribunal for Lebanon and the African Court of Human and Peoples' Rights. The roundtable is one in a series of events organized to mark the 60th anniversary of the 1951 Convention relating to the Status of Refugees (1951 Convention) and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness.²

The following Summary Conclusions do not necessarily represent the individual views of participants, of UNHCR or of ICTR, but reflect broadly the themes, issues and understandings emerging from the discussion.

¹ See G. Acquaviva, *International Criminal Law and Forced Displacement*, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/05, June 2011, available at: <http://www.unhcr.org/4e0344b344.html>; J. Rikhof, *Exclusion at a Crossroads: The Interplay between International Criminal Law and Refugee Law in the Area of Extended Liability*, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/06, June 2011, available at: <http://www.unhcr.org/4e1ff0a19.html>.

² For more information and documentation on the events relating to the commemorations see, www.unhcr.org/commemorations.

Fragmentation of International Law and the Rise of Specific International Legal Regimes

1. International refugee law, international humanitarian law, international criminal law and international human rights law should be interpreted in light of general rules of international law.
2. There is no hierarchical relationship between these strands of international law. They are, however, interconnected.
3. The simultaneous application of different legal regimes has raised particular issues in terms of fragmentation and specialization, but situations of normative conflict should not be exaggerated. Normative differences not only exist between distinct international legal regimes but also within each of these regimes.
4. Harmonization is not an objective in and of itself; the overriding concern should be clarity on the ordinary meaning of the provision at hand guided by the object and purpose of each regime or instrument, or the particular norm in question. Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the notion of “systemic integration” are the main tools of treaty interpretation which are important in the resolution of normative conflict.³
5. The relationship between international, regional and national laws and the role of domestic and regional law and institutions are other dimensions to take into account in the process of interpreting and applying international norms.

Forced Displacement, Deportation and Forcible Transfer

6. There is strong interaction between international refugee law, international human rights law, international humanitarian law and international criminal law as regards forced displacement. Relevant provisions of these branches of law establish a prohibition on arbitrary displacement under international law.⁴

³ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of International Law Commission finalized by Marti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, para. 415.

⁴ See e.g. Art. 13 of the Universal Declaration of Human Rights; Art. 12 of the 1966 International Covenant on Civil and Political Rights; Principle 6.1 of the Guiding Principles on Internal Displacement; and Art. 49 of the Geneva Convention (III).

7. Forced displacement is not a new phenomenon; the slave trade remains one of the more tragic examples of forced displacement carried out on a large scale.
8. The focus of the roundtable discussion revolved around the specific crimes of deportation and forcible transfer as defined under international humanitarian law and international criminal law.
9. Deportation and forcible displacement are both war crimes and crimes against humanity.⁵ In ICTY jurisprudence, deportation is understood to involve forced movement across a State or *de facto* State border, while forcible transfer takes place within State boundaries.⁶
10. The concept of “ethnic cleansing”,⁷ while not an international crime as such, encompasses a cluster of crimes, including deportation and forcible transfer.
11. In international jurisprudence, a shared element in both crimes is a lack of genuine choice. Action intended to raise fear among the targeted population and resulting in their flight (e.g., shelling, bombing, destruction of property) has been considered evidence of a lack of genuine choice.⁸ It would be worth considering whether large refugee outflows or situations of large-scale internal displacement could be evidence of a lack of genuine choice for the purpose of establishing the crime of deportation or forcible transfer.
12. The definitions of both deportation and forcible transfer under international criminal law refer to the “lawful presence” of the population. This should not be interpreted in an overly strict manner; rather, lawful residence is usually assumed based on *de facto* residence in a specific area, including for populations displaced to that area.

⁵ See, on international humanitarian law and war crimes, Art. 147 of the Geneva Convention (IV); Art. 17 of the Additional Protocol II; Art. 2 of the ICTY Statute; Art. 8(2)(e)(viii) of the ICC Statute; see also, on crimes against humanity, Art. 3 of the ICTR Statute; Art. 5 of the ICTY Statute; and Art. 7 of the ICC Statute.

⁶ *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, para. 278 (*‘Stakić Appeals Judgment’*).

⁷ Ethnic cleansing is defined as “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas”. Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992), 27 May 1994 (S/1994/674), para.130.

⁸ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, 17 September 2003, paras. 229, 233; *Stakić Appeals Judgment*, para. 281.

Persecution

13. Many of the same acts are considered persecution under both international criminal law and international refugee law; international human rights law has been used at times by both branches of law to define “persecution”, albeit to differing degrees. That said, there are also important distinctions in the ways in which the concept has been applied and interpreted under each legal regime. In particular, the differing purposes of each branch of law need to be borne in mind.
14. Persecution is only one element in the 1951 Convention refugee definition and is part of an assessment as to whether an individual is in need of international protection from prospective harm. The refugee definition requires that the fear of being persecuted be linked to one or more of the Convention grounds, namely race, religion, nationality, membership of a particular social group or political opinion. Moreover, in refugee claims based on the persecutory conduct of non-State actors, status is granted on the basis of the State’s inability or unwillingness to protect; no specific discriminatory intent is required.
15. Meanwhile, international criminal courts and tribunals must concern themselves with prosecution of harm committed in the past and for the purposes of criminal prosecution. The additional elements to establish the crime of persecution as a crime against humanity under international criminal law – primarily the requirements of discriminatory intent and that the crime be part of a widespread or systematic attack against a civilian population – are not required for a finding that a particular kind of harm amounts to persecution under international refugee law. Such an interpretation would undermine the international protection objectives of the 1951 Convention, as this could be construed as meaning that persons would fall outside the Convention definition even if they nonetheless face serious threats to their life or freedoms, broadly defined.
16. The *actus reus* of persecution under international criminal law requires that the act(s) constitutes discrimination *in fact* violating fundamental human rights and that its consequences for the victims be at least as serious as the effects of other crimes. However, certain human rights violations have been found to meet the threshold for persecution as a crime against humanity even if they do not as such constitute international crimes, including: denial of freedom of movement, denial of employment, denial of access to the judicial process, denial of equal access to public services, and hate speech.
17. While international refugee law developed at first in relative isolation from international human rights law, the latter has been a helpful guide to establishing persecution in some cases. The existence of a serious human rights violation (e.g., torture) is not necessary, however. This is because not all forms of violence or harm have yet been codified in binding human rights treaties.

18. Human rights violations, other kinds of serious harm, or other measures, though not in and of themselves amounting to persecution, can meet the threshold of seriousness required to constitute persecution through accumulation. Furthermore, a series of non-persecutory acts can collectively provide evidence of a well-founded fear of being persecuted in the future.
19. Although persecution in international refugee law must be interpreted and understood in connection with the other elements of the refugee definition in Article 1(A)(2) of the 1951 Convention, persecution is a concept in its own right and should not be conflated with the notion of surrogacy or the absence or failure of State protection.
20. As a basis for refugee status under the 1951 Convention, discrimination has been a central feature of claims relating to gender-related persecution, not least by the link to one or more of the Convention grounds, which are proscribed forms of discrimination. It is well accepted that gender-related forms of persecution fall within the 1951 Convention, and that “gender” can properly be within the ambit of the “social group” category. Forms of gender-related violence can also take the form of political or religious acts, even when committed by non-State actors. Notions of equality should be contextualised, relying on analyses of disadvantage, power, hierarchy, or deprivations of rights, rather than the strict comparator-based discrimination approach.
21. Despite these foundational differences between international criminal law and international refugee law, findings of fact by judges in one of these areas of international law may establish a pattern of evidence, which can be relevant in the other.

Armed Conflict and International Protection

22. There is convergence between international humanitarian law and international criminal law as regards the definition of “armed conflict”. There is broad agreement that for an armed conflict to exist, there must be resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. Indicia to ascertain the level of organization of an armed group include, inter alia, the existence of a command structure; logistical capacity; capacity to implement international humanitarian law; and whether the group can speak with a single voice.
23. From the perspective of international refugee law, the determination of the existence of an armed conflict can have important implications. It is particularly relevant when considering the application of the exclusion clauses in Article 1F(a) of the 1951 Convention, as acts which take place in connection with an armed conflict would need to be assessed under relevant provisions of international humanitarian law and/or international criminal law with a view to determining whether they fall within the category of war crime provided under Article 1F(a).

24. While there is jurisprudence relying on international humanitarian law to interpret Article 15(c) of the EU Qualification Directive, international humanitarian law should be regarded as informative rather than determinative and its relevance should not be overstated. There are situations that may not meet the threshold of armed conflict, yet persons displaced by those situations should nonetheless receive some form of complementary protection. The 1969 OAU Convention and the 1984 Cartagena Declaration have in fact extended, in the regions where they apply, the refugee definition to include flight from aggression, conflict, situations seriously disturbing public order, generalized violence and massive human rights violations. What should be determinative in providing protection is the need for protection, not the legal qualification of the conflict that generates that need.
25. It is however often wrongly assumed that “war refugees” or those fleeing armed conflict are outside the scope of the 1951 Convention. In fact, many modern conflicts are characterized by targeted violence against particular ethnic, racial or religious groups. A full assessment of the applicability of the 1951 Convention criteria must be undertaken before granting complementary forms of protection, which are often associated with fewer rights.

Civilians

26. International humanitarian law considers those who are not members of State armed forces, or of organized armed groups that are a party to the conflict, as “civilians”. Civilians lose their protection as such under international humanitarian law if they directly participate in hostilities. Different approaches have been adopted to identify when civilians are taking a direct part in hostilities, including personal characteristics (e.g. activity, weapons, clothing, age, gender); the specific acts carried out; or a framework approach, which encompasses consideration of specific acts as well as membership and participation in an armed group. None of these approaches has proven fully satisfactory however, and a mix of different criteria might in fact prove more appropriate.

⁹ For the purposes of ensuring the civilian and humanitarian character of asylum, the emphasis must be on identifying all individuals who, because of their involvement with armed activities, pose a threat to refugees, and for that reason need to be separated. UNHCR’s *Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum*, September 2006, p. 17, available at: <http://www.unhcr.org/refworld/pdfid/452b9bca2.pdf>, use the following non-technical terminology, which is different from that applied under international humanitarian law: “[T]he term ‘combatant’ is applied to any member, man or woman, of regular armed forces or an irregular armed group, or someone who has been participating actively in military activities and hostilities, or has undertaken activities to recruit or train military personnel, or has been in a command or decision-making position in an armed organization, regular or irregular, and who find themselves in a host State”. “Armed elements” are defined as “all individuals carrying weapons, who may be either combatants or civilians, [which] is intended to include civilians who may happen to be carrying weapons for reasons of self-defence or reasons unrelated to any military activities (for example hunting rifles, defensive weapons)”. See, also, Executive Committee of the High Commissioner’s Programme, Conclusion No. 94 (2002) on the civilian and humanitarian character of asylum.

27. Conflict often leads to mixed movements of populations, comprising not only refugees and other civilians, but also armed elements seeking sanctuary in neighbouring countries. UNHCR's international protection mandate is civilian and humanitarian in character, and combatants and other armed elements⁹ are not entitled to protection or assistance from UNHCR. Maintaining the civilian and humanitarian character of asylum, in particular through the separation of civilians from combatants, is critical in this regard.
28. The presence of armed elements raises many protection risks for asylum-seekers, refugees, returnees, internally displaced persons and/or stateless persons. These include the diversion of humanitarian aid to armed elements; the targeting of camps by parties to the conflict; the risk of *refoulement* by host States who perceive camps as supporting opposition forces; a breakdown of law and order; and military recruitment, including of children.
29. To maintain the civilian and humanitarian character of asylum persons engaged in armed activities should be separated from refugees and interned in accordance with international humanitarian law standards. Such persons should be denied access to the refugee status determination process, until it is established that they have permanently and genuinely renounced military activities.
30. In determining whether an individual has permanently and genuinely renounced military activities such that access to the refugee status determination process can be granted, the criteria identified in international humanitarian law for determining who is and is not a civilian, explained at paragraph 25, may be of assistance.
31. Once access to refugee status determination is viable, past involvement in combat is not per se a sufficient basis to exclude an individual from refugee status. A thorough exclusion assessment is, however, necessary in such cases in order to determine whether there are serious reasons for considering that the person concerned has committed a crime within the scope of Article 1F of the 1951 Convention.
32. Additional categories of persons, such as political leaders involved with armed groups, do not fit neatly into existing classifications of "armed elements" as used in international refugee law, yet their role and activities may also impact on refugee protection, security and camp management. Screening and identification procedures should be in place at the beginning of a refugee exodus, to ensure that any possible exclusion grounds are assessed and to otherwise preserve the civilian and humanitarian character of asylum and the integrity of the system as a whole.

Exclusion from International Refugee Protection

33. Article 1F of the 1951 Convention excludes from international refugee protection persons who otherwise meet the “inclusion” criteria of the refugee definition in Article 1(A)(2), but with respect to whom there are serious reasons for considering that they have committed certain serious crimes or heinous acts.¹⁰ This provision was included in the 1951 Convention (i) because persons responsible for these crimes or acts were deemed undeserving of international refugee protection, and (ii) to ensure that persons fleeing prosecution rather than persecution should not be able to hide behind the institution of asylum in order to escape justice.
34. For exclusion to be justified, it must be established, on the basis of clear and reliable evidence, that the person concerned incurred individual responsibility for acts which fall within one of the three categories under Article 1F of the 1951 Convention.
35. Article 1F(a) refers to crimes against peace, war crimes and crimes against humanity “as defined in the international instruments drawn up to make provision in respect of crimes”. There is thus a direct link between the exclusion grounds in the 1951 Convention and other areas of international law. The interpretation and application of Article 1F(b) and (c) are also informed by international standards.
36. When assessing the applicability of exclusion from international refugee protection, asylum adjudicators often turn to international criminal law, international humanitarian law, international human rights law as well as general international law, both with regard to the definitions of the kinds of conduct which fall within the scope of Article 1F and the determination of individual responsibility. This is reflected in national jurisprudence as well as UNHCR’s guidance on exclusion from international refugee protection.¹¹

¹⁰ Article 1F of the 1951 Convention reads: “The provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

¹¹ UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <http://www.unhcr.org/refworld/docid/3f5857684.html>.

Exclusion and the International Criminal Process: Indictments and Acquittals

37. Although asylum adjudicators considering exclusion must apply concepts developed in criminal law, there are important differences between an exclusion assessment and a criminal trial. The former is concerned with the person's eligibility for international refugee protection, rather than his or her innocence or guilt for a particular criminal act.
38. Falling within Article 1F means that an individual does not qualify for refugee status and is, therefore, also not within the mandate of UNHCR. Most significantly, it means that he or she does not benefit from protection against *refoulement* under international refugee law. Exclusion from international refugee protection does not, however, affect the excluded person's entitlement to protection, including against *refoulement*, under relevant international human rights law provisions, where applicable, nor does it in any way detract from the universally recognized principle of presumption of innocence in criminal proceedings.
39. Where criminal proceedings for international crimes or other serious crimes are pursued against an asylum-seeker or a refugee, the significance of the indictment and any subsequent acquittal on exclusion from international refugee protection needs to be examined in light of all relevant circumstances.
40. At the level of national courts, whether or not an indictment, or for that matter, a conviction, is sufficient to meet the "serious reasons for considering" threshold required under Article 1F must be assessed on a case by case basis, taking into consideration all relevant factors, including the possibility that criminal prosecution may be a form of persecution. Similarly, in considering whether an acquittal by a national court would establish that there are no "serious reasons for considering" that the individual concerned is excludable, adjudicators would need to examine the grounds for acquittal as well as any other relevant circumstances.
41. An indictment by an international criminal tribunal or court is, on the other hand, generally considered to meet the "serious reasons for considering" standard required under Article 1F of the 1951 Convention. If the person concerned is subsequently acquitted on substantive (rather than procedural) grounds, following an examination of the evidence supporting the charges, the indictment can no longer be relied upon to support a finding of "serious reasons for considering" that the person has committed the crimes for which he or she was charged.
42. An acquittal by an international criminal tribunal or court does not mean, however, that the person concerned automatically qualifies for international refugee protection. It would still need to be established that he or she has a well-founded fear of being persecuted linked to a 1951 Convention ground. Moreover, exclusion may still apply, for example, in relation to crimes not covered by the original indictment.

43. Procedurally, if the asylum determination was suspended pending the outcome of the criminal proceedings, it can be resumed following the acquittal. Likewise, where the person was previously excluded on the basis of the indictment, the acquittal should be considered as a sufficient reason to reopen the asylum determination. If the indictment had been used to cancel or revoke previously granted refugee status, a reinstatement of refugee status may be called for.
44. UNHCR's current guidelines on the interpretation and application of the exclusion clauses under Article 1F of the 1951 Convention do not expressly address the situation where an individual indicted by an international criminal tribunal or court is subsequently acquitted. The forthcoming revised guidelines will provide clarification on this issue.
45. In practical terms, the question of the relocation of acquitted persons who are unable to return to their country of origin due to threats of death, torture or other serious harm is a real one. The problem of such relocation of persons is not easy to resolve and this problem is expected to persist beyond the existence of the ICTR and to arise in the future for other international criminal institutions and, in particular, the ICC. At present, three out of eight individuals who have been acquitted by final judgment before the ICTR have been unable to find countries willing to accept them. It was agreed that durable solutions need to be found for those acquitted by an international criminal tribunal or court and who are unable to return to their country of origin. Indeed, this is a fundamental expression of the rule of law and essential feature of the international criminal justice system. Concern was accordingly expressed about the consequences of failing to find such solutions.
46. The responsibility for resolving this problem does not lie with UNHCR, ICRC or OHCHR, none of which are in a position to implement a solution for the persons concerned without the consent of States. Rather, the question has to be addressed by Member States of the United Nations as part of their cooperation with and support to international criminal institutions, possibly through the establishment of a mechanism to deal with such cases, which fully respects international refugee, humanitarian and human rights law.
47. ICTR, ICTY, UNHCR and OHCHR agreed to embark on a joint advocacy strategy with the aim of sensitizing the UN Security Council and Member States to, and finding a sustainable solution for, the plight of acquitted persons.

Exclusion and Individual Criminal Responsibility

48. Exclusion under Article 1F of the 1951 Convention requires a determination that the person concerned has incurred individual responsibility for a crime within the scope of that provision, either directly as perpetrator or through his or her participation in the commission of crimes by others. The statutes of international criminal tribunals or courts and in particular, of the ICC, provide appropriate criteria for the determination of individual responsibility in an exclusion context. In applying the relevant concepts, States and UNHCR can find useful guidance in the jurisprudence of international criminal tribunals and the ICC.
49. International jurisprudence provides guidance on the criteria for establishing individual responsibility in those cases where the commission of a crime is brought about by two or more persons, and in particular, the different forms of joint criminal enterprise (JCE). The notions of JCE I, II and III were developed primarily by the ICTY in a manner independent of domestic law, in recognition of the collective nature of the commission of the most serious crimes and the need to punish those most responsible for international crimes. By contrast, the criteria for aiding and abetting, as interpreted and applied by both the ICTY and the ICTR, are more closely related to the ways in which individual responsibility is established at national levels for persons who make a substantial contribution to the commission of crimes by others.
50. The first pronouncements of the ICC on issues of individual responsibility indicate a shift away from joint criminal enterprise towards greater reliance on concepts such as co-perpetration or indirect perpetration of international crimes, although it is not yet fully clear to what extent the ICC's criteria for determining the responsibility, especially of persons in positions of authority as well as those contributing to the commission of the acts in various other ways, are different from those developed and applied by the ICTY and ICTR. Further analysis will be needed.
51. At the national level, the notions of extended liability have been, until recently, developed in an autonomous fashion, without regard to international criminal law, although the elements of some of the concepts used, such as "personal and knowing participation" or "common purpose", have a close resemblance to their international counterparts. There are some recent examples of exclusion decisions by courts in which individual responsibility was considered with express reference to the criteria developed by the ICTY for establishing liability on the basis of a JCE, although there seems to have been a certain degree of confusion as to the criteria applicable to the different forms of JCE. Both in State practice and in the experience of UNHCR, one can sometimes observe a tendency to apply the more complex criteria of JCE when on the facts of the case the concepts of aiding and abetting or common purpose would be more appropriate.

Evidence and Witnesses

52. In refugee status determination procedures, evidence will be considered and assessed in light of its relevance and reliability. Refugee status determination must necessarily maintain a flexible yet fair approach given its protection purpose. Evidentiary standards of international criminal law, which might preclude or restrict the consideration of certain evidence, should therefore not be imported into refugee status determination procedures.
53. Evidence gathered and produced in connection with international criminal proceedings or human rights cases may be pertinent in specific asylum cases and any evidence obtained from criminal proceedings should be considered to the extent relevant as any other information.
54. However, as international criminal proceedings can take several years to be completed, and as the test for refugee status is prospective in orientation, the extent to which evidence from international trials can be relied on may be limited. Should evidence obtained raise questions about the correctness of an earlier grant of refugee status, it may provide a sufficient basis for cancellation proceedings.
55. Evidence secured in criminal proceedings might be particularly useful, however, both in establishing general country conditions in the country of feared persecution at a time relevant to the application for refugee status, and in confirming the occurrence of specific events. In particular, the establishment of international criminal tribunals or courts, the referrals of particular situations to the ICC by the Security Council or by a State party, or an action *proprio motu* by the Prosecutor, provides strong indications that serious violations of human rights and/or other international crimes have occurred or are ongoing.
56. The involvement of refugees and other displaced persons in criminal justice processes can play an important role in reconciliation, reconstruction and the search for durable solutions. International criminal institutions must engage with victims, witnesses and others in such way as to minimize the impact this may have on their safety and security and that of the broader community.
57. Responsibility for witness and victim protection rests primarily with the international criminal justice system and with States parties to the relevant international criminal law instruments. UNHCR's refugee status determination and resettlement channels cannot therefore be relied on as a surrogate witness protection system. There may however be linkages to international refugee law and asylum systems in specific cases.
58. Sharing of information by criminal law institutions should be governed by principles of confidentiality and privacy.

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Global Roundtable

Geneva, Switzerland
11–12 May 2011

Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons

Summary Conclusions

On 11 and 12 May 2011, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Office of the High Commissioner for Human Rights (OHCHR) organized the first Global Roundtable on Alternatives to Detention (ATD) of Asylum-Seekers, Refugees, Migrants and Stateless Persons, in Geneva. Thirty eight participants from 19 countries took part, drawn from governments, international organizations, human rights mechanisms, national human rights institutions, national and international non-governmental organizations (NGOs) and academic experts. The discussion was informed by a number of research papers.¹

The roundtable follows up on a number of events, including side panels at both the 2009 Executive Committee of the High Commissioner for Refugees' Programme and the Annual UNHCR-NGO Consultations in the same year, the UNHCR-organized East Asian Roundtable on Alternatives to Detention in Seoul in April 2010, a Regional Consultation on Detention of Asylum-Seekers and Refugees in Bangkok in October 2010, a panel discussion on the human rights of migrants in detention centres held during the 12th session of the Human Rights Council in 2009 and other meetings held during the 13th session in 2010.

The following summary conclusions do not necessarily represent the views of participants, or of UNHCR or OHCHR, but reflect broadly the themes, issues and understandings that emerged from the discussion.

¹ A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Person and Other Migrants*, UNHCR, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1, April 2011, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; R. Sampson, G. Mitchell and L. Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, International Detention Coalition, Melbourne, 2011, available at: <http://www.unhcr.org/4dde23d49.html>.

Main messages

- There is no empirical evidence that detention deters irregular migration, or discourages persons from seeking asylum.
- The human rights consequences as well as social and economic costs of immigration detention compel investigation, study and implementation of alternatives to detention.
- Seeking asylum is not a criminal act and asylum-seekers should not, as a consequence, be penalized for the act of seeking asylum through detention.
- States should avoid criminalizing persons moving irregularly through imposing penal sanctions or conditions of treatment that are not suitable to persons who have not committed a crime.
- Alternatives to detention² – from reporting requirements to structured community supervision and/or case management programmes – are part of any assessment of the necessity and proportionality of detention.
- Alternatives to detention should not be used as alternative forms of detention; nor should alternatives to detention become alternatives to release.
- All alternatives to detention should be established in law and subject to human rights oversight, including periodic review in individual cases, as well as independent monitoring and evaluation. Individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable.
- Treating persons with respect and dignity, including due regard to human rights standards, throughout the asylum or immigration processes contributes to constructive engagement in these processes, and can improve the rates of voluntary return.
- Research shows over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and facilities.
- More research is needed in the area of alternatives to detention.

² For the purposes of the roundtable discussion, the International Detention Coalition's (IDC) definition of "alternatives to detention" was used: "any legislation, policy or practice that allows for asylum-seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country": Sampson et al., *There are Alternatives*, p. 2.

International Legal Framework

1. There is a solid international legal framework that sets out the permissible purposes and conditions of immigration detention.³ This legal framework is guided by the principles of necessity, reasonableness in all the circumstances and proportionality. The starting point is that no one shall be subjected to arbitrary or unlawful detention.⁴
2. Detention is thus a measure of last resort and must only be applied in exceptional circumstances, be prescribed by law, meet human rights standards, be subject to periodic and judicial review and, where used, last only for the minimum time necessary. Maximum time limits on such administrative custody in national legislation are an important step to avoiding prolonged or indefinite detention.
3. International and national jurisprudence has held that decisions around detention must be exercised in favour of liberty, with due regard to the principles of necessity, reasonableness and proportionality. These principles imply that detention can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention, such as national security or public order.
4. While recognising the legitimate interests of States in controlling and regulating immigration, criminalising illegal entry or irregular stay by penal sanctions or inappropriate conditions of detention would exceed the legitimate interests of States.⁵
5. With regard to refugees and asylum-seekers, it was highlighted that the right to seek asylum is not an unlawful act and detention for the mere fact of having sought asylum is, therefore, unlawful. Moreover, the 1951 Convention relating to the Status of Refugees (1951 Convention) prohibits penalties – such as detention – from being imposed on refugees purely on account of their illegal entry or presence.⁶ It has been widely held that mandatory or non-reviewable detention of refugees and asylum-seekers is incompatible with international law. For refugees lawfully staying in a State's territory, they have the right to enjoy freedom of movement and choice of residence.⁷

³ “Immigration detention” refers to the holding in detention of individuals suspected of illegal entry, unauthorized arrival, visa violations and those subject to procedures for deportation and removal.

⁴ This right is found in various international and regional instruments: Article 9(1) of the International Covenant on Civil and Political Rights; Article 16(4) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 6 of the Charter of Fundamental Rights of the European Union; Article 7 of the American Convention on Human Rights; Article I and XXV of the American Declaration on the Rights and Duties of Man; Article 6 of the African Charter on Human and Peoples' Rights.

⁵ Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4, 10 January 2008, para. 53.

⁶ Article 31 of the 1951 Convention relating to the Status of Refugees.

⁷ Article 26 of the 1951 Convention relating to the Status of Refugees.

6. For stateless persons, the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention. Stateless status determination procedures are therefore an important mechanism to reduce the risk of prolonged and/or arbitrary detention.⁸
7. General principles relating to detention apply *a fortiori* to children, who should in principle not be detained at all. The Convention on the Rights of the Child provides specific international legal obligations in relation to children. These include that all actions taken in respect of children are in the best interests of the child, and ensure every child's right to development, family unity, education, information, and the opportunity to express their views and to be heard. A specific challenge remains, however, around accurate age assessments of asylum-seeking and migrant children, and the use of appropriate assessment methods that respect human rights standards.

Human Rights Impacts of Detention

8. Detention can severely limit access to legal advice and can interfere with the ability to claim asylum or establish other means of lawful stay. In some instances, this can result in unlawful deportation or even *refoulement*.
9. The drastic human rights impacts of immigration detention on individuals and their families are well-documented. Reports on immigration detention often reveal overcrowded, undignified and inhumane conditions, ill-treatment and abuse, or failure to separate children from adults.
10. Detention can and has been shown to cause psychological illness, trauma, depression, anxiety, aggression, and other physical, emotional and psychological consequences.
11. Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons. Limited access to lawyers, interpreters, social workers, psychologists or medical staff, as well as non-communication with the outside world, exacerbates the vulnerability and isolation of many individuals, even if they have not been officially classified as “vulnerable” at the time of detention.⁹

⁸ UNHCR, *Summary Conclusions from the Expert Meeting on Stateless Determination Procedures and the Status of Stateless Persons*, April 2011 (this Compilation), para. 23.

⁹ See, e.g., Jesuit Refugee Service, *Becoming Vulnerable in Detention, Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union* (The DEVAS Project), June 2010, available at: <http://detention-in-europe.org/>.

12. Another not uncommon, yet problematic, practice is the detention of asylum-seekers or other migrants in criminal facilities, such as prisons and other correctional institutions. All asylum-seekers and migrants who have not been convicted of recognizable crimes should be kept separate from convicted criminals and housed in specific facilities adapted to their particular circumstances and needs.
13. A shortage of qualified personnel working in detention facilities and a lack of understanding of the specific situation of persons in immigration detention may further negatively impact on individuals in detention.
14. With regard to private contractors, subjecting them to a statutory duty to take account of the welfare of detainees was identified as good practice. However, it is also clear that responsible national authorities cannot contract out of their obligations under international human rights law and remain accountable as a matter of international law. Accordingly, States should ensure that they can effectively oversee the activities of private contractors, including through the provision of adequate independent monitoring and accountability mechanisms.¹⁰
15. Furthermore, there may be negative impacts on the health and welfare of individuals even after their release from immigration detention. These might include family separation or breakdown, or psychological trauma, which can lead to later difficulties for integration or constructive engagement in the community.

Alternatives to Detention

16. Research across various alternatives to detention has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and facilities. A correlation has also been found between some alternatives to detention and voluntary return rates.
17. Moreover, alternatives to detention are considerably less expensive than detention. Costs of detention increase also when one takes into account the negative long-term economic and social consequences of depriving individuals of their liberty.
18. Some alternatives to detention may themselves impact upon a person's human rights, be it on their liberty or other rights. As a consequence, such measures also need to be in line with principles of necessity, proportionality, legitimacy and other key human rights principles. Each alternative to detention must be assessed on its merits and individuals released subject to conditions that restrict their liberty should enjoy the right to periodical review.

¹⁰ Guiding Principles on Business and Human Rights, A/HRC/17/31, 21 March 2011, para. 5.

19. For this reason, alternatives should not be used as alternative *forms of* detention. Likewise, alternatives to detention must not become alternatives to release. Safeguards must be put in place to ensure that those eligible for release without conditions are not diverted into alternatives.
20. Alternatives to detention may take various forms, including registration and/or deposit of documents, bond/bail, reporting conditions, community release and supervision, designated residence, electronic monitoring or home curfew. Ideally, alternatives to detention are provided for by laws and regulations.
21. In designing alternatives to detention, States should observe the principle of minimum intervention and should pay attention to the specific situation of particular vulnerable groups such as children, pregnant women, the elderly, or persons with disabilities.¹¹ While electronic tagging (such as ankle or wrist bracelets) was criticised as being particularly harsh, phone reporting and the use of other modern technologies were seen as good practice, especially for individuals with mobility difficulties.
22. Overly-onerous conditions can lead to non-cooperation, even in alternative programmes, and can set up individuals willing to comply to instead fail. Reporting, for example, that requires an individual and/or his or her family to travel long distances and/or at their own expense can lead to non-cooperation through inability to fulfil the conditions, and can unfairly discriminate on the basis of economic position.
23. Where community models of alternatives to detention are applied, individuals should be able to enjoy economic, social and cultural rights, such as their right to health and to adequate housing. It was emphasized that releasing persons from detention to face destitution was not an appropriate response.
24. Documentation is a necessary feature of alternative to detention programmes in order to ensure that persons possess evidence of their right to reside in the community and to avoid (re-)detention. It also facilitates their ability to rent accommodation, and to access employment, healthcare, education and/or other services. In case of conditions of release that require the deposit or surrender of passports or identity documents, individuals need to be issued with substitute documentation.¹²
25. Independent and transparent evaluation and monitoring are important facets of any alternative programme. In this respect, the important role played by civil society and NGOs in service delivery and/or monitoring in close cooperation with government authorities was acknowledged.

¹¹ See the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990, para. 2.6.

¹² See in the case of refugees and asylum-seekers, Article 27 of the 1951 Convention relating to the Status of Refugees.

Screening and Assessment

26. Screening and assessment methods were identified as essential components of detention policies and in respect of alternative to detention programmes, although it was noted that many countries continue to base detention or release decisions on unproven assumptions and/or administrative convenience. Some States that did have screening and assessment mechanisms reported better compliance outcomes.
27. The International Detention Coalition's 5-Step Community Assessment and Placement (CAP) Model was welcomed as worthy of further exploration.¹³ It allows governments to assess suitability of an individual to a specific alternative programme by, for example, identifying particular vulnerabilities and taking into account other relevant individual factors, such as stage in the migration process, intended destination, family and community ties, belief in the process, past behaviour of compliance and character, risk of absconding, or previous criminal record.
28. The CAP Model assists governments to make informed decisions on the best placement, management and support requirements for individuals. It assesses the level and appropriateness of placement in the community, including both needs and risks to the community. The community assessment comprises case management, legal advice and interpretation, the ability to meet basic needs and documentation. Matching an individual to his or her community circumstances was considered an important part of the success of an alternative programme.

Case Management in the Community

29. Case management was identified as an important aspect in several successful alternative to detention programmes. Case management is a strategy for supporting and managing individuals whilst their status is being resolved, with a focus on informed decision-making, timely and fair status resolution and improved coping mechanisms and well-being on the part of individuals.

¹³ Sampson, Mitchell, and Bowring, *There are Alternatives*, above n 1: Step 1: Presume detention is not necessary; Step 2: Screen and assess each case individually; Step 3: Assess the community context; Step 4: Apply conditions to release if necessary; and Step 5: Detain only as the last resort in exceptional cases.

30. Case management should be part of an integrated process, starting at an early stage in the asylum or immigration process and continuing until asylum or other legal stay is granted, or deportation is carried out. Providing clear and consistent information about asylum, migration and/or return processes, as well as any consequences for non-cooperation, was highlighted as an element of successful alternative programmes. This is often best achieved via individual case management programmes. Transparency, active information-sharing and good cooperation between all actors involved has also been shown to develop trust among the individuals concerned.
31. Skill sets and personalities of staff can contribute to the success or failure of alternative programmes. Recruitment and training of staff needs to be well managed, including tailored training, courses and/or certification. Individuals should have access to non-discriminatory and discreet complaints and redress mechanisms in cases of abuse.

Bail Plus Community Supervision

32. Traditional bail systems can work in favour of asylum-seekers, migrants and stateless persons. Best practice suggests that bail hearings be automatic, rather than upon request. In both systems, the provision of legal advice and language assistance can be essential to effective access to bail. Nonetheless, many asylum-seekers, migrants and stateless persons lack the financial means to be released on bail. Release on conditions without money deposit, or other options, can avoid the discrimination on the basis of financial resources inherent in normal bail systems.
33. A number of alternative programmes were identified as good practice in this regard. Those that combine relief from bail payments with reporting obligations, supervision, counselling and individual coaching on all relevant matters were explored.¹⁴

¹⁴ Edwards, *Back to Basics*, above n 1, specifically examines the Toronto Bail Program in Canada.

Case Management in the Returns Context

34. It was widely acknowledged that voluntary returns are preferred to forced returns. In fact, many governments undertake considerable efforts to encourage this objective, including through engagement with the International Organization for Migration's Assisted Voluntary Return (AVR) programmes. Reintegration aspects, including return packages, which improve the prospects for families and individuals upon return, can be part of a process for achieving voluntary returns.
35. However, case management services limited to the removal procedure and/or return packages were considered to be inadequate. In comparison, programmes that examined all possible legal avenues to stay enjoyed higher return rates than those that only focused on return. This was attributed to the persons concerned having trust and confidence in the process and their realisation that all legal avenues to stay had been exhausted. In addition, experience of governments and research show that treating persons with respect and dignity throughout asylum or immigration processes contributes to constructive engagement in those processes, including in improving voluntary return outcomes.
36. Research shows that families have a greater interest in cooperating if their needs are met and, at the same time, they are helped to realize that irregular stay is not sustainable.
37. In addition to appropriate services, careful "coaching" alongside adequate space and time for individuals and families to deal with their future prospects, are integral components of such programmes. Case management creates a space for empowerment of families and individuals, including the ability to work through the migration options available to them. By creating trust and faith in the system, case management can assist the government in designing and implementing migration policies that are responsive to migration management imperatives as well as human rights.

UNHCR / OHCHR
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Expert Meeting

Dakar, Senegal
23–34 May 2011

Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children

Summary Conclusions

The Office of the United Nations High Commissioner for Refugees (UNHCR) convened an expert meeting on interpreting the 1961 Convention on the Reduction of Statelessness (1961 Convention) in Dakar, Senegal, from 23–24 May 2011. Co-sponsored by the Open Society Justice Initiative, this was the third in a series of expert meetings on statelessness organised in the context of the 50th anniversary of the 1961 Convention. The event focused on interpreting Articles 1 to 4 of the 1961 Convention and the safeguards contained therein for preventing statelessness, particularly among children.¹ A discussion paper was prepared for the meeting.* Thirty-three participants from 18 countries with experience in government, NGOs, academia, the judiciary, the legal profession and international organizations contributed to the debate and conclusions.

The meeting discussed the grant of nationality to persons, particularly children, who would otherwise be stateless and who are either born in the territory of a State or born to a State's nationals abroad. A significant part of the discussion examined when a child, or person, is "otherwise stateless" for the purposes of the 1961 Convention. The discussion also addressed the grant of nationality to foundlings and the extension of the territorial scope of the 1961 Convention to ships and planes flying the flag of the State party concerned. Throughout the meeting, participants looked at the obligations arising under the 1961 Convention in light of universal and regional human rights treaties. The following summary conclusions do not necessarily represent the individual views of participants or those of UNHCR, but reflect broadly the key understandings and recommendations that emerged from the discussion.

¹ UNHCR convened a series of expert meetings on statelessness doctrine in the context of the 50th anniversary of the 1961 Convention on the Reduction of Statelessness. The objective of the discussions was to prepare for the drafting of guidelines under UNHCR's statelessness mandate on the following issues: the definition of a "stateless person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons; the concept of *de facto* statelessness; procedures for determining whether a person is stateless; the status (in terms of rights and obligations) to be accorded to stateless persons under national law; and the scope of international legal safeguards for preventing statelessness among children or at birth.

* G. R. de Groot, *Preventing Statelessness among Children: Interpreting Articles 1-4 of the 1961 Convention on the Reduction of Statelessness and Relevant International Human Rights Norms*.

Impact of International Human Rights Norms on the 1961 Convention

1. Article 15 of the Universal Declaration of Human Rights establishes the right of every person to a nationality. This right is fundamental for the enjoyment in practice of the full range of human rights. The object and purpose of the 1961 Convention is to prevent and reduce statelessness, thereby guaranteeing every individual's right to a nationality. The Convention does so by establishing rules for Contracting States on acquisition, renunciation, loss and deprivation of nationality.
2. The provisions of the 1961 Convention, however, must be read in light of subsequent developments in international law, in particular international human rights law. Of particular relevance are treaties such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1989 Convention on the Rights of the Child (CRC) and the 2006 Convention on the Rights of Persons with Disabilities. Regional human rights instruments, such as the 1969 American Convention on Human Rights, the 1990 African Charter on the Rights and Welfare of the Child, the 1997 European Convention on Nationality, the 2004 Arab Charter on Human Rights, the 2005 Covenant on the Rights of the Child in Islam, and the 2006 Council of Europe Convention on the avoidance of statelessness in relation to State succession are also relevant.

Paramount importance of the Convention on the Rights of the Child and regional human rights treaties that recognize the right of every child to acquire a nationality

3. The CRC is of paramount importance in determining the scope of the 1961 Convention obligations to prevent statelessness among children. All save two United Nations Members States are party to the CRC. All Contracting States to the 1961 Convention are also party to the CRC.
4. Several provisions of the CRC are important tools for interpreting Articles 1 to 4 of the 1961 Convention. CRC Article 7 guarantees that every child has the right to acquire a nationality while CRC Article 8 ensures that every child has the right to preserve his or her identity, including nationality. CRC Article 2 is a general non-discrimination clause which applies to all substantive rights enshrined in the CRC, including Articles 7 and 8. CRC Article 3 also applies in conjunction with Articles 7 and 8 and requires that all actions concerning children, including in the area of nationality, must be undertaken with the *best interests of the child* as a primary consideration.

5. It follows from CRC Articles 3 and 7 that a child may not be left stateless for an extended period of time. The obligations imposed on States by the CRC are not only directed to the country of birth of a child, but to all countries with which a child has a link, e.g. by parentage. In the context of State succession, predecessor and successor States may also have obligations.
6. States parties to the CRC that are also parties to the American Convention on Human Rights or the African Charter on the Rights and Welfare of the Child have an explicit obligation to grant nationality automatically at birth to children born in their territory who would otherwise be stateless.

Impact of gender equality norms on provisions of the 1961 Convention

7. The principle of gender equality enshrined in the ICCPR and CEDAW must be taken into account when interpreting the 1961 Convention. In particular, CEDAW Article 9(2) guarantees that women shall enjoy equality with men in their ability to confer nationality on their children.
8. Prior to adoption of the ICCPR (1966) and CEDAW (1979), many nationality laws discriminated on the basis of gender. The 1961 Convention acknowledges that statelessness can arise from conflicts of laws in cases of children born to parents of mixed nationalities, whether in or out of wedlock, on account of provisions in nationality laws that limit the right of women to transmit nationality. Article 1(3) of the 1961 Convention therefore articulates a safeguard requiring States to grant nationality to children who would otherwise be stateless born to mothers who are nationals.
9. Today, most Contracting States to the 1961 Convention have introduced gender equality in their nationality laws as prescribed by the ICCPR and CEDAW, giving the Article 1(3) safeguard limited importance. This safeguard remains relevant in States where women are still treated less favourably than men in their ability to transmit nationality to their children. Although Article 1(3) of the 1961 Convention only addresses the situation of equality for mothers, in light of the principle of equality set out in the ICCPR and CEDAW, children born in the territory of a Contracting State to fathers who are nationals should also acquire the nationality of that State at birth, if they otherwise would be stateless.

When is a Person “Otherwise Stateless”?

Definition of “stateless” for the 1961 Convention

10. Articles 1 and 4 of the 1961 Convention only require States to grant their nationality to persons who would “otherwise be stateless”. The 1961 Convention, however, does not define the term “stateless”. Rather, Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention), establishes the international definition of a “stateless person” as a person “who is not considered as a national by any State under the operation of its law”. This definition, according to the International Law Commission, is now part of customary international law and is relevant for determining the scope of application of “otherwise stateless” under the 1961 Convention.
11. The exclusion provisions set forth in Article 1(2)² of the 1954 Convention limit the scope of the obligations of States under the 1954 Convention. However, they are not relevant for determining the personal scope of the 1961 Convention. Rather than excluding specific categories of individuals who are viewed as undeserving or not requiring protection against statelessness, the 1961 Convention adopts a different approach. It allows Contracting States to apply certain exhaustively listed exceptions with regard to individuals to whom they would otherwise be obliged to grant nationality.³

² Article 1(2) of the 1954 Convention states as follows:

This Convention shall not apply:

- (i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;
- (ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;
- (iii) To persons with respect to whom there are serious reasons for considering that:
 - (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
 - (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
 - (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

³ The Convention also establishes exceptions to the general rule that individuals should not lose or be deprived of their nationality if this results in statelessness. This was not within the purview of this Expert Meeting, however.

Focus on the situation of the child

12. The concept “otherwise stateless” requires evaluating the nationality of a child and not simply examining whether a child’s parents are stateless. Children can also be “otherwise stateless” if one or both parents possess a nationality but cannot confer it upon their children. The test is whether a child is stateless because he or she acquires neither the nationality of his or her parents nor that of the State of his or her birth; it is not an inquiry into whether a child’s parents are stateless. To restrict the application of the safeguards against statelessness to children of stateless parents is therefore insufficient in light of the different ways in which a child may be rendered stateless and the obligations of States under the 1961 Convention.

Determination of the non-possession of any foreign nationality

13. A Contracting State must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national.⁴ A Contracting State to the 1961 Convention cannot avoid its obligations to grant its nationality to an otherwise stateless person based on its interpretation of another State’s nationality laws which conflicts with the interpretation applied by the State concerned.⁵

Undetermined nationality

14. Some States may make a finding that a child is of “undetermined nationality”. When this occurs, States should seek to determine whether a child is otherwise stateless as soon as possible so as not to prolong a child’s status of undetermined nationality. For the application of Articles 1 and 4 of the 1961 Convention, such a period should not exceed five years which is the maximum period of residence which may be required under Article 1(2)(b) of the 1961 Convention where a State has an application procedure in place (see below at paragraph 28). While designated as being of undetermined nationality, these children should have access to all social services on equal terms as citizen children. If a Contracting State of birth has opted to grant its nationality to otherwise stateless children automatically, children of undetermined nationality should be treated as possessing the nationality of the State of birth unless and until the possession of another nationality is proven.

⁴ A State can refuse to recognize a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm an individual as a national. This issue was explored in greater detail in UNHCR, *Summary Conclusions from the Expert Meeting on the Concept of Stateless Persons under International Law*, September 2010 (this Compilation) and UNHCR, *Summary Conclusions from the Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons*, April 2011 (this Compilation).

⁵ With regard to the key importance of the views of the State concerned in establishing whether a person is a national, or stateless, see UNHCR, *Summary Conclusions from the Expert Meeting on the Concept of Stateless Persons under International Law*, September 2010 (this Compilation).

Possibility to acquire the nationality of a parent by registration

15. Responsibility to grant nationality to otherwise stateless children is not engaged where a child is born in a State's territory and is stateless, but could acquire the nationality of a parent by registration with a State of nationality of a parent, or a similar procedure such as declaration or exercise of a right of option. However, as a general rule it is only acceptable for Contracting States to maintain an exception for granting their nationality to children who would otherwise be stateless if a child can acquire the nationality of a parent immediately after birth and the State of a parent does not have any discretion to refuse the grant of nationality. It is recommended that States that maintain this exception assist parents in initiating the relevant procedure with the authorities of the State of nationality of the parents.
16. Moreover, this exception should not be triggered if a child's parents have good reasons for not registering their child with the State of their own nationality. States normally apply a test of *reasonableness* in this regard. This needs to be determined depending on whether an individual could reasonably be expected to take action to acquire the nationality in the circumstances of their particular case.

Considerations for refugee children

17. Owing to the very nature of refugee status, refugee parents cannot contact their consular authorities to register their children born abroad to acquire or confirm nationality. While refugees recognised under the 1951 Convention relating to the Status of Refugees (Refugee Convention) or the extended refugee definition who formally possess a nationality are viewed as *de facto* stateless persons,⁶ most refugees are not stateless as per the definition in Article 1(1) of the 1954 Convention. Given the fact that the Final Act of the 1961 Convention contains a non-binding recommendation that *de facto* stateless persons should be treated as stateless persons as far as possible, treatment of children born to refugees presents practical difficulties. In particular, refugee parents are in principle not in a position to register the birth of a child with the State of origin's consular representatives nor to approach the relevant authorities to obtain recognition or documentation of that child's nationality.

⁶ Although the concept of *de facto* statelessness is not defined in international law, the first expert meeting in this series examined this concept in detail and concluded on the following operational definition for the term: "*De facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality." UNHCR, *Summary Conclusions from the Expert Meeting on the Concept of Stateless Persons under International Law*, September 2010 (this Compilation), para. 30.

18. States are encouraged to offer refugee children the possibility to acquire the nationality of the country of birth as foreseen under Article 1(1) of the 1961 Convention. Where the child of a refugee is born stateless, the safeguard in Article 1 will apply and the considerations relating to otherwise stateless children discussed during the Expert Meeting are relevant. However, where the child of a refugee has acquired the nationality of the country of origin of the parents at birth, it is not desirable to provide for an automatic grant of nationality under Article 1(1) of the 1961 Convention at birth, especially in cases where dual nationality is not allowed in one or both States. Refugee children and their parents should be given the possibility to decide for themselves, whether or not these children acquire the nationality of the country of birth, taking into account any plans they may have for future durable solutions (e.g. an imminent voluntary repatriation to the country of origin).

Grant of Nationality to Otherwise Stateless Children Born in the Territory of a Contracting State (1961 Convention, Articles 1(1)-1(2))

Relation of Articles 1 and 4

19. The 1961 Convention and relevant universal and regional human rights norms do not dictate the basic rules according to which nationality is acquired and withdrawn by States. The 1961 Convention does not require States to adopt a pure *jus soli* regime whereby States grant nationality to all children born in their territory. Similarly, it does not require adoption of the principle of *jus sanguinis*. Rather, the 1961 Convention requires that in instances where an individual would otherwise be stateless, the Contracting State in which the child is born has to grant nationality to prevent statelessness. In the event that a child is born to the national of a Contracting State in the territory of a non-Contracting State, a subsidiary obligation comes into play and the State of nationality of the parents must grant nationality if the child would otherwise be stateless. As a result, the 1961 Convention addresses conflicts of nationality laws through an approach that draws on the principles of both *jus soli* and *jus sanguinis*.

Options for granting nationality to comply with 1961 Convention obligations

20. Article 1 of the 1961 Convention provides Contracting States with several alternative means for granting nationality to otherwise stateless children born in their territory. Such States can either provide for automatic (*ex lege*, or by operation of law) acquisition of its nationality upon birth pursuant to Article 1(1)(a), or for acquisition of nationality upon submission of an application pursuant to Article 1(1)(b). Article 1 of the 1961 Convention also allows Contracting States to provide for the automatic grant of nationality to otherwise stateless children born in their territory subsequently, at an age determined by domestic law.
21. A Contracting State may apply a combination of these alternatives for acquisition of its nationality by providing different modes of acquisition based on the level of attachment of the individual to that State. For example, a Contracting State might provide for automatic acquisition of its nationality by otherwise stateless children born in their territory whose parents are permanent or legal residents in the country, whereas it might require an application procedure for those whose parents are not legal residents. Any distinction in treatment of different groups, however, cannot be based on discriminatory grounds and must be reasonable and proportionate.

Acquisition of nationality at birth or as soon as possible after birth

22. The rules for preventing statelessness among children contained in Articles 1(1) and 1(2) of the 1961 Convention must be read in light of later human rights treaties, which recognize every child's right to acquire a nationality, in particular where they would otherwise be stateless. The right of every child to acquire a nationality (CRC Article 7) and the principle of the best interests of the child (CRC Article 3) together create a presumption that States need to provide for the automatic acquisition of their nationality at birth by an otherwise stateless child born in their territory, in accordance with Article 1(1)(a) of the 1961 Convention.
23. Where Contracting States opt for an application procedure to grant their nationality to otherwise stateless children, developments in international human rights law create a strong presumption that States should limit application requirements so as to allow children to acquire nationality as soon as possible after birth.
24. The presumption that States must grant their nationality either immediately at birth or as soon as possible after birth is most evident in States that are not only parties to the CRC, but also to regional human rights instruments, in particular the American Convention of Human Rights and the African Charter on the Rights and Welfare of the Child. Article 20 of the American Convention and Article 6 of the African Charter explicitly establish that children are to acquire the nationality of their country of birth if they would otherwise be stateless.

Permissible conditions for the acquisition of nationality upon application (1961 Convention, Article 1(2))

25. Where Contracting States opt to grant nationality upon application pursuant to Article 1(1)(b) of the 1961 Convention, it is permissible for them to do so subject to the fulfilment of certain conditions. Permissible conditions are established by the exhaustive list set forth in Article 1(2) of the 1961 Convention and include: a fixed period for lodging an application immediately following the age of majority (Article 1(2)(a)); habitual residence in the Contracting State for a fixed period, not to exceed five years immediately preceding an application nor ten years in all (Article 1(2)(b)); restrictions on criminal history (Article 1(2)(c)); and the condition that an individual has always been stateless (Article 1(2)(d)). Imposition of any other conditions would violate the terms of the 1961 Convention.
26. The use of the mandatory “shall” (“Such nationality shall be granted...”), indicates that a Contracting State must grant its nationality to otherwise stateless children born in their territory where the conditions set forth in Article 1(2) and incorporated in their application procedure are met. The exhaustive nature of the list of possible requirements means that States cannot establish conditions for the grant of nationality additional to those stipulated in the 1961 Convention. As a result, providing for a discretionary naturalization procedure for otherwise stateless children is not permissible under the 1961 Convention. A State may choose not to apply any of the permitted conditions and simply grant nationality upon submission of an application.

Deadline for lodging an application (1961 Convention, Article 1(2)(a))

27. In accordance with developments in international human rights law, Contracting States that opt to grant nationality upon application pursuant to Article 1(1)(b) of the 1961 Convention, should accept such applications from children who would otherwise be stateless born in their territory as soon as possible after their birth and during childhood. However, where Contracting States set deadlines to receive applications from otherwise stateless individuals born in their territory at a later time, they must accept applications lodged at a time beginning not later than the age of 18 and ending not earlier than the age of 21 in accordance with Article 1(2)(a) of the 1961 Convention. These provisions ensure that otherwise stateless individuals born in the territory of a Contracting State have a window of at least three years after majority to lodge their application.

Condition of habitual residence (1961 Convention, Article 1(2)(b))

28. Among the permissible conditions listed exhaustively in Article 1(2)(b) of the 1961 Convention, States may stipulate that an otherwise stateless person born in its territory fulfil a period of “habitual residence” on the territory of the country of birth in order to acquire that country’s nationality. This period is not to exceed five years immediately preceding an application nor ten years in all. “Habitual residence” should be understood as stable, factual residence. The 1961 Convention does not allow Contracting States to make an application for the acquisition of nationality of otherwise stateless individuals conditional on lawful residence.
29. In cases where it is difficult to determine whether a person is habitually resident in one or another country, for example due to a nomadic way of life, it should be concluded that such persons habitually reside in both countries.
30. States should establish objective criteria for individuals to prove habitual residence. Lists of types of permissible evidence, however, should never be exhaustive.

Criminal history (1961 Convention, Article 1(2)(c))

31. The permissible condition that an otherwise stateless individual has been neither convicted of an offence against national security nor sentenced to a term of imprisonment for five years or more on a criminal charge as set forth in Article 1(2)(c) refers to the criminal history of an otherwise stateless person and not to acts of his or her parents.
32. Criminal consequences due to irregular presence on the territory of a State are never to be used to disqualify an otherwise stateless individual from acquiring nationality under Article 1(2)(c).
33. Whether a crime can be qualified as an “offence against national security” needs to be judged against international standards and not simply by such a characterization by the concerned State. Similarly, criminalization of specific acts and sentencing standards must be consistent with international human rights law and standards.

Has “always been stateless” (1961 Convention, Article 1(2)(d))

34. Where a Contracting State requires that an individual has “always been stateless” to acquire nationality pursuant to an application under Article 1(2)(d), there is a presumption that the applicant has always been stateless and the burden of proof rests with the State to prove the contrary. An applicant’s possession of evidently false or fraudulently obtained documents of another State does not negate the presumption that an individual has always been stateless.

Grant of Nationality to Otherwise Stateless Persons Born to Nationals of Contracting States Abroad (1961 Convention, Articles 1(4), 1(5) and 4)

35. Article 1 of the 1961 Convention places primary responsibility on Contracting States in whose territory otherwise stateless children are born to grant them nationality to prevent statelessness. The 1961 Convention also sets out two subsidiary rules. The first is found in Article 1(4) and applies where an otherwise stateless child is born in a Contracting State to parents of another Contracting State but does not acquire the nationality of the country of birth automatically and either misses the age to apply for nationality or cannot meet the habitual residence requirement. In such cases, responsibility falls to the Contracting State of which the parents of the individual concerned are citizens to grant its nationality to that individual. In these limited circumstances where Contracting States must grant nationality to children born abroad in another Contracting State to one of their nationals, States may require that an individual lodge an application and meet certain criteria set forth in Article 1(5) that are similar to those set forth in Article 1(2), with some distinctions.
36. The second subsidiary rule applies where children of a national of a Contracting State who would otherwise be stateless are born in a non-Contracting State. This rule is set out in Article 4. Although granting nationality in these circumstances is obligatory, Article 4 gives Contracting States the option of either granting their nationality to children of their nationals born abroad automatically at birth or requiring an application subject to the exhaustive conditions listed in Article 4(2).
37. Like Article 1, Article 4 of the 1961 Convention must be read in light of subsequent developments in international human rights law. The right of every child to acquire a nationality, as set out in CRC Article 7 and the principle of the best interests of the child contained in CRC Article 3, create a strong presumption that Contracting States should provide for automatic acquisition of their nationality at birth to an otherwise stateless child born abroad to one of its nationals. In cases where Contracting States require an application procedure, international human rights law, in particular the CRC, obliges States to accept such applications as soon as possible after birth.

Implicit Obligations in Articles 1 and 4 of the 1961 Convention

Appropriate information

38. Contracting States that opt for an application procedure are obliged to provide, as soon as possible, detailed information to parents of otherwise stateless children about the possibility of acquiring the nationality of the country.
39. Information needs to be provided to concerned individuals whose children born in the territory of a Contracting State are otherwise stateless or of undetermined nationality. A general information campaign is not sufficient.

Fees

40. Where Contracting States grant nationality to otherwise stateless individuals upon application, they should accept such applications free of charge. Indirect costs, such as for authentication of documents, must not constitute an obstacle for otherwise stateless individuals to exercise the right to acquire the nationality of Contracting States.

Importance of birth registration

41. While the rules set out in the 1961 Convention operate regardless of whether a child's birth is registered, registration of the birth provides a key form of proof which underpins implementation of the 1961 Convention and related human rights norms. CRC Article 7 specifically requires the registration of the birth of all children and applies irrespective of the nationality or residence status of the parents.

Implementation of treaty obligations in national law

42. Contracting States are encouraged to formulate their nationality regulations in a way that makes clear the procedures by which they are implementing their obligations under Articles 1 to 4 of the 1961 Convention. This also applies for countries in which, according to their Constitutions or legal systems, international treaties are directly applicable.

Foundlings

43. Children found abandoned on the territory of a Contracting State must be treated as foundlings and accordingly acquire the nationality of the country where found. Article 2 of the 1961 Convention does not define an age at which a child can be considered a foundling. The words for ‘foundling’ used in each of the five authentic texts of the 1961 Convention (English, French, Spanish, Russian and Chinese) reveal some differences in the ordinary meaning of these terms, in particular with regard to the age of the children covered by this provision. State practice reveals a broad range of ages within which this provision is applied; several Contracting States limit granting nationality to foundlings that are very young (12 months or younger) while most Contracting States apply their rules in favour of foundlings to older children, including in some cases up to the age of majority.
44. At a minimum, the safeguard for Contracting States to grant nationality to foundlings should apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth. This flows from the object and purpose of the 1961 Convention and also from the right of every child to acquire a nationality. A contrary interpretation would leave some children stateless.
45. If a State provides for an age limit for foundlings to acquire nationality, the age of the child at the date the child was found is decisive and not the date when a child came to the attention of the authorities.
46. Nationality acquired by foundlings pursuant to Article 2 of the 1961 Convention should only be lost if it is proven that the child concerned possesses another State’s nationality.
47. A child born in the territory of a Contracting State without having a parent, who is legally recognised as such (e.g. because the child is born out of wedlock and the woman who gave birth to the child is legally not recognised as the mother), should be treated as a foundling and should immediately acquire the nationality of the State of birth.

Application of Safeguards to Children Born on Ships and Planes

48. The extension of the territory of a Contracting State to “ships” as prescribed in Article 3 of the 1961 Convention is to be interpreted as referring to all “vessels” registered in that Contracting State irrespective of whether the ship involved is destined for transport on the high seas.
49. It follows from the ordinary meaning of the terms used in Article 3 that the extension of the territory of a Contracting State to ships flying the flag of that State and to aircraft registered in that State also applies to ships within the territorial waters or a harbour of another State or to aircraft at an airport of another State.

Transitional Provisions

50. Article 12 of the 1961 Convention provides that if a State opts to grant its nationality automatically to children born in its territory who would otherwise be stateless, this obligation only applies to children born in the territory of that State after the entry into force of the 1961 Convention for that State.
51. If a Contracting State opts to grant its nationality to otherwise stateless individuals upon application in accordance with the provisions of Article 1(1) and 1(2), the rules also apply for otherwise stateless children born before the entry into force for the State involved. This is also the case for Article 1(4) and the application procedure foreseen in Article 4.
52. However, States that opt for automatic acquisition should be encouraged to provide for a transitory application procedure for stateless children born before the entry into force of the 1961 Convention.

UNHCR

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International Cooperation to Share Burdens and Responsibilities

Summary Conclusions

The Office of the United Nations High Commissioner for Refugees (UNHCR) convened an Expert Meeting on International Cooperation to Share Burdens and Responsibilities in Amman, Jordan, on 27 and 28 June 2011.

This expert meeting is one in a series of events organized to mark the 60th anniversary of the 1951 Convention relating to the Status of Refugees (1951 Convention).¹ Participants included 23 experts drawn from governments, non-governmental organizations, policy institutes, academia and international organizations. A discussion paper was prepared by UNHCR.²

Building on the conclusions of the 2010 High Commissioner's Dialogue on Protection Challenges: "Protection Gaps and Responses" (High Commissioner's Dialogue),³ the purpose of this expert meeting was to explore ways in which international cooperation to address refugee challenges could be enhanced. In particular, the development of a *framework on international cooperation*, consisting of a *set of understandings* and an *operational toolbox* was considered. As a starting point, and in order to provide a foundation for this framework, the focus was on taking stock of existing cooperative arrangements to develop a better understanding of their elements and lessons learned.

These Summary Conclusions do not necessarily represent the individual views of participants or UNHCR, but reflect broadly the themes and understandings emerging from the discussion.

¹ For more information and documentation relating to the 2011 Commemorations see: UNHCR, *Commemorating the Refugee and Statelessness Conventions*, www.unhcr.org/commemorations. All documents from the expert meeting will also be available at UNHCR, *Expert Meetings*, <http://www.unhcr.org/pages/4d22f95f6.html>.

² UNHCR, *International Cooperation to Share Burden and Responsibilities: Discussion Paper*, June 2011, available at: <http://www.unhcr.org/4df871e69.html>.

³ UNHCR, *Breakout Session 2: International cooperation, burden sharing and comprehensive regional approaches – Report by the Co-Chairs*, 8 December 2010, available at: <http://www.unhcr.org/4d09e4e09.html>. See also UNHCR, *High Commissioner's Closing Remarks, 2010 Dialogue on Protection Gaps and Responses*, 9 December 2010, available at: <http://www.unhcr.org/4d0732389.html>.

Paragraphs 1–4 of these Summary Conclusions highlight some preliminary understandings of the concept of “international cooperation”. Some common elements and lessons learned from past cooperative arrangements to address different refugee situations are then identified in paragraphs 5–6. Initial elements that could make up a *framework on international cooperation* are recommended in paragraphs 7–9. Finally, input regarding the role of UNHCR in cooperative arrangements is provided in paragraph 10. To capture the richness of the discussion in the four working groups, a summary report is provided in the Annex.

Understanding “International Cooperation”

1. The need for international cooperation is a pressing issue for many governments, regardless of whether they are origin, host or destination countries. The focus on “international cooperation”, rather than other terms such as “responsibility sharing”, “burden sharing” or “international solidarity”, was welcomed. It was felt that a lengthy discussion on terminology (especially on the merits of “burden” versus “responsibility” sharing), at the expense of making concrete progress on enhancing cooperation in practice, needs to be avoided. However, some further clarification of the meaning and scope of “international cooperation” in the refugee context would be useful, not least to ensure that all stakeholders share a common understanding.
2. Some tenets of “international cooperation” were identified during the meeting. International cooperation is an underlying principle of international law, stemming from the Charter of the United Nations.⁴ The 1951 Convention and other instruments also place particular emphasis on the need for international cooperation in light of the international scope and nature of refugee challenges.⁵ These instruments, however, do not specify how international cooperation is to be implemented in practice.
3. International cooperation is best understood as a principle and methodology. It can be manifested in many forms, including material, technical or financial assistance, as well as physical relocation of asylum-seekers and refugees.
4. Cooperation is, however, not to be used as a pretext for burden shifting or to avoid international obligations.

⁴ The Charter of the United Nations, Articles 1, 13, 55 and 56, available at: <http://www.un.org/en/documents/charter/index.shtml> (UN Charter); Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, 4th Principle, available at: <http://www.unhcr.org/refworld/docid/3dda1f104.html>.

⁵ Preamble, 1951 Convention Relating to the Status of Refugees, entered into force 22 April 1954, and the 1967 Protocol relating to the Status of Refugees, entered into force 4 October 1957, available at: <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (1951 Convention). For a summary of references to international cooperation in other relevant international and regional instruments see: UNHCR, *International Cooperation to Share Burden and Responsibilities: Discussion Paper*, June 2011, available at: <http://www.unhcr.org/4df871e69.html>, footnotes 2 and 3. For a summary of UNHCR Executive Committee Conclusions on international cooperation, including burden and responsibility sharing and international solidarity, see: UNHCR, *A Thematic Compilation of Executive Committee Conclusions (4th edition)*, August 2009, available at: <http://www.unhcr.org/3d4ab3ff2.html>, pp. 38–62.

Stocktaking: Elements and Lessons Learned

5. In exploring how international cooperation to address refugee challenges can be enhanced, it is important to build on lessons learned from past examples and to adopt a concrete and practical approach. Past and present cooperative arrangements to address four situations were considered in separate working groups: larger-scale situations (including mass influx), protracted refugee situations, rescue at sea emergencies involving asylum-seekers and refugees, and mixed movements and refugee protection (including irregular onward movements).⁶ In practice these situations are not mutually exclusive and may overlap and blend into each other.
6. Some common elements and lessons learned that were identified across all situations are summarized below.

Cooperative Arrangements – some elements and lessons learned

- Clear ownership and political leadership by States, as well as adequate follow up and monitoring arrangements, can assist to ensure that cooperative arrangements are sustainable.
- Cooperative arrangements can provide for differentiated contributions by interested States, according to needs and capacities. This can be a good way to incentivize cooperation and create political momentum.
- Early involvement of countries of origin can be valuable, where appropriate. Caution is required to ensure that this does not limit protection space or create a risk of *refoulement*.
- Preparedness, management and partnerships are important. Establishing pre-existing “pools” of funds or resources can ensure that responses are timely and effective, while not limiting flexibility and adaptability to the specific circumstances. Such “pools” could include funds (e.g., European Refugee Fund) or pledges of additional resettlement places that may be drawn on in emergencies.
- Close cooperation among stakeholders, including regular communication, can support effective implementation of cooperative arrangements. Stakeholders may include countries of origin, host States, States outside the region, UNHCR and other international organizations, non-governmental organizations, and affected refugee and host communities. Interagency cooperation on the basis of complementarity of mandates and responsibilities is to be encouraged.
- Cooperative arrangements may be incorporated into or build on existing regional processes and/or go beyond refugee protection issues, where useful, as long as adequate protection safeguards are included.
- UNHCR has played a central role in triggering and supporting cooperative arrangements, including through leadership (see further below).

⁶ A summary of the discussion in each of the working groups is contained in the Annex.

Looking Ahead: A Framework on International Cooperation

7. The development of a *common framework on international cooperation to share burdens and responsibilities* could be a practical next step to explore the ways in which cooperation can be enhanced. The framework could be made up of (1) a *set of understandings* on international cooperation; (2) an *operational toolbox* to facilitate the conclusion of bilateral and multilateral agreements.

Set of Understandings

8. A *set of understandings*, building on the initial suggestions indicated in the box below, would support the framing of specific cooperative arrangements.⁷

Set of Understandings – some preliminary suggestions

- The objective of cooperative arrangements is to enhance available protection space, including prospects for durable solutions for refugees.
- International cooperation is a complement to States' protection responsibilities and not a substitute for them. Cooperative arrangements share, and do not shift, burdens and responsibilities between and among States.
- Cooperative arrangements reflect a common approach and take into account the particular interests of and challenges for all States implicated and engaged.
- Cooperative arrangements are guided by general principles, such as international cooperation, humanity and dignity, and must be in line with international refugee and human rights law.
- Cooperative arrangements take into account the autonomy of individual asylum-seekers and refugees to the extent possible, especially where they involve physical relocation.
- Successful cooperative arrangements are adapted to the specific situation to be addressed.
- States remain responsible for meeting their international obligations and cannot devolve this responsibility to international organizations or NGOs through cooperative arrangements. The involvement of international organizations and NGOs in cooperative arrangements is important, but the nature and extent of this involvement will depend on the circumstances.

⁷ The preliminary points outlined here may be supplemented by additional understandings, including with respect to specific situations, as well as further clarification on terminology.

Operational Toolbox

9. The goal of the *operational toolbox* would be to provide a set of templates, actions and instruments that may be drawn on to develop cooperative arrangements to address particular situations.

Operational Toolbox – some preliminary suggestions

- **Compendium of practical examples:** this could ensure that stakeholders are aware of previous cooperative arrangements to address a range of situations, their elements and lessons learned.
- **Further guidance on temporary protection:** this would clarify the nature and scope of temporary protection schemes, relevant international legal standards, and the protection safeguards to be employed.
- **Humanitarian evacuation or resettlement arrangements:** the development of a checklist or standard operating procedures with important considerations and lessons learned from previous experiences could facilitate future arrangements.
- **Sample regional cooperation framework:** this could provide an overview of some elements to consider in addressing, e.g., mixed movements and refugee protection, as part of a regional approach.⁸
- **Sample framework for cooperation in distress at sea situations:** this could outline the rights and obligations of the various actors involved, international standards, and protection safeguards. It could also establish a mechanism for allocating responsibilities between and among States (e.g, differentiating between responsibilities for rescue, disembarkation, processing, and the provision of solutions).
- **Sample readmission agreements:** these would be useful for addressing irregular onward movements. They could emphasise the international standards that apply in the event of transfer of responsibility for processing asylum claims, as well as the importance of including readmission as part of a broader cooperative arrangement to address the causes of irregular onward movements.

⁸ For instance, building on the “10-Point Plan of Action”: UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, 2007, available at: <http://www.unhcr.org/4742a30b4.html> or along the lines of the “Regional Cooperation Framework” developed in the South-East Asia region: UNHCR, *Regional Cooperative Approach to Address Refugees, Asylum-Seekers and Irregular Movements*, November 2010, available at: <http://tinyurl.com/84dko7e>.

UNHCR's Role

10. UNHCR plays an important role in enhancing international cooperation between and among States to address refugee challenges. Some of the suggested ways that UNHCR could contribute have been summarised below.

Role of UNHCR – some suggestions

- UNHCR could, for example, act as a broker to facilitate cooperation between and among States (including through a high level diplomatic role). One possibility could be for the Office to develop a roster of high-level envoys, including both current and former UNHCR officials. It is necessary to continue to build the capacities of UNHCR staff in mediation and political negotiation.
- UNHCR could play an operational role in specific cooperative arrangements, depending on the nature of the agreement and whether or not the Office is a party. UNHCR's role could include: providing emergency assistance and relief (particularly during mass influx situations); carrying out registration, mandate refugee status determination, or monitoring operations; or serving as secretariat.
- The Office would, however, not be involved in cooperative arrangements where this would be seen as devolution of State responsibility to UNHCR or contribute to a shrinking of protection space.
- UNHCR could continue to develop templates and practices to facilitate cooperative arrangements, and draw attention to past successful experiences in different regions, as well as lessons learned.

UNHCR
October 2011

ANNEX:

Summary of Working Group Discussions

This annex provides a summary of the discussion in the four working groups. Each working group considered cooperative arrangements to address a particular refugee situation: larger-scale situations (including mass influx); protracted refugee situations; rescue at sea emergencies involving asylum-seekers and refugees; and refugee protection and mixed movements.

Working Group 1:

Larger-Scale Situations (including Mass Influx)

1. The term “larger-scale situations” is used to refer to situations ranging from “mass influx”¹ to steady but relatively high number of arrivals over time. Such larger-scale situations may involve primarily asylum-seekers and refugees, but they can also consist of “mixed movements”. Understanding the context, including the causes of flight and the profiles of persons arriving in the territory of host State(s), is a crucial first step in order to tailor responses, including in relation to calls for international cooperation and assistance.
2. Larger-scale situations are dynamic, and can change rapidly. They can also turn into protracted situations (see Working Group 2). Early cooperation to ease the pressure on frontier States is important. Taking advantage of momentum in the early stages of a crisis is also key to garnering international attention and support in the longer term. It is useful to establish pre-existing frameworks for cooperation and burden sharing, including, for example, “pools” of emergency funding, humanitarian evacuation or resettlement places. Emergency evacuation or resettlement is best coupled with expedited processing and security clearances to arrange for speedy departures (e.g., UNHCR’s Global Solidarity Resettlement Initiative for North

¹ “Mass influx” is generally understood to involve considerable numbers of persons arriving over an international border; a rapid rate of arrival; inadequate absorption or response capacity in host States, particularly during the emergency phase; and individual asylum procedures, where they exist, are unable to deal with the assessment of such large numbers: UNHCR, *Ensuring International Protection and Enhancing International Cooperation in Mass Influx Situations*, EC/54/SC/CRP.11, 7 June 2004, para. 3, available at: <http://www.unhcr.org/40c70c5310.html>.

Africa).² The need for evacuation platforms of a larger capacity than the current emergency facilities in Romania and Slovakia was also mentioned.³

3. The autonomy and choice of the refugee is to be taken into account to the extent possible in the operationalization of cooperative emergency responses, particularly where these involve physical relocation. One important aspect of this is the provision of proper information about the particular programme and associated rights to those affected.
4. While border closures have been used by some receiving States to trigger cooperation and attention from other countries in the face of large numbers of arrivals, they have regularly had longer-term costs, not least in terms of State credibility. It was underlined that an absence of international cooperation does not allow States to avoid their international obligations to asylum-seekers, refugees and other persons in need of international protection.
5. In some cases, temporary protection schemes could be one component of a cooperative approach to address certain larger-scale situations. The term “temporary protection” refers to short-term emergency protection schemes employed in situations of “mass influx” of asylum-seekers. This should not be used to undermine existing obligations or compromise international standards. But it may be particularly apposite in countries that are not party to the 1951 Convention and/or other relevant instruments. Temporary protection schemes could also be usefully employed where the nature of the protection needs or the volatility of the situation calls for a time-bound response, at least initially. Temporary protection was considered generally inappropriate in situations that have their roots in long-standing conflicts or events, and where return to the country of origin is not likely in the short-term. Its continuing suitability as a protection tool in a particular situation calls for constant monitoring. The scope and implementation of temporary protection schemes as part of cooperative arrangements requires further development, not least the need for a better understanding of the differences between national, regional and international schemes as well as the relationship between temporary protection and existing international standards.

² Under the Global Resettlement Solidarity Initiative in response to North Africa, resettlement States were called upon to consider contributing a first target number of 8,000 places, rising to possibly 20,000 if needs should demand. The primary aims of the Global Resettlement Initiative are to alleviate the burden on the frontier States of Egypt and Tunisia, and to provide durable solutions for refugees in protracted situations in Egypt. See further <http://www.unhcr.org/4e11735e6.html>.

³ For further information see: UNCHR, *Guidance Note on Emergency Transit Facilities*, 4 May 2011, available at: <http://www.unhcr.org/refworld/pdfid/4dddec3a2.pdf>.

Working Group 2: Protracted Refugee Situations

6. Protracted refugee situations⁴ were identified as one of the cases where international cooperation is most needed. They are also among the most complex situations to address, because their resolution often is dependant on a successful engagement with the causes of flight. One particular challenge in “unlocking” protracted situations through international cooperation is the development of sufficient political momentum. Successful historical examples demonstrate the importance of context-specific sustained engagement, usually multi-year; clear ownership of the process; differentiated support and participation; a clearly defined role for civil society; a special facilitator role for UNHCR; and good partnerships.
7. Identifying an appropriate balance of solutions (resettlement, local integration and voluntary repatriation) may encourage a range of interested States to become involved according to their capacity. Cooperation to address protracted situations is not limited to resettlement, but includes also material, technical and financial assistance. The engagement of countries of origin to facilitate sustainable return, where appropriate, was acknowledged as being an essential part of many successful arrangements. The key role of refugee leaders in finding solutions was also noted, provided that refugee leadership reflects the broad and myriad interests of refugee communities.
8. The concept of “local integration” requires further development. It was observed that local integration is a process, and that there are different forms and levels of integration. Access to the labour market and freedom of movement are baseline indicators of a local integration process. The role of the host community is particularly important to the success of this solution, not least the management of access to labour and economic markets.
9. Further thinking on the “strategic use of resettlement” is also called for. Limited third country resettlement has not always triggered other solutions to protracted situations. There may also be refugees and their families who do not wish to be resettled. Strategies for residual caseloads would always be needed. In some situations, resettlement can be a way to relieve pressure on camps in terms of space and quality of life. The impact of remittances on refugee communities in first countries of asylum was also mentioned as an added benefit of resettlement.

⁴ A protracted refugee situation is one in which refugees find themselves in a long-lasting and intractable State of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance: UNHCR, *Protracted Refugee Situations*, June 2004, EC/54/SC/CRP.14, available at: <http://www.unhcr.org/refworld/docid/4a54bc00d.html>.

10. It was felt that the use of migration, as part of a cooperative approach, merits further exploration, e.g., by conducting a survey of countries that admit refugees into international migration quotas, or conducting a pilot project. Caution is needed, however, to ensure that the use of migration channels to provide solutions to some refugees does not inadvertently lead to a shrinking of protection space or confusion between refugees and other groups without international protection needs. Safeguards for refugees taking up migration opportunities were highlighted, including protection against *refoulement* and from trafficking and exploitation. Other ideas that could form part of a broad cooperative approach to address protracted situations included “field innovation centres”, located near long-standing refugee camps/settlements and bringing together external expertise from, e.g., economists, political scientists and migration specialists to analyze the situation and to propose various solutions; or the expanded use of the High Commissioner’s Personal Envoy scheme to target particular situations.⁵

Working Group 3:

Rescue at Sea Emergencies involving Asylum-Seekers and Refugees

11. Cooperative arrangements to address rescue at sea emergencies involving asylum-seekers and refugees will be guided by, and build on, the global legal framework provided by the international law of the sea alongside international refugee and human rights law. This includes, for instance, the obligation to rescue persons in distress regardless of their status or the circumstances in which they are found.⁶

⁵ See e.g. UNHCR, *UNHCR High Commissioner’s Personal Envoy Visits Croatia*, available at: <http://tinyurl.com/7rkzpyo>.

⁶ 1982 United Nations Convention on the Law of the Sea (UNCLOS), entered into force 16 November 1994, Article 98; 1974 International Convention for the Safety of Life at Sea (SOLAS), entry into force 25 May 1980, Chapter V, Regulation 33(1); 1979 International Convention on Maritime Sea and Rescue (SAR), entry into force 25 March 1980, Chapter 2.1.10. See further: UNHCR and IMO, *Rescue at Sea – A guide to principles and practice as applied to migrants and refugees*, available at: <http://www.unhcr.org/450037d34.html>.

12. Although there have been some significant developments in this global framework in recent years,⁷ it nonetheless has legal and operational shortcomings which can result in ambiguity of State responsibility for Search and Rescue (SAR) services and/or disembarkation and processing. This can in turn lead to loss of life at sea and the risk of *refoulement*. Legal and definitional gaps include, e.g., lack of clarity about the definition of “distress” and “place of safety”, and the absence of a system to allocate responsibility for disembarkation. Operational gaps result from institutional, capacity or political limitations. There is also a lack of burden-sharing mechanisms to ensure that (coastal) States along major maritime migration routes do not become overburdened. These issues can be addressed in part through the development of practical cooperative arrangements. More broadly, exploring ways to encourage cooperation through an emphasis on the short- and long-term humanitarian, political and financial costs of non-cooperation was seen as a priority.
13. Clarifying and sharing responsibilities between States may encourage cooperative approaches. For instance, a State may be prepared to provide a place of disembarkation and processing if another State is able to offer durable solutions to some refugees through resettlement. Along these lines, the development of sample frameworks containing mechanisms to allocate responsibility for rescue, disembarkation, processing, and follow up including solutions for refugees could be considered. A system of joint processing for rescuees could also be developed in certain regions, although this would require further elaboration. A regional asylum support office may be one way to facilitate operationalization of such a system.
14. Regional cooperation to address rescue at sea emergencies is particularly important, as there will necessarily be differences in challenges and capacities between regions. Practical cooperative arrangements would be best developed at the regional or even sub-regional level to ensure that these specificities are taken into account. However, these need to be guided by international principles. They could also involve stakeholders from outside the region and support from the international community as appropriate. Meetings and conferences can also play a crucial information-sharing role and build political support for particular approaches.⁸

⁷ For example, recent amendments to the SOLAS and SAR Conventions, as well as accompanying Guidelines issued by the International Maritime Organisation (IMO), underline the duty of all States parties to co-ordinate and co-operate in rescue at sea emergencies: SOLAS Convention, Regulation 33, 1-1; SAR Convention, Chapter 3.1.9; IMO Resolution MSC.167(78), Annex 34, *Guidelines on the Treatment of Persons Rescued at Sea*, 2004.

⁸ An expert meeting, convened by UNHCR in November 2011, on refugees and asylum-seekers in distress at sea offered the opportunity to build on the tools and concepts discussed above: see UNHCR, *Summary Conclusions from the Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea*, December 2011 (this Compilation).

Working Group 4:

Refugee Protection and Mixed Movements

15. The increasing number of bilateral and multilateral regional processes dedicated to tackling irregular migration, including human trafficking and smuggling, suggests that regional cooperation between States in this area may become more frequent. It is essential to ensure that this cooperation includes protection safeguards and, indeed, expands protection space for refugees. Reconciling access to protection with border security measures, particularly measures to counter smuggling and trafficking in persons, is one challenge. The development of protection-sensitive entry systems while avoiding pull factors for persons without genuine international protection needs is another important consideration.
16. Addressing the various aspects of “mixed movements”⁹ was cited as a goal for cooperative arrangements. These aspects include the entry phase (e.g., differentiating between and providing access to appropriate procedures for various categories of persons), reception arrangements and access to self-reliance over time, as well as the end phase of the displacement cycle (e.g., ensuring a range of different outcomes/solutions, including for persons who are not in need of international protection).
17. States within a region faced with mixed movements may have different systems and standards, which can lead to irregular onward movements¹⁰ and be an obstacle to cooperation in practice. Subject to protection safeguards, mechanisms for the transfer of responsibility between countries for determining and meeting international protection needs may be part of cooperative responses to irregular onward movements through return or readmission agreements. At all times, such arrangements need to meet international standards, including protection against *refoulement*, basic human rights, respect for dignity, and provisions for those with specific needs. Transferring States remain responsible under international law for ensuring that protection standards are met in the country to which people are transferred. In addition, regional cooperative approaches can be used to harmonize access to and standards of protection between States, including through technical, financial and material assistance to develop capacity. It is important that harmonization be designed to improve standards across the region, rather than justifying a “race to the bottom”.

⁹ “Mixed movements” involve individuals or groups of persons travelling generally in an irregular manner along similar routes and using similar means of travel, but for different reasons. They may affect a number of countries along particular routes, including transit and destination countries: UNHCR, *Refugee Protection and Mixed Migration: the 10-Point Plan in action*, February 2011, available at: <http://www.unhcr.org/refworld/pdfid/4d9430ea2.pdf>.

¹⁰ Irregular onward movements involve refugees and asylum-seekers who move in an irregular manner from countries in which they have already found protection in order to seek asylum or permanent settlement elsewhere: ExCom Conclusion No. 58 (XL) (1989), available at: <http://www.unhcr.org/41b041534.html>.

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Summary Conclusions

The Office of the United Nations High Commissioner for Refugees (UNHCR) convened an Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea in Djibouti from 8 to 10 November 2011. This expert meeting was one in a series of events organized to mark the 60th anniversary of the 1951 Convention relating to the Status of Refugees (1951 Convention).¹ Participants included 40 experts drawn from governments, regional bodies, international organizations, non-governmental organizations and academia. A background paper was prepared by UNHCR to facilitate discussion.² One day of the expert meeting involved field trips to the Loyada border crossing point and Ali-Addeh refugee camp, and the sea departure point at Obock.

Building on the conclusions of the Expert Meeting on International Cooperation to Share Burdens and Responsibilities in Amman, Jordan, in June 2011,³ the purpose of this expert meeting was to explore how responses to rescue at sea situations involving refugees and asylum-seekers could be improved and made more predictable through practical cooperation to share burdens and responsibilities.

These Summary Conclusions do not necessarily represent the individual views of participants or UNHCR, but reflect broadly the themes and understandings emerging from the discussion.

¹ For more information and documentation relating to the 2011 Commemorations see: UNHCR, *Commemorating the Refugee and Statelessness Conventions*, www.unhcr.org/commemorations. All documents from the expert meeting are available at UNHCR, Expert Meetings, <http://www.unhcr.org/pages/4d22f95f6.html>.

² UNHCR, *Refugees and Asylum-Seekers in Distress at Sea – how best to respond?*, October 2011, available at: <http://www.unhcr.org/4ec1436c9.html>.

³ See UNHCR, *Summary Conclusions from the Expert Meeting on International Cooperation to Share Burdens and Responsibilities*, June 2011 (this Compilation).

The Reality of Irregular Mixed Movements by Sea

1. Complex mixed migratory movements have always been and will continue to be a reality of human existence. The situation in the Gulf of Aden region provides ample evidence of many of these complexities, echoed in all regions faced with irregular sea movements, including the Asia-Pacific, the Mediterranean, the Caribbean and Southern Africa. Individuals may be motivated by a mix of push and pull factors such as conflict, persecution, lack of livelihood opportunities, as well as the desire to seek a better life. They may accordingly have differing protection and other needs. Many people moving irregularly may also resort to dangerous modes of travel when orderly channels are not available.
2. Governments affected by these mixed movements, in the Gulf of Aden as in other regions, face the difficult task of balancing their sovereign right to control their borders and protect national security with the need to uphold the rights of people involved. This is especially the case when such travel is facilitated by human smugglers and traffickers.
3. The Gulf of Aden region also demonstrates the particular challenges of irregular movements by sea. In light of the frequently overcrowded and unseaworthy vessels used for the sea crossing, distress situations are regular occurrences. Search and rescue capacities of coastal States are limited or non-existent, and shipmasters have sometimes faced difficulties in obtaining permission to disembark rescued groups. Concerns about piracy can further limit a commercial vessel's ability or willingness to rescue persons in distress.

The Legal Framework

4. The international legal framework for the protection of human life at sea is made up of different but interrelated bodies of law: international law of the sea; international human rights and refugee law; and, where sea movements are triggered by situations of armed conflict, international humanitarian law.
 - The duty to rescue people in distress is a longstanding maritime tradition and is part of customary international law. It is expressed in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and in several other international law of the sea instruments.⁴ The duty to

⁴ Article 98 of UNCLOS, entered into force 16 November 1994; Chapter V, Regulation 33 1-1 of the 1974 International Convention for the Safety of Life at Sea (SOLAS), entered into force 25 May 1980, as amended; Chapter 2.1.10 of the 1979 International Convention on Maritime Search and Rescue (SAR), entered into force 25 March 1980, as amended.

render assistance applies in all maritime zones and to every person in distress without discrimination, including asylum-seekers and refugees. The specific legal framework governing rescue at sea does not apply to interception operations that have no search and rescue component.⁵

- International human rights law guarantees human dignity, including for those moving irregularly by sea. The principle of *non-refoulement* enshrined in international refugee and human rights law ensures that people rescued at sea are not disembarked in places where they may face torture, persecution or other serious harm.⁶ These provisions apply wherever a State exercises effective jurisdiction, including extraterritorially.⁷
- International humanitarian law obliges parties to an armed conflict to take all possible measures to search for, collect and evacuate the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment and to ensure their adequate care. There are also obligations on parties to take feasible measures to account for persons reported missing, with respect to the right of families to know the fate of their missing relatives, and with respect to the management of the dead and related issues.⁸

⁵ There is no internationally accepted definition of interception, and its meaning is largely informed by State practice. UNHCR Executive Committee Conclusion No. 97 (LIV) (2003) on *Protection Safeguards in Interception Measures* contains a working definition of interception as “one of the measures employed by States to: (i) prevent embarkation of persons on an international journey; (ii) prevent further onward international travel by persons who have commenced their journey; or (iii) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law; where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter”.

⁶ Article 33 of the 1951 Convention relating to the Status of Refugees, entered into force 22 April 1954 (1951 Convention); Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights, entered into force 23 March 1976 (ICCPR); Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987 (CAT).

⁷ For references, including to relevant case law of the International Court of Justice (ICJ) and Human Rights Committee general comments, see UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

⁸ Articles 18, 19, 20, 21 of the 1949 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, entered into force 21 October 1950; Article 26 of the 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War, entered into force 21 October 1950; Articles 10, 17, 32, 33, 34 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force 7 December 1978; Articles 4, 8 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), entered into force 7 December 1978.

Gaps in the Implementation of the Legal Framework Governing Rescue at Sea

5. Recent amendments to the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) and the 1979 International Convention on Maritime Search and Rescue (SAR Convention), as well as associated International Maritime Organization (IMO) Guidelines, have strengthened the framework governing rescue at sea, notably by establishing an obligation for all States to co-ordinate and co-operate in rescue at sea operations.⁹
6. Nevertheless, practical and operational challenges remain. These are due, in part, to the fact that search and rescue operations can trigger the responsibilities of different States and that these responsibilities may conflict with migration management and security objectives relating to irregular sea arrivals. Lack of capacity to implement search and rescue (SAR) obligations or to receive persons rescued at sea upon disembarkation can be additional complicating factors. The inability to properly address these challenges can lead not only to loss of life at sea, but also to significant costs for the shipping industry and the international community. Such failure may also deny the protection due to asylum-seekers and refugees under the principle of *non-refoulement*.
7. Fundamentally, a core challenge in any particular rescue at sea operation involving asylum-seekers and refugees is often the timely identification of a place of safety for disembarkation, as well as necessary follow-up, including reception arrangements, access to appropriate processes and procedures, and outcomes. If a shipmaster is likely to face delay in disembarking rescued people, he/she may be less ready to come to the assistance of those in distress at sea. Addressing these challenges and developing predictable responses requires strengthened cooperation and coordination among all States and other stakeholders implicated in rescue at sea operations.

⁹ For further details see UNHCR, *Refugees and Asylum-Seekers in Distress at Sea – how best to respond?*, October 2011, available at: <http://www.unhcr.org/4ec1436c9.html>.

Towards Solutions: Operational Tools to Enhance International Cooperation

8. This section sets out three proposed operational tools to enhance cooperative responses to rescue at sea situations involving refugees and asylum-seekers, in light of the challenges identified above: a *Model Framework for Cooperation*; Standard Operating Procedures for Shipmasters; and Mobile Protection Response Teams.

Model Framework for Cooperation

9. A *Regional agreement on concerted procedures relating to the disembarkation of persons rescued at sea* is under development by the IMO for the Mediterranean region.¹⁰ This is a useful pilot scheme that seeks to allocate maritime responsibilities more predictably among various States in the region, especially relating to the disembarkation of people rescued at sea.
10. As a complement to the IMO initiative, cooperative arrangements could be developed to support countries of disembarkation and/or processing. This could include assistance for reception arrangements and burden-sharing schemes to provide a range of outcomes to individuals, depending on their profile and needs. The *Model Framework for Cooperation in Rescue at Sea Operations involving Asylum-Seekers and Refugees* (Model Framework) (Annex) proposed by UNHCR offers a starting point for such discussions. The Model Framework is based on and further develops UNHCR's *10 Point Plan of Action on Refugee Protection and International Migration*.¹¹ The Model Framework is without prejudice to and flows from existing international law, including international refugee and human rights law. It is a complement to, and not a substitute for, mechanisms adopted to implement the SAR and SOLAS Conventions.
11. The negotiation of cooperative arrangements based on the Model Framework would be most successful where one or more governments are committed to lead the process and facilitate the necessary political consensus among concerned States. UNHCR and other agencies could advocate for, and act as conveners of, such arrangements. Dedicated expert meetings at the regional level to support the development of the Model Framework would help to adapt it to regional realities. While it is envisaged that the Model Framework would be used on a regional basis, the engagement and support of the international community would be essential, in particular resettlement countries. States outside the region concerned but who are involved in shipping or naval activities in that region could also participate in cooperative arrangements.

¹⁰ IMO Facilitation Committee, 37th session, FAL 37/6/1 of 1 July 2011.

¹¹ UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, 2007, available at: <http://www.unhcr.org/protect/PROTECTION/4742a30b4.pdf>.

12. It is important that support for reception arrangements provided as part of the Model Framework include mechanisms to rapidly identify and distinguish among different groups of rescued persons. Persons found to be in need of international protection and assistance are to be separated from those identified as criminal perpetrators, such as traffickers and smugglers. Reception arrangements should also include mechanisms to manage the remains of persons who have perished at sea and ensure family tracing. The important guidance developed by the International Committee of the Red Cross (ICRC) in this respect could be more widely distributed, and may benefit from specific targeting to the context of irregular mixed movements by sea.¹²
13. Given that many migrants in an irregular situation rescued at sea do not qualify for refugee status or complementary protection, it is necessary to establish within the Model Framework cooperative responses to facilitate the return of people not in need of international protection who are unable to stay in the country of disembarkation and/or processing. Solutions for refugees could, where appropriate, build on existing good practices supporting host States to facilitate self-reliance and local integration. Resettlement can also be part of an overall regional strategic effort to address rescue at sea incidents involving refugees, including as a burden-sharing tool. These traditional solutions may be complemented by temporary or permanent options offered by migration frameworks. Care is required to ensure that rapid processing and/or an increase in resettlement places for asylum-seekers or refugees rescued at sea does not create pull factors or lead persons traveling irregularly by sea to create “distress” situations in order to promote rescue.

Standard Operating Procedures for Shipmasters

14. The Model Framework could be complemented by *Standard Operating Procedures for Shipmasters* (SOPs) when faced with distress at sea situations involving undocumented migrants, refugees and asylum-seekers. The SOPs could be incorporated into “industry best practice” guidance to be developed in conjunction with the International Chamber of Shipping (ICS), to ensure that humanitarian and protection concerns are taken into account.
15. Shipmasters of commercial vessels are not responsible for identifying or differentiating between groups of rescued persons or making substantive decisions on the merits of any international protection claims. However, SOPs could provide guidance as regards the appropriate procedures to be followed when asylum-seekers and refugees may be among groups of rescued persons.

¹² See, e.g., ICRC, *Management of Dead Bodies after Disasters*, 2006, available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0880.pdf ; ICRC, *The Need to Know: Restoring Links between Dispersed Family Members*, 2011, available at: <http://www.icrc.org/eng/resources/documents/publication/p4037.htm>.

16. The SOPs could, for example, include:
- contact points for relevant authorities (i.e. Maritime Rescue Coordination Centres) in specific countries;
 - a list of potential places of safety for disembarkation, as may be designated by Governments for their respective Search and Rescue Region (SRR), along with relevant criteria that may assist to make a determination in any particular case;
 - advice on information that shipmasters may be able to collect about rescued persons;
 - recommendations on proper management of the human remains and handling of data on deceased persons.

Mobile Protection Response Teams

17. Mobile Protection Response Teams could form part of cooperative arrangements to address rescue at sea situations involving undocumented migrants, refugees and asylum-seekers, including those based on the Model Framework. Mobile protection response teams would be composed of experts with complementary backgrounds and expertise from a range of stakeholders, including States, international organizations and NGOs. They could provide support to and capacity-building for States of disembarkation and/or processing in addressing the needs of irregular mixed groups. It is envisaged that the teams would have a particular role in reception arrangements, profiling and referral and, where appropriate, asylum or other status determination procedures.¹³
18. UNHCR, in cooperation with IOM and other agencies, will further develop the concept of *Mobile Protection Response Teams*, including through elaboration of a pilot scheme.

¹³ See further UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.unhcr.org/refworld/docid/4d9430ea2.html>, Chapters 4, 5 and 6.

Regional Processes to Address Irregular Mixed Movements

19. Arrangements to strengthen international cooperation in rescue at sea emergencies involving refugees and asylum-seekers may benefit from inclusion in broader regional processes to address irregular mixed movements. While State-led processes are critical, multi-stakeholder bodies working on these issues, such as the Regional Mixed Migration Secretariat in the Horn of Africa and Yemen sub-region, can also play a supporting role – providing policymakers with analyses on migration dynamics and facilitating data exchange among States and other stakeholders.
20. Examples of comprehensive regional approaches to address irregular mixed movements include the Regional Cooperation Framework established through the Bali Process in the Asia-Pacific region.¹⁴ Where possible, such approaches can aim to address all phases of the displacement and migration cycle, from root causes to solutions, situating responses to the rescue at sea component within a broader context. They can provide alternatives to irregular migration to deter people without protection needs from undertaking dangerous sea journeys (e.g., legal migration opportunities), and strengthen protection capacities in transit States to avoid onward movements (e.g., livelihood projects). Regional processes may also foresee mechanisms to combat human smuggling and trafficking, as well as for voluntary return for those without international protection needs.

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¹⁴ UNHCR, *Regional Cooperative Approach to Address Refugees, Asylum-Seekers and Irregular Movement*, November 2010, available at: <http://tinyurl.com/84dko7e>.

ANNEX:

Model Framework for Cooperation following Rescue at Sea Operations involving Refugees and Asylum-Seekers

The aim of this Model Framework is to strengthen the protection of refugees and asylum-seekers in distress at sea through enhanced international cooperation among concerned States and other stakeholders.

The Model Framework focuses on actions that may be undertaken after a rescue at sea operation involving refugees and asylum-seekers, among others, has been carried out. It offers a starting point for discussion and would require adaptation to the specific regional circumstances to be addressed. The Model Framework could form the basis for an ad hoc arrangement in a particular rescue at sea emergency, or be used to develop a standing cooperative arrangement to increase predictability of responses among certain States. It could also be adopted as one element in a broader comprehensive regional approach to address irregular mixed movements.¹

The Model Framework is based on and further develops UNHCR's "10-Point Plan of Action on Refugee Protection and Mixed Migration" (the 10-Point Plan)² and uses its terminology. UNHCR's publication "Refugee Protection and Mixed Migration: The 10-Point Plan in action" provides a number of practical examples on the implementation of the 10-Point Plan, including in the context of sea arrivals, and contains a detailed glossary setting out relevant terms and definitions.³

The Model Framework could be merged with or exist independently of the "Regional agreement on concerted procedures relating to the disembarkation of persons rescued at sea", which has been proposed by the International Maritime Organization (IMO) as a pilot in the Mediterranean region.⁴

¹ For information on comprehensive regional approaches see UNHCR, *International Cooperation to Share Burden and Responsibilities*, June 2011, available at: <http://tinyurl.com/6n4thbx> and UNHCR, *Regional Cooperative Approach to address Refugees, Asylum-Seekers and Irregular Movement*, November 2010, available at: <http://tinyurl.com/84dko7e>.

² UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, 2007, available at: <http://www.unhcr.org/protect/PROTECTION/4742a30b4.pdf>.

³ UNHCR, *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, available at: February 2011, <http://www.unhcr.org/refworld/docid/4d9430ea2.html> (the 10-Point Plan Compilation). *The Glossary*, in whole or in part, could be annexed to the Model Framework in the event that further clarification of terminology is desired.

⁴ IMO Facilitation Committee, 37th session, FAL 37/6/1 of 1 July 2011.

I. Purpose and Underlying Principles

- 1) The purpose of this Model Framework is to improve responses following rescue at sea operations involving refugees and asylum-seekers travelling as part of irregular mixed movements.
- 2) Specifically, the Model Framework aims to:
 - (i) maximize efforts to reduce loss of life at sea;
 - (ii) ensure more predictability in identifying places for disembarkation;
 - (iii) ensure that rescued people are not disembarked in or transferred to places where they may face persecution, torture or other serious harm; and
 - (iv) establish measures for burden and responsibility sharing to support States providing for disembarkation, processing and/or solutions.
- 3) The Model Framework is without prejudice to, and flows from, existing international law, including international refugee and human rights law. It is a complement to, and not a substitute for, mechanisms adopted to implement the SAR and SOLAS Conventions.⁵ The Model Framework is based on the principles of international cooperation, including burden and responsibility sharing.

II. Scope and Application

This Model Framework applies to rescue at sea operations involving refugees and asylum-seekers, irrespective of the nature of the rescuing vessel;⁶ and where disembarkation at a place of safety and/or processing of rescued persons is being considered in a State other than the flag State of the rescuing vessel.⁷

⁵ 1979 International Convention on Maritime Search and Rescue (SAR), entered into force 25 March 1980, as amended; 1974 International Convention for the Safety of Life at Sea (SOLAS), entered into force 25 May 1980, as amended.

⁶ i.e., regardless of whether the vessel is commercial or a public (coastguard or military).

⁷ These situations warrant cooperative arrangements as they may trigger the responsibility of different States.

III. Operational Arrangements

1) Principal actors

(i) States implicated by a particular rescue at sea operation may include:

- the flag State(s) of the rescuing vessel(s);
- the flag State of the vessel in distress;
- the State(s) in whose Search and Rescue Region (SRR) the rescue operation takes place;
- the State where rescued persons are disembarked;
- the State where rescued persons are processed;
- States of transit and origin of rescued persons;
- third States, including resettlement States, as appropriate.⁸

(ii) Any or all of these States may consider joining this Model Framework. International organizations, including UNHCR, and non-governmental organizations may provide additional support as necessary and appropriate.⁹

2) Undertakings by [*Concerned States*]

(i) In joining this Model Framework, [each *Concerned State*¹⁰] commits to undertake specific responsibilities. The nature and scope of this contribution may differ among States.

(ii) Possible roles and responsibilities may include:

- coordinating search and rescue (SAR) activities;
- carrying out SAR activities;
- providing a place for disembarkation and initial reception;
- processing rescued persons;
- providing solutions for rescued persons;
- providing financial support to affected States.

⁸ In some situations, States may have assumed more than one of these roles.

⁹ See Part IV for the role of UNHCR specifically.

¹⁰ The names of the States party to the Model Framework could be inserted in place of [*Concerned States*].

3) Establishment of task force

(i) [*Concerned States*] may establish a task force to ensure smooth coordination and cooperation among principal actors and other stakeholders.

(ii) Functions of the task force could include:

- designation of specific focal points to share information;
- establishing clear lines of communication;
- clarification of responsibilities.

(iii) The task force will be mindful of the need to arrange for disembarkation of rescued persons at a place of safety as soon as reasonably practical and to release shipmasters from their obligations with minimum further deviation from the ship's intended voyage.

4) Identification of a country for disembarkation

(i) [*Concerned States*] will agree on the most appropriate country for disembarkation, possibly on the basis of a predetermined list of places for disembarkation identified by [*Concerned States*].

(ii) Relevant factors in identifying the place of disembarkation include:

- practical considerations (e.g., maritime safety; geographical proximity; the extent to which the rescuing vessel will be required to deviate from its intended voyage; the needs of rescued persons; facilities at the proposed site of disembarkation, including access to fair and efficient asylum procedures);
- applicable SAR and SOLAS provisions;¹¹
- the principle of *non-refoulement*.¹²

¹¹ 1979 International Convention on Maritime Search and Rescue (SAR), entered into force 25 March 1980, as amended; 1974 International Convention for the Safety of Life at Sea (SOLAS), entered into force 25 May 1980, as amended.

¹² Article 33 of the 1951 Convention relating to the Status of Refugees, entered into force 22 April 1954 (1951 Convention); Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights, entered into force 23 March 1976 (ICCPR); Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987 (CAT).

5) Reception arrangements

(i) [*Concerned States*] will cooperate to ensure adequate reception arrangements are in place at the site of disembarkation.

(ii) The purpose of reception arrangements includes:

- addressing the immediate needs of new arrivals, e.g., medical treatment, shelter and food, family tracing;
- providing for stay consistent with an adequate standard of living;¹³
- providing protection from direct or indirect *refoulement*;
- proper management of human remains and handling of data on deceased persons.

6) Mechanisms for profiling and referral

(i) [*Concerned States*] may establish mechanisms for profiling and referral¹⁴ to rapidly identify and differentiate among rescued persons according to their background and needs.

(ii) Functions of such mechanisms could include:

- the provision of information to rescued persons;
- gathering of information through questionnaires and/or informal interviews;
- the establishment of preliminary profiles for each person;
- counselling and referral to differentiated processes and procedures, including asylum procedures for those who may be in need of international protection.

(iii) Best practice is for profiling and referral to be conducted by expert teams, consisting of officials and representatives from diverse backgrounds, including government, international agencies and/or non-governmental organizations.

¹³ Article 11 of the International Covenant on Economic Social and Cultural Rights (ICESCR), entered into force 3 January 1976.

¹⁴ For further information see Chapter 5 ("Mechanisms for profiling and referral") of the 10-Point Plan Compilation, above n 3.

7) Determining international protection needs

(i) [*Concerned States*] will agree on an appropriate place, and the authorities responsible, for processing any asylum claims made by rescued persons in accordance with applicable international standards.¹⁵

(ii) Processing may occur:

- in the country of disembarkation;
- in the flag State of the rescuing vessel;¹⁶ or
- in a third State, which has agreed to assume responsibility in line with applicable international standards.¹⁷

(iii) In any of the cases identified above processing may be undertaken by the authorities of the State where processing occurs, and/or by authorities of another relevant State, subject to applicable international standards.¹⁸

(iv) The existing capacity of each State to undertake fair and efficient asylum procedures will be a relevant factor in determining the location of processing.

8) Outcomes for rescued persons

(i) [*Concerned States*] may provide for a range of outcomes for rescued persons depending on their profile and needs.

a) Persons in need of international protection

- Persons who have been recognized as refugees or as being otherwise in need of international protection should be permitted to stay in the country of processing or [another *Concerned State*] and provided with the possibility to obtain self-reliance.
- [*Concerned States*] may agree to provide additional support to host States to enhance protection and available solutions.
- Resettlement may be considered to countries within and beyond the region concerned should local integration in the country of processing not be possible, or pursuant to a regional cooperative arrangement to share burdens and responsibilities.¹⁹

¹⁵ UNHCR, *Fair and Efficient Asylum Procedures: a Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005, available at: <http://www.unhcr.org/refworld/docid/432ae9204.html>.

¹⁶ This may be appropriate, for example, where the flag State of the rescuing vessel is also a coastal State within the area where those persons are rescued.

¹⁷ UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, available at: <http://www.unhcr.org/refworld/docid/4cd12d3a2.html>.

¹⁸ For further explanation, see *Maritime interception operations*, above, n 17.

¹⁹ See, e.g., UNHCR, *Regional Cooperative Approach to address Refugees, Asylum-Seekers and Irregular Movement*, November 2010, available at: <http://tinyurl.com/84dko7e>. See also UNHCR, *International Cooperation to Share Burden and Responsibilities*, June 2011, available at: <http://www.unhcr.org/refworld/docid/4e533bc02.html>.

b) Persons not in need of international protection

- Persons found not to be in need of international protection may nonetheless be permitted to remain (temporarily and/or permanently) in the country of processing or [another *Concerned State*] if permission to do so is granted by the relevant authorities.
- Those without international protection needs may also be able to take advantage of migration options to other countries, as appropriate, including on the basis of specific cooperative arrangements.
- Absent alternative solutions, such persons will need to return to their countries of origin, preferably on a voluntary basis and subject to applicable human rights law and humanitarian considerations. Assistance may be provided to support voluntary return, as necessary.²⁰

c) Other categories of persons with specific needs

- Other processes and procedures may be adopted for other groups with specific needs, e.g. unaccompanied or separated children, disabled persons, victims of trafficking.²¹

9) Additional support and capacity building measures for country(ies) of disembarkation/processing

[*Concerned States*] may agree on additional support and capacity building measures for the country(ies) of disembarkation and/or processing, such as increased resettlement places, financial or technical support for the asylum system, and/or other activities.

²⁰ UNHCR, *Protection Policy Paper: The return of persons found not to be in need of international protection to their countries of origin: UNHCR's role, November 2010*, available at: <http://www.unhcr.org/refworld/docid/4cea23c62.html>.

²¹ See Chapter 5 (“Mechanisms for profiling and referral”) and Chapter 6 (“Differentiated processes and procedures”) of the 10-Point Plan Compilation, above n 3.

IV. Role of UNHCR

- 1) UNHCR may become a party to this Model Framework, or other cooperative arrangements, as appropriate.
- 2) UNHCR's engagement will not prejudice pre-existing arrangements that UNHCR may have with [any *Concerned State*] for the purposes of carrying out its regular mandate responsibilities.
- 3) Activities that may be undertaken by UNHCR under this Model Framework, as appropriate and resources permitting, include:
 - supporting reception arrangements;
 - initiating/participating in expert teams for profiling and referral, along with other actors;
 - supporting refugee status determination (RSD);
 - supporting the return of persons without international protection needs by identifying and bringing together relevant partner organizations, in particular the International Organization for Migration (IOM);
 - coordinating resettlement activities.

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The Concept
of Stateless
Persons under
International Law

Statelessness
Determination
Procedures and the
Status of Stateless
Persons

Climate Change
and Displacement

Complementarities
between Refugee Law,
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Alternatives to Detention
of Asylum-Seekers,
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and Stateless Persons

Interpreting the
1961 Convention and
Preventing Statelessness
among Children

International Cooperation
to Share Burdens and
Responsibilities

Refugees and
Asylum-Seekers in
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