

**UNHCR and INTERNATIONAL REFUGEE LAW:  
FROM TREATIES to INNOVATION**

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**A Dissertation submitted in partial fulfilment of the  
requirements for the degree of Doctor of Philosophy in Law  
of  
the London School of Economics and Political Science**

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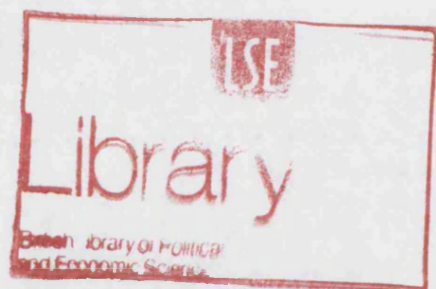


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While I have benefited greatly from the advice and views of many people during the process of researching and writing this thesis, the work presented herein is my own and I take sole responsibility for any and all omissions and errors.

Corinne Lewis

June 2010



## **Abstract of Thesis:**

### **UNHCR and International Refugee Law: from Treaties to Innovation**

Since its establishment in January 1951, the United Nations High Commissioner for Refugees (UNHCR) has played a unique and pivotal role related to international refugee law. The thesis explores the bases for this role and the approaches adopted by UNHCR to strengthen its role since the onset of the crisis in refugee protection in the 1980's. UNHCR's creation of doctrinal positions, that is, the organisation's written views of what refugee law should be, are featured as a crucial means employed by UNHCR to further the elaboration of the refugee law framework. UNHCR's innovative approaches related to States' accession, implementation, and application of international standards for the protection of refugees, such as capacity-building, are highlighted as means to enhance the effectiveness of international refugee law.

The thesis commences with an overview of the historical and statutory foundations for UNHCR's role related to international refugee law, in chapter 1. The content of UNHCR's responsibilities, which concern the development and effectiveness of international refugee law, and the work the organisation carries out in order to fulfil these responsibilities, are explored in chapter 2. The flexibility in UNHCR's international law role, attributable to formal means to modify UNHCR's responsibilities and techniques adopted by the organisation, is elaborated in chapter 3.

The increasing divergence between UNHCR's and States' approaches to refugee law, with the significant consequence that the weaknesses in the treaty law framework and in the means for ensuring its effectiveness, particularly its application, have become increasingly prominent, are the subject of chapter 4. The approaches adopted by UNHCR to address the weaknesses in the treaty law framework are evaluated in chapter 5 while the new activities carried out by UNHCR to strengthen the effectiveness of international refugee law are reviewed in the final chapter, chapter 6.

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### List of Abbreviations

1936 Provisional Arrangement	1936 Provisional Arrangement concerning the Status of Refugees coming from Germany
1938 Convention	1938 Convention concerning the Status of Refugees coming from Germany
1951 Refugee Convention	1951 Convention relating to the Status of Refugees
1965 Convention on the Elimination of Racial Discrimination	1965 International Convention on the Elimination of All Forms of Racial Discrimination
1967 Protocol	1967 Protocol relating to the Status of Refugees
1969 OAU Refugee Convention	1969 OAU Convention governing the specific aspects of refugee problems in Africa
1979 Convention on Elimination of Discrimination against Women	1979 Convention on the Elimination of All Forms of Discrimination against Women
1984 Cartagena Declaration	1984 Cartagena Declaration on Refugees
1984 Convention against Torture	1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
1989 CRC	1989 Convention on the Rights of the Child
1990 Convention on the Protection of Migrant Workers	1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
Dublin Convention	Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities

ECOSOC	United Nations Economic and Social Council
EEC	European Economic Community
EU	European Union
EXCOM	The Executive Committee of the High Commissioner's Programme
Final Act	Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons
Handbook	Handbook on Procedures and Criteria for Determining Refugee Status
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IGCR	Intergovernmental Committee on Refugees
ILC	International Law Commission
ILO	International Labour Organisation
IMO	International Maritime Organisation
IRO	International Refugee Organisation
London Agreement on Travel Documents	Agreement relating to the issue of a travel document to refugees who are the concern of the Inter-governmental Committee on Refugees
Nansen Office	Nansen International Office for Refugees
Rome Statute	Rome Statute of the International Criminal Court

Sub-Committee	Sub-Committee of the Whole on International Protection
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNHCR Statute	Statute of the Office of the United Nations High Commissioner for Refugees
UNRRA	United Nations Relief and Rehabilitation Administration
WHO	World Health Organisation

## **Preface**

As a legal officer with the United Nations High Commissioner for Refugees, first in the UNHCR headquarters in Geneva and then “in the field,” for nearly a decade, I have had the privilege and the pleasure of working on the front lines to ensure that the well-being of refugees is ensured and advanced. The foundations that enabled me to pursue this rewarding work were the international instruments for the protection of refugees, in particular, the 1951 Convention relating to the Status of Refugees, relevant resolutions of the United Nations General Assembly and the conclusions of the Executive Committee of the High Commissioner’s Programme.

In addition, the organisation's doctrinal positions, in other words, its opinions on legal issues, provided the basis for much of my daily work. I cited them in written and oral communications with governmental officials, non-governmental staff members, lawyers, and others. These positions also served as the foundation for the legal information I conveyed during training sessions and the internal position papers I wrote. However, I often wondered about the legal support and reasoning on which the positions were based, particularly when confronted with governmental views that differed from UNHCR's. Unfortunately, the legal underpinnings and rationale were not generally provided in the doctrinal positions. Some doctrine, such as UNHCR's positions on "safe third country" and "manifestly unfounded" asylum-applications, seemed to me, at the time, to be influenced more by political concerns than legal ones.

An insightful internal memorandum expressing concern about the state of UNHCR doctrine in the early 1980's, which was provided to me by its author, a former UNHCR staff member, and discussions with Antonio Fortin, when we both served in UNHCR's Brussels office, awakened in me a profound desire to better understand the nature and role of UNHCR's doctrinal positions as well as an interest in evaluating the basis for these positions. I therefore decided to pursue a research thesis on the topic in connection with my doctoral studies at the London School of Economics.



However, like all adventures in life, the destination one intends to reach is not necessarily the one attained and so it has been with the intended thesis on UNHCR doctrine. The more I delved into the content, nature, and use of UNHCR doctrinal positions, the more I felt that they could not yet be the sole focus of a study. They are too integrally linked to UNHCR's role and work related to international refugee law, a topic that has not yet been addressed in a comprehensive text.

I then expanded the theme of the thesis to include UNHCR's role in international refugee law, which spans the development of international law standards to the application of such standards by States. As I explored this topic, I discovered a significant evolution in UNHCR's role and responsibilities related to international refugee law since its creation and particularly since the appearance in the 1980's of what has been termed a "crisis in refugee law and protection." This crisis emerged as such a pivotal event that it has ultimately dictated the current form of the thesis. Consequently, the thesis begins with UNHCR's traditional role and work related to refugee law treaties and then considers the innovative approaches adopted by UNHCR, including the use of UNHCR doctrine, following the refugee crisis.

If it had not been for the appearance in this world of Tristan, Julien, and Sebastien, I never would have undertaken this work. They have served as both a distraction from and a stimulus for this thesis. My husband Bruce provided unflagging support throughout the research and writing process, and so my heartfelt thanks go to him.

I have been fortunate, as a doctoral student at the London School of Economics and Political Science, to have Chaloka Beyani as an advisor, and thus, to have been guided with great kindness and patience as I undertook this research. During the crucial first year of the Ph.D. process, I benefited greatly from the advice and encouragement of Professor Christopher Greenwood, now a judge with the International Court of Justice, while Chaloka was on a sabbatical leave.

My discussions and work with many admired and respected colleagues at UNHCR have helped shape the content of this thesis and as they are too numerous to thank individually, I thank them collectively. In addition, I am particularly appreciative to Milton Moreno and Carl Söderbergh for their extensive reading of the thesis and their comments thereon as well as to Maria Stavropoulou and Johannes

vanderKlaauw for their valuable feedback. Also, my sincerest thanks go to Frances Nicholson and George Okoth-Obbo, at UNHCR, for their assistance in ferreting out bits of information that otherwise I would not have been able to locate. Finally, I would like to thank Jean Francois Durieux and Louise Arimatsu for serving as examiners for the thesis.

## **Introduction**

In theory, if not always in practice, refugees today have their rights protected through the bias of two key components. The first of these is an international law framework with the 1951 Convention relating to the Status of Refugees at its core. The second is an international organisation, the United Nations High Commissioner for Refugees, with primary responsibility for refugees.<sup>1</sup>

The 1951 Refugee Convention has been supplemented by very few international agreements specifically formulated to protect refugees. The 1957 Agreement relating to Refugee Seamen, with its 1973 Protocol, expanded the protections for refugee seamen. The 1967 Protocol relating to the Status of Refugees removed geographic and temporal restrictions in the 1951 Refugee Convention, and thereby broadened the notion of who was eligible to receive protection as a refugee under the 1951 Refugee Convention. However, apart from these agreements, and despite new flows of refugees around the world, the emergence of new issues, and the continued expansion of the international human rights law framework, no new international refugee law treaty has been created to update the collection of protections in the 1951 Refugee Convention.

Yet, refugee law has changed and adapted to new situations that have given rise to novel issues. A mere reference to concepts such as the rights of refugee children, temporary protection, and non-State agents of persecution, which cannot be found in the 1951 Convention, but are familiar to most persons concerned with refugees today, demonstrates this point. UNHCR, the unique international organisation responsible for refugees, has played a central, but often undervalued role in this evolution.

Moreover, UNHCR is clearly recognized within the international community for the important work it plays in ensuring that international refugee law serves to protect refugees, which means that international refugee law is effective. UNHCR's role in this area is neither straightforward nor free from criticism. States often resent UNHCR's intrusiveness, while refugee advocates and refugees themselves, protest

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<sup>1</sup> However, it should not be forgotten that the United Nations Relief and Works Agency, which was established in 1949, and thus, prior to the UNHCR, has a special responsibility for Palestinian refugees.

that UNHCR does not do enough to ensure the adequate protection of refugees. Yet, UNHCR remains the most visible actor and uniquely situated as it attempts to foster refugee protection by States. Yet, little has been written about UNHCR's role related to international refugee law.

## Literature Review

Much of the work in refugee law concerns the law relating to refugees, in particular the rights of refugees and the corresponding obligations of States. The literature on refugee rights has burgeoned during the past three decades. In addition to textbooks on the topic<sup>2</sup> there is even a specialized legal journal on refugee law, the *International Journal of Refugee Law*.<sup>3</sup> However, while UNHCR is universally acknowledged as the international organisation with responsibility for refugees, few legal scholars have examined how UNHCR fulfils its mandate, in particular, its protection role related to refugees. An exception is Professor Goodwin-Gill, the first editor of the *International Journal of Refugee Law* and currently a Senior Research Fellow at Oxford, who has been particularly active over the years in reviewing, critiquing, and offering suggestions as to how UNHCR should fulfil its protection role.<sup>4</sup> Goodwin-Gill has consistently stressed the importance of UNHCR's core function of protection and the need to ensure strong legal foundations for such protection.

Consideration of UNHCR's protection role has been a theme in the texts on UNHCR of a few political science/international relations scholars, namely Louise Holborn and Gil Loescher. Louise Holborn's account of UNHCR, in *A Problem of Our Time: The Work of UNHCR (1951-1972)*,<sup>5</sup> takes a historical perspective of the

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<sup>2</sup> The major texts in this field are that of Guy GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (3<sup>rd</sup> ed., 2007) and that of JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005).

<sup>3</sup> The leading journal is that of the *International Journal of Refugee Law*, published by Oxford University press. There are, however, a number of immigration law journals and international relations journals that also cover refugee related topics.

<sup>4</sup> For example, see Guy Goodwin-Gill, *Editorial*, 8 Int'l. J. Refugee L. 6 (1996), Guy Goodwin-Gill, *The International Protection of Refugees: What Future?*, 12 Int'l. J. Refugee L. 1 (2000) and Guy Goodwin-Gill, *The Politics of Refugee Protection*, 27 Refugee Surv. Q. 8 (2008).

<sup>5</sup> LOUISE W. HOLBORN, *A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972* (1975).

organisation's work and, in its two chapters on international protection, considers UNHCR's activities related to treaties on refugees. Gil Loescher has examined, from a regime perspective, the history of UNHCR and in particular how UNHCR has carried out its mandate within a global political context in his own book *The UNHCR and World Politics: A Perilous Path*<sup>6</sup> as well as a book he co-authored with two younger scholars, Alexander Betts and James Milner, *The United Nations High Commissioner for Refugees: The politics and practice of refugee protection into the twenty-first century*.<sup>7</sup> The latter book recognises that the 1951 Refugee Convention remains the centrepiece of the refugee regime, but with severe limitations. Thus, these scholars have utilised a formalistic view of refugee law as that contained in treaties.

Legal literature on the parameters and content of UNHCR's protection role and work is nearly nonexistent. This study does not attempt to address the entirety of this extensive topic. Rather, it is limited to a more narrow theme, but one considered essential to the protection of refugees, that of UNHCR's interaction with international refugee law. Limited attention by scholars has been given to both UNHCR's contribution to the development of international refugee law and to its supervisory role. In the area of UNHCR's role related to the development of international law, Louise Holborn's 1975 book contains the most extensive but, as noted above, primarily historical survey of UNHCR's contributions to international refugee law.<sup>8</sup> In the section on international protection, she considers the development of treaties for the protection of refugees from what would be considered by lawyers as a positivist perspective through her consideration of treaty law developments that contain provisions on the rights of refugees. She deviates from this positivist perspective only slightly in acknowledging that UNHCR has contributed to several declarations and noting the close collaboration that UNHCR has had with international and regional organisations to further the development of refugee law.<sup>9</sup>

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<sup>6</sup> GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* (2001).

<sup>7</sup> GIL LOESCHER, ALEXANDER BETTS & JAMES MILNER, *THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES: THE POLITICS AND PRACTICE OF REFUGEE PROTECTION INTO THE TWENTY-FIRST CENTURY* (2008).

<sup>8</sup> Holborn, *supra* note 5.

<sup>9</sup> *Id.* at 227, 234.

Volker Turk, a UNHCR staff member and scholar, is the only person to have examined UNHCR's contribution to the development of international refugee law from a legal perspective. In an article entitled "The role of UNHCR in the development of international refugee law",<sup>10</sup> he provides a brief analysis of the legal basis for UNHCR's role related to the development of international refugee law and how, in practice, UNHCR fulfils its role as a promoter of the development of international law treaties and customary international law. While he acknowledges that EXCOM conclusions contribute to the law-making process of customary international law,<sup>11</sup> his approach to refugee law is primarily a positivist one that leaves aside soft law sources, which are not only prevalent, but also are a key aspect to States' understanding and observance of current international law standards.

In an attempt to move away from a positivist view of international refugee law, in connection with UNHCR's role related to the development of such law, this author wrote an article "UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution"<sup>12</sup> that adopts a more process oriented view of the development of refugee law. The article observes that UNHCR no longer pursues a purely promotional role, which attempts to influence States' formulation of international law standards, and that UNHCR has adopted a more direct role in the formulation of refugee law principles and standards, in the form of guidelines.

UNHCR's supervisory role was brought to the forefront of current refugee issues with the discussions of the topic during the Global Consultations process.<sup>13</sup> Walter Kalin's paper, prepared as a background paper on the topic for the process, and an article by Volker Turk contributed to the discussions held around the world, which then culminated in a round-table in Cambridge from 9-10 July 2001 and concluding observations. The purpose of these papers and discussions was to envision how to enhance UNHCR's supervisory role in light of developments that "undermine the

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<sup>10</sup> Volker Turk, *The Role of UNHCR in the Development of International Refugee Law*, in REFUGEE RIGHTS AND REALITIES (eds. Frances Nicholson & Patrick Twomey, 1999).

<sup>11</sup> *Id.* at 172.

<sup>12</sup> Corinne Lewis, *UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution*, 17 Int'l. J. Refugee L. 67 (2005).

<sup>13</sup> Walter Kalin, *Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 613 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

protection regime created by these instruments” as Kalin noted.<sup>14</sup> Kalin’s and Turk’s documents are both forward looking, with proposals for how UNHCR’s supervisory role could be enhanced; Kalin considers UNHCR’s supervisory role primarily within the context of article 35 of the 1951 Refugee Convention and article II of the Protocol, while Turk takes a broader perspective and considers UNHCR’s supervisory role within its protection mandate.

Both authors utilize the notion of supervision, as defined by Blokker and Muller.<sup>15</sup> The analysis then leads to the question as to whether UNHCR can carry out additional supervisory activities or whether a third party should do so. Kalin’s paper suggests the latter, while Turk’s paper proposed additional activities by UNHCR, thus, leaving UNHCR at the centre of the supervisory process. However, this author believes that the focus on UNHCR’s supervisory role during the Global Consultations process was a limited one and that it is first necessary to obtain a better understanding of why States do and do not comply with international law for the protection of refugees. This understanding could then be coupled with the elaboration of measures that are necessary in order to ensure that States do comply.

This thesis builds upon the foundations of the work of Holborn, Turk and Kalin concerning the development of international refugee law and UNHCR’s supervisory function and attempts to further construct an analytical framework for considering UNHCR’s work related to refugee law. The perspective adopted, however, is broader and more inclusive than that previously undertaken. Specifically, UNHCR’s relationship with international law is considered to affect a continuum that begins with the process of the creation of international law for the protection of refugees, referred to as the development of refugee law in this thesis, and continues through the process of how States use such law, termed “effectiveness” herein. (This latter term is a bit unusual in a legal study and thus, the reasons for its use are explained in detail in chapter 2.) While the continuum initially consisted primarily of States’ actions, with UNHCR as an external actor, UNHCR has now entered into a much closer relationship with States and thus to the process of the development

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<sup>14</sup> *Id.* at 615.

<sup>15</sup> Niels Blokker & Sam Muller, *Some Concluding Observations, in TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF HENRY G. SCHERMERS* 275 (eds. Neils Blokker & Sam Muller, eds., 1991).

and effectiveness of refugee law. The perspective adopted in this thesis is therefore that of how UNHCR impacts upon this process.

In addition, the thesis is constructed against a backdrop of literature related to international organisations law and international relations. International organisations law has recently developed into a distinct and independent topic within public international law, with the development of a specialised journal, *International Organizations Law Review* in 2004 and an increasing literature that considers the impact of international organisations on international law, including as relevant to this thesis, in the area of the development of international law. The influence of international organisations not only affects the traditional sources of international law, but also the process of the creation of such law.<sup>16</sup> While this thesis limits its use of international organisations law to UNHCR's role with respect to international refugee law, the author believes that this field of law has a great deal to offer scholars studying UNHCR's institutional problems and practices.

The second area, international relations studies, is not a legal area, but has increasing significance for all public international law scholars. There is heightened recognition by international law and international relations scholars that both fields can benefit from the methods and approaches of the other.<sup>17</sup> In particular, international lawyers' scholarship on compliance has benefited enormously from the thinking of international relations scholars.<sup>18</sup> International relations studies induce international law scholars to look beyond the question of the organisation's responsibilities to the question of what motivates States to comply with law.

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<sup>16</sup> On the role of international organisations in creating law, see for example, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 22-28 (1994) and JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005).

<sup>17</sup> See for example, Robert O. Keohane, *International Relations and International Law: Two Optics* 38 Harv. Int'l. L. J. 487 (1997) and Anne-Marie Slaughter, Andrew Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 A.J.I.L. 367 (1998).

<sup>18</sup> This area is replete with books and articles that followed the important initial article by Chayes and Chayes: Abraham Chayes & Antonia Handler Chayes, *On Compliance*, 47 Int'l. Org. 172 (1993). For an excellent summary of the international law/international relations scholarship on compliance see Kal Raustiala and Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS, 538 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds., 2002).



Maria Stavropoulou takes a tentative approach to the use of international relations theories in refugee law in a research paper that suggests that regime design and compliance theories from international relations should find greater utilisation by UNHCR in trying to influence State behaviour.<sup>19</sup> Her paper attempts to stimulate further consideration of the usefulness of these theories in UNHCR's practice. In addition, Jean-François Durieux and Alexander Betts have initiated an excellent attempt to interweave international law and international relations in their jointly authored article that considers lessons learned from the Convention Plus initiative.<sup>20</sup> This author wholeheartedly endorses such cross-fertilisation to further scholars' and UNHCR's understanding of how UNHCR can best ensure States' protection of refugees.

## Methodology

Methodology hinges upon the categorisation of theories about law; theories make information more understandable because they provide a structure for the organisation of the information or knowledge.<sup>21</sup> However, the mere articulation of categories of methodology is beset by the problem that the various schools of thought are complex, diverse, overlapping and not easy to structure, since the interaction among them has meant that they have taken on aspects of other categories.<sup>22</sup> In addition, the political backdrop of the time and the prevailing theories against which a new theory is often defined heavily influence the formulation of the theory.<sup>23</sup> Thus, while the reader should take note of the above reservations as to theories, it is nevertheless hoped that clarification of the methodology employed herein should not only assist readers of the thesis but also those persons interested in conducting further research in this area.

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<sup>19</sup> Maria Stavropoulou, *Influencing State behaviour for refugee protection: UNHCR and the design of the refugee protection regime*. (UNHCR, New Issues in Refugee Research, Paper #154, April 2008), <http://www.unhcr.org/481721302.html>.

<sup>20</sup> Jean Francois Durieux & Alexander Betts, *Convention Plus as a Norm-Setting Exercise*, 20 J. Refugee Stud. 509 (2007).

<sup>21</sup> Iain Scobbie, *Some Common Heresies About International Law: Sundry Theoretical Perspectives*, in INTERNATIONAL LAW 62 (ed., Malcolm D. Evans, 2003).

<sup>22</sup> Alvarez, *supra* note 16, at 45.

<sup>23</sup> *Id.*, at 54-55.

Since this thesis treats UNHCR's role related to international refugee law within the context of States' actions and UNHCR is a subsidiary organ within the United Nations, an international organisation, it would seem appropriate to draw upon international organisation law theory. However, there is no "convincing theoretical framework" for international organisation law.<sup>24</sup> Therefore, it is necessary to adopt a general methodology of international law, that of an international law/international relations perspective, and resort to a sub-category within this field, namely functionalism. The functionalist view finds States to be the primary actors and international institutions as necessary to effect cooperation among them.<sup>25</sup> The functionalist approach adopted herein is not a narrow one that considers UNHCR to be simply perpetuated and controlled by States, but rather an organisation that has developed and maintains an autonomy<sup>26</sup> that is sustained by the notion of international protection. Functionalist approaches vary, but the one employed herein rejects a formalistic positivist view of the sources of international law and instead utilises a more open approach that is not solely based on the "status" of the text or the "form" of the action.<sup>27</sup>

The innate tension that exists within the functionalist approach between States' assignment of responsibilities to an organisation and the organisation's independence is the theme that underlies this thesis. States created UNHCR, under international law, to carry out two particular functions related to refugees that of international protection for refugees and seeking solutions to the problem refugees. In connection with its international protection function, States assigned UNHCR responsibilities related to the development and effectiveness of international refugee law, which are the focus of this thesis. Yet, UNHCR is not just an expression of States' interests, but also has a certain legal independence and autonomy, which it deploys to ensure the international protection of refugees.

The interplay between the authority granted to UNHCR by States and UNHCR's organisational autonomy is abundantly evident in connection with international

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<sup>24</sup> JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 3 (2<sup>nd</sup> ed., 2009).

<sup>25</sup> N.D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 2 (1996).

<sup>26</sup> *Id.*, at 3.

<sup>27</sup> Douglas M. Johnston, *Functionalism in the Theory of International Law*, 26 Canadian Yrbk. Int'l. L. 3, 30-31 (1988)

refugee law. International refugee law constitutes the core around which the interaction between UNHCR, on the one hand, and States, on the other, occurs. Conceptually, refugee law affects and structures States' treatment of refugees and UNHCR assists in the development of such law and in ensuring that refugees receive protection.

## Structure

In exploring the theme of the tension between States' mandate to UNHCR and UNHCR's autonomy, the thesis focuses on answering four major questions. First, what are the foundations for UNHCR's role related to the development and effectiveness of international refugee law? Second, what are the formal and informal means that have facilitated the adaptation of UNHCR's role? Third, how has UNHCR influenced the development of international refugee law and finally, how has UNHCR affected the means for ensuring the effectiveness of international refugee law?

UNHCR's role related to international refugee law did not emerge out of a void, but has a historical background derived from prior organisations concerned with the protection of refugees. The responsibilities and work of the refugee organisations that preceded UNHCR had a significant influence on the responsibilities UNHCR would be assigned in relation to international refugee law. The foundations for UNHCR's role related to international refugee law are contained in UNHCR's Statute. Therefore, chapter 1 provides an overview of both the historical and statutory foundations that create an indelible link between UNHCR and international refugee law.

Under UNHCR's statutory mandate, UNHCR is assigned responsibilities in the two key areas of development of international refugee law and ensuring the effectiveness of such law. UNHCR has established general parameters and essential content to these responsibilities through the various activities it has carried out in order to fulfil its mandated responsibilities. Chapter 2 therefore examines the specific statutory responsibilities of UNHCR related to the areas of the development and effectiveness

of international refugee law as well as the work the organisation has carried out in order to fulfil these responsibilities.

UNHCR's international refugee law responsibilities are not static, but can vary and be adapted so as to permit UNHCR to address refugee problems and issues arising out of new circumstances, whether due to new flows of refugees, changes in the willingness of States' of asylum to receive refugees, or other factors. Chapter 3 considers both the formal means by which UNHCR's mandate can be modified and the techniques used by UNHCR to facilitate the evolution in its role related to international refugee law.

As a crisis in international refugee law and refugee protection unfolded in the 1980's, the weaknesses in the legal framework and in the means for ensuring the effectiveness of international refugee law were brought to the fore. The origins of this crisis and the problems with refugee law and its effectiveness, which became more evident as a result of this crisis, are covered in chapter 4. This crisis in international refugee law and protection then necessitated that UNHCR adopt new measures in order to redress the weaknesses in the framework and to ensure that refugee law was more effective. Chapter 5 covers the measures utilized by UNHCR to expand the treaty framework and address the weaknesses in the framework. Chapter 6 addresses steps taken by UNHCR to bolster the effectiveness of international refugee law, in the areas of States' ratification, implementation and application of refugee law.

## Objectives

Today, refugee law issues are conflated more extensively than ever before with issues of migration. In addition, security issues have a greater impact upon States' policies as to whom to admit and under what conditions, thereby affecting national refugee legislation and the actual protection provided to refugees. In exploring the theme of the interplay between UNHCR's autonomy and the authority granted to UNHCR by States, the thesis may assist in providing insights into how UNHCR can further strengthen and expand its role within the political context in which UNHCR currently operates.

As this thesis demonstrates, UNHCR is an organisation with a degree of autonomy; UNHCR's international protection role affords a flexibility that permits it to act proactively on behalf of refugees. In particular, as international refugee law constitutes the basis for the protection of refugees, a better understanding of the foundations for this role and the traditional and more recent approaches used by UNHCR in connection with the development and effectiveness of international refugee law, should assist the organisation in better understanding that it has strong legal bases and greater flexibility than it generally exercises.

Moreover, further delineation by UNHCR of how to develop and ensure the effectiveness of international refugee law would assist UNHCR in clarifying its role with other categories of persons to whom it may provide protection. UNHCR is considering how and to whom its mandate of international protection should be further extended, while it has not yet clarified its role related to refugees. Consideration is being given, at present, as to whether persons displaced by development projects and who flee because of severe environmental conditions should be afforded protection by UNHCR. In addition, UNHCR has extended its protection mandate to persons who flee situations of conflict and violence. These persons are termed "refugees" in some parts of the world under regional instruments, but do not qualify as refugees under a strict reading of the 1951 Refugee Convention definition. UNHCR also has extended its protection in certain situations to internally displaced persons, that is, persons who have often fled for the same reasons as refugees, but who have not crossed the border of their own country into another country. Yet, UNHCR's protection role and the applicable international law is not as clear for these groups as it is for the refugees. Thus, the author hopes that this thesis provides insight into the development of UNHCR's role related to international refugee law and thereby leads to a better understanding of how to ensure protection to not only refugees, but also to internally displaced persons, persons fleeing conflict and violence, and others to whom UNHCR's protection mandate has already been extended, as well as other groups of persons who may require its protection in the future.

Finally, given the dearth of research related to UNHCR as an international organisation and the limited international refugee law research available that

incorporates an international relations perspective, the author hopes that this thesis will serve as a foundation for the research of others. The thesis also may be of service to scholars of international organisations law who seek concrete examples of how particular international organisations influence the development and effectiveness of international law.

#### Additional Points

Since the thesis is written with the intention of furthering the understanding of UNHCR's role related to the development and the effectiveness of international refugee law, the focus is from an international legal perspective. Therefore, the political background and influences on UNHCR's work, other than with respect to the crisis in refugee protection, have not been explored in detail. In addition, as international refugee law is the central concern of the thesis, other groups of persons who are receiving protection from UNHCR, including returnees, internally displaced persons, persons who flee due to civil conflict or violence within their countries, and stateless persons, are only incidentally considered herein. The author recognizes, however, that their protection merits greater attention and further research.

Finally, it should be noted that the content of this thesis is based on the law and resources that existed as of June 2010.

## CHAPTER 1: FOUNDATIONS FOR UNHCR'S INTERNATIONAL REFUGEE LAW ROLE

### 1.1. INTRODUCTION

The United Nations High Commissioner for Refugees was not the first international organisation with responsibilities for refugees. Beginning with the time of the League of Nations, there was a succession of refugee organisations created to deal with groups of refugees. These organisations are presented as the precursors to UNHCR in refugee law texts, treatises on refugee law, and UNHCR's training manual on international protection.<sup>1</sup> The agreements for the protection of refugees that existed prior to the 1951 Convention on the Status of Refugees<sup>2</sup> are also presented. However, the narratives generally do not address how these organisations related to and were involved with refugee law. Such organisations and refugee law did not just coexist; refugee law was the centrepiece for the work of nearly all of UNHCR's predecessors.

The mandates and work of UNHCR's predecessors significantly influenced the formulation of UNHCR's responsibilities, including the organisation's responsibilities related to international refugee law, which are the focus of this study. Therefore, this chapter serves as a complement to the traditional background of UNHCR through its presentation of the

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<sup>1</sup> See for example: the textbook by DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA, & MARYELLEN FULLERTON, *FORCED MIGRATION: LAW AND POLICY* 34-38 (2007); the refugee law treatise of GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 15-20 (3rd ed., 2007); and chapters 1 and 2 of the UNHCR protection training manual, UNHCR, *SELF-STUDY MODULE 1: AN INTRODUCTION TO INTERNATIONAL PROTECTION: PROTECTING PERSONS OF CONCERN TO UNHCR* (1 August 2005), <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae6bd5a0&query=protection%20training%20manual>.

<sup>2</sup> Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150 [hereinafter "1951 Refugee Convention"].

responsibilities and work, related to international refugee law, of the refugee organisations created prior to UNHCR. In so doing, this chapter grounds the unique and enduring role of UNHCR, as it relates to international refugee law, in the historical foundations of the refugee organisations that preceded UNHCR.

The chapter begins with the organisations created by the League of Nations after the First World War: the High Commissioner for Russian Refugees, the Nansen International Office for Refugees, the Office of the High Commissioner for Refugees coming from Germany, and the High Commissioner of the League of Nations for Refugees. Then it turns to the Intergovernmental Committee on Refugees formed during the inter-war period and finally considers the United Nations Relief and Rehabilitation Administration established at the end of the Second World War and the International Refugee Organisation created after the war. The chapter concludes by situating UNHCR's responsibilities related to international refugee law within the overall context of international protection and by linking UNHCR's responsibilities in this area to the fundamental refugee law instrument, the 1951 Convention on the Status of Refugees.

## 1.2. HISTORICAL FOUNDATIONS

The plight of persons fleeing their homelands to seek protection in other lands is as old as persecution itself. Originally, when a person left his/her country and sought asylum in another country, it was up to the authorities in the country of asylum to decide whether the individual would receive protection and not be expelled. Since the sovereign was generally the source of law, s/he was the ultimate arbiter of how the individual would be treated and what rights would be accorded.



Collective action by States to confront the problem of forced migration did not occur until the formation of the League of Nations in 1919 following the end of the First World War. The League served as an international forum in which States could pursue cooperation not only in the political sphere to prevent wars and ensure peace, but also in the areas of social and economic matters.<sup>3</sup>

#### 1.2.1 Refugee Organisations Created by the League of Nations

The displacement of about 1.5 million Russians, as a consequence of the 1917 Bolshevik revolution, civil war, and the 1921 Russian famine,<sup>4</sup> served as the catalyst for collective State interest in the creation of the first international office for refugees. The lack of clarity as to which State was responsible for these persons, many of whom required material assistance and lacked a recognized identity document, and their movement among countries, in some cases as a result of their expulsion by a country, created tensions among European States.<sup>5</sup>

Therefore, in 1921, the League of Nations created the office of the High Commissioner for Russian Refugees and appointed Dr. Fridtjof Nansen as

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<sup>3</sup> The League of Nations created a number of committees to facilitate cooperation among countries, including a Committee for Intellectual Cooperation, which eventually became the United Nations Organization for Educational, Scientific and Cultural Organization, an Advisory Committee on Traffic in Opium and Other Dangerous Drugs, and an Advisory Committee on Traffic in Women and Children. The League also created a Permanent Health Organisation in 1923, which was the precursor to the World Health Organisation. JOHN KNUDSON, *A HISTORY OF THE LEAGUE OF NATIONS*, 273, 246, 251, 265 (1938).

<sup>4</sup> TOMMIE SJÖBERG, *THE POWERS AND THE PERSECUTED: THE REFUGEE PROBLEM AND THE INTERGOVERNMENTAL COMMITTEE ON REFUGEES* (IGCR), 1938-1947, 24-5 (1991). See also JOHN HOPE SIMPSON, *THE REFUGEE PROBLEM: REPORT OF A SURVEY*, 62 (1939) and MICHAEL MARRUS, *THE UNWANTED: EUROPEAN REFUGEES IN THE 20<sup>th</sup> CENTURY* 53-61 (1985).

<sup>5</sup> See Sjöberg, *supra* note 4, at 26. See also GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* 24 (2001). Sjöberg also does not discount the importance of sympathy for the Russian refugees as a contributing factor to the initiative by the League to create the first refugee organization. See Sjöberg, *supra* note 4, at 27.

the first High Commissioner.<sup>6</sup> Initially, his responsibilities concerning the Russian refugees included defining their legal status, organizing their repatriation or allocation to various countries which might be able to receive them, assisting them with finding work, and with the assistance of aid groups, providing relief to them.<sup>7</sup> In 1924 his mandate was extended to include Armenian refugees who had fled from Turkey and then in 1928 to include Assyrian and Assyro-Chaldean and Turkish refugees.<sup>8</sup> He then carried out the same responsibilities for these two groups and the term “Russian” was deleted from his title.

Following the death of the High Commissioner in 1930, the League of Nations created the Nansen International Office for Refugees to carry out the humanitarian assistance work for refugees previously handled by Nansen.<sup>9</sup> The secretariat of the League of Nations assumed responsibility for the legal and protection work handled by Nansen, but in practice, it was the Nansen Office that would carry out both the humanitarian and legal and protection aspects.<sup>10</sup>

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<sup>6</sup> The initiative for the creation of an office of a Commissioner for the Russian refugees originated with the International Red Cross, which noted the situation of 800,00 Russian refugees in Europe who lacked legal protection. *Letter From The President of the Comité International de la Croix-Rouge of 20 Feb. 1921*, 2 O.J.L.N. 227 (1921) and *Memorandum from the Comité International de la Croix-Rouge at Geneva to the Council of the League of Nations of 20 Feb. 1921*, 2 O.J.L.N. 228-9 (1921). A request by the Secretary-General of the League of Nations to Governments for their suggestions on the resolution of this problem, a report by Mr. Hanotaux, and discussions in the Council of the League of Nations then followed. See *Report by M. Hanotaux adopted on 27 June 1921*, 2 O.J.L.N. 755-8 (1921) and *Circular Letter by the Secretary-General to All States concerned in the Question of 7 July 1921*, 2 O.J.L.N. 485-6 (1921). The Council adopted a resolution on 27 June 1921 in which it agreed to appoint a High Commissioner and on 20 August 1921 appointed Dr. Fridtjof Nansen to the position. Paul Weis, *The International Protection of Refugees*, 48 Am. J. Int'l. L. 193, 208 (1954).

<sup>7</sup> These responsibilities were proposed by the Secretary-General to the Council of the League. See *Memorandum by the Secretary-General of 16 March 1921*, 2 O.J.L.N. 225-6 (1921).

<sup>8</sup> Weis, *supra* note 6, at 209 (1954).

<sup>9</sup> *Id.*

<sup>10</sup> See *Work of the Inter-Governmental Advisory Commission for Refugees during its Eighth Session*, 17 O.J.L.N. 140 (1936). The Statutes of the Nansen International Office for Refugees can be found at 12 O.J.L.N. 309-10 (1931).

In response to the exodus of persons from Germany, in 1933, the League of Nations created a special organisation, the Office of the High Commissioner for Refugees coming from Germany,<sup>11</sup> which initially was not part of the League of Nations system due to the membership of Germany in the League at the time. The office was to assist refugees from Germany in the same manner as the High Commissioner for Refugees and the Nansen Office, with the secretariat of the League, had supported other groups of refugees. In 1938, the Office of the High Commissioner for Refugees coming from Germany also became responsible for refugees fleeing Austria,<sup>12</sup> but this office was liquidated, along with the Nansen Office, at the end of 1938, and replaced by a High Commissioner of the League of Nations for Refugees. Consequently, this new High Commissioner assumed responsibility for the refugees aided by the Nansen Office and the High Commissioner for Refugees coming from Germany.<sup>13</sup>

The organisations created by States through the League of Nations were the first international attempts by States to coordinate efforts related to refugees. However, each of the organisations mentioned above, like other entities created by the League to deal with specific refugee situations,<sup>14</sup> was only given responsibility for certain nationalities of refugees. States were not yet ready to deal with refugees as an international phenomenon,

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<sup>11</sup> Council of League of Nations, Comm. on International Assistance to Refugees, 17 O.J.L.N. 126-9 (1936).

<sup>12</sup> See Desirability of Extending the Authority of the High Commissioner for Refugees coming from Germany to cover Refugees coming from the Territory which Formerly Constituted Austria, 19 O.J.L.N. 367-8 (1938). Initially, the Office of the High Commissioner for Refugees coming from Germany reported to its own governing body rather than to the Council of the League of Nations. Simpson, *supra* note 4, at 215-6.

<sup>13</sup> The mandate of the High Commissioner of the League of Nations for Refugees is contained in the Report of the Council Committee Appointed to Draw Up a Plan for International Assistance to Refugees, 19 O.J.L.N. 365-6 (1938).

<sup>14</sup> For example, the Greek Refugee Settlement Commission was established in 1923 to assist Greek refugees, a High Commissioner was created in 1926 for Bulgarian refugees and in 1933 a sub-committee of the Council was formed for Assyrians from Iraq. Simpson, *supra* note 4, at 222-3.

but instead considered them to be discrete localized problems. The refugees' nationality and the fact that they had crossed an international border were the defining characteristics of the groups of refugees.

#### 1.2.1.1 Responsibilities related to international refugee law

When the League of Nations appointed Nansen as the first High Commissioner in 1921, international refugee law was non-existent.<sup>15</sup> However, Nansen's mandate included refugee law related responsibilities. Specifically, he was to define the legal status of refugees, although his mandate did not establish how he was to do this. The problems encountered by the refugees would serve as the catalyst for Nansen's significant role in the development of international refugee law.

The practical difficulties faced by the de-nationalized Russian refugees, who lacked identity or travel documents, spurred the Council to call a conference of representatives of interested governments, which met in August 1921. A second conference was convened in September 1921, over which Dr. Nansen presided, to further discuss the problem. Dr. Nansen then consulted with the International Labour Office, legal authorities among the refugees, and a conference of private organisations and prepared specific proposals on identity papers for the refugees to be considered by governments.<sup>16</sup> At an inter-governmental conference in 1922, called by Dr. Nansen,<sup>17</sup> the Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees was adopted, which provides a

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<sup>15</sup> However, refugee law was not new, according to Grahl-Madsen. He cites the 1685 Edict of Potsdam and an 1832 French law, as examples of prior laws concerning refugees. Grahl-Madsen, *The Emergent International Law Relating to Refugees: Past – Present – Future*, THE LAND BEYOND: COLLECTED ESSAYS ON REFUGEE LAW AND POLICY BY ATLE GRAHL-MADSEN, 180, 182 (Peter Macalister-Smith, & Gudmundur Alfredsson eds., 2001).

<sup>16</sup> The High Commissioner of the League, *Report on the Work accomplished up to March 15<sup>th</sup>, 1922*, 3 O.J.L.N. 385-94 (1922).

<sup>17</sup> Atle Grahl-Madsen, *supra* note 15, at 182 .

common form for the identity certificate as well as conditions related to its issuance and use by a refugee.<sup>18</sup>

Similar concerns about the situation of Armenian refugees led the High Commissioner to consider, at the request of the Council of the League of Nations, the issue of identity certificates for Armenians; Dr. Nansen studied the problem and then drafted an agreement concerning identity certificates for this group of refugees.<sup>19</sup> He subsequently initiated an agreement that consolidated and amended the arrangements concerning identity certificates for Russian and Armenian refugees.<sup>20</sup> Other practical problems faced by the refugees resulted in the High Commissioner preparing two instruments that concerned the rights of refugees, which were adopted at an inter-governmental conference in 1928.<sup>21</sup> These arrangements concerned the personal status, legal assistance, expulsion, taxation, and identity certificates of certain groups of refugees.

Despite the fact that the Nansen Office was responsible for the humanitarian rather than the legal and protection work, as noted above, it, nevertheless, was mandated to undertake a function related to the practical application by States of the arrangements instituted by the first High Commissioner. Specifically, the Nansen Office was to "[f]acilitat[e], within the limits of its competence, the application, in particular cases, of

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<sup>18</sup> Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, 5 July 1922, 13 L.N.T.S. 237.

<sup>19</sup> Plan for the Issue of a Certificate of Identity to Armenian Refugees, 31 May 1924, 5 O.J.L.N. 969-70 (1924). Interestingly, this agreement was merely a plan drafted by the High Commissioner and his staff and then circulated to governments for their signature without an international conference. Thirty-nine governments acceded to the agreement. Grahl-Madsen, *supra* note 15, at 182.

<sup>20</sup> This agreement was the Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, 12 May 1926, 89 L.N.T.S. 47. Report of the Secretary-General, 36 (footnote 2.2), U.N. Doc. A/C.3/527 and Corr.1 (26 Oct. 1949) [hereinafter "Report of the Secretary-General"].

<sup>21</sup> *Id.* These two agreements were the Arrangement relating to the Legal Status of Russian and Armenian Refugees, 30 June 1928, 89 L.N.T.S. 53, and the Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures taken in Favour of Russian and Armenian Refugees, 30 June 1928, 89 L.N.T.S. 63.

the arrangements that have been made for the benefit of the refugees."<sup>22</sup> This included "certifying the identity and the position of the refugees", "[t]estifying to the regularity, validity, and conformity with the previous law of their country of origin, of documents issued in such country" among other services.<sup>23</sup> In addition, although not specified in its mandate, the Nansen office prepared an agreement, the first one to be legally binding on States, relating to the protection of refugees,<sup>24</sup> the 1933 Convention relating to the International Status of Refugees.<sup>25</sup>

As for the High Commissioner's Office for Refugees coming from Germany, it was specifically instructed to convoke an intergovernmental conference in order to provide "a system of legal protection for refugees coming from Germany",<sup>26</sup> which it did in the form of the 1936 Provisional Arrangement Concerning the Status of Refugees Coming from Germany, which concerned certificates of identity, and the personal status and freedom of movement of refugees, among other matters.<sup>27</sup> After the drafting of the 1936 Provisional Arrangement, the Office was instructed by the Assembly of the League of Nations to obtain the accession of States to the Arrangement and "to prepare an intergovernmental conference for the adoption of an international convention on the status of these refugees."<sup>28</sup> The result was the 1938 Convention Concerning the Status of Refugees coming from Germany that replaced the 1936 Arrangement. The 1938 Convention reiterated most of the provisions contained in the 1936

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<sup>22</sup> Statutes of the Nansen International Office for Refugees, 12 O.J.L.N. 309-10 (1931).

<sup>23</sup> Arrangement relating to the Legal Status of Russian and Armenian Refugees, *supra* note 19.

<sup>24</sup> Simpson, *supra* note 4, at 211.

<sup>25</sup> The Convention relating to the International Status of Refugees, 28 October 1933, 159 L.N.T.S. 199. This convention provided a further elaboration of the rights contained in the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees.

<sup>26</sup> See Report of the Council Committee Appointed to Draw Up a Plan for International Assistance to Refugees, *supra* note 13, at 128.

<sup>27</sup> Provisional Arrangement concerning the Status of Refugees coming from Germany, 4 July 1936, 171 L.N.T.S. 75.

<sup>28</sup> Report of the Secretary General, *supra* note 20.

Arrangement, but also covered topics such as labour conditions, welfare and relief, and the education of refugees.<sup>29</sup>

As a result of the creation of a number of agreements for the protection of refugees, when the High Commissioner of the League of Nations for Refugees was appointed in 1938, following the liquidation of the office of the High Commissioner's Office for Refugees coming from Germany and the Nansen Office, the League of Nations Assembly provided it with a specific supervisory responsibility related to international refugee law agreements. The High Commissioner was to "superintend the entry into force and the application of the legal status of refugees, as defined more particularly in the Conventions of 28 October 1933 and 10 February 1938".<sup>30</sup> Specifically, the High Commissioner was to ensure that the 1933 Convention relating to the International Status of Refugees concerning Russian, Armenian, Assyrian, Assyro-Chaldean, Turkish and other refugees, and the 1938 Convention concerning the Status of Refugees Coming from Germany were ratified by States and applied by them within their national systems.

Thus, while the first High Commissioner, Nansen, was given a general mandate for defining the legal status of refugees, the realities of the refugees' situation, in particular, the obstacles they faced, served as the catalyst for the creation of international arrangements concerning identity documents and refugees' legal status. Similarly, while nothing in its mandate provided that it should further develop legal standards for the protection of refugees, the Nansen Office prepared the first convention to be legally binding on States. In creating the High Commissioner for

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<sup>29</sup> Convention concerning the Status of Refugees coming from Germany, 10 Feb. 1938, 192 L.N.T.S. 59.

<sup>30</sup> See the Mandate of the High Commissioner of the League of Nations for Refugees, Report of the Council Committee Appointed to Draw Up a Plan for International Assistance to Refugees, *supra* note 13, ¶ 2(b). The two conventions were the 1933 Convention Relating to the International Status of Refugees, *supra* note 25, and the 1938 Convention concerning the Status of Refugees Coming from Germany, *supra* note 29.

Refugees coming from Germany, States recognized that the protection afforded to certain groups of refugees, such as Russians, Armenians, Turkish, Assyrian, and Assyro-Chaldean refugees needed to be provided to German refugees. Therefore, the High Commissioner for Refugees coming from Germany facilitated the creation of two agreements to provide similar rights to refugees from Germany.

As a result, the first High Commissioner, the Nansen Office, and the High Commissioner for Refugees coming from Germany contributed to the further development of international standards for the protection of the categories of refugees who were of their concern. Their work in this area established an early precedent of involvement by refugee organisations in the development of international refugee law, which would be reflected in the mandate of the International Refugee Organisation as well UNHCR's statutory mandate, as discussed below.

Once international agreements for the protection of refugees had been created, there was a need to ensure that they were adopted and applied by States. The Nansen Office assisted in ensuring the application of such agreements in a practical manner, as most likely did the first High Commissioner. However, it was the High Commissioner of the League of Nations for Refugees that was first assigned specific responsibilities for the supervision of States' ratification and application of agreements for the protection of refugees. Therefore, the activities of these early refugee organisations as well as the mandate of the High Commissioner of the League of Nations, related to the effectiveness of agreements for the protection of refugees, helped establish a basis for the involvement of future organisations in this area, including eventually UNHCR.

### 1.2.2 Subsequent Refugee Organisations

The forced mass emigration of Jews from Germany led the United States, which was not a member of the League of Nations, to organize a



conference in 1938 of thirty-one States to discuss co-ordination of support for persons who wished to flee or already had fled Germany because of persecution.<sup>31</sup> As a result, the Intergovernmental Committee on Refugees was created, in 1938, to assist Jewish persons to leave Germany and resettle in other countries, through negotiations with Germany as well as countries of resettlement,<sup>32</sup> but this work was obstructed by the outbreak of the Second World War.<sup>33</sup>

Renewed cooperation among States was spurred by the situation of millions of displaced persons in countries liberated by the Allies at the end of the Second World War. In 1943, 44 States established the United Nations Relief and Rehabilitation Administration to provide material assistance to displaced persons, who also included persons who had fled because of persecution, and to facilitate the return of displaced persons to their home countries.<sup>34</sup> However, UNRRA's work became increasingly difficult as a result of the political changes in Eastern Europe and the Soviet Union, which deterred many displaced persons from wanting to

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<sup>31</sup> Simpson, *supra* note 4. It should be noted that other authors claim that the conference was attended by representatives of 32 States. See for example, 1 LOUISE HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972* 18 (1975) and Weis, *supra* note 6, at 209.

<sup>32</sup> The resolution creating the IGCR, which was adopted by a committee representing 31 States, is contained in 19 O.J.L.N. 676-7 (1938). Sjöberg states that while "it was officially denied" that the IGCR was established with the purpose of assisting only Jewish persons, he finds that "there is no doubt that this was in fact the case- at least for all practical purposes." Sjöberg, *supra* note 4, at 51.

<sup>33</sup> JACQUES VERNANT, *THE REFUGEE IN THE POST-WAR WORLD* 26-7 (1953).

<sup>34</sup> KIM SALOMON, *REFUGEES IN THE COLD WAR: TOWARD A NEW INTERNATIONAL REFUGEE REGIME IN THE EARLY POSTWAR ERA*, 48 (1991). UNRRA 'only incidentally provided assistance for refugees escaping from untenable political situations' according to Leon Gordenker. LEON GORDENKER, *REFUGEES IN INTERNATIONAL POLITICS* 23 (1987). For UNRRA's mandate, see Agreement for United Nations Relief and Rehabilitation Administration, 9 Nov. 1943, 3 Cmd. No. 6491 (1943). In addition, the IGCR's membership and mandate were extended in 1943 "to include, as far as practicable also those persons, wherever they may be, who as a result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs". Vernant, *supra* note 33, at 27-28. The IGCR worked alongside UNRRA in providing protection and assistance to refugees in territory that had been liberated. Grahl-Madsen, *supra* note 15, at 186.

return. UNRRA then refused to return persons who did not wish to go back to their home countries.<sup>35</sup> As a result, such persons were stuck in camps. UNRRA was faced with another significant problem. In 1945, new refugees had begun fleeing from Germany, Austria and Italy, but UNRRA's mandate provided only for support for repatriation, and therefore, the organisation could not facilitate their settlement in the country in which they had sought refuge or their resettlement in another country.<sup>36</sup>

States addressed the limitations in UNRRA's capacity by creating the International Refugee Organisation, as a specialised agency of the United Nations.<sup>37</sup> The mandate of the IRO was "to bring about a rapid and positive solution of the problem of *bona fide* refugees and displaced persons".<sup>38</sup> IRO had broad responsibilities for such persons; it was to carry out the "repatriation; the identification, registration and classification; the care and assistance; the legal and political protection; the transport; and the re-settlement and re-establishment, in countries able and willing to receive them, of persons who are the concern of the

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<sup>35</sup> Gordenker, *supra* note 34, at 23.

<sup>36</sup> Holborn, *supra* note 31, at 28.

<sup>37</sup> For an excellent summary of IRO's work see LOUISE HOLBORN, *THE INTERNATIONAL REFUGEE ORGANIZATION: A SPECIALIZED AGENCY OF THE UNITED NATIONS - ITS HISTORY AND WORK 1946-1952* (1956). IRO's Constitution, an international treaty, was approved by the General Assembly on 15 December 1946, but would only come into effect once 15 States, whose contributions to IRO amounted to not less than 75% of the total budget, had become parties to the Constitution. Constitution of the International Refugee Organization, and Agreement on Interim Measures to be Taken in Respect of Refugees and Displaced Persons, G.A. Res. 62(I), ¶ 18(b), U.N. Doc. A/RES/62(I) (15 Dec. 1946). Therefore, the work of the IRO was initially carried out by a Preparatory Commission, which assumed responsibility for refugees and displaced persons from the IGCR and UNRRA on 1 July 1947. IRO formally came into existence in August 1948, after the requisite number of States had signed IRO's Constitution, and was abolished in January 1952. 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW: REFUGEE CHARACTER* 18 (1966).

<sup>38</sup> Constitution of the IRO, in Holborn, *supra* note 37, at Annex 1, art. 1(a).

Organization".<sup>39</sup> The IRO even sub-let ships to transport refugees,<sup>40</sup> and its annual budget was four times that of the United Nations.<sup>41</sup>

The IRO essentially assumed responsibility for refugees and displaced persons covered by the mandates of UNRRA and the IGCR<sup>42</sup> as well as new refugees fleeing from Germany, Austria and Italy. The IRO's focus was the repatriation of persons to their home countries. Where such persons objected to their return because of persecution, reasons of a political nature, or compelling family reasons or infirmity or illness, they were to remain under the protection of the IRO and would be assisted with local settlement or resettlement in another country.<sup>43</sup>

#### 1.2.2.1 Responsibilities related to international refugee law

Although the mandates of the IGCR and UNRRA did not contain specific responsibilities related to the development of international refugee law, both organisations initiated agreements related to refugees. IGCR inaugurated what became known as the London Agreement on Travel Documents,<sup>44</sup> promoted accessions to it, and worked to ensure that States

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<sup>39</sup> *Id.*, at art. 2(1).

<sup>40</sup> This information is found in the table of the Planned and Actual Expenditures of IRO from 1947-1952. Holborn, *supra* note 37, at 124.

<sup>41</sup> U.N. GAOR, 4th Sess., 265<sup>th</sup> plen.mtg., ¶ 12 (3 Dec. 1949).

<sup>42</sup> See 27 June 1947 Agreement between the IGCR and the PCIRO and the 29 June 1947 Agreement between the PCIRO and UNRRA in Holborn, *supra* note 37, at 591-4.

<sup>43</sup> See Constitution of the IRO, in Holborn, *supra* note 37, at art. 2(1)(b) and Annex I, Part I, Section C. The IRO Constitution provided the first comprehensive definition of a "refugee" in Part I of Annex 1. The wording in Part I, Section A.I clearly served as a basis for the definition of a refugee in the UNHCR Statute and the 1951 Refugee Convention. It provides that a "refugee" shall apply to a person "who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality." Constitution of the IRO, in Holborn, *supra* note 37, at Annex I, Part I, Section A(1).

<sup>44</sup> Agreement relating to the issue of a travel document to refugees who are the concern of the Inter-governmental Committee on Refugees, 15 Oct. 1946, 11 U.N.T.S. 73 [hereinafter "London Agreement on Travel Documents"]. Weis, *supra* note 6, at 212.

implemented the agreement.<sup>45</sup> Similarly, UNRRA committees drafted several agreements. These committees, comprised of government representatives, formulated amendments to modify the 1926 International Sanitary Convention and the 1933 International Sanitary Convention for Aerial Navigation, agreements that arose out of concern about the problems that might arise in connection with the large movements of persons after the war.<sup>46</sup>

In contrast with the IGCR and UNRRA, IRO's constitutional mandate contained several responsibilities related to refugee law. First, instead of detailing specific responsibilities related to prior refugee conventions or the creation of international refugee conventions, IRO's mandate provided a general overarching responsibility. IRO was to provide "legal and political protection" to refugees.<sup>47</sup> In addition, the IRO mandate authorized the organisation to enter into agreements with governments and the occupation authorities in order to ensure assistance to refugees,<sup>48</sup> the protection of their rights,<sup>49</sup> and to arrange mutual assistance in the repatriation of displaced persons.<sup>50</sup> These agreements helped ensure that the IRO obtained the necessary governmental cooperation in matters relating to displaced persons and refugees. Thus, such bilateral

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<sup>45</sup> Weis, *supra* note 6 at 212. The IGCR appointed a Committee of Experts in 1944 that drafted the text and the form of the travel document, which were then adopted on 15 September 1946 at an Intergovernmental Conference. Vernant, *supra* note 33, at 29.

<sup>46</sup> A.H. Robertson, *Some Legal Problems of the UNRRA*, 23 Brit. Y.B. Int'l. L. 142, 154 (1946). These agreements arose out of concern about the problems that might arise in connection with the large movements of persons after the war. *Id.*

<sup>47</sup> Constitution of the IRO, in Holborn, *supra* note 37, at art. 2(1).

<sup>48</sup> The IRO "shall have power ... to enter into contracts and undertake obligations; including contracts with Governments or with occupation or control authorities, whereby such authorities would continue, or undertake, in part or in whole, the care and maintenance of refugees and displaced persons in territories under their authority, under the supervision of the Organization" and "to conduct negotiations and conclude agreements with Governments". *Id.*, at art. 2.2(d)-(e).

<sup>49</sup> The IRO "shall have power ... to conclude agreements with countries able and willing to receive refugees and displaced persons for the purpose of ensuring the protection of their legitimate rights and interests in so far as this may be necessary". *Id.*, at art. 2.2(j).

<sup>50</sup> The IRO "shall have power... to promote the conclusion of bilateral arrangements for mutual assistance in the repatriation of displaced persons". *Id.*, at art.2.2(g).

agreements covered the specific details of the operations, including the facilities to be provided to IRO in the country, the financing of the operation, and the responsibilities for the provision of material assistance and legal and political protection.

Under the IRO's broadly worded legal and political protection mandate, the IRO made significant contributions to the development of international refugee law. The IRO's concern about the ability of persons to conclusively establish the death of a family member, in order to permit such persons to remarry or inherit, led to the IRO's proposal to the United Nations Economic and Social Council, in 1948, that an International Convention on the Declaration of Death of Missing Persons should be drafted.<sup>51</sup> In addition to its contribution to the drafting of the convention, the IRO participated in a number of international conferences concerning refugees' legal position, provided its views on the Universal Declaration of Human Rights and the draft Human Rights Covenant, and was also actively involved in the preparation of the 1951 Refugee Convention Relating to the Status of Refugees.<sup>52</sup> Moreover, with its work to increase the number of accessions to the 1946 London Agreement on Travel Documents, the IRO contributed to the actual effectiveness of this agreement.<sup>53</sup>

In sum, the IGCR and UNRRA were both organisations with very specific purposes; essentially, the IGCR was to help Jewish refugees leave Germany and resettle and UNRRA was to provide material assistance to displaced persons and help them return to their home countries. Despite the lack of any reference to legal or protection responsibilities in their mandates, both organisations undertook activities to create agreements that provided protection to the persons they were assisting.

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<sup>51</sup> *Id.*, at 326.

<sup>52</sup> *Id.*, at 325-7.

<sup>53</sup> Weis, *supra* note 6, at 212.

The IRO, however, was explicitly mandated to provide legal and political protection to refugees. The IRO attempted to secure States' protection of refugees by entering into individual agreements with governments concerning refugee protection, such as to ensure refugees' non-discriminatory treatment, access to the labour market and social benefits,<sup>54</sup> rather than promoting the conclusion of treaties among governments that would provide such protection. Most significantly, the IRO actively contributed to the drafting of key international human rights agreements and the 1951 Refugee Convention and thereby assisted in the development of the legal framework that remains essential to the protection of refugees today.

In the area of the development of international refugee law, the work carried out by the IGCR, UNRRA, and IRO, as well as the IRO's legal and political protection mandate, built upon the bases established by prior refugee organisations, namely the first High Commissioner, the Nansen Office, and the High Commissioner for Refugees coming from Germany. In addition, in the area of the effectiveness of international refugee law, both the IGCR and the IRO promoted accessions to an agreement providing for documentation for refugees, the London Travel Agreement on Travel Documents, thereby furthering the basis of the role of refugee organisations, established by the previous refugee organisations mentioned above, as well as the High Commissioner of the League of Nations for Refugees. Thus, the need for and practice of refugee organisations in the areas of the development and effectiveness of international refugee law was well established prior to the creation of UNHCR.

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<sup>54</sup> Holborn, *supra* note 37, at 318.

### 1.2.3 The Need for a New Organisation

The IRO, however, was unable to arrange for the repatriation or settlement of all of the refugees and displaced persons from the Second World War due to the political changes taking place. The increasing restrictions on rights of persons in the former Soviet Union and many Eastern European countries meant that refugees from those countries were less inclined to return. Western countries also became less willing to return refugees to their home countries. The IRO estimated that upon its cessation, scheduled for 30 June 1950, there would remain approximately 292,000 persons in Europe who had not been repatriated to their home countries or resettled in third countries.<sup>55</sup> These numbers were substantially augmented by the increasingly large numbers of persons who were fleeing to Western European countries from Eastern European ones as well as the refugee movements in other areas of the world,<sup>56</sup> such as on the Indian subcontinent, the Korean peninsula, in China and in Palestine. Thus, given the temporary nature of the organisation<sup>57</sup> and the changing political situation, it became clear that the refugee problem could not be solved entirely by the IRO.

As a result, there was a clear need for a new international organisation with a statutory mandate to deal with old and new refugees. In 1949, the UN Economic and Social Council adopted a resolution requesting the United Nations Secretary-General to prepare a plan for a new organisation and to propose "the nature and extent of the legal functions to be performed, taking into consideration the experience of the League of Nations, the Intergovernmental Committee on Refugees and the IRO".<sup>58</sup>

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<sup>55</sup> Note by the Secretary General, U.N. Doc. A/C.3/528, ¶ 12 (26 Oct. 1949).

<sup>56</sup> See Loescher, *supra* note 5, at 42.

<sup>57</sup> Holborn states that IRO's General Council never lost sight of the temporary nature of the organization. Holborn, *supra* note 31, at 36.

<sup>58</sup> E.S.C. Res. 248(IX) A, 9<sup>th</sup> Sess. (6 Aug. 1949). ECOSOC did not request the Secretary-General to take into account the experience of UNRRA, in its 6 August

The UN Secretary-General, in his 1949 Report, duly took into account the experience and the mandates of the previous organisations in formulating proposals for the functions, form and financial arrangements of the future refugee organisation. Since the Secretary-General's report served as the basis for the discussions about the new organisation in the Economic and Social Council, the General Assembly and the third committee of the General Assembly, the report had a determinative influence on the role and responsibilities of the new organisation. In particular, the Secretary-General relied on the mandates and work of UNHCR's predecessors in formulating UNHCR's proposed responsibilities. The culmination of the discussions was the creation of a subsidiary organ of the United Nations General Assembly,<sup>59</sup> the office of the United Nations High Commissioner for Refugees.<sup>60</sup>

### 1.3. STATUTORY FOUNDATIONS

The United Nations High Commissioner for Refugees was created in December 1950 pursuant to the adoption of its Statute by the General Assembly.<sup>61</sup> The organisation began operating in January 1951.

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1949 resolution, most likely because it was created with a very specific purpose of providing assistance and facilitating the return of persons displaced by the war.

<sup>59</sup> U.N. Charter arts. 7 & 22. Article 7 states: "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter." Article 22 states, "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions." Refugees were of concern to the General Assembly from its very creation as evidenced by the General Assembly's adoption of a resolution on the refugee problem during its first session as an urgent matter. See G.A. Res. 8(I) (1946).

<sup>60</sup> The UNHCR was therefore created to carry out the General Assembly's responsibilities of "promoting international cooperation in the political field" and "assisting in the realization of human rights and fundamental freedoms for all with distinction as to race, sex, language, or religion." U.N. Charter art. 13, para. 1.

<sup>61</sup> Statute of the Office of the United Nations High Commissioner for Refugees, contained in the Annex to UN General Assembly Resolution 428(V) of 14 December 1950. G.A. Res. 428(V) (14 Dec. 1950) [hereinafter "UNHCR Statute"].



UNHCR's Statute remains, even after over 50 years, the defining document for the organisation's structure and powers.

Structurally, as a subsidiary organ of the United Nations General Assembly, UNHCR not only reports to the General Assembly<sup>62</sup> but also may have its mandate modified through General Assembly resolutions. UNHCR's Statute also provides for UNHCR to receive advice from the General Assembly, in the form of resolutions,<sup>63</sup> and from the Executive Committee of the High Commissioner's Programme, an advisory body created by the United Nations Economic and Social Council and comprised of approximately 72 State representatives,<sup>64</sup> in the form of conclusions.

UNHCR's structure and responsibilities were significantly influenced by those of its predecessors, in particular by the IRO. The IRO had been an all-encompassing specialised agency with very broad responsibilities for refugees that required substantial funding. The drafters of UNHCR's Statute did not want UNHCR to be as operationally active nor to replace government services as the IRO had done.<sup>65</sup> Therefore, UNHCR, unlike the IRO, was not authorised to provide material assistance without the approval of the General Assembly. Instead, UNHCR's role was to be one

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<sup>62</sup> *Id.*, at ¶ 11. UNHCR initially reported to the General Assembly through the UN Economic and Social Council, as provided in paragraph 11 of UNHCR's Statute, but now it submits its Annual Reports directly to the General Assembly. The Notes on International Protection are submitted to EXCOM.

<sup>63</sup> *Id.*, at ¶ 3, 9.

<sup>64</sup> For more information on the Executive Committee's relationship to UNHCR see section 3.2 of chapter 3. With respect to EXCOM's issuance of guidance to States, it is not at all clear whether EXCOM has the legal authority to issue conclusions directed to States, given that the body was created as an advisory one to UNHCR, even though it has a well-established practice of doing so.

<sup>65</sup> As the UK representative, Mr. Corley stated: "Unlike the International Refugee Organization, the High Commissioner with his small staff would not constitute an operational agency; furthermore, he would concern himself with refugee problems of a broader and more universal nature than those faced by the IRO." U.N. GAOR, 4th Sess., 265<sup>th</sup> plen.mtg. at ¶ 81 (3 Dec. 1949).

of "guidance, supervision, co-ordination and control",<sup>66</sup> and it was envisioned that the High Commissioner would enjoy the same authority and prestige as had Dr. Nansen in order to ensure the effective protection of the refugees.<sup>67</sup>

UNHCR's two primary functions, the provision of international protection to refugees and the seeking of permanent solutions for the problem of refugees,<sup>68</sup> built upon the work and responsibilities of UNHCR's predecessors. The function of providing international protection to refugees was derived from the mandates of the High Commissioner for Refugees under the Protection of the League of Nations and the IRO that prescribed a "legal and political protection" responsibility.<sup>69</sup> Even the wording of some of UNHCR's specific protection responsibilities, not only those that concerned international refugee law as elaborated below, but also others, can be traced to the mandates of these two organisations.

For example, UNHCR's responsibility to "[keep] in close touch with the governments and inter-governmental organisations concerned" and to

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<sup>66</sup> Statement of the Representative of France, U.N. GAOR, 4th Sess., 256<sup>th</sup> plen. mtg. at ¶ 14 (4 Nov. 1949).

<sup>67</sup> Statement of the Representative of Mexico, U.N. GAOR, 4th Sess., 257<sup>th</sup> plen., 3rd cee mtg., at ¶ 40 (8 Nov. 1949). As the UN Secretary-General noted, "legal and political protection has on the whole been a secondary task, which has been performed largely within the framework of material assistance." Report of the Secretary-General, *supra* note 20, ¶ 14.

<sup>68</sup> *Id.*, at ¶ 1. Despite the Statute's pronouncement, in paragraph 1, that UNHCR has two primary functions the structure and wording of the Statute suggest that the international protection role actually subsumes the search for permanent solutions. Paragraph 8 of the Statute lists activities that further the protection of refugees including that UNHCR is to "assist[] governmental and private efforts to promote voluntary repatriation or assimilation within new national communities". Not only does paragraph 8 include a solutions type activity under its protection task, but there is no paragraph which elaborates the tasks associated with solutions in the same manner as paragraph 8 does for the international protection of refugees. For a more detailed discussion of the significance of the search for permanent solutions as a separate function of UNHCR, see MARJOLEINE ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES 80-1 (1997). Also see Goodwin-Gill & McAdam, *supra* note 1, at 426, noting that "the provision of international protection is of primary importance".

<sup>69</sup> See Report of the Secretary-General, *supra* note 20, at ¶ 19 (footnote 1). The Secretary-General proposed the term "international legal protection of refugees", *Id.*, at ¶ 19.

"establish[] contact in such manner as he may think best with private organisations dealing with refugee questions" repeated obligations that the High Commissioner for Protection under the League of Nations had under his mandate<sup>70</sup> and was similar to IRO's responsibility to "consult and cooperate with public and private organisations whenever it is deemed advisable".<sup>71</sup> In addition, UNHCR's responsibility to enter into agreements with governments for "the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection" is similar to obligations that IRO had in its Constitution.<sup>72</sup>

### 1.3.1 Responsibilities Related to International Refugee Law

UNHCR's specific responsibilities related to international refugee law are contained in sub-paragraph 8(a) of its Statute, which states that "the High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) [p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto".<sup>73</sup> Four

<sup>70</sup> See UNHCR Statute, *supra* note 61, ¶ 8(g) and (h) and mandate of the High Commissioner of the League of Nations for Refugees contained in Report of the Council Committee Appointed to Draw Up a Plan for International Assistance to Refugees, *supra* note 11.

<sup>71</sup> Constitution of the IRO, in Holborn, *supra* note 37, at art. 2.2(f).

<sup>72</sup> See UNHCR Statute, *supra* note 61, ¶ 8(b) and Constitution of the IRO, in Holborn, *supra* note 37, at arts. 2.2(g) and (j). In practice, UNHCR would make individual determinations on the eligibility of persons for refugee status as the IRO had done and UNHCR's Statute would contain a refugee definition that had its origins in the definition contained in Annex I to the Constitution of the IRO.

<sup>73</sup> Paragraph 8(b) also contains wording that could be interpreted as relating to international treaties on refugees. This paragraph states that the High Commissioner also shall promote "through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection". The reference to "special agreements", however, is not to treaties in the same sense as Paragraph 8(a). The *travaux préparatoires* for the 1951 Convention demonstrate that this sub-paragraph was intended by the drafters to refer to agreements with Governments such as repatriation agreements between individual countries and UNHCR as well as cooperation agreements for the establishment of UNHCR offices in countries. Corinne Lewis, *UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution*, 17 Int'l. J. Refugee L. 67, 71-2 (2005).

distinct responsibilities can be identified in the wording of this sub-paragraph: (i.) the promotion of the conclusion of international treaties concerning refugees; (ii.) the proposal of amendments to such treaties; (iii.) the promotion of ratifications to such treaties; and (iv.) the supervision of the application by States of such treaties.

These four responsibilities, which are considered in detail in chapter 2, permit UNHCR to work toward securing the existence of international refugee law standards and their effectiveness. The importance of these responsibilities can be ascertained from the fact that they are contained in the first sub-paragraph defining the responsibilities that UNHCR must carry out in order to fulfil its international protection function. They also are consistent with a consideration of international law as not only the basis for the United Nations and the international relations among States,<sup>74</sup> but also as essential for the maintenance of international peace and security.<sup>75</sup>

Additional sub-paragraphs in paragraph 8 of the Statute facilitate and support UNHCR's responsibilities under sub-paragraph (a). Under sub-paragraph (f), UNHCR is to obtain information from governments concerning the number and situation of refugees and the laws and regulations concerning them. Thus, this paragraph provides a means that facilitates UNHCR's work of supervising States' application of refugee conventions, since it permits UNHCR to obtain the necessary information from States about their treatment of refugees. This provision also would serve as a basis for UNHCR's initially limited role related to States'

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<sup>74</sup> EDVARD HAMBRO, LELAND M. GOODRICH, AND ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS 134 (1969). This approach is reflected in Article 1(1) of the Purposes and Principles section of the UN Charter. Article 1(1) provides that the United Nations shall "maintain international peace and security and to that end:...bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

<sup>75</sup> Carl-August Fleischhauer, *Article 13*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 298, 299 (Bruno Simma, ed., 2<sup>nd</sup> ed. 2002).

implementation of their international refugee law obligations. Sub-paragraph (g) lends additional support to UNHCR's responsibilities under paragraph 8(a), since it provides for UNHCR to stay in close touch with governments and thereby foster a good working relationship with States to benefit the refugees UNHCR was mandated to protect.

#### 1.3.1.1 Tracing the historical foundations

As discussed above, UNHCR's four statutory responsibilities related to international refugee law<sup>76</sup> are derived from the experiences and mandates of UNHCR's predecessors. In the area of the development of international refugee law, since nearly all of UNHCR's predecessors found it necessary to initiate and encourage the conclusion of treaties pertaining to refugees' status and other matters affecting refugees, UNHCR was assigned the responsibility of promoting the conclusion of international treaties concerning refugees.

In addition, States already had seen that the evolution of the refugee situation could necessitate changes in the international agreements related to their protection. The 1926 Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees<sup>77</sup> amended the 1922 Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees and the 1924 Plan Relating to the Issue of a Certificate of Identity to Armenian Refugees.<sup>78</sup> The 1926 Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees was then extended to other groups of refugees with the 1928 Arrangement Concerning the Extension to Other Categories of Refugees of Certain

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<sup>76</sup> The importance of these responsibilities can be seen from the fact that they were included in the earliest drafts of UNHCR's mandate. See for example France: draft resolution, ¶ III(c), U.N. Doc. A/C.3/L.26 (11 Nov.1949) and United States of America: draft resolution, ¶ 5(b), U.N. Doc. A/C.3/L.28 (11 Nov. 1949).

<sup>77</sup> 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, *supra* note 20.

<sup>78</sup> 1922 Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, *supra* note 18. 1924 Plan for the Issue of a Certificate of Identity to Armenian Refugees, *supra* note 19.

Measures Taken in Favour of Russian and Armenian Refugees.<sup>79</sup> In addition, the 1938 Convention concerning the Status of Refugees Coming from Germany, replaced, according to its article 18, the 1936 Provisional Arrangement Concerning the Status of Refugees.<sup>80</sup> Logically, therefore, UNHCR was assigned the responsibility to propose amendments to treaties concerning the protection of refugees.

As concerns the ratification of international refugee law agreements, the Intergovernmental Committee on Refugees and the International Refugee Organisation, as noted above, encouraged States to ratify or accede to the London Agreement on Travel Documents<sup>81</sup> and the High Commissioner of the League of Nations for Refugees had been specifically mandated to encourage States to accede to conventions covering refugees. Moreover, the drafters of UNHCR's Statute may have been concerned about the difficulties in obtaining ratifications to previous international conventions concerning refugees.<sup>82</sup> Each subsequent instrument developed for the protection of refugees had a lower number of States parties than the preceding one.<sup>83</sup> In particular, the conventions, as contrasted with the

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<sup>79</sup> 1928 Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, *supra* note 21.

<sup>80</sup> 1938 Convention concerning the Status of Refugees Coming from Germany, *supra* note 29. 1936 Provisional Arrangement Concerning the Status of Refugees, *supra* note 27.

<sup>81</sup> London Agreement on Travel Documents, *supra* note 44.

<sup>82</sup> The Report of the Secretary-General notes that further ratifications and accessions could be obtained to the 1938 Convention concerning the Status of Refugees coming from Germany and the 1946 Agreement relating to the Issue of a Travel Document of Refugees who are the Concern of the Intergovernmental Committee on Refugees. Report of the Secretary-General, *supra* note 20, ¶ 24 (footnote 3).

<sup>83</sup> The 1922 Arrangement with Regard to the Issue of Certificates of Identity to Russian Refugees, *supra* note 15, had 53 States parties. The 1924 Plan for the Issue of a Certificate of Identity to Armenian Refugees, *supra* note 19, had 35. The 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, *supra* note 20, had 20 States. The 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees, *supra* note 21, had 11 States. The 1933 Convention relating to the International Status of Refugees, *supra* note 25, had 8 States. The 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany, *supra* note 27, had 7 States. The 1938 Convention concerning the Status of Refugees coming from Germany, *supra* note 29, had 3 States. UNHCR Colloquium on the development in the law of refugees with particular reference to the 1951 Convention and the Statute of the Office of the

arrangements, had very few State parties. The 1933 Convention Relating to the International Status of Refugees was ratified by only eight countries and the 1938 Convention Concerning the Status of Refugees Coming from Germany by a mere three countries.<sup>84</sup>

Most likely, the drafters of UNHCR's Statute would have wanted to ensure that the new convention for the protection of refugees, the 1951 Convention relating to the Status of Refugees<sup>85</sup> that was being formulated by an ad hoc committee while discussions were taking place on UNHCR's mandate,<sup>86</sup> would be ratified by as many States as possible.<sup>87</sup> Thus, UNHCR's responsibility to promote the ratification of the new convention, the 1951 Refugee Convention, when it was completed, as well as the ratification of any future refugee instruments, would help ensure that such agreements would be legally binding on more States.

Finally, as part of their everyday activities, many of UNHCR's predecessors would have monitored States' conduct to determine whether such conduct conformed to the international standards in place and made representations to governments on issues ranging from non-expulsion, legal protections afforded refugees, detention, and naturalizations procedures.<sup>88</sup> Therefore, it naturally followed from these precedents that UNHCR's drafters would provide UNHCR with a supervisory responsibility related to international conventions for the protection of

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Office of the United Nations High Commissioner for Refugees held at *Villa Serbelloni Bellagio (Italy)* from 21-28 April 1965: *Background paper submitted by the Office of the United Nations High Commissioner for Refugees*, ¶ 28 (1965), <http://www.unhcr.org/protect/PROTECTION/3ae68be77.html>.

<sup>84</sup> *Id.*

<sup>85</sup> 1951 Refugee Convention, *supra* note 2.

<sup>86</sup> ECOSOC appointed an ad hoc committee "consisting of representatives of thirteen Governments, who shall possess special competence in this field". E.S.C. Res. 248(IX) B (6 Aug. 1949).

<sup>87</sup> The concern about the ratification of multilateral treaties continues to retain the attention of the United Nations at a general level. For example, in connection with the United Nations Decade of International Law from 1990-1999, G.A. Res. 45/40, Annex I, ¶ 2, A/RES/45/40 (28 Nov. 1990).

<sup>88</sup> Vernant, *supra* note 33, at 26.

refugees. The supervisory language of the mandate of the High Commissioner of the League of Nations for Refugees would serve as the basis for the wording of UNHCR's supervisory responsibility.<sup>89</sup>

#### 1.3.1.2 Purpose of responsibilities: international protection

The ultimate purpose of UNHCR's responsibilities related to international refugee law under paragraph 8 of its Statute is to ensure international protection, one of UNHCR's primary functions, as noted above. However neither paragraphs 1, 8 nor any other paragraph of the Statute, establishes a definition of "international protection". Nor does the Statute contain a preamble that would provide the context for the term. Moreover, the meaning of 'international protection' is not self-evident since the terms "international" and "protection" have independent meanings<sup>90</sup> and their coupling into a phrase does not provide a separate meaning that stands alone. However, paragraph 8 of the Statute enumerates the activities that UNHCR is to carry out in order to ensure the fulfilment of its international protection function, and therefore, these activities can be examined to determine what they disclose about the meaning of UNHCR's international protection function. Specifically, paragraph 8 provides:

The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:

- (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
- (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
- (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;

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<sup>89</sup> The High Commissioner of the League of Nations was "to superintend the entry into force and the application of the legal status of refugees". Report of the Secretary-General, *supra* note 20, at 36 [footnote 1(b)].

<sup>90</sup> See the definition of "international" and "protection" in VII THE OXFORD ENGLISH DICTIONARY 1123-4 (2<sup>nd</sup> ed. 1989) and XII THE OXFORD ENGLISH DICTIONARY 678-9 (2<sup>nd</sup> ed. 1989).



- (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
- (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
- (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
- (g) Keeping in close touch with the Governments and inter-governmental organisations concerned;
- (h) Establishing contact in such manner as he may think best with private organisations dealing with refugee questions;
- (i) Facilitating the co-ordination of the efforts of private organisations concerned with the welfare of refugees.<sup>91</sup>

The list of responsibilities has an eclectic nature rather than a systematic one, but three general areas can be identified. First, UNHCR is to facilitate the admission of refugees to the territories of States where they can be protected; UNHCR does this by promoting the admission of refugees (sub-paragraph d). Second, UNHCR helps ensure that the rights of refugees are respected; UNHCR does so by promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto (sub-paragraph a). Third, UNHCR is to work towards finding solutions for refugees; UNHCR therefore concludes special agreements with governments (sub-paragraph b) and assists governments and others to promote "voluntary repatriation or assimilation within new national communities" (sub-paragraph c). UNHCR also works to ensure that as part of such solutions refugees are permitted to transfer their assets pursuant to (sub-paragraph e).

UNHCR's responsibilities to obtain information from governments (sub-paragraph f) and to undertake its work in co-ordination with States and inter-governmental and private organisations (sub-paragraphs g and h) as well as to help co-ordinate the work of private organisations (sub-paragraph i), support all three of the general areas mentioned above.

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<sup>91</sup> UNHCR Statute, *supra* note 61, ¶ 8.

UNHCR's international protection activities follow the path of a refugee from his/her flight to the finding of a solution. A refugee must be admitted to a State in order to obtain an alternative protection to that which would normally have been provided by the country of origin and have his/her rights respected by the country of refuge. Eventually, a refugee should be able to dispense with the protection provided by the state of refuge by either returning to the country of origin or by becoming a national of a new country and thus, obtaining the panoply of rights provided to nationals.

The foregoing examination of UNHCR's international protection activities, in order to define "international protection" more precisely, gives a sense of the practical objectives of international protection, but still does not reveal a clear meaning for the term. UNHCR's international protection function was essentially the performance of activities to ensure that States provide refugees with the necessary legal protection in the absence of such protection from the refugees' home countries. The activities are wide-ranging, but include ensuring that States have legal obligations for the protection of refugees and that these obligations are effective. The general manner in which international protection was defined meant that UNHCR would have a great deal of flexibility in defining the parameters and content of its work, as will be seen in subsequent chapters.

#### 1.3.1.3 The Essential Link to International Refugee Law: the 1951 Refugee Convention

The initial and foundational link between UNHCR's statutory responsibilities and international refugee law would be laid with the adoption of the 1951 Convention relating to the Status of Refugees.<sup>92</sup> The Secretary-General proposed the concept of a new refugee convention, what would become the 1951 Refugee Convention, as the second prong of the solution to the problem of refugees after the Second World War. The

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<sup>92</sup> Convention relating to the Status of Refugees, *supra* note 2.

drafting of the Convention, which began in January 1950 and was completed in July 1951, overlapped with the drafting of UNHCR's Statute. When the drafting of the 1951 Refugee Convention was undertaken, international refugee law was still comprised of the various ad hoc arrangements and agreements described above, most of which dated from the League of Nations period. However, these agreements did not cover the various groups of new refugees that were fleeing from Eastern to Western Europe and in other areas of the world. In addition, while the pre-1951 instruments addressed rights that had previously generated serious problems for refugees, the adoption of the Universal Declaration of Human Rights in 1950,<sup>93</sup> with its elaboration of the political, social, economic and cultural rights of persons, meant that a new and firmer basis for the development of the rights of refugees had been provided.

Moreover, in light of the fact that many of the refugees for whom UNHCR assumed responsibility were unable or unwilling to be repatriated, other solutions, such as local integration and resettlement in a third country would need to be applied, thus, requiring an increased focus on rights in a country that would not be their country of nationality.

The 1951 Refugee Convention was intended therefore "to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement".<sup>94</sup> The 1951 Refugee Convention would be first refugee convention for which UNHCR would carry out its responsibilities related to international refugee law. UNHCR

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<sup>93</sup> The Universal Declaration of Human Rights is referred to in the first preambular paragraph of the 1951 Refugee Convention. The drafters of the 1951 Refugee Convention frequently mentioned the UDHR during their discussions. Guy Goodwin-Gill, *Barbara Harrell-Bond Lecture "Refugees and their human rights"*, at 6-7, Refugee Studies Centre Working Paper No.17 (Refugee Studies Centre, Univ. of Oxford, ed., 12 Nov. 2003), <http://www.rsc.ox.ac.uk/PDFs/workingpaper17.pdf>.

<sup>94</sup> 1951 Refugee Convention, *supra* note 2, 3<sup>rd</sup> preambular ¶.

would: promote ratifications,<sup>95</sup> obtain information about the laws and regulations implementing the standards in the 1951 Refugee Convention, seek amendment of the 1951 Refugee Convention, and supervise States' applications of the 1951 Refugee Convention's provisions.

However, the 1951 Refugee Convention was not drafted as a universal agreement intended to cover all refugee situations, but instead, was created to meet the needs of States dealing with refugees following the Second World War. The 1951 Refugee Convention defined a refugee as a person who had a well-founded fear of persecution “[a]s a result of events occurring before 1 January 1951” and States had the option of limiting this phrase to “events occurring in Europe” or allowing it to apply to “events occurring in Europe or elsewhere” before this date.<sup>96</sup> Thus, the 1951 Refugee Convention, like previous agreements protecting refugees, was drafted with a particular refugee group in mind. As a result, new refugee crises would highlight the weaknesses in the use of the instrument as a universal agreement for all refugee situations. Despite these weaknesses, UNHCR would continue to use the 1951 Refugee Convention as the cornerstone for its work related to international refugee law.

#### 1.4. CONCLUSION

Thus, UNHCR’s predecessors, from the first High Commissioner for Refugees through UNHCR's immediate predecessor, the International Refugee Organisation, demonstrate that UNHCR was not an entirely new creation. Instead, UNHCR is a continuation of a means used by States, the creation of an organisation, to address a specific refugee problem.

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<sup>95</sup> As of November 2007, nearly 150 countries are now parties to either the 1951 Convention and/or the 1967 Protocol.

<sup>96</sup> 1951 Refugee Convention, *supra* note 2, art. 1.A.(2), 1.B.

UNHCR's predecessors played a significant role in the development of international refugee law standards; they participated in and facilitated the drafting of legal instruments that articulated the treatment that States were to accord to refugees. UNHCR's mandate reflects this role in providing that UNHCR is to promote the conclusion of international treaties concerning refugees and to propose amendments to such treaties. These precursor organisations also carried out activities to ensure that the early arrangements and agreements were effective. Moreover, it was the mandate of the Office of the High Commissioner of the League of Nations for Refugees, with its explicit mandate related to States' ratification and application of refugee conventions, that provided the wording for UNHCR's supervisory responsibility.

The work of UNHCR's predecessors also demonstrates how the development of instruments for the protection of refugees was of a gradual nature in reaction to events of the time. The instruments were created to address specific problems encountered by refugees. This incremental approach to resolve new problems also would characterize UNHCR's development of new approaches as will be seen in chapters 5 and 6.

Thus, States acting through the General Assembly provided UNHCR with a generally worded mandate, which provided the two primary purposes of UNHCR's work, namely, international protection and seeking solutions to the problem of refugees. UNHCR's role was to be one of guidance, supervision, coordination and oversight to manage the problem of refugees that States encountered. With a generally worded mandate, UNHCR was provided with a degree of autonomy in its work. The primary tool for UNHCR's international protection work vis-à-vis States would be the international refugee law agreement, the 1951 Refugee Convention. This agreement also would serve as the basis for States' protection of refugees.

## CHAPTER 2: UNHCR'S STATUTORY ROLE AND WORK RELATED TO REFUGEE LAW

### 2.1. INTRODUCTION

The United Nations High Commissioner for Refugees was created following the adoption of its Statute by States in the General Assembly in 1950.<sup>1</sup> These States assigned UNHCR the primary function of providing international protection to refugees, as noted in chapter 1, and as part of this function, specified certain responsibilities related to the development and effectiveness of international refugee law. These statutory responsibilities were derived from the experiences and mandates of UNHCR's predecessors<sup>2</sup> and were general expressions of such responsibilities. UNHCR would establish the content and parameters of these responsibilities through its actual practice.

Therefore, this chapter first considers UNHCR's mandated responsibilities related to the development of international refugee law and then the work actually carried out by UNHCR related to such development. The chapter then turns to the topic of the effectiveness of international refugee law. After clarifying the term "effectiveness", UNHCR's mandated responsibilities and activities in this area are considered. This analysis demonstrates how UNHCR developed its autonomy in interpreting its own statute and thus, established the foundations for UNHCR's role as the coordinator for international refugee matters.

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<sup>1</sup> UN General Assembly Resolution 428(V) of 14 Dec. 1950. G.A. Res. 428(V) (14 Dec.1950)

<sup>2</sup> See section 1.3.1.1 'Tracing the historical foundations' in Chapter 1.

## 2.2. UNHCR AND THE DEVELOPMENT OF REFUGEE LAW

The general parameters for UNHCR's work related to the development of international refugee law were established by its Statute, but as shown below, the statutory wording was not completely clear. Therefore, the actual work performed by UNHCR gives a clearer picture of the content of UNHCR's responsibilities in this area. This work reveals that UNHCR's techniques for furthering the development of international refugee law ranged from identifying the issue that required a convention among States to participation in the drafting of provisions of the convention.

### 2.2.1. UNHCR's Mandate

In the area of the development of international refugee law, UNHCR, under its statutory mandate, was to "promot[e] the conclusion ... of international conventions for the protection of refugees ... and propos[e] amendments thereto".<sup>3</sup> The meaning of UNHCR's latter responsibility is much clearer from its wording than the former. UNHCR's proposal of amendments to States and to relevant international bodies clearly would be covered under its mandate as means by which it could propose amendments to international conventions for the protection of refugees.

However, with UNHCR's responsibility to promote the conclusion of international conventions for the protection of refugees, the term "promote" has a very broad meaning.<sup>4</sup> The UNHCR Statute does not provide any additional guidance as to the specific activities that UNHCR

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<sup>3</sup> See paragraph 8(a) of the Statute of the Office of the United Nations High Commissioner for Refugees, contained in the Annex to UN General Assembly Resolution 428(V) of 14 Dec. 1950. G.A. Res. 428(V) (14 Dec.1950) [hereinafter "UNHCR Statute"].

<sup>4</sup> To 'promote' means 'to further the growth, development, progress or establishment of (anything); to help forward (a process or result)' and '[t]o support actively the passing of (a law or measure)'. XII THE OXFORD ENGLISH DICTIONARY 616-7 (2<sup>nd</sup> ed. 1989).

should perform in order to carry out this activity.<sup>5</sup> Moreover, the *travaux préparatoires* do not contain any detailed discussion, by the drafters of UNHCR's Statute, on UNHCR's promotional role.<sup>6</sup> However, the ambiguity in the meaning of UNHCR's responsibility to promote the conclusion of international conventions for the protection of refugees meant that UNHCR could not only determine how to fulfil this responsibility, but could also carry out a broad range of responsibilities.

#### 2.2.2. UNHCR's Contributions to International Treaties for the Protection of Refugees

The first international convention for the protection of refugees, the 1951 Refugee Convention<sup>7</sup> overlapped with the drafting of UNHCR's Statute. Therefore, while UNHCR did not participate in the drafting process, it did attend the Conference of Plenipotentiaries, held in Geneva from 2 to 25 July 1951, at which the 1951 Refugee Convention was adopted.<sup>8</sup> UNHCR would, however, play a crucial role in the formulation of the two other key universal refugee agreements, the 1957 Agreement relating to Refugee Seamen and the 1967 Protocol relating to the Status of Refugees.

##### 2.2.2.1. 1957 Agreement relating to Refugee Seamen

The 1957 Agreement relating to Refugee Seamen<sup>9</sup> was the first international agreement for the protection of refugees that UNHCR “promoted”. This agreement arose out of one of the first significant

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<sup>5</sup> For a more detailed analysis utilizing the provisions on treaty interpretation in the 1969 Vienna Convention on the Law of Treaties, see Corinne Lewis, *UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution*, 17 Int'l. J. Refugee L. 67, 72-6 (2005).

<sup>6</sup> The drafters focused on issues which engendered significant disagreement. 1 LOUISE HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972* 65 (1975). For a summary of these issues see Lewis, *supra* note 5, at 74 (footnote 21).

<sup>7</sup> Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 [hereinafter “1951 Refugee Convention”].

<sup>8</sup> UNHCR, *Report of the UNHCR*, ¶ 32, U.N. Doc. A/2394 (1953).

<sup>9</sup> Agreement relating to Refugee Seamen, 23 Nov. 1957, 506 U.N.T.S. 125.



protection problems that UNHCR had to handle after its creation. Holborn has described this problem very aptly:

[S]eamen who sought refuge by serving on ships of states other than their own, or who sought to exercise their calling as seafarers after gaining refuge in a country of asylum, often found themselves in the precarious position of having no country in which they could legally stay, no valid identity or travel documents (or only documents which had expired), and in an irregular status everywhere. Frequently such seamen were not permitted to leave their ships in any port of call for lack of documents, and thus were virtually condemned to sail the seas forever or risk imprisonment when trying to land.<sup>10</sup>

While the 1951 Refugee Convention contains an article that concerns refugee seamen, this article does not establish a fixed standard for determining the State responsible for providing a refugee seaman with travel documents, but only requires States to "give sympathetic consideration to their [refugee seamen] establishment on its territory and the issue of travel documents to them or their temporary admission".<sup>11</sup>

The large number of refugee seamen requesting UNHCR's assistance led UNHCR, in 1953, to request the Government of the Netherlands to conduct a study to determine the nature of the problem; out of 700 seamen, one-quarter of them did not possess any travel document and another quarter of them were in a "precarious" position.<sup>12</sup> Consequently, UNHCR sent a memorandum to the International Labour Organisation suggesting that its governing body consider the problem.<sup>13</sup> When the Netherlands initiated a conference of eight Western European maritime nations, UNHCR was present as an observer and participated in the discussions of

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<sup>10</sup> Holborn, *supra* note 6, at 203.

<sup>11</sup> 1951 Refugee Convention, *supra* note 7, at art. 11.

<sup>12</sup> Paul Weis, The Hague Agreement relating to Refugee Seamen, 7 Intl. & Comp. L.Q. 334, 339 (1958). UNHCR had also requested, in 1953, the assistance of the International Labour Organisation with the refugee seamen and had submitted a memorandum on the problem to the ILO. *Id.* at 338.

<sup>13</sup> UNHCR, *Report of the UNHCR*, ¶ 84, U.N. Doc.A/2648 (1954).

the new agreement; the 1957 Agreement relating to Refugee Seamen.<sup>14</sup>

This agreement essentially turned Article 11 of the 1951 Refugee Convention into a more concrete obligation by providing methods for determining which State is responsible for issuing the travel document to a particular refugee.

#### 2.2.2.2. 1967 Protocol relating to the Status of Refugees

UNHCR's work to modify the definition of a refugee in the 1951 Refugee Convention, and thereby give it a truly international scope constituted an extremely significant contribution to the development of international refugee law. The definition of a refugee under the 1951 Refugee Convention provided that:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country....<sup>15</sup>

The phrase “events occurring before 1 January 1951” was to be interpreted, according to the following paragraph in the 1951 Refugee Convention, as either “events occurring in Europe before 1 January 1951” or “events occurring in Europe or elsewhere before 1 January 1951”.<sup>16</sup>

This meant that the refugee definition in the 1951 Refugee Convention did not apply to all refugees throughout the world. The definition limited the events giving rise to a fear of persecution to events prior to 1 January 1951 and gave States the option of further limiting the scope of such events to those that occurred in Europe. The need for a modification of the refugee definition in the 1951 Refugee Convention became increasingly apparent during the terms of the first three High Commissioners.

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<sup>14</sup> UNHCR, *Report of the UNHCR*, ¶ 244-50, U.N. Doc.A/3123/Rev.1 (1956).

<sup>15</sup> 1951 Refugee Convention, *supra* note 7, at art. 1.A(2).

<sup>16</sup> *Id.*, at art. 1B.(1).

G.J. van Heuven Goedhart, who became the first High Commissioner in 1951, envisioned that the 1951 Refugee Convention was to "become as universal as possible by the accession of the greatest possible number of States" and to include "any future groups of refugees".<sup>17</sup> However, in practice, the 1951 Refugee Convention, as well as UNHCR itself, remained an instrument almost exclusively for the protection of refugees as a result of events occurring in Europe before 1951. High Commissioner Goedhart correctly noted the discrepancy between the refugee definition under the 1951 Refugee Convention with the time and optional geographic limitations, on the one hand, and the universal definition of a refugee under UNHCR's Statute, on the other.<sup>18</sup>

UNHCR's determination, of which groups would receive its protection and which only assistance, became increasingly irregular, particularly under Auguste Lindt, who became High Commissioner in 1956 following the death of Goedhart. During Lindt's term, UNHCR applied its mandate and the 1951 Refugee Convention to certain European groups based on an event-effect argument; East Europeans fleeing Communist-bloc countries after 1951 were considered to be refugees under UNHCR's mandate and the 1951 Refugee Convention on the basis that the events causing the effect, the flight, had occurred prior to 1951.<sup>19</sup> Similarly, nearly 200,000 Hungarians<sup>20</sup> fleeing Hungary following the invasion of the Soviet Army in November 1956 were recognized as refugees, under UNHCR's mandate and the 1951 Refugee Convention, because the events that gave rise to such flight occurred before 1951.<sup>21</sup>

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<sup>17</sup> Gerrit Jan van Heuven Goedhart, *The Problem of Refugees*, 82 Recueil des Cours, Hague Academy of International Law, 264, 292, 280 (1953).

<sup>18</sup> *Id.*, at 280.

<sup>19</sup> Kazimierz Bem, *The Coming of a 'blank cheque' – Europe, the 1951 Convention and the 1967 Protocol*, 16 Int'l. J. Refugee L. 609, 619 (2004).

<sup>20</sup> UNHCR, *Report of the UNHCR*, ¶ 3, U.N. Doc. A/3585/Rev.1 (1957).

<sup>21</sup> Also see the discussion of UNHCR's determination that the Hungarians qualify as refugees in section 3.4.1.1 of chapter 3. For a good summary of events leading up to the exodus and UNHCR's determination of whether such persons qualified as

UNHCR adopted a different approach with respect to Chinese fleeing to Hong Kong and Algerians. Chinese refugees who escaped to Hong Kong, as a result of the political and economic changes in China particularly during 1945-1952,<sup>22</sup> were given assistance only, pursuant to funds raised by UNHCR under its "good offices" function, authorized by General Assembly resolutions.<sup>23</sup> UNHCR did not view them as 'refugees' under its statutory mandate due to the political problem of the two Chinas.<sup>24</sup> Algerians fleeing as a result of the Algerian war of independence from 1954-1962 and persecution by the French,<sup>25</sup> were implicitly but unofficially considered by UNHCR to qualify as refugees under its mandate, but UNHCR only provided them with assistance.<sup>26</sup>

Felix Schnyder, the third High Commissioner led the organisation from 1960-1965. He continued to expand UNHCR's use of its "good offices" in providing assistance to refugees in Africa, who had fled after 1951; however, these refugees were not considered to fall under the protection of the 1951 Refugee Convention.<sup>27</sup> Thus, by the mid-1960's the majority of refugees assisted by UNHCR world-wide did not receive protection under the 1951 Refugee Convention.<sup>28</sup>

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"refugees" under the 1951 Convention, see UNHCR, THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION, 26-32 (2000).

<sup>22</sup> IVOR JACKSON, THE REFUGEE CONCEPT IN GROUP SITUATIONS 90 (1999).

<sup>23</sup> See G.A. Res. 1167 (XII) (26 Nov. 1957) and G.A. Res. 1784 (XVII) (7 Dec. 1962).

<sup>24</sup> Jackson, *supra* note 22, at 94. For a detailed description of UN deliberations concerning the Chinese refugees in Hong Kong, see *Id.*, at 90-94.

<sup>25</sup> For a good summary of the events that caused their flight and their situation in countries of asylum see UNHCR, THE STATE OF THE WORLD'S REFUGEES, *supra* note 21, at 38-43. Cecilia Ruthström-Ruin provides a detailed overview of not only the factual causes of the flight, but also the various internal positions taken by UNHCR on this issue. See RUTHSTRÖM-RUIN, CECILIA, BEYOND EUROPE: THE GLOBALIZATION OF REFUGEE AID 42-98 (1993).

<sup>26</sup> GIL LOESCHER, THE UNHCR AND WORLD POLITICS: A PERILOUS PATH 100 (2001). Also see Ivor Jackson's analysis which leads to the conclusion that 'the Algerian refugees were considered *prima facie* as a group of concern to the High Commissioner under his normal terms of reference.' Jackson, *supra* note 22, at 141.

<sup>27</sup> UNHCR, THE STATE OF THE WORLD'S REFUGEES, *supra* note 21, at 53.

<sup>28</sup> *Id.*

High Commissioner Schnyder began to view the disparity, between the number of refugees who benefited from UNHCR's services, but who did not receive the protection of the 1951 Refugee Convention, as a significant problem.<sup>29</sup> He wanted to ensure that the 1951 Refugee Convention would serve as a universal convention, particularly in light of the decision of the then Organisation of African Unity (now the African Union) to draft a regional refugee convention.<sup>30</sup>

Under High Commissioner Schnyder, UNHCR studied 'ways and means by which the personal scope of the 1951 Refugee Convention might be liberalized'<sup>31</sup> and proposed a colloquium on this issue.<sup>32</sup> UNHCR representatives attended the colloquium, along with thirteen legal experts from various countries and representatives from the Carnegie Endowment for International Peace and the Institut de Hauts Etudes in Geneva, where they discussed how to modify the 1951 Refugee Convention in order to ensure its applicability to new refugee situations.<sup>33</sup>

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<sup>29</sup> Félix Schnyder, *Les aspects juridiques actuels du problème des réfugiés*, 114 Recueil des Cours, Hague Academy of International Law, 335, 365 (1965). Thus, High Commissioner Schnyder's view evolved considerably during his tenure as High Commissioner. Upon assuming office, he believed that UNHCR would focus on assistance to refugees in the developing world and that "his actions in 'new' refugee situations should be based on his good offices function and not on his mandate." Loescher, *supra* note 26, at 106, 112.

<sup>30</sup> Holborn, *supra* note 6, at 179. UNHCR in its 1968 Note on International Protection espouses a practical justification for its movement from the provision of primarily material assistance to refugees in Africa to that of ensuring their protection. UNHCR states that initially assistance was the more urgent need, that many African countries did not have legislation on employment and social security, among other protections, and that the large number of refugees made it difficult to conduct individual determinations of eligibility for refugee status. The Note adds that due to the fact that more refugees were living in towns and that the legal infrastructure was developing in many African countries, UNHCR was then justified in providing international protection to such refugees. UNHCR, *Note on International Protection* ¶ 13-15, U.N. Doc. A/AC.96/398 (9 Sept. 1968).

<sup>31</sup> UNHCR, *Addendum to the Report of the UNHCR*, ¶ 33, U.N. Doc. A/5811/Rev.1/Add.1 (1965).

<sup>32</sup> Schnyder, *supra* note 29, at 444.

<sup>33</sup> See UNHCR, *Colloquium on the Legal Aspects of Refugee Problems (Note by the High Commissioner)*, Annex I, U.N. Doc. A/AC.96/INF.40 (5 May 1965) for a list of participants in the Colloquium held in Bellagio Italy from 21-28 April 1965.

UNHCR also drafted a background note for the conference, which extensively considered prior refugee arrangements and conventions and the drafting history of the refugee definition in the 1951 Refugee Convention.<sup>34</sup> UNHCR then assessed the content and the potential forms the document could take, specifically, whether it should be a recommendation or a binding legal instrument.<sup>35</sup> Following the Colloquium's recommendation that the time limitation should be removed completely and that no geographic declarations should be made by States ratifying the Protocol,<sup>36</sup> UNHCR prepared a draft instrument that incorporated States' views. After final modifications were made to the text following suggestions by members of the Executive Committee of the High Commissioner's Programme, UNHCR submitted the 1967 Protocol relating to the Status of Refugees to the General Assembly, via the Economic and Social Council,<sup>37</sup> where it was adopted.

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<sup>34</sup> UNHCR, *Colloquium on the development in the law of refugees with particular reference to the 1951 Convention and the Statute of the Office of the United Nations High Commissioner for Refugees held at Villa Serbelloni Bellagio (Italy) from 21-28 April 1965: Background paper submitted by the Office of the United Nations High Commissioner for Refugees*, <http://www.unhcr.org/protect/PROTECTION/3ae68be77.html>.

<sup>35</sup> *Id.*, at ¶ 128-31. In paragraph 132 of its note, UNHCR proposed: "The possibility cannot be excluded that certain States may still be unwilling to assume future obligations, the extent of which they cannot foresee or to broaden their obligations to cover all existing groups of refugees without limitation. It may thus be necessary to seek a compromise between universality on the one hand and effectiveness on the other. From the point of view of legal technique, it might therefore be desirable for the new obligation, if it is to secure acceptance by the largest possible number of States, either to be limited in itself or to contain the possibility of limitation. Such a limitation could be established (a) *rationae personae*, i.e. according to a particular group, or particular groups, of refugees or (b) *rationae materiae*, i.e. according to particular provisions of the Convention, or the two techniques could be combined."

<sup>36</sup> UNHCR, *Colloquium on the Legal Aspects of Refugee Problems*, *supra* note 33, ¶ 4, 5.

<sup>37</sup> Paul Weis, *The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties*, 42 B.Y.I.L. 39, 45 (1967). Protocol relating to the Status of Refugees, 16 December 1966, 606 U.N.T.S. 267.

### 2.2.3. UNHCR's Contribution to other Instruments

UNHCR's promotional work was, as its Statute provides, to relate to “international conventions for the protection of refugees”.<sup>38</sup> However, from very early on, UNHCR’s promotional work extended to instruments that were not universal international ones, and to instruments that were not solely for the protection of refugees. Thus, UNHCR promoted the inclusion of provisions for the protection of refugees in human rights treaties, conventions on particular topics that affect refugees, and regional instruments.

Although a strict reading of the wording of paragraph 8(a) of UNHCR's Statute, which states that UNHCR is to promote "international conventions for the protection of refugees", might suggest that UNHCR's promotional work should be limited to refugee conventions, consideration of this phrase, in light of UNHCR's overall purpose of helping to ensure the international protection of refugees provides a different perspective. As noted in chapter 1, the lack of a clear definition of “international protection” in UNHCR’s Statute permits UNHCR a great deal of flexibility in its interpretation and thus, in determining the activities that contribute to furthering international protection. Consequently, UNHCR could be said to have the authorization to promote other types of agreements other than universal refugee law conventions.

#### 2.2.3.1. International human rights treaties

Since its creation, UNHCR has been active in contributing to the development of standards for the protection of refugees in international human rights instruments. UNHCR actively promoted the inclusion of a right to asylum in the draft Covenant on Civil and Political Rights, worked on by the UN Human Rights Commission (now the Human Rights

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<sup>38</sup> UNHCR Statute, *supra* note 3, ¶8(a).

Council), which work included submission of a memorandum to the Commission<sup>39</sup> and lobbying by the UNHCR Chief Legal Adviser, Paul Weis,<sup>40</sup> although the Commission ultimately rejected the inclusion of such a right. The rejection of such a provision was due to the prevalence of the view that extending asylum to an individual was the right of the State rather than a fundamental right of the individual and to a lack of agreement on the wording of the provision.<sup>41</sup> Thus States considered refugees to be in an exceptional situation that required a problem-solving practical approach rather than one oriented toward international human rights.

In addition, UNHCR supplied its advice during the work on the draft convention on the reduction of statelessness, the 1961 UN Convention on the Reduction of Statelessness,<sup>42</sup> since refugees may have lost their nationality and become stateless persons. Specifically, Paul Weis was seconded to the United Nations' legal department to assist the special rapporteurs of the International Law Commission with the drafting of the Convention.<sup>43</sup>

UNHCR's involvement in the drafting of human rights agreements, which as noted, was established very early on in its existence, remains an

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<sup>39</sup> UNHCR, *Report of the UNHCR*, ¶ 42, U.N. Doc. A/2394 (1953).

<sup>40</sup> Holborn, *supra* note 6, at 228.

<sup>41</sup> See Paul Weis, *The United Nations Declaration on Territorial Asylum*, VII Can. Y.B. Int'l. L. 92, 97 (1969). UNHCR also contributed to the drafting of the 1967 Declaration on Territorial Asylum, G.A. Res. 2312 (XXII) (14 Dec. 1967). UNHCR submitted comments on various drafts of the Declaration and provided its views to the Commission on Human Rights, which prepared the Declaration. Weis, *Id.*, at 99, 101, 103.

<sup>42</sup> Convention on the Reduction of Statelessness, 30 August 1961, 989 U.N.T.S. 175. The International Law Commission drafted the 1961 Convention on the Reduction of Statelessness. The issue of statelessness initially subsumed that of refugees. See for example, The Secretary-General, *A Study of Statelessness, submitted to ECOSOC*, U.N. Doc. E/1112 (Aug. 1949), although the Secretary-General does distinguish between stateless persons and refugees in pages 7-8 of his report. A 1954 Convention relating to the Status of Stateless Persons was drafted which provided to stateless persons who are not refugees, similar rights to those of refugees under the 1951 Refugee Convention. Convention relating to the Status of Stateless Persons, 28 Sept. 1954, 360 U.N.T.S. 117.

<sup>43</sup> Paul Weis, *The United Nations Convention on the Reduction of Statelessness, 1961*, 11 Int'l. & Comp. L.Q. 1073, 1075 (1962).



important part of its promotional work of new conventions for the protection of refugees, particularly given the importance of human rights work to the protection of refugees, as will be seen in chapter 6. For example, UNHCR contributed to the discussions on the draft of the 1989 Convention on the Rights of the Child.<sup>44</sup> As a result, this Convention specifically mentions refugee children and children seeking asylum and provides that States shall take measures to ensure that they benefit from the rights contained therein.<sup>45</sup>

#### 2.2.3.2. International agreements on particular topics that affect refugees

UNHCR's work on treaties has been oriented toward ensuring that international agreements on specific topics that affect the rights of refugees properly protect refugees' rights. UNHCR's work on such agreements has not only been of a varied nature, but also has covered a range of subjects. The following examples illustrate the breadth of UNHCR's involvement.

UNHCR contributed to the creation of the Protocol to the 1952 Universal Copyright Convention,<sup>46</sup> which concerns the rights of authorship to works created by authors, musicians, and others, and provides additional content to article 14 of the 1951 Refugee Convention. UNHCR submitted memoranda and participated as an observer in the Inter-Governmental Copyright Conference concerning the 1952 Universal Copyright Convention and proposed that refugees should be covered by the

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<sup>44</sup> See UNHCR Memorandum from Gilbert Jaeger (Director of Protection) to the UNHCR Regional Representative at UN Headquarters, New York, concerning 'Possible Convention on the Rights of the Child' (16 Oct. 1978) (available in UNHCR archives and on file with author).

<sup>45</sup> Convention on the Rights of the Child, art. 22.1, 20 Nov. 1989, 1577 U.N.T.S. 3.

<sup>46</sup> Protocol 1, Annexed to the 1952 Universal Copyright Convention, 6 Sept. 1952, 216 U.N.T.S. 132. The 1952 Universal Copyright Convention has been updated with the 1971 Universal Copyright Convention, 24 July 1971, 943 U.N.T.S. 178. Refugees are protected under Protocol 1 to this agreement

agreement; while the conference decided not to cover refugees in the primary agreement, it adopted a Protocol covering them instead.<sup>47</sup>

UNHCR also submitted memoranda and participated as an observer in the discussions of the text of the 1956 Convention on the Recovery Abroad of Maintenance Obligations.<sup>48</sup> With respect to the 1963 Vienna Convention on Consular Relations, UNHCR circulated a memorandum related to certain issues under discussion at the UN Conference on the Convention and informally advocated its views to delegations.<sup>49</sup> In connection with the 1982 Maintenance of Social Security Rights Convention, drafted under the auspices of the International Labour Organisation, UNHCR participated in the negotiations of the agreement, during which it made interventions, thereby ensuring that the definition of a refugee would be consistent with that in the 1951 Refugee Convention as well as the 1967 Protocol.<sup>50</sup>

More recently, UNHCR was involved in the drafting of two Protocols that supplement the 2000 United Nations Convention against Organised Crime: the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the 2000 Protocol against the

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<sup>47</sup> UNHCR, *Report of the UNHCR and Addendum*, ¶ 7, U.N. Doc. A/2126 (1952).

UNHCR, *Report of the UNHCR*, ¶ 37, U.N. Doc. A/2394 (1953).

<sup>48</sup> *Id.*, at ¶ 41.

<sup>49</sup> Memorandum from the UNHCR, submitted to the United Nations Conference on Consular Relations, U.N. Doc. A/CONF.25/L.6 (4 March 1963) and Letter from High Commissioner Schnyder to Ambassador Baron C.H. von Platen, Permanent Rep. of Sweden to the European Office of the United Nations (available in UNHCR archives and on file with author). Vienna Convention on Consular Relations, 24 Apr. 1963, 596 U.N.T.S. 261.

<sup>50</sup> UNHCR Memorandum from Mr. P.M. Moussalli, Director of International Protection, to G.J.L. Coles, Chief, Conference and Treaties Section, concerning Report on the elaboration of the ILO Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security (12 July 1982) and attached Memorandum from N. Cronstedt to G.J.L. Coles, Chief, Conference and Treaties Section, concerning Report on the elaboration of the ILO Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security (25 June 1991) (both documents are available in UNHCR archives and are on file with author). 1982 International Labour Organisation Convention No. 157 Maintenance of Social Security Rights Convention <http://www.ilo.org/ilolex/english/convdisp1.htm>.

Smuggling of Migrants by Land, Air and Sea.<sup>51</sup> UNHCR issued an inter-agency note on the Protocols, delivered an oral statement and informally provided its views to delegations in order to ensure that the Protocols do not negatively affect States' rights under the 1951 Refugee Convention.<sup>52</sup> As a result, both Protocols contain a savings provision which provides that nothing in the Protocols “shall affect the other rights, obligations and responsibilities of States and individuals under international law, including” the 1951 Refugee Convention and the 1967 Protocol and the principle of *non-refoulement* contained therein.<sup>53</sup>

#### 2.2.3.3. Regional instruments

UNHCR's contributions relating to the creation of international refugee law also have extended to key regional conventions concerning refugees or which affect refugees.<sup>54</sup> UNHCR had been carrying out this work for

<sup>51</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (15 Nov. 2000) and Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (15 Nov. 2000).

<sup>52</sup> See UNHCR, *Note by the United Nations High Commissioner for Human Rights, International Organization for Migration, United Nations High Commissioner for Refugees, and the United Nations Children's Fund on the Protocols concerning migrant smuggling and trafficking in persons* (21 Feb. – 3 March 2000) (on file with author) and UNHCR, *UNHCR Summary Position on the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime* (11 Dec. 2000), <http://www.unhcr.org/refworld/docid/3ae6b3428.html>.

<sup>53</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *supra* note 51, at art. 14 and Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, *supra* note 52, at art. 19.

<sup>54</sup> In addition to UNHCR's contributions to regional conventions, UNHCR has also assisted with the drafting of the key non-binding refugee instruments in Central America, the Cartagena Declaration on Refugees, OAS/Ser.L/V.II.66, doc. 10, rev.1, at 190-3 (1984), and for Asia-Africa, the Principles concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee, *The Rights of Refugees: Report of the Committee and Background Materials* 207-19 (1966). UNHCR cosponsored the colloquium at which the Cartagena Declaration was drafted. See GUY GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 38 (footnote 119) (3rd ed., 1998). As regards UNHCR's

some time, but EXCOM and the General Assembly explicitly encouraged UNHCR to become involved in the creation of regional refugee standards in 1997 at the time of the adoption of the Amsterdam Treaty in the European Union.<sup>55</sup> UNHCR's efforts in this area are particularly apparent from its work in Africa and Europe.<sup>56</sup>

#### 2.2.3.3.1 Africa

In Africa, UNHCR provided substantial input into the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>57</sup> At the time of the drafting of this Convention, the 1951 Refugee Convention, with its time and geographic limitations, did not apply to refugees in Africa. Therefore, with the massive movement of refugees in Africa arising out of problems associated with decolonization and independence struggles, the Organisation of Africa Unity (now the African

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participation in the drafting of the 1966 Principles adopted by the Asian-African Legal Consultative Committee, see pages 3-4 of the Legal Bulletin annexed to UNHCR, *Legal Bulletin No. 5*, UNHCR/IOM/26/65; UNHCR/BOM/32/65 (15 Dec. 1965) and Asian-African Legal Consultative Committee, *THE RIGHTS OF REFUGEES: REPORT OF THE COMMITTEE AND BACKGROUND MATERIALS* 3-5, 208-10 (1966). In the case of the former, UNHCR's involvement included the preparation of a working paper for the Colloquium on the Declaration and participation in the Colloquium. See Jackson, *supra* note 22, at 400, 395-6. For the latter instrument, UNHCR assisted the secretariat of the Asian-African Legal Consultative Committee with procuring relevant materials and the preparation of a background note which formed the basis for discussions. Asian-African Legal Consultative Committee, *THE RIGHTS OF REFUGEES: REPORT OF THE COMMITTEE AND BACKGROUND MATERIALS* 3 (1966).

<sup>55</sup> EXCOM Conclusion 81, endorsed by the General Assembly, "[e]ncourages States and UNHCR to continue to promote, where relevant, regional initiatives for refugee protection and durable solutions, and to ensure that regional standards which are developed conform fully with universally recognized standards and respond to particular regional circumstances and protection needs". EXCOM Conclusion 81 (XLVIII), ¶ k, 1997 endorsed by G.A. Res. 52/103, ¶ 1, U.N. Doc. A/RES/52/103 (12 Dec. 1997).

<sup>56</sup> UNHCR's work in this area has also extended to the Organisation for American States. For example, UNHCR proposed the *non-refoulement* provision contained in the American Convention on Human Rights applicable to Member States of the Organisation for American States. See Richard Plender, *The Present State of Research Carried Out By the English-Speaking Section of the Centre for Studies and Research, in THE RIGHT OF ASYLUM* 1989: HAGUE ACADEMY OF INTERNATIONAL LAW 63, 73 (1990).

<sup>57</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept. 1969, 1001 U.N.T.S. 45.

Union) began a process, in 1964, that would eventually lead to a regional convention to cover refugees in Africa.<sup>58</sup>

UNHCR proposed and was then invited to participate in the process after two unsatisfactory drafts of the convention were completed and as a result, the Deputy High Commissioner of UNHCR and two staff members from the Legal Division attended the meetings of the Council of Ministers and the Heads of State and of governments as observers in October 1965.<sup>59</sup> Therefore, UNHCR was integrally involved in the drafting process.<sup>60</sup> UNHCR's involvement helped ensure that the OAU refugee convention, the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa, complemented rather than conflicted with the 1951 Refugee Convention. UNHCR was successful in reaching this objective since the preamble of the 1969 OAU Refugee Convention, states that the 1951 Refugee Convention "constitutes the basic and universal instrument relating to the status of refugees".<sup>61</sup>

#### 2.2.3.3.2 *Europe*

From its early years up through the present, UNHCR has played a significant role in the creation of European treaties that impact upon refugees' rights. After the inception of the 1951 Refugee Convention, UNHCR contributed to the creation of European treaties on specific issues

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<sup>58</sup> Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 Int'l. J. Refugee L. 185, 190-1 (1991).

<sup>59</sup> Holborn, *supra* note 6, at 186.

<sup>60</sup> Arboleda, *supra* note 58, at 193.

<sup>61</sup> *Id.*, at 9th preambular ¶. UNHCR continues to participate in the drafting of conventions in this region. For example, UNHCR recently participated in the drafting of the Convention on the Protection and Assistance of Internally Displaced Persons and the 2006 Protocol on Protection and Assistance to Internally Displaced Persons. In the case of the Convention, UNHCR was a member of the panel of Experts that worked on the draft and for the Great Lakes Protocol, the Division of International Provision made contributions to the drafting process. Interview of Chaloka Beyani, London School of Economics and Political Science, 13 June 2008.

such as visa requirements and social security, which also affected refugees. For example, UNHCR undertook efforts toward the codification of a right for refugees to travel between Western European countries without a visa, in a similar manner to nationals, which resulted in the creation of the 1959 European Agreement on Abolition of Visas for Refugees.<sup>62</sup> UNHCR also contributed to the formulation of protocols to several European social security agreements in order to ensure the extension of such protection to refugees.<sup>63</sup>

Moreover, UNHCR contributed to the drafting of the 1957 European Convention on Extradition.<sup>64</sup> Importantly, UNHCR advocated the inclusion of a provision to protect a refugee from being returned to his/her home country where the home country's request "for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person's position may be prejudiced for any of these reasons."<sup>65</sup>

UNHCR also provided input into the drafting of the 1990 Dublin Convention<sup>66</sup> agreed to by the 12 States, which were members of the European Economic Community, the forerunner of the European Union.<sup>67</sup> Under the 1990 Dublin Convention, European Economic Community Member States established rules among themselves for determining which State is responsible for considering an application for asylum.

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<sup>62</sup> For a good summary of this process see Holborn, *supra* note 6, at 206-10.

<sup>63</sup> Schnyder, *supra* note 29, at 408. Holborn, *supra* note 6, at 220-22. UNHCR, *Report of the UNHCR*, ¶ 38-9, U.N. Doc. A/2394 (1953).

<sup>64</sup> 1957 European Convention on Extradition, 13 Dec. 1957, C.E.T.S. 24.

<sup>65</sup> Holborn, *supra* note 6, at 217-8.

<sup>66</sup> Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 19 Sept. 1996, C.274 [known as the "Dublin Convention"].

<sup>67</sup> The European Economic Community was established by the Treaty of Rome in 1957. The European Union was created pursuant to the 1992 Maastricht Treaty.

More recently, UNHCR's participation in the European context has related to harmonization of asylum policies by Member States of the European Union. Pursuant to the 1997 Treaty of Amsterdam, the Treaty Establishing the European Community was amended to include a provision whereby Member States agreed to establish directives on certain asylum-related topics within a five year period from the date the Treaty of Amsterdam entered into force, which was 1 May 1999.<sup>68</sup> Directives are not treaties, yet EU Member States are obliged to implement directives, drafted by the European Commission and then amended and approved by the Council of Ministers of the European Union, through their national laws.<sup>69</sup>

As UNHCR was not invited by the EU Member States to participate in the formal discussions of the asylum provisions in the 1997 Treaty of Amsterdam or the various asylum directives, UNHCR used indirect channels to funnel its advice into the discussion processes. For example, with respect to the asylum provisions in the 1997 Treaty of Amsterdam, UNHCR provided its advice in writing and informally through government representatives. Regarding the directives, UNHCR has worked to influence the content of all of the directives, which thus far include directives on minimum procedural standards for granting and withdrawing refugee status,<sup>70</sup> minimum standards for the determination and content of

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<sup>68</sup> The Treaty of Amsterdam amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, 10 Nov. 1997, 1997 O.J. (C. 340). For the relevant consolidated text see Consolidated Version of the Treaty Establishing the European Community, Title IV, arts. 63, 67, 24 Dec. 2002, 2002 O.J. (C.325).

<sup>69</sup> UNHCR also has welcomed South America/MERCOSUR's Declaration of Rio de Janeiro of 10 Nov. 2000, which expresses the intention of the regional trading bloc organisation to harmonize refugee laws in the region. See UNHCR Briefing Notes: UNHCR welcomes South America/Mercosur declaration, 17 Nov. 2000, <http://www.unhcr.org/news/NEWS/3ae6b82358.html>. Mercosur State Members include Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay.

<sup>70</sup> Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005/85, 2005 O.J. (L 326) 13 (EC).

refugee status and complementary protection<sup>71</sup> and on reception procedures and temporary protection.<sup>72</sup> UNHCR met with Commission staff drafting the directives, provided its comments formally to the Commission and has given advice on amendments. UNHCR also provided its comments directly to member States, took its comments to European Parliament members to have them advocate UNHCR's positions, and submitted its views on the general approach taken on asylum to the EU Council of Ministers from time to time. Thus, while UNHCR would have preferred to be included in the formal process, since it was not, it had to resort to influencing a wide variety of actors in the EU context who could impact upon the drafting process. UNHCR did derive a number of benefits from its advocacy work; UNHCR's positions became better known to a wider audience and although UNHCR's positions were not always adopted, UNHCR established contacts in the EU context and demonstrated its expertise and therefore relevance for further discussions of refugee and asylum matters.

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<sup>71</sup> Council Directive 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, 2004/83, 2004 O.J. (L 304) 12 (EC).

<sup>72</sup> Council Directive laying down minimum standards for the reception of asylum seekers in Member States, 2003/9, 2003 O.J. (L31) 18 (EC) and Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Council Directive 2001/55, 2001 O.J. (L212) 12 (EC). Also pursuant to Article 63 of the Consolidated Version of the Treaty Establishing the European Community, the Dublin Convention was replaced by Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (EC) No. 343/2003 of 18 Feb. 2003, 2003 O.J.



## 2.3. UNHCR'S MANDATE CONCERNING THE EFFECTIVENESS OF REFUGEE LAW

### 2.3.1 Effectiveness

UNHCR's international protection function not only concerns the development of conventions for the protection of refugees, discussed above, but also actions to ensure that States provide the necessary protection to refugees in the absence of protection from their States of origin. The assurance of such legal protection through refugee law is termed “effectiveness” in this thesis. The term “effectiveness” has been consciously utilized instead of the traditional term “compliance” because it is more appropriate to this study. The term compliance, which means “a state of conformity or identity between an actor’s behaviour and a specified rule”,<sup>73</sup> is too limited in its scope and too formalistic to adequately capture the comprehensiveness of UNHCR’s work and the nature of States’ actions.

The traditional approach to compliance involves an evaluation as to whether a State’s actions conform to standards contained in an agreement.<sup>74</sup> Compliance with a rule may be sought to protect the interest that the rule is supposed to serve or to protect the particular rule as well as “the entire system of rules.”<sup>75</sup> States’ conduct related to refugees would be contrasted primarily with the provisions in the 1951 Refugee Convention. With the onset of the crisis in refugee protection and refugee law, discussed in chapter 4, UNHCR was confronted with States’ actions that violated express provisions of the 1951 Refugee Conventions, in particular on *non-refoulement*. Such problems were not limited, as compliance

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<sup>73</sup> Kal Raustiala and Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538, 539 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds., 2002).

<sup>74</sup> ROGER FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 20 (1981).

<sup>75</sup> *Id.*, at 20-21.

problems often are in the human rights area, to developing and nondemocratic States or States in the midst of war or internal conflict,<sup>76</sup> but also extended to developed, democratic States.

A simple assessment of whether States comply with the provisions of the 1951 Refugee Convention overlooks the fact that States' conduct may conform with some provisions of the Convention that contain fairly low standards, such as those concerning the juridical status of the refugee and assistance from the State, while contravening compliance with the key provision of the Convention, the *non-refoulement* provision, which is the precursor to the refugees' ability to access other protections.<sup>77</sup> Thus, a high level of compliance with the 1951 Refugee Convention's provisions may mask the lack of the essential protection by a State against *non-refoulement*.

A focus on compliance with particular norms for the protection of refugees can overlook the effect such norms may have on States' behaviour.<sup>78</sup> The interaction that UNHCR has with States, in particular those that are not in compliance with refugee law norms, may produce changes in their interests that result in their obeying such legal standards over time.<sup>79</sup>

In addition, the 1951 Refugee Convention contains significant gaps and ambiguities, discussed in detail in chapter 4, which render the 1951 Refugee Convention's applicable legal standards insufficient in ensuring protection. For example, a State that does not have a refugee status determination procedure or detains asylum-seekers who lack legal

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<sup>76</sup> George W. Downs & Andrea W. Trento, *Conceptual Issues Surrounding the Compliance Gap*, in *INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP* 21 (Edward C. Luck and Michael W. Doyle, eds., 2004).

<sup>77</sup> 1951 Refugee Convention, *supra* note 7, at Chap. II "Juridical Status", IV "Welfare", and art. 33 "Prohibition of expulsion or return ('refoulement').

<sup>78</sup> Raustiala and Slaughter, *supra* note 73, at 539.

<sup>79</sup> See Harold Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2598, 2659 (1997). Koh finds that with a transnational legal process approach there is a dynamic interaction that occurs, which results in the internalization of the rule by States.

documents could be considered to be in technical compliance with the standards in the 1951 Refugee Convention, since the 1951 Refugee Convention does not contain any explicit provisions on the procedures that States must adopt and article 31, concerning refugees unlawfully in the country of refuge, does not mention detention. Yet, the State would not necessarily be providing sufficient legal protection to the person.

Even to the extent that international human rights, humanitarian, and criminal law provisions are incorporated into the refugee law framework, as discussed in chapter 5, the general wording of many of the provisions, particularly in the human rights area, may render the determination as to whether a State has complied open to debate. There also is no clear agreement between States, on the one hand, and UNHCR, on the other, as to which provisions are applicable to refugees. Furthermore, the focus on compliance with the 1951 Refugee Convention overlooks the significance of soft law standards, such as UNHCR doctrinal positions and EXCOM conclusions, and other types of actions that are discussed in chapters 5 and 6. Moreover, since States may comply with a treaty's provisions, even where they have not implemented the provisions in national law, the term is too narrow for the purpose of this study.

The terms "compliance" and "effectiveness" are closely related, but are not identical, and their differences have been a subject of recent research in the international relations field on environmental regimes.<sup>80</sup> In the environmental area, the objective is not to eliminate pollution, as laudable as that might be even if it is not practical at this time, but instead to change States' behaviour with respect to activities that pollute. Thus, environmental scholars use the term in connection with changes in

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<sup>80</sup> Raustiala and Slaughter, *supra* note 73, at 539, 553.

behaviour by States that are caused by and further the goals of the agreement.<sup>81</sup>

This thesis applies the term “effectiveness” in a manner similar to that used in connection with environmental law. Effectiveness, as used herein, is considered to be the capacity to produce an effect or result. In the case of refugees, the result to be produced is the refugees’ enjoyment of their “fundamental rights and freedoms without discrimination” as stated in the preamble to the 1951 Refugee Convention.<sup>82</sup> While their legal protection starts with the provisions of the 1951 Refugee Convention, it also includes not only other agreements, but also soft law, and a general humanitarian approach to refugees. Thus, the effectiveness of refugee law is not just the technical adherence by States to applicable treaty standards, but a more global consideration of whether the protection of refugees is the product of States’ actions.

As refugee law forms the basis for UNHCR’s interaction with States to ensure protection, refugee law treaties serve as the departure point for UNHCR’s work to ensure the effectiveness of refugee law. The concept of the effectiveness of refugee law then can be divided into three sub-areas that facilitate the evaluation of UNHCR’s responsibilities and work: ratification, implementation, and application. These categories represent States commitment to the international obligations (ratification), that such international law obligations are incorporated into national law (implementation), and that States apply the standards in practice (application).

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<sup>81</sup> David G. Victor, Kal Raustiala, & Eugene B. Skolnikoff (eds.), *Introduction and Overview, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* 8 (1998).

<sup>82</sup> 1951 Refugee Convention, *supra* note 7, at 1<sup>st</sup> preambular ¶.

These three areas provide a structure for the evaluation of UNHCR's actions relating to the effectiveness of international refugee law. Specifically, UNHCR's mandated responsibilities as well as the work that UNHCR performed in connection with these responsibilities, prior to the refugee crisis in the 1980's, are discussed below.

### 2.3.2 Ratification of Treaties

The first step in ensuring the effectiveness of international refugee law is to have States bound by the treaties that provide for the international protection of refugees.<sup>83</sup> Pursuant to its statutory mandate, UNHCR shall provide for the protection of refugees by "[p]romoting the ...ratification of international conventions for the protection of refugees".<sup>84</sup> This responsibility is derived from the work of UNHCR's predecessors as well as the mandate of the High Commissioner of the League of Nations for Refugees.<sup>85</sup> The General Assembly and EXCOM have adopted resolutions and conclusions, respectively, which reiterate the importance of UNHCR's responsibility, most often specifically mentioning States' accession to the 1951 Refugee Convention and the 1967 Protocol,<sup>86</sup> but do not provide any specifics as to the content of this responsibility.

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<sup>83</sup> Some persons believe that "there still may exist expectations which a State, under the principle of good faith and under consideration of international comity, has to fulfil before it decides to make use of its sovereign right not to ratify." See HANNA BOKOR-SZEGO, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* 158 (Dr. Sándor Simon trans., 1978) (citing the UNITAR Study Series No. 2 at 4).

<sup>84</sup> UNHCR Statute, *supra* note 3, ¶ 8(a).

<sup>85</sup> See section 1.3.1.1 'Tracing the historical foundations' in Chapter 1. The mandate of the High commissioner of the League of Nations for Refugees is contained in the Report of the Council Committee Appointed to Draw Up a Plan for International Assistance to Refugees, 19 O.J.L.N. 365-6 (1938).

<sup>86</sup> For example, see G.A. Res. 56/137, ¶ 3, U.N. Doc. A/RES/56/137 (19 Dec. 2001); G.A. Res. 55/74, ¶ 4 U.N. Doc. A/RES/55/74 (4 Dec. 2000); and G.A. Res. 53/125, ¶ 3, U.N. Doc. A/RES/53/125 (9 Dec. 1998), which expressly reiterate UNHCR's responsibility in this area. Other General Assembly resolutions have endorsed the EXCOM conclusion that mentions such responsibility. For example, see G.A. Res. 52/103, ¶ 1, U.N. Doc. A/RES/52/103 (12 Dec. 1997) which endorses EXCOM Conclusion 81(XLVIII), ¶ m, 1997. With respect to EXCOM Conclusions see EXCOM Conclusion 90 (LII), ¶ b, 2001 and EXCOM Conclusion 87 (L), ¶ e, 1999.

Yet, the meaning of UNHCR's responsibility to promote the ratification of conventions is much more evident than for UNHCR's responsibility of "promoting the *conclusion*... of international conventions".<sup>87</sup> Since treaty ratification is done by States, UNHCR is to encourage States to ratify relevant treaties.<sup>88</sup> In the General Assembly resolution to which UNHCR's Statute was annexed, the General Assembly called upon governments to become parties to international conventions for the protection of refugees, as part of their cooperation with UNHCR.<sup>89</sup>

### 2.3.3 Implementation of Treaties in National Law

Once a State has ratified or acceded to a convention providing protection to refugees, the convention needs to become part of the State's domestic law.<sup>90</sup> If the obligations undertaken by State signatories of the 1951 Refugee Convention/1967 Protocol are not part of national law, then the protection of refugees' rights cannot be assured within the State. UNHCR, therefore, encourages implementation in order to ensure the protection of refugees and to facilitate its supervisory work.

Some countries, such as France and many African countries, have a national rule that provides for the automatic incorporation of a treaty's provisions into national law without the adoption of a national statute,

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<sup>87</sup> See section 2.1.1 'UNHCR's mandate' in chapter 2. Italics added.

<sup>88</sup> This approach is essentially an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" as provided in Article 31 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 331. Although the 1951 Refugee Convention was drafted prior to the 1969 Vienna Convention, since the provisions on interpretation in the Vienna Convention are considered to be reflective of customary international law, they can be applied to the 1951 Refugee Convention.

<sup>89</sup> G.A. Resolution 428(V), ¶ 2(a) (14 Dec.1950).

<sup>90</sup> As stated by Heinrich Triepel and translated by Antonio Cassese: "To fulfil its task, international law has to turn continuously to domestic law. Without the latter it is in many respects utterly impotent.... similarly a single rule of international law brings about a number of rules of domestic law, all pursuing the same end: to implement international law within the framework of States". Antonio Cassese, *Modern Constitutions and International Law*, 192 Recueil des Cours, Hague Academy of International Law, 335, 342 (1985).

whereas other countries must adopt either specific, such as in the case of the UK and Israel, or general, as in Italy and Germany, national legislation for the treaty's provisions to become effective in national law.<sup>91</sup> The actual means used by a State to implement its treaty obligations has traditionally been regarded as an internal matter by international courts and supervisory bodies when evaluating alleged breaches of treaty obligations; however, this may be changing.<sup>92</sup>

Paragraph 8(a) of UNHCR's Statute, which contains the essential elements of UNHCR's duties related to international refugee law, does not establish any responsibility for UNHCR related to States' implementation of conventions for the protection of refugees.<sup>93</sup> The drafters considered two provisions proposed by the Secretary-General that would have assigned UNHCR an active role in this area. One suggestion was for UNHCR to consult with States in order to further the implementation of their international law obligations.<sup>94</sup> Another draft provision prescribed a reporting obligation by UNHCR concerning States' implementation of rules for the protection of refugees, which implicitly, according to the Secretary-General, would entail obtaining such information from governments.<sup>95</sup>

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<sup>91</sup> ANTONIO CASSESE, *INTERNATIONAL LAW* 226 (2<sup>nd</sup> ed., 2005).

<sup>92</sup> Eileen Denza, *The Relationship between International and National Law*, in *INTERNATIONAL LAW*, 419-20 (Malcolm Evans, ed., 2003).

<sup>93</sup> See section 1.3.1 of chapter 1.

<sup>94</sup> Specifically, the Secretary-General proposed that UNHCR should “consult with governments with a view to facilitating the application of conventions”. Despite his use of the word “application”, he was referring to implementation since he noted that with this responsibility, “[t]he international service would be empowered to consult with, and make suggestions to, governments regarding the legislative and administrative measures which might appear necessary to secure the implementation of the provisions of international conventions in force at any one time.” Report of the Secretary-General, 35, U.N. Doc. A/C.3/527 and Corr.1 (26 Oct. 1949). [hereinafter “Report of the Secretary-General”].

<sup>95</sup> The Secretary-General’s proposal provided that UNHCR would “report upon the carrying out of conventions and agreements in force and to further their implementation.” The Secretary-General noted that “[t]his function would involve obtaining information on legislative and administrative measures taken with a view

In the end, the drafters of UNHCR's Statute set aside the Secretary-General's first proposal and adopted a version of his second. However, the ideas of a reporting obligation by UNHCR and its solicitation of information from governments on their implementation of standards for the protection of refugees were placed in two different provisions. With respect to the latter, UNHCR's Statute provides that UNHCR has the responsibility to "[o]btain[] from Governments information concerning ... the laws and regulations concerning" refugees.<sup>96</sup> UNHCR's reporting obligation is contained in a separate provision that provides that the "High Commissioner shall report annually to the General Assembly through the Economic and Social Council",<sup>97</sup> but does not elaborate at all upon the content of such reports. The duty to implement refugee law treaty obligations clearly fell upon the States themselves, as expressed in the General Assembly resolution to which the Statute of the Office of UNHCR was annexed; States are to "tak[e] the necessary steps of implementation" of conventions relating to refugees and provide the High Commissioner with information on "laws and regulations concerning [refugees]" as part of their cooperation with UNHCR.<sup>98</sup>

The extent to which implementation was viewed at the time as within the sole purview of States, and not an obligation that needed to be articulated, is illustrated by the drafting history of the 1951 Refugee Convention. A proposed article providing an obligation for States to "take all the legislative or other measures necessary under the rules of their constitution for the application of the present Convention" was considered but rejected during the drafting process.<sup>99</sup> The British representative believed that the article should be deleted since he said it was "an innovation in

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to carrying out the conventions and agreements". Report of the Secretary General, *Id.*, at 36.

<sup>96</sup> UNHCR Statute, *supra* note 3, at ¶8(f).

<sup>97</sup> *Id.*, at ¶11.

<sup>98</sup> G.A. Res. 428(V), ¶ 2(a), (h) (14 Dec. 1950).

<sup>99</sup> ATLE GRAHL-MADSEN, COMMENTARY ON THE REFUGEE CONVENTION 1951: ARTICLES 2-11, 13-37, at 256 (UNHCR, ed., 1997).



international treaties" and that "[i]t was further pre-supposed that such measures would be taken at the discretion of the State within a reasonable time" and that "the article was superfluous, since the Convention laid down provisions which, in the case of most countries, were already covered by domestic law".<sup>100</sup>

The final wording of the 1951 Refugee Convention concerning States' obligations to provide information on their implementation of the Convention creates two separate obligations for States. First, States are to provide UNHCR

in the appropriate form with information and statistical data requested concerning:...(b) the implementation of [the 1951 Refugee Convention], and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees<sup>101</sup>

so that UNHCR may "make reports to the competent organs of the United Nations".<sup>102</sup> This provision implies that UNHCR must request the information from States; States are not obligated to provide such information automatically to UNHCR. States have a second reporting obligation under the 1951 Refugee Convention; they must provide the Secretary-General, without his/her making a request, with "the laws and regulations which they may adopt to ensure the application" of the 1951 Refugee Convention.<sup>103</sup> Thus, while the 1951 Refugee Convention does not obligate States to implement the provisions of the agreement, it does provide reporting measures so that implementation of the Convention may be monitored by UNHCR.

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<sup>100</sup> *Id.*

<sup>101</sup> 1951 Refugee Convention, *supra* note 7, at art. 35(2)(b) and (c),

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, at art 36.

#### 2.3.4 Application

States' actual application of their international refugee law obligations is the final step in ensuring that international refugee law becomes effective and that the necessary protection is provided to refugees. At the time of the creation of UNHCR, enforcement was not a significant concern of the United Nations; as Oscar Schachter has stated:

"[t]he busy world of law-making and law-applying carried on pretty much without serious consideration of means of ensuring compliance. Some international lawyers dismissively referred to enforcement as a political matter outside the law."<sup>104</sup>

Consequently, the drafters of UNHCR's Statute did not provide any sort of structured system to sanction non-compliance.<sup>105</sup> However, they did provide UNHCR with a supervisory responsibility over international conventions for the protection of refugees.

Specifically, as part of its international protection function, UNHCR is to supervise the application "of international conventions for the protection of refugees".<sup>106</sup> However, as with the term "promotion", the meaning of "supervision" is nowhere defined in UNHCR's Statute and in ordinary usage, has a very general meaning.<sup>107</sup> Therefore, the phrase does not elucidate either the scope or the content of UNHCR's work in this area.

UNHCR has not encouraged either EXCOM or the General Assembly to provide concrete guidance on the scope and precise content of its

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<sup>104</sup> Oscar Schachter, *The UN Legal Order: An Overview*, in UNITED NATIONS LEGAL ORDER 1, 15 (Oscar Schachter & Christopher Joyner, eds., 1995).

<sup>105</sup> The critique of the international legal system's lack of enforcement mechanisms is derived from a comparison with domestic legal systems. See for example, Antonio Cassese's textbook that states: "[i]n domestic legal orders enforcement strictly denotes all those measures and procedures, mostly taken by public authorities, calculated to impel compliance, by forcible and other coercive means, with the law." Cassese, *supra* note 91, at 296.

<sup>106</sup> UNHCR Statute, *supra* note 3, ¶ 8(a).

<sup>107</sup> To "supervise" means "[g]eneral management, direction, or control; oversight, superintendence." XVII THE OXFORD ENGLISH DICTIONARY 245 (2<sup>nd</sup> ed., 1989).

supervisory work. However, as with UNHCR's "international protection" function and its responsibility to "promote[] the conclusion... of international conventions", the lack of concrete guidance on the content of UNHCR's supervisory responsibility allowed UNHCR to have a great deal of flexibility in determining the parameters and content of the work it could carry out to fulfil the responsibility.

EXCOM has given UNHCR only minimal guidance related to its supervisory responsibility. Specifically, EXCOM noted the "need for constant advice by UNHCR on the practical application" of the 1951 Refugee Convention and the 1967 Protocol,<sup>108</sup> which naturally flows from UNHCR's responsibility to supervise these agreements. EXCOM also requested UNHCR to ensure "adequate levels of ... supervision of programmes for prevention and protection from sexual abuse and exploitation, including through physical presence".<sup>109</sup> This latter reference to UNHCR's supervisory work concerns UNHCR's monitoring work of the physical protection needs of women refugees and asylum-seekers in an operational setting.

#### 2.4. UNHCR'S WORK CONCERNING THE EFFECTIVENESS OF REFUGEE LAW

The work that UNHCR performs in fulfilling its statutory responsibilities related to the effectiveness of international refugee law is not as easily describable as with its contributions to the development of international refugee law, namely the promotion of the conclusion and amendments of international conventions for the protection of refugees. UNHCR's work

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<sup>108</sup> See EXCOM Conclusion 19 (XXXI), ¶ d, 1980.

<sup>109</sup> See EXCOM Conclusion 98 (LIV), ¶ b(iii), 2003. Also see ¶ a(iv) of the same conclusion which provides that the "supervision", among other aspects should be "designed and implemented in a manner that reduces the risk of sexual abuse and exploitation". EXCOM Conclusion 98 (LIV), ¶ a(iv), 2003.

related to the creation of new agreements and amendments to others can be verified through written documents and most often leads to a concrete result, either a new treaty or provisions protecting the rights of refugees. In the area of effectiveness, in contrast, UNHCR's activities are ongoing, can be formally or informally undertaken, and do not always produce a clear result.

Despite the fluidity between the actions and the consequences of UNHCR's work in the area of effectiveness, a brief overview is provided below of the activities UNHCR has performed concerning States' ratification of international conventions for the protection of refugees and States' implementation and application of the provisions of such conventions.

#### 2.4.1 Work Related to Ratifications and Accessions

UNHCR has striven, since its creation, to ensure the ratification of and accession to the fundamental convention for the protection of refugees, the 1951 Refugee Convention, and accessions to its 1967 Protocol, which removed the geographic and temporal limitations of the Convention.<sup>110</sup> Even in its first annual report to the General Assembly in 1951, UNHCR noted and welcomed the ratification of the 1951 Refugee Convention by States and expressed the hope that other States would do the same.<sup>111</sup>

UNHCR staff members, in UNHCR headquarters in Geneva and in branch offices throughout the world, have undertaken efforts to encourage States to ratify or accede to the 1951 Refugee Convention and the 1967 Protocol. UNHCR also has been instrumental in the creation of General Assembly resolutions and EXCOM conclusions that acknowledge ratifications and accessions and encourage other States to ratify and accede to the 1951

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<sup>110</sup> 1951 Refugee Convention, *supra* note 7. 1967 Protocol, *supra* note 37.

<sup>111</sup> UNHCR, *Report of the UNHCR*, ¶ 42, 44, UN. Doc. A/2011(1951).

Refugee Convention and the 1967 Protocol<sup>112</sup> as well as an EXCOM conclusion that requests States to remove reservations to these instruments.<sup>113</sup>

Yet, UNHCR's work in this area has not been limited to the 1951 Refugee Convention and the 1967 Protocol. UNHCR has encouraged States to ratify and accede to other conventions for the protection of refugees, many of which were drafted with UNHCR's input. These include the 1956 Convention on the Recovery Abroad of Maintenance Obligations,<sup>114</sup> the 1957 Agreement relating to Refugee Seamen, the 1959 European Agreement on Abolition of Visas for Refugees, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.<sup>115</sup> Therefore, as with UNCHR's responsibility to promote the conclusion of such agreements, discussed above in section 2.2.3, UNHCR interpreted paragraph 8(a) in its Statute as authorizing its promotion of States' ratification of not just international refugee law agreements, but also other agreements. Also, UNHCR did so without obtaining clarification from the General Assembly or EXCOM.

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<sup>112</sup> For example, the General Assembly has adopted resolutions regularly requesting States to accede to the 1951 Convention and the 1967 Protocol. See for the most recent General Assembly resolution, G.A. Res. 60/129, ¶ 3, U.N. Doc. A/RES/60/129 (16 Dec. 2005). EXCOM regularly acknowledges accessions to the 1951 Refugee Convention and the 1967 Protocol and calls on other States also to do so. See for example, EXCOM Conclusion 102 (LVI), ¶ c, 2005 and EXCOM Conclusion 99 (LV), ¶ c, 2004.

<sup>113</sup> EXCOM Conclusion 79 (XLVII), ¶ e, 1996.

<sup>114</sup> Holborn, *supra* note 6, at 226.

<sup>115</sup> For example, see UNHCR, *Note on International Protection*, ¶ 11, 14, U.N. Doc. A/AC.96/377 (6 Sept. 1967). In addition, when the Convention on the Declaration of the Death of Missing Persons (1950) entered into force in 1952, High Commissioner Goedhart and the Director-General of the IRO sent a letter "to governments expressing the hope that more of them would accede to the Convention." Letter from UNHCR and the Office of the Director-General of the International Refugee Organisation (26 Apr. 1951) (UNHCR archives and on file with author).

## 2.4.2 Work Related to Implementation

UNHCR has carried out its statutory responsibility to obtain information from governments about their laws and regulations on refugees<sup>116</sup> by requesting the actual legislation and administrative regulations adopted by States, both informally and formally. One of the formal means was a questionnaire sent by UNHCR to all signatory States of the 1951 Refugee Convention and the 1967 Protocol. UNHCR sent questionnaires in both 1970 and 1990. However, only a limited number of States responded to them.<sup>117</sup> In the case of the 1970 questionnaire, which was sent to 63 States, UNHCR had received only 38 replies as of 1974<sup>118</sup> and only 27 States out of nearly 100 States had responded by 1992 to the 1990 questionnaire.<sup>119</sup> Thus, States demonstrated that they did not consider completion of the questionnaires as either significantly important for UNHCR or obligatory and thus few States completed them. This response by States to UNHCR's request implicitly indicated States' unwillingness to have UNHCR integrally involved in assuring States' implementation of refugee law agreements.

In spite of the general view of States, at the time of the drafting of the 1951 Refugee Convention, that the implementation of treaties was a matter to be left to the responsibility of States, UNHCR did carry out activities to encourage States to implement their refugee law obligations. For example, as UNHCR noted in its report to the General Assembly in 1958:

Largely owing to the close cooperation which has developed between UNHCR Branch offices and the governmental authorities,

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<sup>116</sup> UNHCR Statute, *supra* note 3, ¶ 8(f).

<sup>117</sup> The second part of the 1990 questionnaire also treats States' application of international refugee law standards in national law systems. UNHCR, *Information Note on Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR Doc. EC/SCP/66 (22 July 1991).

<sup>118</sup> UNHCR, *Note on International Protection Addendum 2: Implementation of the 1951 Convention and 1967 Protocol on the status of refugees – preliminary report*, ¶ 4, U.N. Doc. A/AC.96/508/Add.2 (26 Sept. 1974).

<sup>119</sup> UNHCR, *Report of the UNHCR*, ¶13, U.N. Doc. A/47/12 (1992).

new legal provisions have been adopted for the benefit of refugees, and measures have continued to be taken for the implementation of important articles of the 1951 Convention....<sup>120</sup>

In UNHCR's 1979 Annual Report to the General Assembly, UNHCR explicitly noted that it was "encouraging the adoption by States of appropriate legislative and/or administrative measures to ensure that the provisions of these international instruments are effectively implemented."<sup>121</sup> UNHCR also instigated the adoption by EXCOM, in one of its first conclusions, of a recommendation that UNHCR "continue to follow up on the ... implementation of the 1951 Refugee Convention and 1967 Protocol".<sup>122</sup>

Thus, the close relationship between UNHCR and governmental authorities meant that UNHCR could encourage States' implementation of the 1951 Refugee Convention and the 1967 Protocol, despite the lack of an explicit statutory responsibility concerning promotion of such implementation and the fact that UNHCR's responsibility was limited to obtaining information from governments on laws and regulations concerning refugees. The authority for UNHCR to promote States' implementation, as will be seen in section 3.1 of chapter 6, can be derived from its implied powers.

#### 2.4.3 Work Related to Application

UNHCR's supervisory work, which concerns States' application of their international law obligations, has always permeated the organisation's international protection role. UNHCR monitors how States treat refugees, what policies they adopt, and the problems that refugees encounter within

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<sup>120</sup> See for example, UNHCR, *Report of the UNHCR*, ¶ 11, U.N. Doc. A/3828/Rev.1 (1958).

<sup>121</sup> UNHCR, *Report of the UNHCR*, ¶12, U.N. Doc. A/34/12 (1979).

<sup>122</sup> EXCOM Conclusion 2 (XXVII), ¶c, 1976. Also see EXCOM Conclusion 41 (XXXVII), ¶ g, 1986. Moreover, UNHCR was requested by EXCOM to prepare a detailed report on implementation of the 1951 Refugee Convention and the 1967 Protocol for consideration by EXCOM's Sub-Committee of the Whole on International Protection of Refugees. See EXCOM Conclusion 57 (XL), ¶ d, 1989.

countries, whether related to their legal status, or to their basic rights, such as shelter, food, and health. UNHCR then must analyze this information to determine whether it is consistent with international law standards. In some cases, it is evident when a violation has occurred; in other cases, UNHCR must conduct a more detailed investigation of the situation and carefully consider the applicable legal standards.

Where there is a violation, then UNHCR must provide some feedback to the concerned State to change its conduct. There is a spectrum of responses that UNHCR can undertake ranging in formality and import. The local office can verbally advise the concerned officials, a *note verbale* can be sent as a formal communication, and/or meetings can be held among UNHCR officers, from local or regional offices or UNHCR headquarters in Geneva, with various levels of government officials. For the most important issues, the matter can be communicated to the UN General Assembly, through UNHCR's Note on International Protection or its Annual Protection Report.

UNHCR's participation in national asylum determination procedures also can be considered as part of UNHCR's supervisory responsibility.<sup>123</sup> UNHCR's role has varied depending upon the experience, need, and structure of the State's asylum procedures. For example, in Belgium, UNHCR was the sole determination authority until the responsibility was transferred to the Belgian authorities. Even after the transfer, UNHCR provided its views on issues, upon request as well as when it deemed it necessary. Its activities range from the determination of refugee status, in countries such as in Morocco and Turkey, and involvement of a UNHCR staff member in the government's status determination bodies, to the provision of information and views to the government status determination

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<sup>123</sup> In addition, UNHCR, like its predecessor, the International Refugee Organisation, solely determines whether an individual qualifies as a refugee under its statutory mandate.



bodies. UNHCR's involvement in refugee status determination continues today with UNHCR playing a role in nearly 65 countries.<sup>124</sup>

## 2.5. CONCLUSION

States granted UNHCR the authority, through its Statute, to participate in the development of a refugee law framework, specifically to promote the conclusion of international conventions for the protection of refugees and propose amendments thereto. UNHCR's role was primarily a promotional one; it encouraged States to action, but had no ability to coerce or force States to do so. UNHCR's discretionary scope was primarily limited to the determination of the content of its responsibilities.

UNHCR utilized the ambiguity in its Statute, related to States' conclusion and ratification of "international conventions for the protection of refugees", to extend the legal framework beyond international refugee law treaties to other conventions that apply to refugees as well as regional refugee instruments. UNHCR did so without obtaining prior formal clarification or authorization from the General Assembly or guidance from EXCOM. This practice is consistent with that of UNHCR's predecessors, which also promoted agreements even in the absence of an explicit mandate to do so, as seen in chapter 1.

UNHCR also devised a wide-ranging practice of specific means to carry out its work related to the development of international refugee law. These included: identification of the issue which requires a treaty among States, proposing a meeting to discuss the issue, making substantive proposals for the content of the provisions of the treaty, commenting on

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<sup>124</sup> UNHCR, *Note on International Protection*, ¶ 25, U.N. Doc. A/AC.96/1024 (12 July 2006). The information provided by UNHCR is as of 2005. UNHCR's submission of *amicus curiae* is discussed in section 6.4.3 in chapter 6.

proposed provisions, participating in the negotiations of the draft agreement, informally and formally communicating its views to States and bodies working on draft agreements, and actually drafting provisions for such agreements.

Thus, UNHCR played a crucial role in the development of early international agreements in the refugee law framework. However, States appeared to be less willing to permit UNHCR to coordinate and direct their formulation of standards in regional fora. In both the African and European contexts, UNHCR was not presumed to be a direct participant in the negotiations among States. States appeared to desire to maintain their control over the formulation of regional instruments. While UNHCR became a full participant in the African process, UNHCR was limited to providing its opinions informally during the European harmonization of asylum standards process. By limiting UNHCR's participation, the concerned States could restrict the rights granted to asylum-seekers and refugees.

In addition, not wishing to leave the assurance of the protection of refugees to the unfettered discretion of States, the drafters of UNHCR's Statute provided UNHCR with a crucial role with respect to ensuring the effectiveness of international refugee law, traditionally a domestic domain where State sovereignty dominates. UNHCR's approach was focused on the 1951 Refugee Convention and to ensure that once it was in force in a State at a national law level, that States complied with its provisions.

UNHCR's mandated responsibilities in this area included the promotion of States' ratification of international conventions for the protection of refugees and the supervision of States' application of such conventions, but not the promotion of States' implementation of these same conventions. UNHCR's mandate related to implementation was limited to obtaining information from governments on their laws and regulations

relating to refugees. Nevertheless, UNHCR established the precedent of encouraging States to implement the provisions of the 1951 Refugee Convention and the 1967 Protocol. In doing so, UNHCR went beyond the express terms of its mandate to supplement its responsibilities.

UNHCR's work related to ratifications has primarily focused on encouraging the ratification and accession to the 1951 Refugee Convention and accession to the 1967 Protocol. However, UNHCR also encouraged the ratification and accession to other instruments for the protection of refugees within the context of an ambiguous authorization under its Statute and without express authorization from the General Assembly or EXCOM.

UNHCR's supervisory responsibilities, with respect to States' application of their international refugee law obligations, were not given specific content by the drafters of its Statute and UNHCR did not attempt to have the parameters of these responsibilities drawn by the General Assembly and EXCOM. Thus, UNHCR exercised its own discretion to determine how to carry out such supervision. Activities employed by UNHCR range from monitoring and gathering information on States' policies, legislation, and actions to raising concerns about inconsistencies with international refugee law informally and through more formal channels, such as the General Assembly. UNHCR also has been involved in diverse ways in refugee status determination.

In sum, UNHCR established a practice concerning the performance of its responsibilities, related to international refugee law, in a manner that was responsive to the practical situations that it faced. The interpretation of the ambiguous wording of its responsibilities and its proactive approach to implementation were minor adjustments made by UNHCR to more assuredly fulfil its international protection role. UNHCR's work related to refugee law can be characterized as a normative one, with its focus on treaties, in particular the 1951 Refugee Convention. States remained the

primary actors in the creation of legal instruments for the protection of refugees and in taking measures to ensure the effectiveness of refugee law. However, UNHCR's mandated responsibilities could be modified and further amplified and augmented, as shown in chapter 3.

## CHAPTER 3: FLEXIBILITY IN UNHCR'S INTERNATIONAL LAW ROLE

### 3.1. INTRODUCTION

Given the various permutations in the nature and structure of refugee organisations prior to UNHCR and the political context in which refugee flows occur, UNHCR requires flexibility in order to remain relevant in addressing refugee situations. States in the General Assembly accorded UNHCR a statutory mandate that provides several ways for States to alter UNHCR's responsibilities and work. At the same time, UNHCR, as an autonomous institution, has means available to it to assist it in adapting to new situations and issues.

This chapter initially considers the formal means for States to modify UNHCR's mandate and to provide guidance to the organisation. These include the General Assembly's assignment of additional responsibilities and policy guidance to UNHCR as well as the advice of a formal advisory body comprised of States, the Executive Committee of the High Commissioner's Programme, known as "EXCOM".

Then the informal means, or techniques adopted by UNHCR to enable the organisation to adjust and adapt its role to changing circumstances and needs, will be studied in this chapter. These include UNHCR's interpretation of its international protection function and UNHCR doctrinal positions. As the validity and acceptance of UNHCR's techniques are closely linked to their legal authority, the bases for such authority also are examined. Moreover, given the growing importance of UNHCR doctrinal positions to the organisation's work, the legal nature and development of doctrine are reviewed.

The consideration of the formal and informal means to modify UNHCR's responsibilities related to refugee law will then serve as the basis for understanding and evaluating the evolution in such responsibilities, which evolution is the subject of chapters 5 and 6, following the onset of the refugee law crisis, discussed in chapter 4.

### 3.2. STATUTORY MEANS FOR UNHCR'S ROLE TO EVOLVE

UNHCR's drafters presciently provided UNHCR with several means for its statutory role, including its responsibilities related to international refugee law, to evolve. The first is for the General Assembly to supplement UNHCR's statutory responsibilities by the adoption of a resolution authorizing a new area of work. Specifically, paragraph 9 of UNHCR's Statute states that "[t]he High Commissioner shall engage in such additional activities ... as the General Assembly may determine".<sup>1</sup> In doing so, the Statute emphasizes a right to modify UNHCR's mandate that the General Assembly legally has even in the absence of an express statutory provision.<sup>2</sup>

The General Assembly has been quite active in extending UNHCR's mandate both *ratione personae* and *ratione materiae*. It has directed UNHCR to protect and assist certain categories of persons, other than refugees, as defined in the 1951 Refugee Convention, including: (i.) persons fleeing situations of conflict;<sup>3</sup> (ii.) returnees, that is, refugees who

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<sup>1</sup> See paragraph 9 of the Statute of the Office of the United Nations High Commissioner for Refugees, contained in the Annex to UN General Assembly Resolution 428(V) of 14 Dec. 1950. G.A. Res. 428(V) (14 Dec. 1950) [hereinafter "UNHCR Statute"].

<sup>2</sup> As noted in footnote 56 of chapter 1, the General Assembly has the authority under articles 7 and 22 of the UN Charter to create subsidiary organs, and thus, UNHCR. Therefore, the General Assembly can modify UNHCR's statutory mandate.

<sup>3</sup> See, for example, the 1994 General Assembly resolution which calls upon States "to assist and support the High Commissioner's efforts to continue to provide international protection and assistance ... to persons who have been forced to flee or to remain outside their countries of origin as a result of danger to their life or freedom

have returned to their country of origin,<sup>4</sup> (iii.) persons who have fled to another location within their country as a result of a fear of persecution or situations of conflict, termed "internally displaced persons", <sup>5</sup> and (iv.) stateless persons.<sup>6</sup> The General Assembly also has added substantial new responsibilities to UNHCR's mandate, including the provision of assistance to refugees and others of concern to UNHCR, involvement in development-oriented assistance, and early warning activities related to new massive flows of refugees and displaced persons.<sup>7</sup>

A second means, under UNHCR's Statute, to facilitate the evolution of UNHCR's role, is for the General Assembly to provide policy guidance to UNHCR. Pursuant to paragraph 3 of UNHCR's Statute, "[t]he High Commissioner shall follow policy directives given him by the General Assembly".<sup>8</sup> Such policy directives are legally binding on UNHCR.

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owing to situations of conflict". G.A. Res. 49/169, ¶ 6, U.N. Doc. A/RES/ 49/169 (23 Dec. 1994).

<sup>4</sup> The General Assembly has called upon UNHCR to undertake action within the country of origin relating to returnees. A 1994 General Assembly resolution "calls upon the High Commissioner, in cooperation with States concerned, to promote, facilitate and coordinate the voluntary repatriation of refugees, including the monitoring of their safety and well-being on return". *Id.*, at ¶ 9.

<sup>5</sup> See for example, G.A. Res. 47/105, ¶ 14, U.N. Doc. A/RES/ 47/105 (16 Dec. 1992) which welcomes "efforts by the High Commissioner, on the basis of specific requests from the Secretary-General or the competent principal organs of the United Nations and with the consent of the concerned State, to undertake activities in favour of internally displaced persons". Also see G.A. Res. 48/116, ¶ 12, U.N. Doc. A/RES/48/116 (20 Dec. 1993) which "[r]eaffirms its support for the High Commissioner's efforts... to provide humanitarian assistance and protection to persons displaced within their own country".

<sup>6</sup> See for example, G.A. Res. 3274 (XXIX), ¶ 1 (9 Dec. 1974).

<sup>7</sup> UNHCR's Statute provides for it to administer funds which it receives for assistance to refugees and to distribute them to the "public agencies which [it] deems best qualified to administer such assistance." UNHCR Statute, *supra* note 3, ¶ 10. However, UNHCR is now authorized to provide assistance to refugees and other categories of persons. See for example, G.A. Res. 39/139, ¶ 7, U.N. Doc. A/RES/ 39/139 (14 Dec. 1984). With respect to UNHCR's role related to development-oriented assistance, see G.A. Res. 39/140, ¶ 7, U.N. Doc. A/RES/ 39/140 (14 Dec. 1984) and with respect to early warning see for example, G.A. Res. 50/182, ¶ 9, U.N. Doc. A/RES/50/182 (22 Dec. 1995).

<sup>8</sup> The United Nations Economic and Social Council may also provide policy guidance to UNHCR, pursuant to paragraph 3 of UNHCR's Statute. However, ECOSOC resolutions related to UNHCR have rarely directed UNHCR to undertake specific action, but have more often recognized UNHCR's work or requested UNHCR to provide information on a particular refugee situation.

Thus, the General Assembly has requested UNHCR to take special steps to ensure the protection of certain groups of refugees, such as refugee children, women, and elderly refugees<sup>9</sup> and encouraged UNHCR to improve international burden and responsibility sharing.<sup>10</sup>

Admittedly, the General Assembly does not make any clear distinction in the wording of its resolutions to indicate whether it has assigned additional activities to UNHCR or provided policy guidance. However, for the purpose of attempting to differentiate the two, the former could be characterised as the intention to add new responsibilities and the latter as an elaboration of UNHCR's activities related to its mandated responsibilities.

A third means under UNHCR's Statute to ensure that UNHCR's role remains relevant is through guidance provided to UNHCR by the Executive Committee of the High Commissioner's Programme, generally referred to simply as EXCOM. EXCOM, created in 1958 by the United Nations Economic and Social Council, at the request of the General Assembly, in order to provide advice to UNHCR,<sup>11</sup> is presently comprised

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<sup>9</sup> Recent General Assembly resolutions on refugee children include G.A. Res. 61/137, ¶ 13, 14, U.N. Doc. A/RES/61/137 (19 Dec. 2006); G.A. Res. 60/129, ¶ 19, U.N. Doc. A/RES/60/129 (16 Dec. 2005); G.A. Res. 58/150, ¶ 10, U.N. Doc. A/RES/58/150 (22 Dec. 2003); G.A. Res. 56/136, ¶ 6, 7, 10, U.N. Doc. A/RES/56/136 (19 Dec. 2001) and on refugee women: G.A. Res. 61/137, ¶ 13, 14, U.N. Doc. A/RES/61/137 (19 Dec. 2006); G.A. Res. 60/129, ¶ 19, U.N. Doc. A/RES/60/129 (16 Dec. 2005) and G.A. Res. 55/74, ¶ 21, U.N. Doc. A/RES/55/74 (4 Dec. 2000) and on elderly refugees: G.A. Res. 56/135, ¶ 28, U.N. Doc. A/RES/56/135 (19 Dec. 2001). UNHCR also has been called upon to ensure that the refugee's family is protected, "including through measures aimed at reuniting family members separated as a result of refugee flight". G.A. Res. 55/74, ¶ 24, U.N. Doc. A/RES/55/74 (4 Dec. 2000).

<sup>10</sup> G.A. Res. 61/137, ¶ 24, U.N. Doc. A/RES/61/137 (19 Dec. 2006); G.A. Res. 60/129, ¶ 10, U.N. Doc. A/RES/60/129 (16 Dec. 2005).

<sup>11</sup> E.S.C. Res. 672 (XXV), U.N. Doc. E/3123 (1958). G.A. Res. 1166 (XII), ¶ 5, U.N. Doc. A/3805 (26 Nov. 1957). Paragraph 4 of UNHCR's Statute states that the Economic and Social Council may establish "an advisory committee on refugees, which shall consist of representatives of States Members and States non-members of the United Nations...." Pursuant to this provision, an Advisory Committee on Refugees was established in 1951 with responsibility for providing advice to the High Commissioner, upon request. The structure, composition and responsibilities of the advisory committee, foreseen under UNHCR's Statute, have varied during the years. The first advisory committee was created following UNHCR's establishment



of 79 States. States that are not EXCOM members also may attend EXCOM meetings. UNHCR, pursuant to its Statute, can request EXCOM's advice with respect to its functions.<sup>12</sup> Given that UNHCR's responsibilities related to international refugee law are activities that UNHCR is statutorily mandated to carry out in order to fulfil its international protection function, UNHCR may seek EXCOM's advice that relates to these responsibilities as well.

EXCOM's advice is provided in the form of conclusions on international protection. Although it is not entirely clear from a legal perspective whether EXCOM's conclusions are legally binding upon UNHCR<sup>13</sup> without endorsement from the General Assembly,<sup>14</sup> UNHCR acts as

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in 1951 and was called the Advisory Committee on Refugees. It operated until 1954 when it was replaced by the United Nations Refugee Fund Executive Committee (UNREF). UNREF was in turn replaced by the present EXCOM.

<sup>12</sup> UNHCR Statute, *supra* note 1, ¶ 1. Specifically, paragraph 1 of UNHCR's Statute provides that "[i]n the exercise of [UNHCR's] functions, more particularly when difficulties arise, and for instance with regard to any controversy concerning the international status of these persons, the High Commissioner shall request the opinion of the advisory committee on refugees". The conclusions sometimes indicate that the guidance is for States or for UNHCR and at other times does not specify to whom it is directed.

<sup>13</sup> Holborn states that EXCOM has "the authority to issue directives to the HC in the field of material assistance programs, but in matters concerning international protection could only give advice" without providing the legal basis for such view. Holborn, 1 LOUISE HOLBORN, REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972 92 (1975). Jerzy Sztucki takes the opposite view in finding that "[s]ince the resolutions of the General Assembly on internal matters of the Organization have binding effect, and given that the Committee's involvement in protection matters has been confirmed in practice, such recommendations and requests must be regarded as binding on the High Commissioner, especially bearing in mind General Assembly resolutions 1673(XVI) and 1783(XVII)." Jerry Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 Int'l. J. Refugee L. 285, 298-9 (1989).

<sup>14</sup> The current practice of the General Assembly is to endorse the EXCOM conclusions, see for example G.A. Res. 64/127, ¶ 1, U.N. Doc. A/RES/64/127 (18 Dec. 2009), which endorses EXCOM's 60<sup>th</sup> report. Report of the 60th session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/64/12/Add.1 (23 Oct. 2009). In the past, the General Assembly has had a mixed practice of endorsing EXCOM conclusions. At times, it has specifically endorsed certain EXCOM conclusions. For example, see G.A. Res. 45/140, ¶ 15, U.N. Doc. A/RES/45/140 (14 Dec. 1990), which "[e]ndorses the conclusion on the note on international protection" adopted by EXCOM at its 41<sup>st</sup> session. At other times, the General Assembly has used the content of a particular EXCOM conclusion in its resolution without naming

though they are by consistently following such advice. EXCOM, like the General Assembly, has provided advice related to groups of refugees, including refugee women, children and elderly persons,<sup>15</sup> and has provided guidance on UNHCR's protection work, on topics ranging from the registration of refugees to solutions, such as resettlement.<sup>16</sup>

UNHCR, however, is not a passive recipient of changes to its mandate, made by the General Assembly, nor the policy guidance provided by the General Assembly and EXCOM. UNHCR is an active participant in articulating the changes that should be made as well as the formulation of those changes by the General Assembly and similarly for the policy guidance provided to it by the General Assembly and EXCOM. Staff in UNHCR Headquarters in Geneva actually propose issues and draft proposals for EXCOM conclusions and General Assembly resolutions and therefore, UNHCR plays an important role in determining not only the content of such documents, but also the timing of when changes are made

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or referring specifically to the conclusion. See, for example, G.A. Res. 48/116, ¶ 16, U.N. Doc. A/48/116 (20 Dec. 1993) which “[r]eaffirms the importance of promoting and disseminating refugee law and principles for the protection of refugees”. This language mirrors the content of EXCOM Conclusion 71 (XLIV), ¶ aa, 1993, although the General Assembly does not specifically cite the conclusion.

<sup>15</sup> EXCOM has adopted numerous conclusions specifically addressing concerns about refugee women and children. With respect to refugee women, these include: EXCOM Conclusion 105 (LVII) 2006; EXCOM Conclusion 98 (LIV) 2003; EXCOM Conclusion 73 (XLIV) 1993; EXCOM Conclusion 64 (XLI) 1990; and EXCOM Conclusion 60 (XL) 1989. Conclusions which specifically cover refugee children include: EXCOM Conclusion 107 (LVIII) 2007; EXCOM Conclusion 105 (LVII) 2006; EXCOM Conclusion 84 (XLVIII) 1997; and EXCOM Conclusion 59 (XL) 1989. UNHCR also addressed issues relating to refugee women and children in its general conclusions as well as in the context of other topics. See for example the 2005 conclusion on local integration and the 2004 conclusion on mass influxes. EXCOM Conclusion 104 (LVI), ¶ o-p, 2005 and EXCOM Conclusion 100 (LV), ¶ d, 2004. The elderly have been covered by recent EXCOM conclusions as well. See for example EXCOM Conclusion 104 (LVI), ¶ o-p, 2005 and EXCOM Conclusion 90 (LII), ¶ i, 2001.

<sup>16</sup> On the registration of refugees, see EXCOM Conclusion 102 (LVI), ¶ v, 2005 and EXCOM Conclusion 91 (LII), ¶ c and d, 2001, and on resettlement see EXCOM Conclusion 102 (LVI), ¶ s, 2005, EXCOM Conclusion 99 (LV), ¶ x, 2004 and EXCOM Conclusion 90 (LII), ¶ n, 2001. The adoption and use of conclusions by EXCOM have been under discussion within EXCOM and UNHCR. See UNHCR, *Review of the Use of UNHCR Executive Committee Conclusions on International Protection*, PDES/2008/03 (UNHCR Policy Development and Evaluation Service, 10 April 2008).

to its mandate or certain policy guidance provided. As a result, it is logical that UNHCR would follow EXCOM's policy guidance in practice even if such guidance is not legally binding, as noted above.

### 3.3. UNHCR'S INTERPRETATION OF ITS INTERNATIONAL PROTECTION FUNCTION

UNHCR is to carry out its statutory responsibilities related to international refugee law as part of its international protection function. Yet, as seen in section 3.1.2 of chapter 1, UNHCR's Statute does not establish a definition for the term "international protection", but only provides a list of the activities that UNHCR should perform in order to provide for the protection of refugees.<sup>17</sup> UNHCR has adopted an approach to the concept of international protection, described below, that reflects an institutional flexibility, but also contains a core meaning.

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<sup>17</sup> The meaning of "international protection" also has been considered by a number of scholars. See Guy Goodwin-Gill, *The Language of Protection*, 1 Int'l. J. Refugee L. 6, 6 (1989). In addition, Arthur Helton finds that protection actually means "legal protection". See Arthur Helton, *What is Refugee Protection?*, Int'l. J. Refugee L. (Special Issue) 119, 119 (1990), and Arthur Helton, *What is Refugee Protection?: A Question Revisited*, in PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES AND HUMAN RIGHTS, 19, 20 (Niklaus Steiner, Mark Gibney, Gil Loescher, eds., 2003).). Walter Kälin has considered UNHCR's protection role as part of his analysis of the content of UNHCR's supervisory role in his note for the Global Consultations process. In the note, Kalin utilises B.G. Ramcharan's definition of 'international protection' from B.G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: FORTY YEARS AFTER THE UNIVERSAL DECLARATION 17, 20-1 (1989). "International protection denotes 'the intercession of an international entity either at the behest of a victim or victims concerned, or by a person on their behalf, or on the volition of the international protecting agency itself to halt a violation of human rights' or 'to keep safe, defend, [or] guard' a person or a thing from or against a danger or injury." Walter Kalin, *Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 613, 619 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003). For an extensive consideration of 'international protection' from an organisational and legal perspective see GUY GOODWIN-GILL AND JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 421-61(3rd ed., 1998).

UNHCR has ascribed various meanings to the concept of "international protection" over the years. For example, after nearly ten years of operation, the High Commissioner, Auguste Lindt, described UNHCR's international protection role as helping refugees "to overcome the disabilities caused by their lack of national protection and ... safeguarding their rights and legitimate interests".<sup>18</sup> At a time of crisis in international refugee law, UNHCR noted in its 1986 Note on International Protection that:

International protection involves first of all legal protection, i.e. seeking to ensure that refugees are treated in accordance with internationally accepted standards including protection against *refoulement*, freedom from discrimination and the enjoyment of economic and social rights. Secondly, it entails action to promote the development of standards for the treatment of refugees through the adoption of appropriate legal provisions on the international level and/or in national legislation.<sup>19</sup>

More recently, in its Note on International Protection for the year 2000, issued on the 50<sup>th</sup> anniversary of UNHCR's creation, UNHCR states: "the challenge of international protection is to secure admission, asylum, and respect by States for basic human rights".<sup>20</sup>

Although these descriptions by UNHCR of its international protection function vary, they nevertheless contain several common features. First, they all have at their core the importance of ensuring respect for the rights of refugees. International protection furnishes refugees, who by definition

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<sup>18</sup> UNHCR, *Report of the UNHCR, Appendix I*, ¶ 12, U.N. Doc. A/4104/Rev.1 (1959). A similar definition was provided in the Secretary-General's report, concerning the organisation and functions of UNHCR. The report states that "[t]he international legal protection of refugees consists essentially of efforts on the part of an international service to ensure that refugees ... shall not be subject to legal and social disabilities arising from their peculiar status." Report of the Secretary-General, ¶ 19, U.N. Doc. A/C.3/527 and Corr.1 (26 Oct. 1949).

<sup>19</sup> UNHCR, *Note on International Protection*, ¶ 2, U.N. Doc. A/AC.96/680 (5 July 1986).

<sup>20</sup> UNHCR, *Note on International Protection*, ¶ 9, U.N. Doc. A/AC.96/930 (7 July 2000). This Note, written in connection with UNHCR's 50<sup>th</sup> anniversary, focuses on how UNHCR meets particular protection challenges in order to fulfil its international protection role.

are persons who no longer benefit from the legal protection of their country of origin, a substitute legal protection under international law.

To be effective in practice, international protection for refugees, afforded by international treaties, must be transformed into a legal obligation for the State of asylum, through the State's ratification of international treaties for the protection of refugees, the implementation into national law, and the practical application of the treaties' provisions for protection. Thus, UNHCR must work to ensure that there are international standards to protect refugees and that States, which bear the primary responsibility for the legal protection of refugees,<sup>21</sup> render the standards contained in international law effective at the national level.

Second, the diverse descriptions demonstrate that international protection is more than just a legal notion; it is, as EXCOM has stated, "both a legal concept and at the same time very much an action-oriented function".<sup>22</sup> The General Assembly has reiterated the active nature of international protection:

International protection of refugees is a dynamic and action-oriented function ... that includes, in cooperation with States and other partners, the promotion and facilitation of, inter alia, the admission, reception and treatment of refugees in accordance with internationally agreed standards and the ensuring of durable, protection-oriented solutions.<sup>23</sup>

Walter Kalin, in his final paper for the Global Consultations process, provides a broad range of activities endorsed by EXCOM and agreed to by States as part of UNHCR's international protection role.<sup>24</sup> Not only does

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<sup>21</sup> The primary responsibility of States for the legal protection of refugees was articulated by the General Assembly in the very resolution that created UNHCR. Specifically, the General Assembly recalls the Economic and Social Council request to States "to provide the necessary legal protection for refugees". G.A. Res. 319, 3rd preambular ¶ (3 Dec. 1949).

<sup>22</sup> EXCOM Conclusion 95 (LIV), ¶ b, 2003.

<sup>23</sup> G.A. Res. 60/129, ¶ 9, U.N. Doc. A/RES/60/129 (16 Dec. 2005).

<sup>24</sup> Kalin, *supra* note 18, at 622-24. For example, he includes UNHCR's monitoring, report, cooperation with States in designing operational responses, and advisory and

international protection permeate UNHCR's fieldwork, but it also is the cornerstone of the organisations' institutional structure. The import of international protection within UNHCR is readily apparent today from the presence of a Deputy High Commissioner for Protection who oversees the Division of International Protection, which is arguably the most influential section within UNHCR.

Most significantly, and of crucial importance to UNHCR's ability to adjust and adapt its role to changing circumstances and needs, these various formulations of "international protection" by UNHCR convey a sense of the expansive construction given to the term by the organisation. As Holborn states: "from the beginning the practice of the UNHCR has been to ignore the obscurities of par. 8 and to rely instead on the broad phrasing of the paragraph and the general tenor of the Statute to support its contention that international protection should be interpreted broadly."<sup>25</sup> The general formulation of "international protection" in UNHCR's Statute, which has at its core the importance of ensuring the rights of refugees, then serves as guidance for UNHCR's operational work; UNHCR exercises a great deal of latitude in deciding what activities are appropriate and conducive to the fulfilment of its international protection role and thus, its international refugee law responsibilities.

Thus, UNHCR's construction of "international protection" as both a legal and an active function, which has as its base the protection of refugees, provides UNHCR with a sufficiently flexible and expansive meaning for "international protection" so as to permit UNHCR to modify and enhance its activities related to both the development and effectiveness of international refugee law.

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consultative work with national asylum or refugee status determination procedures, as examples of UNHCR's activities that have been agreed to by States.

<sup>25</sup> Holborn, *supra* note 14, at 100.

### 3.3.1 Authority for UNHCR to Define and Perform Additional Responsibilities: Implied Powers

UNHCR's ability to determine what specific activities it will carry out to fulfil its international protection function, and how it shall perform them, provides UNHCR with an important tool to enable its role and responsibilities, including those related to the development and effectiveness of international refugee law, to evolve, as noted above. However, UNHCR must have the legal capacity to do so.

The law of international organisations has struggled with the notion of the basis of an organisation's actions that extend beyond the express provisions of its constitution or treaty. This struggle epitomizes the inherent tension that exists between two underlying notions in international organisations law: first, that international organisations are creations of States and are granted authority by States to carry out certain responsibilities but remain subject to the interests of those States; and second, that once international organisations are created, they have legal personality and autonomy separate from States.

Unlike States, which are presumed to be able to act freely unless international law imposes a limitation, the most prevalent view of international organisations' powers is that international organisations can only act to the extent that they have been granted specific powers.<sup>26</sup> In order to provide a legal imprimatur to organisations' actions beyond such powers, the theory of implied powers is the traditional theory employed. The theory balances States' grant of authority to organisations with the independence needed by such organisations to carry out the purposes assigned to them. Therefore, the prevailing view of international scholars is that the authority of an organisation is derived from its constitution or

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<sup>26</sup> HENRY SCHERMERS & NEILS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 155 (4th ed., 2003).

statute, termed express powers, but that the organisation has implied powers derived from the express powers that permit it a degree of independence and flexibility in determining what actions it can carry out without having explicit authorization from States for every such action. Implied powers could be said to give effect to the organisation's purposes, by reading a term "into the organisation's statute".<sup>27</sup>

The implied powers theory is legally grounded in several advisory opinions of the International Court of Justice related to the powers of the United Nations organs. The Reparations for Injuries Suffered in the Service of the United Nations case is considered the seminal case for the implied powers theory with several subsequent ICJ cases, namely the Effect of Awards of Compensation made by the United Nations Administrative Tribunal case, the Certain Expenses of the United Nations case, and the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) case, cited as further support for the theory.<sup>28</sup> However, the lack of clarity in the Court's articulation of

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<sup>27</sup> Krzysztof Skubiszewski, *Implied Powers of International Organisations*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 855 (ed., Yoram Dinstein, 1989). The reading of a term into the organisation's statute is not just useful, but necessary, since "it is never possible to lay down an exhaustive list of powers of the organisation in a constitution, *inter alia* because any organisation needs to respond to developments in practice which cannot be foreseen when it is created." Schermers & Blokker, *supra* note 26, at 175-76.

<sup>28</sup> In the Reparations for Injuries Suffered in the Service of the United Nations Case, the Court considered whether the UN had the ability to bring a claim for injuries by a State to a UN employee and held that "[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." Reparations for Injuries Suffered in the Service of the United Nations Case, Advisory Opinion, 1949 I.C.J. 174, 182 (11 Apr.) [hereinafter "Reparations case"].

In the Effect of Awards of Compensation made by the United Nations Administrative Tribunal case, the Court found, in determining whether the General Assembly had the power to establish an administrative tribunal that it could do so where it was "essential to ensure the efficient working of the Secretariat....Capacity to do this arises by necessary intendment out of the Charter." Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion 1954 I.C.J. 47, 57 (13 July).



the doctrine has provided much fodder for the debate among scholars as to whether such powers are based on the purposes, the functions, or the explicit responsibilities assigned to the organisation<sup>29</sup> and whether the implied power must be of a necessary or essential nature.<sup>30</sup>

While the theory of implied powers became increasingly prominent during the 1990's at a time of significant development of international organisations, some scholars believe it is now on the wane.<sup>31</sup> One of the few alternative theories is that of inherent powers, which argues that organisations, just by virtue of being such, possess the powers necessary to perform all acts related to their purposes. This approach starts from a

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The Court went even further in the *Certain Expenses of the United Nations* case, in which it was determined whether expenses for peace-keeping were "expenses of the Organization" under article 17(2) of the UN Charter. The Court found that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization". *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 168 (20 July) [hereinafter "*Certain Expenses case*"]. Moreover, in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* case, the Court in considering whether the General Assembly's termination of South Africa's mandate over Namibia was within its competence also considered the Security Council's powers and noted that "The only limitations [on its responsibility for the maintenance of peace and security] are the fundamental principles and purposes found in Chapter I of the Charter." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 52 (21 June). Note not all scholars mention the Namibia case.

<sup>29</sup> Schermers & Blokker, *supra* note 26, at 177.

<sup>30</sup> Schermers & Blokker, *supra* note 26, at 179. Another three limitations identified by the authors are: (i) the existence of certain explicit powers in the same area, (ii) fundamental rules and principles of international law may not be violated and (iii) the distribution of the functions within the organisation may not change as a result of the implied powers. *Id.*, at 179-80. Skubiszewski finds for example that this limitation leads to a clearer demarcation of the limits on the scope of implied powers, *supra* note 27, at 861.

<sup>31</sup> Jan Klabbbers suggests that the "doctrine has passed its heyday" as evidenced by the ICJ advisory opinion on the World Health Organization's question with respect to the legality of nuclear weapons. JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW*, 69 (2<sup>nd</sup> ed, 2009). *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66 (8 July). The ICJ, after reviewing the object and purpose of the organisation, found that the organisation did not have the competence to address the legality of the use of nuclear weapons and to ask the Court about such legality. *Id.*, at 66. Klabbber also cites recent decisions by the Court of Justice in the European Community.

presumption that an organisation, like a State, has full powers, rather than starting from a more limited view that the powers of the organisation are derived from the organisation's constitution or statute. With the inherent powers theory, the statute or constitution serves as the limitation on the powers.

Drawing on the decision of the International Court of Justice in the *Certain Expenses* case, which is the primary legal basis cited for the inherent powers theory, if the action taken by the organisation is "appropriate for the fulfilment of one of the stated purposes of the UN, the presumption is that such action is not *ultra vires* the Organisation".<sup>32</sup> Thus, to state the latter more clearly by expressing the Court's holding in the alternative, if the organisation's action does not fulfil a stated purpose then it is *ultra vires* and is not legally authorized. However, it cannot be presumed that just because the mandate does not explicitly prohibit an activity that the organisation is authorized to carry it out<sup>33</sup> and therein lays the greatest weakness in the inherent powers theory.

As the implied powers theory remains the most cohesive legal justification for the actions of an organisation, which extend beyond the terms of its mandate, it is used herein. The requirement that such activities be necessary and essential to the performance of the organisation's functions or powers, derived from Judge Hackworth's dissent in the ICJ *Reparations* case,<sup>34</sup> is not utilized in the analysis since this introduces a subjective determination that might vary depending upon whether States or UNHCR made the assessment. With international protection as its primary function, the notion of implied powers affords UNHCR wide discretion to

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<sup>32</sup> *Certain Expenses* case, *supra* note 28. This position has been most notably articulated by Professor Syersted. See FINN SEYERSTED, *COMMON LAW OF INTERNATIONAL ORGANIZATIONS* 65-70 (2008).

<sup>33</sup> Klabbers, *supra* note 31, at 67.

<sup>34</sup> Judge Hackworth stated that "[p]owers not expressed cannot freely be implied. Implied powers flow from a grant of express powers, are limited to those that are 'necessary' to the exercise of powers expressly granted." *Reparations* case, *supra* note 28, at 198.

determine what activities will permit it to first, further the responsibilities assigned to it under paragraph 8(a) of its Statute concerning the development and effectiveness of international refugee law, and second, fulfil its purpose of international protection.

### 3.4. UNHCR DOCTRINE

UNHCR also developed another technique, termed "UNHCR doctrine" in this thesis, which has significantly contributed to the evolution in UNHCR's role related to the development and effectiveness of international refugee law. UNHCR doctrine is UNHCR's "voice" on refugee law issues, that is, the articulation by UNHCR of its views on such issues. This approach relies on the meaning of "doctrine" as used in the French language, to refer to the opinions of those who teach or who write about the law.<sup>35</sup> The term is used herein to refer to UNHCR's views of what the law is or should be related to refugees. There is a debate in French law as to whether "doctrine" is a source of law.<sup>36</sup> UNHCR's doctrinal positions do not arise in a vacuum. They are often formulated as a result of questions posed by States, differing positions taken by States, or positions adopted by States and opposed by UNHCR. The formulation of doctrine by UNHCR is neither simple nor done in isolation. UNHCR doctrinal positions can be influenced by numerous factors including: the views of non-governmental organisations, academics, and government officials; political considerations; State practice, and even different views within UNHCR, to name a few. UNHCR may seek the views of a few or

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<sup>35</sup> See GERARD CORNU, VOCABULAIRE JURIDIQUE 324 (8<sup>th</sup> ed. 2007). The term "doctrine" finds its etymological basis in the latin word *doctrina* which is derived from *docere*, which means to teach in the sense of theoretical study. DENIS ALLANDE & STÉPHANE RIALS, DICTIONNAIRE DE LA CULTURE JURIDIQUE 384-7 (2003).

<sup>36</sup> Allande & Rials, *supra* note 35, at 385.

many other actors in the refugee law field or may create the position as a result of primarily internal consultations.

UNHCR doctrinal positions are not legally binding on States, since governmental representatives do not create such positions; the staff of UNHCR, who are international civil servants, create them. Since doctrinal positions are not created by States, they do not constitute one of the traditional sources of international law, such as rules established by treaties, international customary rules, or general principles of law.<sup>37</sup> The term "doctrine" is found in the French version of the paragraph in article 38 of the Statute of the International Court of Justice that refers to subsidiary sources "la doctrine des publicistes les plus qualifiés des différentes nations" which in English is "the teachings [*doctrine*] of the most highly qualified publicists of the various nations".<sup>38</sup>

UNHCR can be considered to have an expertise similar to academics or publicists. In fact, given the international composition of the UNHCR personnel, the organisation may reflect a more diverse and international perspective than a publicist with his/her particular national orientation. However, UNHCR doctrine is most frequently *lege ferenda*, what the law should be, rather than *lex lata*, what the law is. Therefore, it does not fit well into the definition of subsidiary sources in the Court's Statute, which are supposed to evidence what the law is and not what it should be.

UNHCR doctrine may be considered a form of "soft law". "Soft law" in international law is somewhat of a misnomer in the sense that it is not "law" in a strict sense; this is particularly the case when a strict positivist approach to sources, as solely those created by States, is utilised. However, while some scholars believe that soft law should not be a

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<sup>37</sup> I.C.J. Statute, art. 38.

<sup>38</sup> The French version of article 38, paragraph 1(c) of the Statute of the International Court of Justice reads as follows: "... les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination du droit."

concern of lawyers,<sup>39</sup> and that this term belongs to the international relations area, it is nevertheless useful in identifying influences upon the development of international law. Although the term has been accorded various interpretations,<sup>40</sup> a prerequisite is that the soft law must be in writing.<sup>41</sup> Soft law instruments include not only treaties that contain soft obligations and resolutions of international organisations, but also statements of principles by eminent international lawyers.<sup>42</sup> Such statements of principles by lawyers with expertise can be analogised to UNHCR doctrinal positions drafted by refugee law experts in the organisation. UNHCR doctrinal positions, like other forms of soft law, often serve an informative or educational role.<sup>43</sup>

Moreover, in their form as *lege ferenda*, UNHCR doctrinal positions supplement the provisions of the 1951 Refugee Convention and affect the development of the traditional forms of law as will be shown in chapter 5. Such positions have the advantage of being in a non-binding form and so do not require States' explicit approval and can be easily modified. In addition, UNHCR can utilise them in connection with existing legal standards to evaluate States' conduct and to provide concrete guidance to States on how they should conform their laws and policies so as to further the protection of refugees, as discussed in chapter 6.

The remaining portion of this chapter will consider the evolution in the content and form of UNHCR doctrine, since the time of UNHCR's establishment up through the present, and the authority for UNHCR's issuance of doctrine. This should then provide a basis for understanding

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<sup>39</sup> See for example JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 121 (2005).

<sup>40</sup> Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law"* 30 McGill L.J., 37, 44 (1984).

<sup>41</sup> REBECCA WALLACE, INTERNATIONAL LAW: A STUDENT INTRODUCTION 30 (3<sup>rd</sup> ed., 1997).

<sup>42</sup> C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 I.C.L.Q. 850, 851 (1989).

<sup>43</sup> *Id.*, at 862.

the contribution made by UNHCR doctrine to the development and effectiveness of international refugee law, covered in chapters 5 and 6, respectively, since the onset of the crisis in refugee law, discussed in chapter 4.

One cautionary note must be made before embarking upon a review of UNHCR's doctrine since its creation. In order to facilitate the overview of UNHCR doctrine, the nearly 60-year period has been divided into sub-periods based on the evolution in the need and use of doctrine. However, it is not intended to be a rigid delineation, but rather a tool for obtaining greater insight into the changes in the content and form of UNHCR doctrine.

### 3.4.1 The Evolution of UNHCR Doctrine

#### 3.4.1.1 Emergence of UNHCR doctrine: 1950-1966

Following the drafting of the 1951 Refugee Convention, UNHCR's predominant concern was to ensure respect by States of the various political, social and economic rights of refugees contained therein. The underlying thinking was most likely that if refugees' countries of first asylum or resettlement accorded them these rights, then the refugees would be able to integrate into their new countries of residence. UNHCR conveyed its views, concerning these rights, to governments primarily through representations by its branch offices.<sup>44</sup>

UNHCR was particularly preoccupied with problems related to two of the rights contained in the 1951 Refugee Convention, which were considered

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<sup>44</sup> As UNHCR stated in its Annual Report for the period June 1952 to May 1953: "Space would not permit a detailed description of all the representations made by each of the branch offices to the competent authorities to ensure that refugees obtain recognition of their legal rights. These representations cover matters such as the determination of refugee status, regularization of residence, expulsion, the exercise of the right to work, public relief, travel documents, authentication of documentation, personal status, public assistance and social security." UNHCR, *Report of the UNHCR*, ¶ 64, U.N. Doc. A/2394 (1953).

to be essential to refugees' welfare: the right to work and the provision of a travel document. The provisions on 'gainful employment' in the 1951 Refugee Convention concern the core means by which a person becomes self-supporting and could thereby support not only him or herself, but also family members, and therefore were of significant importance to refugees. UNHCR's reports to the General Assembly not only express the hope that States, which had not yet ratified the Convention, would do so without a reservation to this provision, but also criticise other States for not giving refugees free access to certain professions.<sup>45</sup>

With respect to travel documents, article 28 of the 1951 Refugee Convention provides that States shall issue travel documents to refugees lawfully staying in their territory. The Final Act of the 1951 Conference, which is an appendix to the 1951 Refugee Convention, explains the importance of such documents in stating that "the issue and recognition of travel documents is necessary to facilitate the movement of refugees".<sup>46</sup> Such movement was undertaken by refugees for a variety of reasons: resettlement, employment, business, education, and to visit relatives or friends. The High Commissioner used the recommendation in the Final Act as a basis for encouraging States to give effect to article 28<sup>47</sup> and encouraged States to use a particular form for the travel document so as to ensure uniformity in the documents issued by States.<sup>48</sup>

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<sup>45</sup> For example, UNHCR hoped that the Italian Government would not make any serious reservations to the right to work and criticized Belgian and French practices. UNHCR, *Report of the UNHCR and Addendum*, ¶ 70, 87, 100, U.N. Doc. A/2126 (1952).

<sup>46</sup> Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, ¶ IV.A, 28 July 1951, 189 U.N.T.S. 137.

<sup>47</sup> UNHCR, *Report of the UNHCR and Addendum*, ¶ 28, U.N. Doc. A/2126 (1952). Also see UNHCR, *Report of the UNHCR*, ¶ 43, U.N. Doc. A/2394 (1953). Travel documents for refugees was one of the first issues addressed by the first High Commissioner, Fridtjof Nansen, under the League of Nations, as discussed in section 1.2.1.1 of chapter 1.

<sup>48</sup> UNHCR, *Report of the UNHCR*, ¶ 72, U.N. Doc. A/2648 (1954).

The Final Act also served as the basis for UNHCR's positions related to family reunion. Recommendation B in the Final Act recognizes that "the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee". Thus, UNHCR promoted the reunion of family members who were separated as a result of refugee movements.<sup>49</sup>

When situations emerged that raised issues not directly addressed by the 1951 Refugee Convention or the Final Act, UNHCR provided practical advice to countries. The ability to resolve problems in this manner rested on the close relationship UNHCR had with States; one of cooperation, which is further discussed in section 4.2.1 of chapter 4. For example, refugees who had been recognised as refugees in one country of asylum were at times moving to another country, which was not eager to accept them. Thus, the issue arose, which UNHCR would continue to address over the years, of the first country of asylum. UNHCR sought a solution to this problem with Germany through discussions<sup>50</sup> and then articulated a view in its Second Annual Report: "These [second] countries cannot undertake to accept indiscriminately refugees who have been given asylum previously in another country."<sup>51</sup> This position would form the basis for a later doctrinal position on "first country of asylum" in the 1980's.

The only area in which UNHCR created positions that articulated novel concepts was with respect to the interpretation of the refugee definition under the 1951 Refugee Convention. Specifically, UNHCR construed the refugee definition in the 1951 Refugee Convention, in addition to its mandate, as applicable to the approximately 190,000 Hungarians who fled primarily to Austria and Yugoslavia in 1956, well after the 1951 temporal limitation. To reach this result, UNHCR advanced the idea that the events

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<sup>49</sup> See UNHCR, *Note on International Protection*, ¶22, U.N. Doc. A/AC.96/227 (3 March 1964).

<sup>50</sup> UNHCR, *Report of the UNHCR*, ¶ 58, U.N. Doc. A/2648 (1954), UNHCR, *Report of the UNHCR*, ¶ 57, U.N. Doc. A/2902 and Add.1 (1955).

<sup>51</sup> UNHCR, *Report of the UNHCR*, ¶ 83, U.N. Doc. A/2394 (1953).



leading to the revolution in 1956 had their genesis prior to 1951.<sup>52</sup>

UNHCR utilised the same approach to recognise, as refugees, persons fleeing other Eastern European countries after the 1951 date.<sup>53</sup>

In recognising the Hungarians as refugees under the 1951 Refugee Convention, UNHCR not only provided a distinctive interpretation of the Convention's refugee definition, but also employed a group determination of refugee status. The employment of this concept harkened back to the approach utilised by refugee organisations at the time of the League of Nations. Group determination of refugee status appears to contrast sharply with the notion of an individual determination under the refugee definition, but the drafters of the 1951 Refugee Convention discussed this group approach<sup>54</sup> and UNHCR's Statute provides that its work shall normally relate to "groups and categories of refugees".<sup>55</sup> Thus, while UNHCR had assisted refugees on a group basis as a "good offices" operation, the determination of refugee status under the 1951 Refugee Convention, based on a group determination, was a new position, but one supported by the general wording of its Statute.

#### 3.4.1.2 Extension of UNHCR doctrine: 1967-1981

States' adoption of the 1967 Protocol heralded the commencement of a truly international approach to refugees by UNHCR. Consequently, UNHCR was confronted with the need to address the protection situation of refugees in regions other than Europe, initially, in Africa<sup>56</sup> and then in

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<sup>52</sup> IVOR JACKSON, *THE REFUGEE CONCEPT IN GROUP SITUATIONS* 117 (1999). As Grahl-Madsen notes, the Ad Hoc Committee "interpreted the term 'events' as 'happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution which are after-effects of earlier changes'". Grahl-Madsen agrees with Robinson that this was too restrictive of an interpretation. 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW: REFUGEE CHARACTER* 164 (1966).

<sup>53</sup> Kazimierz Bem, *The Coming of a 'blank cheque' – Europe, the 1951 Convention and the 1967 Protocol*, 16 Int'l. J. Refugee L. 609, 619 (2004)

<sup>54</sup> Jackson, *supra* note 52, at 85.

<sup>55</sup> UNHCR Statute, *supra* note 1, at ¶ 2.

<sup>56</sup> UNHCR, *Report of the UNHCR*, ¶ 2, U.N. Doc. A/7612 (1969).

Asia and Central America.<sup>57</sup> UNHCR, therefore, began to issue doctrinal positions on not only the criteria for determining refugee status, but also on the standards for the treatment of refugees. These positions would take new forms as the organisation sought to ensure that not only its staff, but also States themselves were apprised of the principles.

While continuing to advocate convention standards,<sup>58</sup> UNHCR articulated its views on new issues related to the assessment of refugee status. For example, UNHCR furnished advice on the eligibility of freedom fighters for refugee status<sup>59</sup> and set forth standards of interpretation for the determination of whether persons associated with organisations that advocate violence could obtain refugee status.<sup>60</sup> UNHCR also drew upon international principles to address the situation of the extradition of asylum-seekers and refugees.<sup>61</sup> UNHCR's views in these areas were initially provided to staff members via internal memoranda. However, the memoranda served as the basis to ensure uniformity of views among UNHCR's offices and for UNHCR staff members to provide consistent advice to governments and others.

Most significantly, in order to address the problem of different interpretations of the refugee definition,<sup>62</sup> UNHCR clarified, in 1979, how the definition should be applied in a stand-alone document, the Handbook on Procedures and Criteria for Determining Refugee Status.<sup>63</sup> This

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<sup>57</sup> UNHCR, *Report of the UNHCR*, ¶ 1, U.N. Doc. A/34/12 (1979).

<sup>58</sup> See for example, UNHCR, *Report of the UNHCR*, ¶ 17, U.N. Doc. A/8012 (1970).

<sup>59</sup> UNHCR, *Question of "Freedom Fighters" and Liberation Movements in Africa*, UNHCR/IOM/22/68; UNHCR/BOM/26/68 (June 1968).

<sup>60</sup> UNHCR, *Determination of refugee status of persons connected with organisations or groups which advocate and/or practise violence*, UNHCR/IOM/162/78; UNHCR/BOM/16/78 (5 Apr. 1978).

<sup>61</sup> UNHCR, *Extradition*, UNHCR/IOM/23/68; UNHCR/BOM/29/68 (26 June 1968).

<sup>62</sup> UNHCR was concerned about the uniform application of the refugee definition even during the first decade of its work. See for example, the Statement by the High Commissioner in Annex II of UNHCR, *Report of UNHCR*, ¶ 9, U.N. Doc. A/3828/Rev.1 (1958).

<sup>63</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/IP/4/Eng./Rev.1 (Jan. 1992). The Handbook was originally published in 1979.

document, which has become one of the most important doctrinal documents ever created by UNHCR, is still used today by UNHCR, lawyers, and refugee status determination bodies, among others. The Handbook not only provides a clause by clause interpretation of the definition, but also interprets the principle of family unity by examining to whom it applies and in what circumstances. Furthermore, the Handbook establishes procedures for the determination of refugee status. Of particular importance to the development of UNHCR doctrine is the fact that the Handbook was not limited to providing guidance on existing standards. It also enunciated new principles such as that of agents of persecution and group determination in large-scale influxes, criteria for cancellation of refugee status, and the standard for the burden of proof in establishing refugee status (the benefit of the doubt), topics that are not explicitly mentioned in the 1951 Refugee Convention.<sup>64</sup>

UNHCR also used documentation furnished to EXCOM and the General Assembly to set forth its positions. In particular, UNHCR expressed its views in its Notes on International Protection. Following the creation of the Sub-Committee of the Whole on International Protection of EXCOM, in 1975, UNHCR's notes to the Sub-Committee on particular topics became a key means for UNHCR to document and elaborate its doctrinal views and bring those views to the attention of States.<sup>65</sup> For example, UNHCR advocated procedural standards for handling asylum claims in its

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<sup>64</sup> *Id.*, at ¶ 65, 44, 117, 196, 203-4.

<sup>65</sup> The Sub-Committee was established in order to “study in more detail some of the technical aspects of the protection of refugees”. EXCOM Conclusion 1 (XXVI), ¶ h, 1975. The Sub-Committee met for the first time in 1976. UNHCR selected the topics for discussion by the Sub-Committee and served as the secretariat for the Sub-Committee. UNHCR, *Review of Selected Issues for Future Consideration of the Sub-Committee of the Whole on International Protection*, UNHCR Doc. EC/SCP/56 ¶ 6, (28 July 1989). The Sub-Committee was replaced by the Standing Committee in 1995.

1976 Note on International Protection and in a 1977 Note to the Sub-Committee of the Whole on International Protection.<sup>66</sup>

UNHCR's provision of its views to the Sub-Committee then served as the basis for the formulation of EXCOM conclusions on protection issues, which would become an ideal means for UNHCR to have its doctrinal positions endorsed by States. For example, UNHCR established that a State's determination of refugee status should normally not be questioned by another State unless the person "manifestly does not fulfil the requirements of the Convention".<sup>67</sup> UNHCR extended the protection offered against the expulsion of refugees under article 32 of the 1951 Refugee Convention by asserting that refugee delinquents cannot be expelled, but should be treated in the same manner as national delinquents<sup>68</sup> and advised on the content of the provisions in refugee travel documents and their renewal.<sup>69</sup>

UNHCR also utilised EXCOM conclusions to provide procedural guidance on the determination of refugee status and to advance principles for the treatment of asylum-seekers,<sup>70</sup> since the 1951 Refugee Convention contains few explicit provisions for the protection of asylum-seekers, except article 31, concerning penalties for illegal entry and freedom of movement, and article 33, on *non-refoulement*. Moreover, after having established that asylum-seekers in large-scale influxes should receive "at least temporary refuge" in EXCOM conclusions in 1977 and 1978, a 1979 EXCOM conclusion more forcefully advocated that "[i]n cases of large-scale influx, persons seeking asylum should always receive at least

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<sup>66</sup> UNHCR, *Note on International Protection*, ¶ 30, U.N. Doc. A/AC.96/527 (20 Sept. 1976), UNHCR, *Note on Determination of Refugee Status under International Instruments*, ¶ 16, UNHCR Doc. EC/SCP/5 (24 Aug. 1977).

<sup>67</sup> EXCOM Conclusion 12 (XXIX), ¶ g, 1978.

<sup>68</sup> EXCOM Conclusion 7 (XXVIII), ¶ d, 1977. This conclusion relates to article 32 of the 1951 Refugee Convention.

<sup>69</sup> EXCOM Conclusion 13 (XXIX), ¶ c-d, 1978.

<sup>70</sup> EXCOM Conclusion 8 (XXVIII), ¶ e, 1977. EXCOM Conclusion 15 (XXX) 1979.

temporary refuge".<sup>71</sup> Subsequently, UNHCR encouraged EXCOM to articulate the standards that should apply to the treatment of refugees who receive temporary protection.<sup>72</sup>

Another area in which UNHCR asserted its own doctrinal views was with respect to the cessation clauses to refugee status in UNHCR's Statute and the 1951 Refugee Convention. UNHCR initially declared the application of the cessation clauses to refugees from two former Portuguese colonies, Guinea-Bissau and Mozambique.<sup>73</sup> Although such declaration under the Statute follows naturally from UNHCR's responsibility to determine whether individuals are eligible for refugee status, nothing in the 1951 Refugee Convention, which is between States, assigns UNHCR this role.

UNHCR, as in prior years, also continued to interpret its mandate in light of changing circumstances. For example, UNHCR adopted the doctrinal position that it is responsible for persons fleeing armed conflict or serious and generalised disorder and violence.<sup>74</sup> Thus, UNHCR extended its mandate beyond refugees having a fear of persecution to include persons who qualified as refugees under the regional instruments, specifically, under the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration.

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<sup>71</sup> EXCOM Conclusion 5 (XXVIII) 1977, EXCOM Conclusion 11 (XXIX), ¶ d, 1978, EXCOM Conclusion 15 (XXX), ¶ f, 1979. The concept of temporary protection was not a new concept at the time. The idea of asylum is that it should be of a temporary nature with refugees returning to their country of origin or eventually becoming integrated in the country of residence or a third country. The concept was included in Article II.5. of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept. 1969, 1001 U.N.T.S. 45 [hereinafter "1969 OAU Refugee Convention"].

<sup>72</sup> EXCOM Conclusion 19 (XXXI), ¶ e, 1980. EXCOM Conclusion 22 (XXXII) 1981. This latter conclusion followed a report of the Group of Experts on temporary refuge in situations of large-scale influx, which met in Geneva from 21-24 April 1981.

<sup>73</sup> UNHCR, *Status of Guineans (Bissau) abroad*, UNHCR/IOM/38/75; UNHCR/BOM/48/75 (1 Dec. 1975) and UNHCR, *Status of Mozambicans abroad after 25 June 1975*, UNHCR/IOM/36/75; UNHCR/BOM/47/75 (14 Nov. 1975).

<sup>74</sup> UNHCR, *Note on International Protection*, ¶ 17, U.N. Doc. A/AC.96/593 (31 July 1981). Also see EXCOM Conclusion 22 (XXXII), ¶ 1, 1981.

By the end of the 1970's, UNHCR had established the practice of providing guidance on the application of the refugee definition, further developed existing refugee law standards, and addressed new issues not specifically derived from the standards in the 1951 Refugee Convention. The most significant step taken by UNHCR was the publication of the Handbook, which essentially contained UNHCR's doctrinal positions on the interpretation and application of the refugee definition.

UNHCR formulated its doctrinal views in a way to reach an increasing number of States. UNHCR no longer solely responded to individual requests from States for UNHCR's views based on its internal memoranda, but increasingly employed documentation prepared for EXCOM and the General Assembly, bodies comprised of States, to express its views. EXCOM conclusions became a means for obtaining endorsement by States of UNHCR's views. The provision of such doctrinal views, however, was by and large limited to States. Even the Handbook was intended for use outside of UNHCR only by government officials; distribution of the Handbook to non-governmental organisations and others, such as academics and the media, was restricted.<sup>75</sup>

### 3.4.1.3 Expansion of use of UNHCR doctrine: 1982-present

#### 3.4.1.3.1 1982-1989

During the 1980's, UNHCR intensified its formulation and issuance of doctrinal positions through means well established in the 1970's: internal memoranda, documents to EXCOM and the General Assembly, and EXCOM conclusions. The import of certain UNHCR doctrinal positions was strengthened by UNHCR's obtainment of the General Assembly's

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<sup>75</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR/BOM/66/80 (31 Oct. 1980).

endorsement of specific EXCOM conclusions, which contained UNHCR doctrine.<sup>76</sup>

Provisions of the 1951 Refugee Convention continued to receive clarification and elaboration through UNHCR doctrine. UNHCR doctrinal documents established elements for the determination of the refugee status of persons connected with organisations that advocate or practice violence and persons in civil war situations<sup>77</sup> and elements for the consideration of issues relevant to the "membership of a particular social group" grounds in the inclusion clauses of the refugee definition.<sup>78</sup>

With respect to standards for protection in the 1951 Refugee Convention, UNHCR doctrine clarified the topic of detention, related to article 31 of the 1951 Refugee Convention. Specifically, UNHCR suggested standards on detention for refugees and asylum seekers in its 1984 Note on International Protection, which were then articulated in an EXCOM conclusion.<sup>79</sup> UNHCR even expressed the view that the principle of *non-refoulement* had acquired the character of a peremptory rule of international law.<sup>80</sup> In addition, UNHCR continued to elaborate upon the principle of family unity, contained in the Final Act annexed to the 1951 Refugee Convention, with an interpretation of types of family reunification.<sup>81</sup>

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<sup>76</sup> See for example G.A. Res. 40/118 ¶ 7, U.N. Doc. A/RES/40/118 (13 Dec. 1985) and G.A. Res. 42/109 ¶ 5, 6, U.N. Doc. A/RES/42/109 (7 Dec. 1987).

<sup>77</sup> UNHCR, *Determination of refugee status of persons connected with organisations or groups which advocate and/or practise violence*, UNHCR/IOM/78/88; UNHCR/FOM/71/88 (1 June 1988); UNHCR, *Refugees in civil war situations*, UNHCR/IOM/138/89; UNHCR/FOM/114/89 (18 Dec. 1989).

<sup>78</sup> UNHCR, *Membership of a particular social group*, UNHCR/IOM/132/89; UNHCR/FOM/110/89 (12 Dec. 1989) and EXCOM Conclusion 39 (XXXVI), ¶ k, 1985..

<sup>79</sup> UNHCR, *Note on International Protection*, ¶ 26-30, U.N. Doc. A/AC.96/643 (9 Aug. 1984). EXCOM Conclusion 44 (XXXVII) 1986.

<sup>80</sup> EXCOM Conclusion 25 (XXXIII), ¶ b, 1982.

<sup>81</sup> UNHCR, *The Reunification of Refugee Families*, UNHCR/IOM/52/83; UNHCR/FOM/49/83 (18 July 1983).

Importantly, UNHCR continued its formulation of doctrinal positions on issues not covered in the 1951 Refugee Convention. UNHCR articulated principles for the application of the cancellation of refugee status,<sup>82</sup> an option not mentioned in the 1951 Refugee Convention but provided for in the Handbook.<sup>83</sup> The doctrinal principle that repatriation should take place at the freely expressed wish of the refugee was articulated in an EXCOM conclusion.<sup>84</sup> UNHCR prepared guidelines on voluntary repatriation,<sup>85</sup> at the request of EXCOM,<sup>86</sup> and subsequently, articulated key standards in its 1987 Note on International Protection.<sup>87</sup> UNHCR also provided procedural guidance on the determination of manifestly unfounded applications in two conclusions,<sup>88</sup> and articulated principles for when asylum-seekers could be returned to their first country of asylum,<sup>89</sup> a concept initially addressed by UNHCR in the early 1950's.

#### 3.4.1.3.2 1990's

In the 1990's, UNHCR began to provide its views much more publicly.<sup>90</sup> The European Union's harmonization process was a key factor that pushed UNHCR to develop its positions well beyond standards contained in the 1951 Refugee Convention and to issue them in a publicly available, non-restricted manner. Thus, UNHCR issued doctrinal positions on such issues

<sup>82</sup> UNHCR, *Note on Loss of Refugee Status Through Cancellation* (4 July 1989), <http://www.unhcr.org/refworld/docid/441045d44.html>.

<sup>83</sup> UNHCR Handbook, *supra* note 63, at ¶ 117.

<sup>84</sup> EXCOM Conclusion 40 (XXXVI), ¶ b, 1985.

<sup>85</sup> UNHCR, *Voluntary Repatriation: Principles and Guidelines for Action*, UNHCR/IOM/5/87; UNHCR/FOM/5/87 (10 Feb. 1987).

<sup>86</sup> EXCOM Conclusion 40 (XXXVI), ¶ m, 1985. Pursuant to this paragraph, UNHCR was called upon to elaborate an instrument “reflecting all existing principles and guidelines relating to voluntary repatriation for acceptance by the international community as a whole.”

<sup>87</sup> UNHCR, *Note on International Protection*, ¶ 47, U.N. Doc. A/AC.96/694 (3 Aug. 1987).

<sup>88</sup> EXCOM Conclusion 28 (XXXIII) 1982, EXCOM Conclusion 30 (XXXIV) 1983.

<sup>89</sup> EXCOM Conclusion 58 (XL), ¶ f, 1989.

<sup>90</sup> This is likely due to the crisis in international refugee law, which is treated in detail in chapter 4. UNHCR had become quite concerned about refugee protection, which was “seriously jeopardized in certain situations as a result of denial of access, expulsion, refoulement and unjustified detention, as well as other threats to ...[refugees'] physical security, dignity and well-being”. EXCOM Conclusion 71 (XLIV), ¶ f, 1993.



as reception standards, temporary protection, and complementary protection, among others in connection with the European Commission's drafting of directives on various asylum topics.<sup>91</sup>

UNHCR increasingly began to provide doctrinal positions in stand-alone documents rather than primarily in its reports submitted to EXCOM and the General Assembly. For example, UNHCR announced doctrinal positions on the eligibility of draft evaders and military deserters,<sup>92</sup> agents of persecution,<sup>93</sup> and the exclusion and cessation clauses of the refugee definition.<sup>94</sup> Moreover, UNHCR expressed its views on issues that were not covered by the 1951 Refugee Convention. These positions included the topic of complementary protection,<sup>95</sup> and a range of issues interpreted by States in a manner so as to deny asylum-seekers protection as refugees: internal relocation as a reasonable alternative to seeking asylum,<sup>96</sup> safe country of origin and safe country of asylum notions,<sup>97</sup> the safe third

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<sup>91</sup> For a compilation of UNHCR's positions on draft directives, see UNHCR, TOOL BOXES ON EU ASYLUM MATTERS: TOOL BOX 2, THE INSTRUMENTS (Sept. 2002), <http://www.unhcr.org/publ/PUBL/406a8c432.pdf>.

<sup>92</sup> UNHCR, *UNHCR's Position on Certain Types of Draft Evasion*, (22 Jan. 1991), <http://www.unhcr.org/refworld/docid/441025c44.html>.

<sup>93</sup> UNHCR, *Agents of Persecution – UNHCR Position* (14 Mar. 1995), <http://www.unhcr.org/refworld/docid/3ae6b31da3.html>.

<sup>94</sup> On exclusion, see UNHCR, *The Exclusion Clauses: Guidelines on Their Application*, (2 Dec. 1996), <http://www.unhcr.org/refworld/docid/3ae6b31d9f.html>; UNHCR, *Note on the Exclusion Clauses*, UNHCR Doc. EC/47/SC/CRP.29 (30 May 1997); and UNHCR, *Background Paper on the Article 1F Exclusion Clauses*, (June 1998) (on file with author). On cessation, see UNHCR, *Note on Cessation Clauses*, UNHCR Doc. EC/47/SC/CRP.30 (30 May 1997) and UNHCR, *The Cessation Clauses: Guidelines on their Application* (26 Apr. 1999), <http://www.unhcr.org/refworld/docid/3c06138c4.html>.

<sup>95</sup> UNHCR, *Protection of Persons of Concern to UNHCR who fall outside the 1951 Convention: a Discussion Note*, UNHCR Doc. EC/1992SCP/CRP.5 (2 Apr. 1992).

<sup>96</sup> UNHCR, *UNHCR Position Paper: Relocating Internally as a Reasonable Alternative to Seeking Asylum (The So-Called "Internal Flight Alternative" or "Relocation Principle")* (9 Feb. 1999), <http://www.unhcr.org/refworld/docid/3ae6b336c.html>.

<sup>97</sup> UNHCR, *Background Note on the Safe Country Concept and Refugee Status*, UNHCR Doc. EC/SCP/68 (26 July 1991).

country concept,<sup>98</sup> visa requirements and carrier sanctions,<sup>99</sup> and agents of persecution.<sup>100</sup>

For the first time, UNHCR doctrinal positions did not just elaborate principles, but also overtly criticized certain approaches adopted by States. Thus, UNHCR stated that the fiction of "international zones" in airports was used to "avoid obligations toward refugees", that "carrier sanctions pose a threat to basic principles of refugee protection", and that the use of the concept of safe country of origin essentially "preclude[d] access to status determination procedures as a de facto reservation to art. 1 A (2) of the Convention".<sup>101</sup>

UNHCR also developed doctrinal principles concerning the protection of refugee children and women, issues that were fairly uncontroversial for States in light of the global concern about these groups. In the case of refugee children, UNHCR utilised the 1989 Convention on the Rights of the Child, which has near universal ratification by States,<sup>102</sup> to further define principles for the treatment of refugee children and for unaccompanied children seeking asylum.<sup>103</sup> Several UNHCR Notes to EXCOM concerning refugee women not only established policy approaches for dealing with refugee women but also procedural

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<sup>98</sup> UNHCR, *Considerations on the "Safe Third Country" Concept* (July 1996), <http://www.unhcr.org/refworld/docid/3ae6b3268.html>.

<sup>99</sup> UNHCR, *UNHCR Position: Visa Requirements and Carrier Sanctions* (Sept. 1995), <http://www.unhcr.org/refworld/docid/3ae6b33a10.html>.

<sup>100</sup> UNHCR, *Agents of Persecution- UNHCR Position* (14 Mar. 1995) (on file with author).

<sup>101</sup> UNHCR, *Current Asylum Issues*, UNHCR/IOM/28/92; UNHCR/FOM/29/92 (13 Mar. 1992).

<sup>102</sup> Somalia and the United States remain the only countries that have not yet ratified this convention.

<sup>103</sup> See for example, EXCOM Conclusion 84 (XLVIII) 1997 and UNHCR, *UNHCR Policy on Refugee Children*, UNHCR Doc. EC/SCP/82 (6 Aug. 1993) and UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children seeking Asylum* (Feb. 1997), <http://www.unhcr.org/refworld/docid/3ae6b3360.html>.

requirements with respect to the treatment of asylum claims by women and particular grounds for their persecution.<sup>104</sup>

The ability of UNHCR to issue doctrinal documents was not totally unlimited, however. UNHCR had to remain aware of and sensitive to States' interests as suggested by UNHCR's experience in attempting to have EXCOM adopt a conclusion on detention that built upon the initial position it articulated in the 1986 EXCOM Conclusion.<sup>105</sup> In 1999, UNHCR issued Revised Guidelines on the Detention of Asylum-Seekers. UNHCR then prepared a paper titled 'Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice' for the 1999 EXCOM session with the intention that EXCOM would adopt a conclusion on this topic.<sup>106</sup> However, insufficient support for a conclusion in EXCOM resulted in no conclusion on the topic.

#### 3.4.1.3.3 2000 to present

UNHCR's creation of doctrinal positions accelerated significantly at the beginning of the second millennium. UNHCR produced papers on various topics that not only explored the context and the different approaches adopted by States, but also established doctrinal principles. These included papers on gender-related persecution, complementary protection, and the interpretation of article 1 of the 1951 Refugee Convention.<sup>107</sup>

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<sup>104</sup> See UNHCR, *Note on Certain Aspects of Sexual Violence against Refugee Women*, U.N. Doc. A/AC.96/822 (12 Oct. 1993) and UNHCR, *Note on Refugee Women and International Protection*, UNHCR Doc. EC/SCP/59 (28 Aug. 1990). Also see EXCOM Conclusion 64 (XLI), ¶ a (iii), 1990 and EXCOM Conclusion 73 (XLIV), ¶ a, 1993.

<sup>105</sup> EXCOM Conclusion 44 (XXXVII) 1986.

<sup>106</sup> UNHCR, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice*, UNHCR Doc. EC/49/SC/CRP.13 (4 June 1999). In particular, see paragraph 26, which sets forth recommended practices that would have served as the basis for an EXCOM conclusion.

<sup>107</sup> See UNHCR, *Gender-related Persecution* (Jan. 2000) (on file with author), UNHCR, *Complementary Forms of Protection* (Apr. 2001) (on file with author), and UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (Apr. 2001), <http://www.unhcr.org/refworld/docid/3b20a3914.html>.

The present formulation of doctrine by UNHCR takes the Global Consultations process, launched by UNHCR in late 2000, as its starting point. Two significant anniversaries, the 50<sup>th</sup> anniversary of UNHCR in 2000 and the 50<sup>th</sup> anniversary of the 1951 Refugee Convention in 2001 were the stimuli for this process. UNHCR decided to mark these key dates with a process that would reinvigorate the principles and standards that assure protection to refugees. During the consultations, which were undertaken during an 18-month period among governments, intergovernmental and nongovernmental organisations, UNHCR and refugee experts,<sup>108</sup> numerous protection issues were discussed.<sup>109</sup>

The outcome of these discussions was UNHCR's creation of an Agenda for Protection, approved by EXCOM, which specifies that UNHCR shall "produce complementary guidelines to its *Handbook on Procedures and Criteria for Determining Refugee Status*" and that UNHCR is to "explore areas that would benefit from further standard-setting".<sup>110</sup>

Therefore, since the adoption of the Agenda for Protection, UNHCR has formulated a number of guidelines, including on the topics of the exclusion clauses, the cessation clauses, and refugee women as a particular social group.<sup>111</sup>

In addition, the legal value of UNHCR doctrine contained in EXCOM conclusions has been further strengthened. The General Assembly now regularly endorses EXCOM's annual report, which contains the EXCOM

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<sup>108</sup> UNHCR, AGENDA FOR PROTECTION 9 (2003).

<sup>109</sup> *Id.*, at 85-93.

<sup>110</sup> *Id.*, at 38.

<sup>111</sup> UNHCR, *Guidelines on International Protection No. 5, Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05 (4 Sept. 2003); UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)* HCR/GIP/03/03 (10 Feb. 2003); UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02 (7 May 2002).

conclusions.<sup>112</sup> Thus, all of the EXCOM conclusions adopted each year are endorsed by the General Assembly.

### 3.4.2 Authority for UNHCR's Issuance of Doctrine

As is evident from a purview of UNHCR's Statute, there is no wording that suggests that UNHCR is to issue doctrinal positions. Moreover, the General Assembly has not issued any resolution that refers to UNHCR's creation of doctrinal positions. The lack of any specific mandatory wording or any General Assembly resolution mentioning UNHCR's issuance of doctrinal positions is not surprising; the General Assembly merely establishes UNHCR's responsibilities and the general parameters of UNHCR's work. Yet, UNHCR clearly believes that:

[UNHCR] has a doctrinal responsibility to work for the progressive development of international refugee law. In essence, this function involves promoting, interpreting, safeguarding and developing the fundamental principles of refugee protection. The immediate goal is to strengthen international commitments to receive refugees, as well as to combat discrimination and negative practices jeopardising refugees and to search for durable solutions to their problems which give prime importance to humanitarian considerations and respect for basic rights. For the longer term, the objective is to develop and promote a far-reaching regime of refugee protection based on solid legal foundations and internationally recognized principles."<sup>113</sup>

So, the question remains, what is the source of authority for UNHCR's issuance of doctrinal positions? Such authority can be found in a number of sources depending on the nature of the doctrinal work. In some cases, UNHCR has been asked to create a doctrinal document by EXCOM. For example, UNHCR drafted the Handbook pursuant to an explicit request by the Executive Committee to "consider the possibility of issuing- for the guidance of Governments- a handbook relating to procedures and criteria

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<sup>112</sup> See for example, G.A. Res. 61/137, ¶ 1, U.N. Doc. A/RES/61/137 (19 Dec. 2006) and G.A. Res. 62/124, ¶ 1, U.N. Doc. A/RES/62/124 (18 Dec. 2007).

<sup>113</sup> UNHCR, *Note on International Protection*, ¶ 3 U.N. Doc. A/AC.96/728 (2 August 1989).

for determining refugee status ...- with due regard to the confidential nature of individual requests and the particular situations involved".<sup>114</sup>

UNHCR's development of guidelines on voluntary repatriation also was made by UNHCR following a request by EXCOM.<sup>115</sup> Furthermore, EXCOM requested UNHCR to promote the development of criteria and guidelines with respect to refugee women.<sup>116</sup>

More generally worded EXCOM conclusions can be considered as the basis for UNHCR's issuance of other doctrinal positions, not authorized by one of the foregoing methods. EXCOM has encouraged "the continued development and elaboration of refugee law in response to the new and changing humanitarian and other problems of refugees and asylum-seekers"<sup>117</sup> and recognized the contributions made by UNHCR through its activities.<sup>118</sup> EXCOM also acknowledged that UNHCR's work related to "the development ... of basic standards for the treatment of refugees" is part of UNHCR's international protection function.<sup>119</sup> This development of standards should be carried out "by maintaining a constant dialogue with Governments, non-governmental organisations and academic

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<sup>114</sup> EXCOM Conclusion 8 (XXVIII), ¶ g, 1977.

<sup>115</sup> EXCOM Conclusion 40 (XXXVI), ¶ m, 1985. Ten years passed between EXCOM's request and UNHCR's issuance of the guidelines, which suggests that it was not easy for UNHCR to prepare guidelines which conformed to UNHCR's protection standards but yet would be acceptable to States. See UNHCR, *Handbook: Voluntary Repatriation: International Protection*, 1996, <http://www.unhcr.org/pub/PUBL/3bfe68d32.pdf> (1996).

<sup>116</sup> See EXCOM Conclusion 77 (XLVI), ¶ g, 1995, which "[c]alls upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women". Also see EXCOM Conclusion 79 (XLVII), ¶ o, 1996 which recalls the 1995 conclusion.

<sup>117</sup> EXCOM Conclusion 25 (XXXIII), ¶ i, 1982. Although the conclusion does not specify that UNHCR must take action, since EXCOM's purpose is to provide advice to UNHCR, as noted in section 2 above, it can be implied that this advice is directed to UNHCR.

<sup>118</sup> EXCOM Conclusion 29 (XXXIV), ¶ k, 1983.

<sup>119</sup> EXCOM Conclusion 29 (XXXIV), ¶ b, 1983.

institutions and of filling lacunae in international refugee law", according to EXCOM.<sup>120</sup>

One of the most noteworthy EXCOM conclusions in this area suggests an involved and substantive role for UNHCR in the creation of principles within international refugee law; specifically, UNHCR is to "explor[e] the development of guiding principles" to ensure international protection to all who need it.<sup>121</sup> This guidance from EXCOM could be construed as a direct reference to UNHCR doctrine. However, as noted above in section 2, while in practice UNHCR does follow the guidance provided by EXCOM conclusions, which is only logical since UNHCR plays a key role in their formulation, they are not legally binding.

UNHCR's articulation of its doctrinal views, in reports submitted to the General Assembly<sup>122</sup> and EXCOM, can be considered as an inherent and normal aspect of its reporting obligation. Any UNHCR doctrinal position, which cannot be considered as authorized by either an EXCOM conclusion or as part of UNHCR's reporting responsibility, can be justified on the basis of UNHCR's implied powers that are derived from its express powers, discussed above in section 3.1. UNHCR's issuance of doctrinal positions relates to its general function of the provision of international protection and to its expressly mandated statutory responsibilities of the promotion of the creation of international conventions for the protection of refugees by States and supervision of States' application of existing international refugee conventions. They have become an integral and necessary component of its international protection work, and more specifically its efforts to ensure the development and effectiveness of

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<sup>120</sup> EXCOM Conclusion 29 (XXXIV), ¶ j, 1983. As with EXCOM Conclusion 25 (XXXIII), ¶ i, 1982 cited in footnote 122 above, it can be assumed that although the conclusion does not specify that UNHCR must take action, it is nevertheless directed to UNHCR.

<sup>121</sup> EXCOM Conclusion 77 (XLVI), ¶ f, 1995 and EXCOM Conclusion 81 (XLVIII), ¶ p, 1997 endorsed by G.A. Res. 52/103, ¶ 1, U.N. Doc. A/RES/52/103 (12 Dec. 1997).

<sup>122</sup> UNHCR Statute, *supra* note 1, at ¶ 11.

international refugee law, as will be seen in more detail in chapters 5 and 6.

### 3.5. CONCLUSION

UNHCR's statutory provisions related to international refugee law reflect the intention of the Statute's drafters to balance the ability of States to retain ultimate control over the organisation with UNHCR's ability to determine how to carry out its responsibilities within a changing political context. A formal mechanism by which States can adjust the responsibilities of UNHCR and thereby adapt core aspects of UNHCR's mandate, including its responsibilities related to the development and effectiveness of international refugee law, to the exigencies of new situations, is General Assembly's ability to assign UNHCR additional responsibilities. In addition, the General Assembly and EXCOM can provide policy guidance to UNHCR. However, in practice, UNHCR generally initiates the request for a modification of its mandate or guidance thus further supporting the discretion that States accord to UNHCR in determining how to carry out its mandate.

UNHCR's authority to determine the content of its responsibilities related to international refugee law has been manifested not only by its instigation of General Assembly Resolutions and EXCOM Conclusions, but also through several techniques adopted by the organisation. One is a flexible interpretation of its international protection function that permits UNHCR to alter and extend its responsibilities related to international refugee law. The authority for UNHCR to define, add, and carry out additional responsibilities related to international refugee law can be based on the notion of implied powers. The second technique, which permits UNHCR to continue to play a key role in ensuring international protection for



refugees and has been progressively developed by UNHCR over the years, is that of UNHCR's "voice" on refugee law issues, referred to as "UNHCR doctrine" in this thesis. The authority for UNHCR to articulate doctrinal positions varies in accordance with the nature of the doctrinal work. Such authority may emanate from EXCOM's specific requests for such positions, generally worded EXCOM conclusions, or be an inherent characteristic of its reporting work to the General Assembly and EXCOM. Such authority may also be derived from UNHCR's implied powers linked to its statutory responsibilities to promote the creation of international refugee law as well as its supervisory responsibilities.

UNHCR's doctrinal positions have significantly changed during UNHCR's nearly 60 years of work. The content has evolved from an initial reiteration of standards contained in the 1951 Refugee Convention to the articulation of new principles as well as the further development of the refugee definition and standards contained in the 1951 Refugee Convention. The form of these positions has been transformed from internal memoranda to include documents drafted by UNHCR for EXCOM and the General Assembly, including EXCOM conclusions, and most importantly, independent documents provided not only to governments, but also to non-governmental organisations and academics, among others. The evolution in the nature of UNHCR's doctrinal positions has been most significant since the 1980's and has coincided with the need for UNHCR to undertake a greater role in shaping the development of international refugee law. The contribution made by UNHCR doctrine to the development of international refugee law following the commencement of the crisis in international refugee law and protection, will be discussed in chapter 5.

By making such documents available on its web site, UNHCR has enhanced the availability of its positions to all interested persons. However, it has not yet provided the public with a comprehensive

compilation of such positions. Thus, government officials, researchers and others must still sift through the rather daunting number of UNHCR position papers, handbooks and training manuals, and other documents to find relevant positions.

The statutory mechanisms and techniques, which provide UNHCR with flexibility to adapt its responsibilities related to international refugee law, would prove to be invaluable in permitting UNHCR to address the crisis in refugee law, discussed in chapter 4.

## CHAPTER 4: THE CRISIS IN REFUGEE PROTECTION

### 4.1. INTRODUCTION

Those concerned with refugees generally speak of "refugee crises", that is, flows of refugees. In the 1980's, however, the crisis became a "crisis in refugee protection". States demonstrated not only a pronounced unwillingness to ensure the protection of refugees as generously as they had previously, but also manifested their desire and intent to resume control over, what they considered to be, the refugee problem. Such assertion of control divested UNHCR of the extensive practical authority it previously had to manage the problem of refugees on behalf of States and shifted responsibility for refugees more squarely into the domain of States, or in some cases regional bodies.

Consequently, the relationship between States and UNHCR, based on cooperation, would become marked by significant differences in views. The domain for the formulation of these different views would be international refugee law. As a result, the weaknesses in the refugee law framework and in the means for ensuring the effectiveness of the 1951 Refugee Convention standards became increasingly apparent and of crucial importance.

This chapter considers the nature of the relationship of cooperation between UNHCR and States, the causes that gave rise to the divergence in views between them, and the restrictive measures adopted by States. The chapter then turns to the weaknesses that were highlighted by such changes, specifically, the weaknesses in the treaty framework, which include: gaps, ambiguities, and different standards for different States. The obstacles to the completion of the treaty framework to address these

weaknesses also are reviewed. The final portion of the chapter examines the weaknesses in the means for ensuring the effectiveness of international refugee law in the areas of ratifications and accessions, implementation, and application.

## 4.2. UNHCR'S CHANGING RELATIONSHIP WITH STATES

### 4.2.1 Cooperation

In theory, UNHCR's role related to the international protection of refugees is to complement that of States. States bear the primary responsibility for not only creating international refugee law standards, but also for taking the necessary steps to ensure that those standards are effective at a national level. In order to execute this relationship in practice, a close and cooperative relationship between UNHCR and States is essential.

The essential obligation of cooperation, for both UNHCR and States, was articulated at the time of the drafting of UNHCR's Statute. UNHCR is to stay "in close touch with the Governments... concerned"<sup>1</sup> and States are "to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions".<sup>2</sup> The importance of such cooperation is reflected in the wording of the sixth preambular paragraph of the 1951 Refugee Convention<sup>3</sup> and is reinforced by article 56 of the UN

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<sup>1</sup> See paragraph 8(g) of the Statute of the Office of the United Nations High Commissioner for Refugees, contained in the Annex to UN General Assembly Resolution 428(V) of 14 December 1950. G.A. Res. 428(V) (14 Dec. 1950) [hereinafter "UNHCR Statute"].

<sup>2</sup> G.A. Res. 428(V), ¶ 2 (14 Dec. 1950).

<sup>3</sup> Convention relating to the Status of Refugees, 6<sup>th</sup> preambular ¶, 28 July 1951, 189 U.N.T.S. 150 [hereinafter "1951 Refugee Convention"]. This preambular paragraph states that: "Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner."

Charter.<sup>4</sup> Moreover, pursuant to article 35 of the 1951 Refugee Convention, States are to "undertake to co-operate with" UNHCR "in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions" of the 1951 Refugee Convention.<sup>5</sup>

However, this cooperative relationship is a dynamic one affected by refugee crises, and the changing political, social and economic situation within States. The number of asylum-seekers seeking protection, their countries of origin, their reasons for flight, and their needs can vary and affect States' willingness to grant them asylum. States' treatment of asylum-seekers and refugees constantly fluctuates due to a complex, but inevitable interplay between States' concern about refugees and their national interests.<sup>6</sup> This interaction between States' humanitarian concerns for refugees and political interests is not new; it existed well before the drafting of the 1951 Refugee Convention. For example, when Western European countries, which would eventually form the core contingent of

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<sup>4</sup> U.N. Charter, art. 56.

<sup>5</sup> 1951 Refugee Convention, *supra* note 3, at art. 35(1). Protocol relating to the Status of Refugees, art. II(1), 16 December 1966, 606 U.N.T.S.267. Regional instruments relating to refugees also contain provisions on cooperation with UNHCR. For example, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides that "Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees." OAU Convention governing the Specific Aspects of Refugee Problems in Africa, art. VIII.1, 10 Sept. 1969, 1001 U.N.T.S. 45. Similarly, the 1984 Cartagena Declaration, a non-binding instrument that has significant moral force in Central America, states: "[H]aving acknowledged with appreciation the commitments with regard to refugees included in the Contadora Act on Peace and Co-operation in Central America, the bases of which the Colloquium fully shares" and which include "[t]o support the work performed by the United Nations High Commissioner for Refugees (UNHCR) in Central America and to establish direct co-ordination machinery to facilitate the fulfilment of his mandate." The Cartagena Declaration on Refugees, ¶II.e, OAS/Ser.L/V.II.66, doc. 10, rev.1, at 190-3 (1984). In Europe, Declaration 17 to the Treaty of Amsterdam provides for consultations to be established with UNHCR "on matters relating to asylum policy". Declaration No. 17 on article 73k of the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and certain Related Acts, Oct. 2, 1997, 1997 O.M. (C 340).

<sup>6</sup> See Guy Goodwin-Gill, *The Politics of Refugee Protection*, Lecture given on 19 Oct. 2007 at the Workshop "UNHCR and the Global Cold War, 1971-1984" (on file with author)..

signatory States of the 1951 Refugee Convention, were trying to avoid a war in the 1930's, they refused to accept Jewish persons as refugees.<sup>7</sup> British refugee policy since 1905, according to some, has been generous to refugees "as much the result of guilt, economic self-interest and international power politics (including, to a lesser extent, international law) than of notions of 'natural justice' *per se*."<sup>8</sup>

UNHCR, as part of its supervisory responsibility, has always had to address States' actions that are inconsistent with international refugee law. Situations of non-fulfilment by States of their obligations under the 1951 Refugee Convention have preoccupied UNHCR since its creation.<sup>9</sup> However, where States' approaches are underpinned by a commitment to the protection of refugees and a general humanitarian spirit, workable resolutions to such situations are more readily formulated in a cooperative manner with UNHCR.

With the end of the Second World War, there was a convergence between States' concern about refugees and States' national interests, which resulted in the creation of UNHCR and the drafting of the 1951 Refugee Convention. At that time, States were attempting to resolve a collective problem, the situation of the estimated 292,000 persons in Europe who had not been repatriated to their home countries or resettled in third countries<sup>10</sup> as well as the new refugees who were arriving from Eastern European countries.<sup>11</sup> Their interest in protecting refugees did not arise exclusively

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<sup>7</sup> Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 Int'l. J. Refugee L. 238, 243 (2002).

<sup>8</sup> TONY KUSHNER & KATHARINE KNOX, REFUGEES IN AN AGE OF GENOCIDE: GLOBAL, NATIONAL AND LOCAL PERSPECTIVES DURING THE TWENTIETH CENTURY 399 (1999).

<sup>9</sup> For example, see UNHCR, *Report of the UNHCR and Addendum*, U.N. Doc. A/2126 (1952), which includes a review of the protection problems of refugees in different countries.

<sup>10</sup> Note by the Secretary-General, U.N. Doc. A/C.3/528, ¶ 12 (26 Oct. 1949) [hereinafter "Note by the Secretary-General"]. U.N. GAOR, 4th Sess., 265<sup>th</sup> plen.mtg. at ¶ 12 (3 Dec. 1949).

<sup>11</sup> GIL LOESCHER, THE UNHCR AND WORLD POLITICS: A PERILOUS PATH 42 (2001).

from a humanitarian spirit. There also was a very practical and political side to States' willingness to guarantee the protection of refugees. As the President of the International Refugee Organisation noted in 1950, during discussions on the draft Convention, States would be willing to accept refugees to the extent that they needed labour.<sup>12</sup> Indeed, this was the primary approach taken by States that accepted Eastern European refugees after the creation of UNHCR.<sup>13</sup>

#### 4.2.2 Divergence

At present, there is a widespread perception that States are less willing to receive refugees, and to provide them with international protection. Thus, a significant divergence between UNHCR's and States' views of how asylum-seekers and refugees should be treated has emerged.<sup>14</sup> Pinpointing when and why States' interest in providing protection to refugees no longer converged with their political, economic and social interests is not easy.

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<sup>12</sup> During the discussions of the draft Statue of UNHCR, accusations were made by Eastern European countries that Western European countries were willing to accept healthy refugees who could provide needed labor. See for example, statements by the Representative of the Ukrainian Soviet Socialist Republic, U.N. GAOR, 4th Sess., 258<sup>th</sup> 3<sup>rd</sup> cee mtg. at ¶ 47, (9 Nov. 1949) and Mr. Zebrowski, Poland, U.N. GAOR, 4th Sess., 264<sup>th</sup> plen. mtg. at ¶ 165-6 (2 Dec. 1949). The memorandum of the International Refugee Organisation, addressed to the General Assembly, essentially confirms the view of the Eastern European States by stating that approximately 150,000 persons cared for by the IRO "are in circumstances which have so far made resettlement difficult, if not impossible, for them. They consist of people left alone in the world, unable to support themselves, requiring hospital accommodation or permanent care, or of individuals or whole families who, on grounds of age, health, occupation etc., have not as yet been resettled in other countries." Note by the Secretary-General, *supra* note 11, at ¶ 14.

<sup>13</sup> As Jan and Leo Lucassen have noted, the refugees fleeing from Eastern to Western Europe "were ostensibly welcomed by western countries for ideological and humanitarian reasons. In practice, however, each country tried to select the most able and best educated among the refugees. No one was interested in people who were elderly, sick, or disabled." JAN LUCASSEN & LEO LUCASSEN, *MIGRATION, HISTORY, HISTORY: OLD PARADIGMS AND NEW PERSPECTIVES* 16 (1997).

<sup>14</sup> There have been numerous articles analyzing the causes and effects of such crisis and making proposals for the way forward. See for example, Guy Goodwin-Gill, *The International Protection of Refugees: What Future?*, 12 Int'l. J. Refugee L. 1 (2000) and James Hathaway, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 Harv. Hum. Rts. J. 115 (1997).

There has been no comprehensive study done of the causes of such crisis, but various theories have been advanced. Chimini finds that the end of the Cold War meant that refugees no longer had "ideological or geopolitical value" for developed States.<sup>15</sup> Loescher cites the "steep rise in European unemployment combined with high immigration levels" which resulted in "increasing concern about being flooded by foreigners."<sup>16</sup> Gilbert Jaeger, a former Director of UNHCR's Division of International Protection, believes that the end of legal immigration, except for family reunification, in Western Europe in 1973-4, also played a significant role.<sup>17</sup> Grahl-Madsen situates the problem in an even broader context of a stagnating world economy and man's increasing awareness of global limitations in such areas as raw materials, energy and the capacity to reabsorb pollution, as well as rising unemployment.<sup>18</sup>

At the time of the beginnings of the refugee law and protection crisis, UNHCR found that:

It cannot be overlooked that various problems related to asylum have acquired an increasingly complex character due to continuing large influxes of asylum-seekers experienced by developed and developing countries alike. The higher level of economic opportunities in certain countries has prompted the mass movement from lesser developed areas of persons who voluntarily leave their country of origin drawn by the prospect of economic betterment. Current recessionary trends in the developed world have however limited the capacity of such countries to absorb large numbers of new arrivals. An additional and related factor is a perceptible resentment against aliens - including refugees - who are seen as competing for reduced economic opportunities. In the face of

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<sup>15</sup> See B. S. Chimini, *The Meaning of Words and the Role of UNHCR in Voluntary Repatriation*, 5 Int'l. J. Refugee L. 442, 443-4 (1993).

<sup>16</sup> Loescher, *supra* note 12, at 235.

<sup>17</sup> Gilbert Jaeger, *Are Refugees Migrants? The Recent Approach to refugee Flows as a Particular Aspect of Migration*, in OIKOUMENE, Special Issue, Refugees and Asylum Seekers in a Common European House, 18, 20 (Commission on Inter-Church Aid and World Council of Churches, eds., Aug. 1991) (on file with author).

<sup>18</sup> Atle Grahl-Madsen, *Refugees and Refugee Law in a World in Transition*, in THE LAND BEYOND: COLLECTED ESSAYS ON REFUGEE LAW AND POLICY BY ATLE GRAHL-MADSEN 138, 138-9 (Peter Macalister-Smith & Gudmundur Alfredsson eds., 2001).



increasingly restrictive admission practices resulting from declining immigration quota - many of the persons included in these migratory flows attempt to circumvent immigration rules by endeavouring to gain admission as asylum-seekers. These various developments must also be seen against the background of a general decline in public sympathy for the situation of the asylum-seeker, an unfortunate development that has been described as 'compassion fatigue'.<sup>19</sup>

Clearly, the declining economies in developed countries combined with increasing numbers of asylum-seekers left the public as well as officials with a less welcoming approach to refugees. One indication of the impending changes in countries' approaches to asylum was the unsuccessful attempt to turn the 1967 Declaration on Territorial Asylum into a Convention. The Universal Declaration of Human Rights provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution"<sup>20</sup>, but in reality, the concept of asylum has been viewed as the prerogative of the State, rather than the right of the individual. A convention on territorial asylum would have given individuals such a right. However, despite more than five years of work with a significant contribution by UNHCR, States could not reach agreement on the text.<sup>21</sup> The failure of States to adopt a text did not augur well for States' humanitarian approach to refugees. Since then, States have not adopted any additional refugee law instruments of a universal stature.

Signs of change clearly emerged in States' treatment of refugees in the 1980's. UNHCR's 1981 annual report to the General Assembly was quite

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<sup>19</sup> UNHCR, *Note on International Protection*, ¶ 10, U.N. Doc. A/AC.96/609 (26 Aug. 1982).

<sup>20</sup> Universal Declaration of Human Rights, G.A. Res. 217A, art.14(1), U.N. Doc. A/810 (12 Dec. 1948).

<sup>21</sup> The final death knell for the draft Convention occurred at the United Nations Conference on Territorial Asylum held from January to February 1977 at which only a few of the draft articles were discussed amidst a harsh political climate. Atle Grahl-Madsen, *TERRITORIAL ASYLUM*, 8-10 (1980). An honest assessment of the reasons for the failure of the conference are given in Gervase Coles, *Recent and Future Developments in International Refugee Law* 5-8 (paper submitted to the Seminar on Problems in the International Protection of Refugees, Univ. of New South Wales, 2-3 August 1980) (on file with author).

positive. It notes that the general protection situation was "somewhat more encouraging than in previous years", with no large-scale measures of *refoulement*, States were generally applying liberal practices as regards the admission of asylum-seekers.<sup>22</sup> However, in UNHCR's 1982 annual report, UNHCR notes that "[t]here are indications that Governments in different areas of the world are adopting an increasingly restrictive approach", such as by assuming "that certain groups of asylum-seekers were a priori ineligible for refugee status" and adopting "more onerous standards of proof" for certain categories of asylum-seekers.<sup>23</sup>

These initial restrictive measures would develop into a pronounced trend, which became the dominant focus of UNHCR's concern about international protection, and specifically, the effectiveness of refugee law. As a result, the 1983 Note on International Protection was essentially devoted to the deterioration in international protection, in particular with respect to States' admission policies and their treatment of refugees.<sup>24</sup>

Countries, particularly those in the developed world, have continued to devise restrictive measures. They attempt to limit the number of refugees reaching their territory, including through the sealing off of borders with electric fences, direct or indirect *refoulement*, non-embarkation of asylum-seekers arriving by boat, visa requirements, carrier sanctions,<sup>25</sup> and detention,<sup>26</sup> and have even proposed to screen asylum-seekers outside the

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<sup>22</sup> UNHCR, *Report of the UNHCR*, ¶ 7, U.N. Doc. A/36/12 (1981). However, the situation was not completely rosy as certain problems encountered in previous years, such as difficulties for refugees of finding a country of asylum, *refoulement* of individuals, unjustified detention, threats to personal safety, piracy, abduction and armed attacks, continued. *Id.*, at ¶14.

<sup>23</sup> UNHCR, *Report of the UNHCR*, ¶ 9, 47, U.N. Doc. A/37/12 (1982).

<sup>24</sup> UNHCR, *Note on International Protection*, ¶ 10-19, U.N. Doc. A/AC.96/623 (31 July 1983).

<sup>25</sup> See UNHCR, *Note on International Protection*, ¶14-15, U.N. Doc. A/AC.96/750 (27 Aug. 1990).

<sup>26</sup> See UNHCR, *Note on International Protection*, ¶ 13, U.N. Doc. A/AC.96/989 (7 July 2004).

country of asylum.<sup>27</sup> States also have attempted to limit the number of persons eligible for refugee status through various approaches. They have applied narrow interpretations of the refugee definition and exclusion clauses, and limited rights to appeal.<sup>28</sup> They have provided alternative categories for refugee status, such as "humanitarian status", "B status", and "de facto status",<sup>29</sup> delayed the determination of refugee status in the expectation that the country situation would change, and adopted principles, such as first country of asylum, safe third country and safe country of origin.

Developing countries also have adopted restrictive measures, such as: the obligation that refugees live in camps, prohibitions on seeking or accepting work, and restrictions on education for children. They have increased their use of the arrest and detention of refugees, restricted movement outside refugee camps, and reduced food rations, opportunities for generating income.<sup>30</sup>

In the developed world, today, the refugee issue is intertwined with States' preoccupation about migration issues on the one hand, in particular illegal immigration and smuggling activities, and on the other, security concerns, on the other, particularly following the terrorist acts of 11 September

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<sup>27</sup> This issue received considerable attention when a draft United Kingdom document, see CO/HO Future of Migration Project, *A New Vision for Refugees*, Final Report, 4 (Jan. 2003) was leaked to the UK press. See Alan Travis, Shifting a problem back to its source – would-be refugees may be sent to protected zones near homeland, *The Guardian*, 5 February 2003.

<sup>28</sup> See UNHCR, *Note on International Protection*, ¶ 11, U.N. Doc. A/AC.96/609/Rev.1 (26 Aug. 1982). Chaloka Beyani finds that "a narrow construction of refugee law has emerged by reference to the mechanical process of status determination under domestic legal procedures and case law." Chaloka Beyani, *The Role of Human Rights Bodies in Protecting Refugees*, in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS: ESSAYS IN MEMORY OF JOAN FITZPATRICK AND ARTHUR HELTON, 269, 271 (Anne Bayefsky ed., 2006).

<sup>29</sup> UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, ¶2, UNHCR Doc. EC/50/SC/CRP.18 (9 June 2000).

<sup>30</sup> See UNHCR, *Note on International Protection*, ¶ 7, U.N. Doc. A/AC.96/1008 (4 July 2005).

2001.<sup>31</sup> Issues of race, or as others term it, the north-south problem, also complicate the situation. Concerns in the developing world, which have received much less attention from the press and refugee scholars, primarily revolve around human security issues related to economic security, social and political security, and physical security.<sup>32</sup>

At the same time that States were adopting measures, some of which actively violated the provisions of the 1951 Refugee Convention/1967 Protocol and others, which although not an express breach of a provision were nevertheless contrary to the humanitarian spirit of those agreements, UNHCR's influence and ability to curb such approaches was diminishing. States' various internal difficulties, mentioned above, meant that they were less willing to follow UNHCR's guidance, particularly in the absence of an international refugee law that contradicted or contravened their conduct, and were unable or unwilling to preserve the more humanitarian approach of previous years.

UNHCR could no longer simply advise States how to remedy a refugee issue and count on States' cooperation in doing so. UNHCR's frustration was apparent in its 1988 Note on International Protection when it noted that its international protection function was a "fundamental, humanitarian responsibility...[which] requires UNHCR to stand between the endangered individuals and a state authority."<sup>33</sup> Many of the policies and actions taken by States capitalized upon the weaknesses in refugee law and the methods for ensuring the effectiveness of international refugee law. As a result, the content of refugee law became the source for the points of contention between UNHCR and States and the effectiveness of refugee law became a dominant concern for UNHCR. As UNHCR acknowledged in its 1983

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<sup>31</sup> *Id.*, at ¶ 9.

<sup>32</sup> See chapter 1 titled "Safeguarding human security" in UNHCR, *THE STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA* (1997).

<sup>33</sup> UNHCR, *Note on International Protection*, ¶ 1, U.N. Doc. A/AC.96/713 (15 Aug. 1988).

Note on International Protection, the principles of international protection needed to be "strongly reaffirmed, effectively implemented and, where necessary, further developed."<sup>34</sup>

#### 4.3. WEAKNESSES IN THE TREATY FRAMEWORK

The difficulties, which emerged in the 1980's with States' protection of refugees, brought the weaknesses in the traditional refugee law framework to the forefront. This traditional framework is based on the 1951 Refugee Convention and is supplemented by the 1967 Protocol and several other specific international refugee law instruments, namely, the 1957 Refugee Seamen Agreement and the Universal Copyright Convention, which supplement articles 11 and 14, respectively, of the 1951 Refugee Convention<sup>35</sup> as well as regional refugee instruments. As the 1951 Refugee Convention contains the most comprehensive elaboration of States' obligations to refugees and had been only minimally supplemented by other agreements, the gaps and ambiguities relate primarily to the provisions of this convention.

While in 1983, UNHCR acknowledged the insufficiency of standards relating to the obligation of governments towards refugees and asylum-seekers,<sup>36</sup> nearly 20 years later such inadequacies would lead to claims by some government officials that the 1951 Refugee Convention is no longer

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<sup>34</sup> UNHCR, *Note on International Protection*, ¶ 27, U.N. Doc. A/AC.96/623 (31 July 1983).

<sup>35</sup> Agreement relating to Refugee Seamen, 23 Nov. 1957, 506 U.N.T.S. 125, which was updated with the 1973 Protocol relating to Refugee Seamen, 12 June 1973, 965 U.N.T.S. 445; Protocol 1 to the Universal Copyright Convention, 6 Sept. 1952, 216 U.N.T.S. 132; and Protocol 1 Annexed to the Universal Copyright Convention as Revised at Paris on 24 July 1971, concerning the Application of that Convention to Works of Stateless Persons and Refugees, 24 July 1971, 943 U.N.T.S. 178.

<sup>36</sup> UNHCR, *Note on International Protection*, ¶ 27, U.N. Doc. A/AC.96/623 (31 July 1983).

relevant and that a new convention should be drafted.<sup>37</sup> In particular, the weaknesses in this traditional refugee law framework include gaps and ambiguities in the treaty standards, different regional standards, and political and institutional obstacles to the completion of the legal framework.

#### 4.3.1 Gaps and Ambiguities

In the 1980's, States' treatment of asylum-seekers and refugees resulted in new legal issues that exposed gaps in the traditional legal framework, comprised of the 1951 Refugee Convention, other international refugee agreements, and regional refugee instruments. For example, States prevented asylum-seekers, who arrived by boat, from disembarking in their territory. States argued that the 1951 Refugee Convention only applied once the asylum-seeker had reached the territory of a State party to the Convention. Also, in the absence of legal standards concerning voluntary repatriation, States attempted to return refugees to their countries of origin by adopting measures to pressure them into returning and frequently returned them without any guarantees as to their treatment upon return.

In addition, States adopted more restrictive approaches in their treatment of refugees, in particular with respect to asylum-seekers. Only two articles in the 1951 Refugee Convention directly apply to asylum-seekers; article 31 prohibits States from imposing penalties on a person based on her illegal entry, and article 33 bars States from undertaking the *refoulement* of a person.<sup>38</sup> Thus, States limited the rights of asylum-seekers in their

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<sup>37</sup> For example, in 2000, the UK Home Secretary, Jack Straw, indicated an interest in completely revising the 1951 Refugee Convention. See Alan Travis, *Straw aims to rewrite treaty on refugees*, The Guardian, 8 June 2000 at 1-2. Presidency of the European Union, *Austrian Strategy Paper on Immigration and Asylum*, ¶ 102, 9809/98 (13 July 1998) proposing that the Convention should be supplemented, amended or replaced.

<sup>38</sup> 1951 Refugee Convention, *supra* note 3, at arts. 31(1), 33(1). The first paragraph of Article 31 provides that "The Contracting States shall not impose penalties, on

territories in order to discourage additional arrivals. UNHCR also was confronted by States' adoption of approaches and concepts that had not previously existed, such as those of "safe third country" and "first country of asylum", which were intended to limit the number of refugees for which countries of asylum were responsible.

States' tendency to adopt narrow interpretations of the 1951 Refugee Convention's provisions also made ambiguities in the provisions of the traditional legal framework more apparent, and highlighted areas in which the 1951 Refugee Convention's provisions required clarification. These included: the meaning of "particular social group" in the refugee definition, the application of the cessation and exclusion clauses,<sup>39</sup> the content of States' obligation not to impose penalties on asylum-seekers for their illegal entry or presence, and the extent of the obligation imposed upon States by the provision that they "shall as far as possible facilitate the assimilation and naturalization of refugees."<sup>40</sup>

The 1951 Refugee Convention provides only general guidance when addressing new issues or clarifying the content of the Convention's provisions. Specifically, the preamble to the 1951 Refugee Convention states that the Charter of the United Nations and the Universal Declaration of Human Rights affirm the principle "that human beings shall enjoy fundamental rights and freedoms without discrimination."<sup>41</sup> The Final Act,<sup>42</sup> of the UN Conference, which completed the drafting and adopted

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account of their illegal presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." The first paragraph of Article 33 provides that "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

<sup>39</sup> 1951 Refugee Convention, *supra* note 3, at arts. 1A, 1C, 1F.

<sup>40</sup> *Id.*, at arts. 31, 34.

<sup>41</sup> 1951 Refugee Convention, *supra* note 3, at 1<sup>st</sup> preambular ¶.

<sup>42</sup> Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 28 July 1951, 189 U.N.T.S. 137.

the 1951 Refugee Convention, also contains some limited principles, specifically those of family unity, the extension of treatment provided by the Convention to other persons not covered by the Convention, and international cooperation among States in order to ensure that refugees find asylum.

Thus, when States adopted measures, which exploited the gaps and ambiguities in the refugee law framework, UNHCR had difficulty alleging that such actions were breaches of specific 1951 Refugee Convention standards. UNHCR's problem, in addressing States' actions through the provisions of the 1951 Refugee Convention, was compounded by the fact that the Convention does not provide a mechanism for the further development of its standards. The general principles in the preamble of the 1951 Refugee Convention and the Final Act only serve as a general guide to the tenor and approach that should be taken to clarify such ambiguities or to fill in such gaps.

#### 4.3.2 Different Standards for Different States

The 1951 Refugee Convention, with the 1967 Protocol, furnished the foundations for refugees to be treated in a similar manner regardless of the country of asylum, but the presence of the 1969 OAU Refugee Convention and, from 1984, the Cartagena Declaration, meant that different standards applied to refugees in different regions. For example, in OAU member States and Latin American States, every person had a right to seek and obtain asylum.<sup>43</sup> States outside of these two regions, however, were only bound by the 1951 Refugee Convention's prohibition on the *refoulement* of a refugee.<sup>44</sup>

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<sup>43</sup> African Charter on Human and Peoples' Rights, art.12(3), 27 June 1981, 21 I.L.M. 58 (1982) and American Convention on Human Rights, art. 22(7), 22 Nov. 1969, 1144 U.N.T.S. 123.

<sup>44</sup> 1951 Refugee Convention, *supra* note 3, at art. 33.



The presence of regional conventions also meant that even the definition of who is a refugee depended on where the person is located. Latin American States, under the 1984 Cartagena Declaration and African Union States, under the 1969 OAU Refugee Convention, recognized a broader category of refugees than States relying solely on the refugee definition in the 1951 Refugee Convention. The former group of States recognized not only persons fleeing persecution, but also persons fleeing internal conflict or war or other causes that perturbed public order.<sup>45</sup> Although UNHCR recognized such persons as refugees,<sup>46</sup> no international convention of a universal stature enshrined the larger refugee definition.

Recently, a further regional disparity in who may qualify as a refugee was introduced by the European Union's limitation of the definition of a "refugee" to third country nationals.<sup>47</sup> As a result, persons who originate from an EU Member State country are excluded from obtaining refugee status; only persons coming from a non-EU Member State are eligible for refugee status within an EU country.

Temporary protection is another concept whose application was dependent upon the location of the person; persons in the OAU (now African Union) could obtain temporary protection, but not persons in other States. For member States, the 1969 OAU Refugee Convention provides that refugees may be accorded temporary asylum where the "refugee has not received the right to reside in any country of asylum", but does not elaborate the obligations States have to refugees in such cases or any other details.<sup>48</sup> There is no universal refugee convention, however, that contains the

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<sup>45</sup> 1969 OAU Refugee Convention, *supra* note 5, at art. I.2 and 1984 Cartagena Declaration, *supra* note 5, at III.3.

<sup>46</sup> UNHCR, *Note on International Protection*, ¶ 17, U.N. Doc. A/AC.96/593 (31 July 1981). Also see EXCOM Conclusion 22 (XXXII), ¶ 1, 1981.

<sup>47</sup> Council Directive 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, art. 2(c), 2004/83, 2004 O.J. (L 304) 12 (EC) [hereinafter "Qualification Directive"].

<sup>48</sup> 1969 OAU Refugee Convention, *supra* note 5, at Art. II.5.

concept of temporary protection, although from a common sense standpoint, it could be said that asylum was always meant to be a temporary solution to the situation of refugees.

Another regional approach to the issue of temporary protection was introduced by the European Union with the EU Council Directive 2001/55 on temporary protection. This Directive establishes certain obligations of EU member States towards persons receiving temporary protection, including the length of time of the temporary protection, and the ability of persons receiving temporary protection to submit an asylum application.<sup>49</sup> However, unlike the 1969 OAU Refugee Convention, EU Council Directive 2001/55 does not clearly state when States may utilize temporary protection.

Thus, in the absence of a universal harmonization of international legal standards applicable to refugees, the treatment of an asylum-seeker or refugee depends upon the location of such person. From a general perspective, the legal framework also becomes less universal and more regionalized, thereby leaving inconsistent standards. Additionally, there is a risk that States begin to view the legal framework for refugee protection as one based upon their own regional interests rather than a common international one.

#### 4.3.3 Obstacles to the Completion of the Treaty Framework

Logically, if the treaty law framework is deficient and incomplete, then why has it not been modified and supplemented to address the gaps, ambiguities, and differences in standards? There are a number of reasons, both political and institutional, why it has not.

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<sup>49</sup> Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Council Directive 2001/55, 2001 O.J. (L212) 12 (EC).

From a political perspective, there has not been a new refugee convention adopted at the international level following States' inability to reach agreement on a convention on territorial asylum. As noted in section 2 above, the changes in the political, social and economic situation of States have meant that States are not interested in expanding the rights of refugees, but rather in limiting such rights and the number of refugees who reach their territories. Thus, UNHCR has never pursued an update of the 1951 Refugee Convention as it realized that States were unlikely to adopt new instruments to meet these situations.<sup>50</sup> Moreover, if States could agree on additional standards, that would provide further clarification and elaboration of the legal protection for refugees, they would likely reduce the protection standards for refugees rather than enhance them.

Recent developments in regional refugee law standards in the European Union attest to the fact that countries are more interested in limiting the rights of refugees. UNHCR initially welcomed the important initiative of the European Union to harmonize asylum law as an opportunity to have similar, elaborated and it was hoped, high level protection for refugees. However, as the process continued, UNHCR, non-governmental organisations and others concerned about refugees became increasingly alarmed by the propensity to adopt standards that harmonized member States' laws at the "lowest common denominator"<sup>51</sup> and that provided opt-out provisions, which permit States not to apply certain substantive provisions.

For example, as noted above, the refugee definition in the EU Council Directive on minimum standards for the qualification and status as

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<sup>50</sup> UNHCR, *Note on International Protection*, ¶ 44, U.N. Doc. A/AC.96/830 (7 Sept. 1994). According to Schachter "[T]he prevailing practice of seeking consensus or near-unanimity to adopt a convention has led to highly ambiguous or vacuous provisions." Oscar Schachter, *The UN Legal Order: An Overview in THE UNITED NATIONS AND INTERNATIONAL LAW*, 3, 7 (Christopher Joyner, ed., 1997)

<sup>51</sup> UNHCR, *Aide Memoire: Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status*, (18 Nov. 2003), <http://www.unhcr.org/protect/PROTECTION/43661fd62.pdf>.

refugees is more restrictive than the definition contained in the 1951 Refugee Convention, since it is limited to “third country nationals”.<sup>52</sup> Moreover, the EU Directive introduces two additional criteria for excluding an asylum applicant from refugee status that are not contained in the 1951 Refugee Convention.<sup>53</sup>

From an institutional perspective, there is no body at the international level with responsibility for the creation of refugee law in a manner similar to legislatures and parliaments that create law at a national level. Within the United Nations, the General Assembly does not have any legislative powers, but rather is to “encourag[e] the progressive development of international law and its codification”.<sup>54</sup> The International Law Commission, created by the General Assembly to assist it in furthering the progressive development of international law,<sup>55</sup> was assigned, as part of its initial list of subjects to be codified, the topic of the right to asylum. However, the ILC did not consider this topic ready for codification. Consequently, the ILC has never codified the right to asylum or any other refugee law topic.<sup>56</sup> However, the ILC decided to include the topic on the expulsion of aliens in its programme in 2004. The draft articles on this topic contain a specific provision barring the expulsion of an asylum-seeker or refugee except for certain exceptional reasons, which include those contained in article 33(2) on *non-refoulement* in the 1951 Refugee Convention, as well as others.<sup>57</sup>

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<sup>52</sup> Qualification Directive, *supra* note 49, at art. 2(c).

<sup>53</sup> *Id.*, at art. 14(4-5).

<sup>54</sup> U.N. Charter art. 13, para. 1a. In fact, a proposal to permit the General Assembly to adopt conventions, in a manner similar to that of the ILO Conference, was defeated at the San Francisco conference on the drafting of the UN Charter. D.W. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 344 (4<sup>th</sup> ed. 1982).

<sup>55</sup> G.A. Res. 174(II) (21 Nov. 1947).

<sup>56</sup> ARTHUR WATTS, *1 THE INTERNATIONAL LAW COMMISSION: 1949-1998*, 5-6 (1999).

<sup>57</sup> Draft article 5 on the non-expulsion of refugees provides:

“1. A State may not expel a refugee lawfully in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a

The ILC not only consolidates existing law but also contributes to its progressive realization and in doing the latter, assists in making significant advancements in areas of law that it considers. States, however, are not ready for significant advancements in connection with either asylum or refugee law in general since these areas are viewed by States as within their domain and refugees a *problem* to be resolved. Thus, the General Assembly has not evidenced any recent interest in assigning refugee law related issues to the ILC or another body for drafting.

Neither is there an administrative body that is empowered to adopt binding interpretative formulations on refugee law issues as in certain national legal systems.<sup>58</sup> The Executive Committee of the UNHCR is the closest analogy that exists in refugee law to an administrative body with such interpretative authority. EXCOM does adopt conclusions on protection issues addressed to States, but these are not legally binding on them.<sup>59</sup> In addition, EXCOM cannot be said to be a fully representative body since not all State parties to the 1951 Refugee Convention or the 1967 Protocol

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final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.

2. The provisions of paragraph 1 of this article shall also apply to any person who, being in an unlawful situation in the territory of the receiving State, has applied for refugee status, unless the sole manifest purpose of such application is to thwart an expulsion order likely to be handed down against him or her [against such person].”

See footnote 398 in para. 198 of the International Law Commission Report for its session of 7 May-5 June and 9 July to 10 August 2007. General Assembly, International Law Commission, *Report of the International Law Commission (59th Session)*, U.N. GAOR, 62nd Sess., Supp. No. 10, A/62/10 (2007).

<sup>58</sup> In fact, no human rights treaty has such a body. However, note that several UN specialized agencies do have mechanisms for creating standards without the explicit approval of all member States. For example, the International Civil Aviation Organisation can adopt international standards and recommended practices as annexes to the Chicago Convention. See Frederic Kirgis, *Specialized Law-Making Processes*, in *THE UNITED NATIONS AND INTERNATIONAL LAW*, 65, 70-72 (Christopher Joyner, ed. 1997).

<sup>59</sup> The General Assembly and ECOSOC resolutions creating EXCOM, discussed in section 3.2 of chapter 3, do not expressly authorise EXCOM to provide advice to States. EXCOM’s role was to advise the High Commissioner.

are members of EXCOM.<sup>60</sup> However, from a practical standpoint, EXCOM conclusions often address areas where there is a lack of standards or ambiguities in existing standards. Even though Member States of EXCOM would not adopt such conclusions if they did not believe that States should abide by them, there is no follow-up mechanism to evaluate compliance. Endorsement of EXCOM's conclusions by the General Assembly does provide the conclusions with additional significance, but does not turn them into legally binding obligations for States.<sup>61</sup>

Thus, States remain the decisive force and the key to the international community's failure to complete the gaps and clarify ambiguities in refugee law. As a former Director of the Division of International Protection in UNHCR has stated: "some States have actively resisted" the development of refugee law while "others have given clear precedence to perceived political or national interests".<sup>62</sup> The lack of action by States may be preferable, however, to the updating of the 1951 Refugee Convention in a manner that diminishes States' obligations to accord rights to refugees. A risk exists that they would adopt an approach similar to that applied by the ILC with respect to the rights of aliens who are to be expelled; namely, that while the International Court of Justice has recognized States' obligation to respect human rights, State practice may lead to limiting such rights to fundamental human rights and freedoms and those required by the specific circumstances.<sup>63</sup>

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<sup>60</sup> Only seventy-nine States are represented on EXCOM and not all of them are parties to the 1951 Refugee Convention or 1967 Protocol.

<sup>61</sup> General Assembly resolutions are not normally binding, except with respect to certain internal matters, such approval of the budget and decisions on the appointment of persons to UN positions. BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 29 (Philippe Sands & Pierre Klein, eds., 5<sup>th</sup> ed., 2001).

<sup>62</sup> Dennis Macnamara & Guy Goodwin-Gill, *UNHCR and International Refugee Protection*, Refugee Studies Centre Working Paper No. 7, at 6 (Refugee Studies Centre, Univ. of Oxford, ed., June 1999), <http://www.rsc.ox.ac.uk/PDFs/workingpaper2.pdf>.

<sup>63</sup> See paragraph 93 of the Report of the International Law Commission on the work of session from 4 May to 5 June and 6 July to 7 August 2009. General Assembly,

#### 4.4. WEAKNESSES IN THE MEANS FOR ENSURING THE EFFECTIVENESS OF INTERNATIONAL REFUGEE LAW

States' employment of restrictive measures toward refugees, which led to a crisis in international protection and refugee law in the 1980's, highlighted not only problems in the refugee law framework, but also weaknesses in the means for ensuring the effectiveness of international refugee law standards for the protection of refugees. In particular, the difficulties with ensuring States' ratification and accession of the 1951 Refugee Convention and the 1967 Protocol and States' implementation and application of their international refugee law obligations under these agreements, assumed greater importance. This chapter examines the problems in these three areas.

##### 4.4.1 Problems with Ensuring Ratifications and Accessions

International refugee law is founded upon a treaty law basis, that of the 1951 Refugee Convention, with its 1967 Protocol. Since the 1951 Refugee Convention was the primary international agreement providing protection to refugees prior to the crisis in refugee law and protection, and remains the central agreement today, it is essential that all member States of the United Nations become parties to the 1951 Refugee Convention with its 1967 Protocol.

The drafters of UNHCR's Statute, who provided UNHCR with a promotional role related to States' ratification of international conventions for the protection of refugees, as discussed in section 1.3.1.1 of chapter 1, were indeed justified in their concern about States' ratification of the 1951 Refugee Convention. Eleven years passed before all original signatories to the 1951 Refugee Convention had ratified the 1951 Refugee Convention, with Turkey being the last signatory to ratify it in 1962. No mechanism

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International Law Commission, *Report of the International Law Commission (61st Session)*, U.N. GAOR, 64th Sess., Supp. No. 10, (A/64/10) (2009).

exists to oblige States to submit the 1951 Refugee Convention for ratification within a certain time frame or requires States that have not yet ratified to report on measures toward ratification or the problems delaying ratification. Such mechanisms do exist under the constitutions of the International Labour Organisation, the World Health Organisation, and the United Nations Educational, Scientific and Cultural Organisation,<sup>64</sup> but these are organisations that are UN specialized agencies with constitutions that are treaties rather than, in the case of UNHCR, a General Assembly resolution.

The process of turning the 1951 Refugee Convention into a treaty universally applicable, through accessions to it and its 1967 Protocol, has been a slow process. As of November 2007, there were still nearly fifty countries that had not become parties to one or both treaties.<sup>65</sup> This means that nearly one quarter of the world's countries are still not bound by the 1951 Refugee Convention standards.

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<sup>64</sup> See for example, Constitution of the International Labour Organisation, art. 19(5), which provides that States will take action upon the convention or agreement within 1 year and even where formal ratification is not obtained by a State, the State must report periodically on its law and practice relative to matters dealt with in the convention. For the ILO Constitution see <http://www.ilo.org/ilolex/english/constq.htm> [hereinafter "ILO Constitution"]. Under article 20 of the Constitution of the World Health Organisation, each State must take action to accept a convention or agreement within 18 months and if it does not accept such instrument within this time limit, then the State must furnish information as to the reasons for non-acceptance. For the WHO Constitution see [http://www.who.int/gb/bd/pdf/bd46/e-bd46\\_p2.pdf](http://www.who.int/gb/bd/pdf/bd46/e-bd46_p2.pdf) [hereinafter "WHO Constitution"]. In addition, under article IV(4) of UNESCO's Constitution, each Member State shall submit recommendations or conventions to its competent authorities within a year. For UNESCO's Constitution see [http://www.icomos.org/unesco/unesco\\_constitution.html](http://www.icomos.org/unesco/unesco_constitution.html). In addition, the International Maritime Organisation has a mechanism to ensure that amendments to treaties come into effect relatively quickly; when an amendment is adopted by the IMO, States are obligated to accept such amendments after the passage of a certain period of time. See Nagendra Singh, *The UN and the Development of International Law in UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS* 384, 411-2 (Adam Roberts & Benedict Kingsbury, eds., 2<sup>nd</sup> ed., 1993).

<sup>65</sup> See UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, (as of 1 November 2007), <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.



Most States that are not parties to these refugee instruments are located in Asia and the Middle East. Quite a few of these countries, such as Pakistan, Thailand, Iraq, and Jordan have hosted or are currently hosting large numbers of refugees. However, while there is a regional declaration on refugees in Asia, the Bangkok Principles on Status and Treatment of Refugees,<sup>66</sup> no binding regional convention exists for Asia. In the Middle East, an Arab Convention on Regulating Status of Refugees in the Arab Countries was adopted in 1994, but is not used.<sup>67</sup>

From a legal standpoint, the fact that the State does not accede to the 1951 Refugee Convention or the 1967 Protocol does not mean that the State cannot protect refugees' rights in practice. But if the State has no international legal obligation then there are fewer incentives for it to adopt the requisite national legislation and to comply with such obligations. Consequently, accession remains the essential first step in ensuring the effectiveness of international refugee law.

Even where a State is a party, States may use reservations to limit the effectiveness of the refugee treaties. For example, Madagascar, Monaco, and Turkey still maintain the geographic restriction contained in the 1951 Refugee Convention.<sup>68</sup> Other States, such as Botswana, Mexico, and Papua New Guinea, have made reservations to key provisions of the 1951 Refugee Convention, such as article 31 on illegal entry and article 32 concerning the expulsion of refugees. No means exists to review and require the State concerned to remove its reservation.

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<sup>66</sup> Asian-African Legal Consultative Organization (AALCO), *Principles Concerning Treatment of Refugees, Asian-African Legal Consultative Committee* ("Bangkok Principles"), 31 December 1966, available at: <http://www.unhcr.org/refworld/docid/3de5f2d52.html>.

<sup>67</sup> Arab Convention on Regulating the Status of Refugees in Arab Countries, adopted by the League of Arab States in 1994, <http://www.unhcr.org/publ/PUBL/455c733b2.pdf>.

<sup>68</sup> UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, *supra* note 65.

As a result, in the case of countries that have not acceded to the 1951 Refugee Convention or the 1967 Protocol and countries that maintain a geographic restriction, UNHCR is left without the 1951 Refugee Convention as the key instrument for sanctioning actions that violate refugees' rights and for diplomatically or vociferously demanding a change in such conduct. In addition, reservations made by countries to key provisions of the 1951 Refugee Convention also pose challenges to UNHCR's work to ensure that the full range of obligations contained in the Convention are binding on States at an international level.

In sum, the ratification and accession of the key conventions for the protection of refugees, the 1951 Refugee Convention and the 1967 Protocol, have been matters left to the discretion of States, with UNHCR's traditional role being merely one of promoting ratifications and accessions, as seen in chapter 2.

#### 4.4.2 Problems with Implementation

The 1951 Refugee Convention and the 1967 Protocol remain dead letter law unless their provisions, for the protection of refugees, are incorporated into national law. The only legal obligation of States related to their implementation of international refugee law standards is that of furnishing UNHCR with information about "the implementation" of the 1951 Refugee Convention and the 1967 Protocol as well as "laws, regulations and decrees" relating to refugees and providing the UN Secretary-General with "the laws and regulations which they may adopt to ensure the application" of the 1951 Refugee Convention.<sup>69</sup> However, while States have an affirmative obligation to apprise the UN Secretary-General of the national laws and regulations that implement their international obligations, such information is to be provided to UNHCR following

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<sup>69</sup> 1951 Refugee Convention, *supra* note 3, at arts. 35(2) and 36, 1967 Protocol, *supra* note 5, at arts. II(2), III.

UNHCR's request. Moreover, the obligations to provide such information are not very stringent, particularly as they do not establish a time frame within which this information must be provided, as is the case with some of the UN specialized agencies<sup>70</sup> and under certain international human rights instruments.<sup>71</sup>

UNHCR has understandably taken the initiative to request information on States' national laws and rules that implement their international refugee law obligations. However, when UNHCR requested information from States about their implementation of the 1951 Refugee Convention through questionnaires, many States failed to respond, as discussed in section 2.4.2 of chapter 2. Even where States responded, the information provided was not always sufficiently detailed or accurate,<sup>72</sup> since States are usually unwilling to criticise themselves.<sup>73</sup>

States' approach, increasingly visible in the 1980's, of discouraging the arrival of more asylum-seekers and of making the lives of those asylum-seekers already on their territories objectionable, has taken concrete form

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<sup>70</sup> Under the ILO Constitution each Member State must report annually "on the measures it has taken to give effect to the provisions of Conventions to which it is a party". ILO Constitution, *supra* note 64, at art. 22. Under the WHO Constitution, each member must report annually on action taken with respect to recommendations and conventions, and provide "important laws, regulations, official reports and statistics pertaining to health which have been published in the State". WHO Constitution, *supra* note 64, at arts. 62-3.

<sup>71</sup> See for example, article 9(1) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which provides a time within which States must report on the "legislative, judicial, administrative or other measures which they have adopted and which give effect" to the Convention's provisions and provides for regular reporting "thereafter every two years and whenever the Committee so requests". International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, 660 U.N.T.S. 195.

<sup>72</sup> See for example, UNHCR, *Note on International Protection Addendum 2: Implementation of the 1951 Convention and 1967 Protocol on the status of refugees – preliminary report*, ¶ 4, U.N. Doc. A/AC.96/508/Add.2 (26 Sept. 1974).

<sup>73</sup> Henry Schermers & Niels Blokker, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 882 (4th ed., 2003) citing Niels Blokker & Sam Muller, *Towards More Effective Supervision by International Organizations*, in 1 *TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF HENRY G. SCHERMERS* 281-2 (1994).

in the national legislation adopted by States. Therefore, UNHCR has been confronted with national legislation that actually violates the standards of the 1951 Refugee Convention, such as with provisions for the detention of all asylum-seekers arriving without visas at airports. In other cases, national legislation or administrative measures may contain provisions, such as the safe third country concept, which do not expressly violate the 1951 Refugee Convention's standards but are nevertheless contrary to the humanitarian spirit of the convention and the notion of refugee protection. Yet, no UNHCR or international mechanism exists to sanction the content of States' national rules.

Some States simply fail to incorporate the provisions of international conventions for the protection of refugees into their national laws. This clearly suggests reluctance, on their part, to give full effect to the rights that they are legally obligated to accord to refugees under international law. Here again, there is no means provided to require States to incorporate their international legal obligations to refugees into national standards.

Thus, traditionally and prior to the crisis in international protection and refugee law, implementation of international conventions for the protection of refugees was primarily left to the discretion of States, with UNHCR's responsibility consisting of obtaining information from States about actual administrative and legislative measures that States had adopted.

#### 4.4.3 Problems with Application

Prior to the 1980's and the onset of the refugee law crisis, when States' and UNHCR's perceptions of the importance of protecting refugees were in greater alignment, UNHCR could provide informal advice to States and States were more likely to undertake the necessary steps to modify their actions. As noted above, a greater sense of cooperation prevailed between

UNHCR and States before the mid-1980's. Since then, the question of how to ensure the application of international legal standards for the protection of refugees has become a predominant concern of UNHCR.

Enforcement mechanisms are the normal means relied upon in law to ensure compliance.<sup>74</sup> In the area of international refugee law, the International Court of Justice offers two possible avenues to sanction a State's actions that violate the 1951 Refugee Convention. First, UNHCR can make a request to the International Court of Justice for an advisory opinion related to the interpretation of the 1951 Refugee Convention, pursuant to article 65 of the ICJ Statute.<sup>75</sup> UNHCR has never done so. Alternatively, under article 38 of the 1951 Refugee Convention, States can bring a dispute to the ICJ that concerns the interpretation or application of the 1951 Refugee Convention.<sup>76</sup> However, this dispute mechanism has not yet been invoked by any State. In fact, the ICJ has only heard two cases related to refugee law, both of which it decided prior to the adoption of the 1951 Refugee Convention.<sup>77</sup>

No other multi-national mechanism exists, in relation to the provisions of the 1951 Refugee Convention, to sanction non-compliance. UNHCR's statutory responsibility, to supervise States' application of international conventions for the protection of refugees, remains the primary means of ensuring compliance by States. However, UNHCR does not have the authority, in contrast to the treaty bodies to the key human rights

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<sup>74</sup> See Carl-August Fleischhauer's distinction between enforcement and compliance. Carl-August Fleischhauer, *Inducing Compliance*, in UNITED NATIONS LEGAL ORDER 231, 232 (Oscar Schachter & Christopher Joyner, eds., 1995).

<sup>75</sup> U.N. Charter, art. 65.

<sup>76</sup> 1951 Refugee Convention, *supra* note 3, at art. 38.

<sup>77</sup> Asylum Case (Colombia v. Peru) 1950 I.C.J. 266 (20 Nov.) and Haya de la Torre (Columbia v. Peru) 1951 I.C.J. 71 (13 June). These cases, between Columbia and Peru, involved the issue of the grant of diplomatic asylum by the Colombian Ambassador in Lima, Peru in 1949 to Mr. Haya de la Torre, the head of a political party in Peru. Both cases involve the interpretation of a provision in the 1928 Havana Convention on Asylum concerning asylum in a country's embassy to political refugees of the country in which the embassy is located.

agreements, to receive and hear complaints from States or individuals concerning non-compliance with the 1951 Refugee Convention's provisions.

States' obligation to cooperate with UNHCR, under the 1951 Refugee Convention and/or the 1967 Protocol, includes "in particular [to] facilitate [UNHCR's] duty of supervising the application of the provisions of this Convention".<sup>78</sup> The question is then what States must do to "facilitate" UNHCR's supervision. UNHCR has not provided a response to this question, although Walter Kalin, in his final report on UNHCR's supervisory responsibility for the Global Consultations process, finds that such cooperation imposes

[a] treaty obligation on States Parties (i) to respect UNHCR's supervisory power and not to hinder UNHCR in carrying out this task, and (ii) to cooperate actively with UNHCR in this regard in order to achieve an optimal implementation and harmonized application of all provisions of the Convention and its Protocol. These duties have a highly dynamic and evolutive character.<sup>79</sup>

As UNHCR does not have a means to enforce or ensure that States comply with their international refugee law obligations, UNHCR's key tools for its supervisory work are soft ones, those of persuasion, coercion, and inducement with the objective of obtaining States compliance. UNHCR can bring the matter to the attention of EXCOM, the Council on Human Rights, the UN Economic and Social Council or the UN General Assembly. However, the positions taken by these bodies on States' actions, in conclusions, in the case of EXCOM, or resolutions, in the case of the Council on Human Rights, ECOSOC and the General Assembly, are not binding on States. Thus, while UNHCR can call upon States to take

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<sup>78</sup> 1951 Refugee Convention, *supra* note 3, at art. 35(1).

<sup>79</sup> Walter Kalin, *Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 613, 617 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

certain actions, States ultimately decide whether and to what extent they will comply with such requests.

Moreover, given the nature of the 1951 Refugee Convention, as a human rights treaty, States do not derive mutual benefits from the observance of its provisions and therefore have little incentive to supervise one another's conduct.<sup>80</sup> Thus, essentially, the refugee system has been and continues to be primarily a system of voluntary compliance with international refugee law by States.

Clear violations of international refugee law are not the only ones that pose a challenge to a refugee regime without an enforcement mechanism. States' adoption of policies and measures, which attempt to diminish the number of refugees obtaining access to their territories and reduce the rights accorded asylum-seekers and refugees but do not explicitly violate refugee law, present a different, but still significant problem. In the case of an explicit violation of the 1951 Refugee Convention by a State, other States, UNHCR, non-governmental organisations and other concerned parties can clearly identify the legal standard that has been breached. States may choose not to condemn such action publicly, but they still can clearly identify the violation. Where States' policies, legislation, and actions limit refugees' access to asylum and reduce their rights but do not violate an international law standard, it is more difficult for States and others to determine if a violation exists. If they wish to do so, they have

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<sup>80</sup> As the first High Commissioner, Gerrit Jan van Heuven Goedhart, stated in his lecture at the Hague Academy of International Law, "Conventions concerning refugees are, from the point of view of international law, of a special character inasmuch as they are 'pacta in favorem tertiorum': normally the Contracting States derive rights from international conventions and undertake obligations under them; in this case, however, the beneficiaries of the Convention are the refugees, persons who do not enjoy national protection. Since they themselves do not directly derive any enforceable rights from the Convention, the international community has considered it desirable that the international organ charged with the protection of refugees should also supervise its application to the beneficiaries – the refugees." Gerrit Jan van Heuven Goedhart, *The Problem of Refugees*, 82 Recueil des Cours, Hague Academy of International Law, 261, 293 (1953).

the added difficulty of not having an explicit standard from the 1951 Refugee Convention to cite to condemn the offensive policy, legislation or action.

UNHCR, in particular, faces a significant difficulty when confronted with States' actions, which negatively impact upon the rights of refugees, but do not expressly violate the 1951 Refugee Convention. In such cases, UNHCR lacks a clear standard with which to criticize the action by the State and to use as a basis to request a modification in treatment of the refugees. Moreover, restrictive measures by States not only diminish the actual protection afforded to refugees, but also set a negative precedent, which other States may follow. There also is a risk that restrictive measures adopted by other States may eventually develop into a new customary law.

#### 4.5. CONCLUSION

The relationship between States and UNHCR is based upon cooperation. The concept of cooperation is expressed in both UNHCR's Statute and the General Assembly resolution to which the Statute was annexed. However, while the General Assembly's creation of UNHCR is legally binding on States,<sup>81</sup> neither UNHCR's Statute nor the General Assembly resolution to which UNHCR's Statute was annexed is binding on them.<sup>82</sup>

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<sup>81</sup> The general view taken by international institutional law authors is that General Assembly resolutions creating subsidiary organs, pursuant to article 22 of the UN Charter and which concern the internal workings of the UN, are binding. As Rosalyn Higgins has stated, "the *Expenses Case* established that lawfully established subsidiary bodies – that is to say, bodies established with the objects and purposes of the UN Charter and given tasks not specifically prohibited thereunder – generate financial and legal obligations for UN members." ROSALYN HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW TO USE IT* 25 (1994).

<sup>82</sup> The issue of whether UNHCR's Statute is binding on States was considered by several authors in the late 1970's to mid-1980's. See for example, Maynard and Garvey who



States are legally bound, however, to cooperate with UNHCR pursuant to the 1951 Refugee Convention and the 1967 Protocol, or if not a party to either of these agreements, then pursuant to article 56 of the UN Charter. States are to cooperate with UNHCR in the exercise of its international protection function, which includes UNHCR's international refugee law responsibilities. These responsibilities, under UNHCR's Statute, include: UNHCR's promotion of the conclusion and ratification/accession to conventions for the protection of refugees, its obtainment of information concerning the laws and regulations concerning refugees, and its supervision of conventions for the protection of refugees. Yet, the specific content of what States must do to cooperate with UNHCR in connection with its international protection function remains undefined. Vagueness in the content of such cooperation posed no difficulty to UNHCR's work until the 1980's since States operated with a humanitarian approach that was responsive to UNHCR's formal and informal suggestions as to how to improve protection for refugees.

In the 1980's, the underlying premise of cooperation between States and UNHCR eroded as a result of significant changes in the approach of States to refugee protection. Although it is not entirely clear what the exact causes of these changes were, the decline in States' interest in assuring the protection of refugees clearly emerged in the 1980's and has continued up

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believe UNHCR's Statute is recommendatory and non-binding. P.D. Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INT'L & COMP. L.Q., 415, 416 (1982) and Jack Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L.J., 483, 488 (1985). For the contrary view see Hartling, a former High Commissioner, and Professor Grahl-Madsen, a former lawyer with UNHCR. Poul Hartling, finds that since UNHCR's Statute was adopted pursuant to a General Assembly resolution, it is "therefore valid in all States Members of the United Nations." Poul Hartling, *Concept and Definition of "refugee" – legal and humanitarian aspects*, 48 Nordisk Tidsskrift for International Ret 125, 129 (1979). Grahl-Madsen notes the responsibilities of the General Assembly under article 55 of the UN Charter and finds that UNHCR Statute "may consequently be construed as an international convention adopted by delegated authority. Consequently the Member States are contractually bound to recognize the competence of the High Commissioner as defined in the Statute". 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW: REFUGEE CHARACTER* 31-2 (1966).

until the present day. States in all parts of the world have adopted measures, in the form of policies, legislation, and even actions toward refugees that contradict UNHCR's views. In some cases the measures specifically violate provisions of the 1951 Refugee Convention, while others, although not express breaches of the 1951 Refugee Convention, are contrary to the humanitarian spirit and the notion of international protection that underpin the 1951 Refugee Convention. These measures essentially attempt to limit refugees' access to States' territory, the number of asylum-seekers eligible for refugee status, and the rights of asylum-seekers and refugees.

The various measures taken by States took advantage of the weaknesses in refugee law to reduce their responsibilities toward asylum-seekers and refugees. Their maintenance of such measures, despite UNHCR's objections and requests to modify such conduct, were assertions of States' interest in placing refugee matters back under the national domain. UNHCR no longer had the same degree of influence over States' policies and approaches to refugee matters and thus, would have its liberty of action circumscribed by States in a manner that it had not previously experienced.

Consequently, international refugee law became, and today remains, the basis for the points of contention between UNHCR and States. This meant that the weaknesses in the refugee law framework became more clearly exposed. The gaps and ambiguities in the provisions of the 1951 Refugee Convention resulted in a refugee law framework that did not adequately cover new refugee law issues. In addition, the presence of regional laws and directives created disparate and sometimes contradictory standards, and detracted from the universal nature of refugee protection, that is, the treatment and respect accorded the refugee varied greatly depending upon the country in which the person had obtained asylum. As a result, the fact that "the legal rules linking governments are far from being a coherent,

uniform body covering all situations and all needs", as High Commissioner Schnyder recognized in the mid-1960's",<sup>83</sup> become a significant impediment for the protection of refugees with the onset of the refugee crisis in the 1980's.

States, following the emergence of the crisis in refugee law and refugee protection, have not demonstrated any interest in extending the rights of refugees. In the absence of a body at the international level, which has responsibility for creating international refugee law or even an administrative body that could adopt interpretative decisions on refugee law issues, the adoption of new universal refugee law treaties has come to a standstill.<sup>84</sup>

In addition, the question of how to ensure the effectiveness of refugee law, that is the actual protection of refugees, became a dominant concern for UNHCR. At the time of the onset of the crisis in refugee law and protection, the 1951 Refugee Convention and 1967 Protocol had not been acceded to by all States and some States maintained reservations to key provisions in the Convention. Not all States had fully incorporated the standards in the 1951 Refugee Convention into their national legislation, while the legislation of other States expressly violated provisions of the 1951 Refugee Convention, or contravened the spirit of this agreement. Thus, refugee protection lacked an adequate expression in the very States that were supposed to provide protection to refugees. States' obligation to provide UNHCR with information, on the implementation of the 1951

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<sup>83</sup> Felix Schnyder, *Les aspects juridiques actuels du problème des réfugiés*, 114 *Recueil des Cours*, Hague Academy of International Law, 335, 347 (1965). Translation from French into English by author.

<sup>84</sup> The weaknesses in international refugee law, however, are not unique. As Castaneda has noted with respect to international law in general: "The absence of permanent legislative organs and, in general, the unspecialized and uninstitutionalized nature of the process by which international law is created, gives rise to a lack of stability, precision, and definiteness in many nonconventional rules, to frequent contradictions among certain rules, and to the relatively numerous lacunae observed in that normative order." JORGE CASTANEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS*, 169-70 (1969).

Refugee Convention and the laws, regulations and decrees relating to refugees, was a weak mechanism for inciting States to adopt adequate national legislation to ensure refugees' rights.

The crisis in refugee law also highlighted the fact that States' actual application of international refugee law standards remains one almost exclusively within their discretion. The existing mechanisms, by which the International Court of Justice could hear an advisory claim by UNHCR or a dispute between States parties to the 1951 Refugee Convention, have never been utilized in practice. UNHCR's supervisory responsibility was the conventional means used to obtain States' compliance with international refugee law standards, but is based on soft means of persuasion.

Thus, UNHCR would need to adapt its role and responsibilities in order to ensure a more complete legal framework and the effectiveness of refugee law. The steps UNHCR has taken in order to do so are explored in chapters 5 and 6.

## CHAPTER 5: UNHCR'S INNOVATIVE APPROACHES TO ADDRESS WEAKNESSES IN THE TREATY FRAMEWORK

### 5.1. INTRODUCTION

Beginning in the 1980's, UNHCR was confronted with a crisis in refugee protection, precipitated by States' adoption of restrictive measures, use of gaps and ambiguities in the refugee law framework to limit access to their territory and to reduce protection, along with States' unwillingness to further extend protections afforded to refugees through additional treaties intended for universal acceptance. As a result, UNHCR faced the dilemma of the extent to which it should continue to carry out its traditional promotional role relative to the development of refugee law and what measures it should adopt to bolster the international protection of refugees. In connection with its determination as to how to counter States' actions and policies, UNHCR had to choose whether to seek specific authorisation from the General Assembly or guidance from EXCOM or the General Assembly or to utilise the techniques available to it within its discretion as to how to interpret and carry out its mandate.

UNHCR exercised its organisational autonomy in initiating three approaches, two of which were successful, without obtaining prior express approval in a General Assembly resolution or an EXCOM conclusion. All three were means for UNHCR to reshape the parameters and supplement the content of refugee law without recourse to the creation of a multilateral treaty, the normal form of law creation by States.

This chapter considers the three methods adopted by UNHCR to address the weaknesses in the legal framework following the onset of the crisis in refugee protection. The two successful methods are considered first:

UNHCR's use of other legal instruments to extend the refugee law framework and UNHCR's development of doctrinal positions. The chapter then turns to an evaluation of the third method, the Convention Plus initiative, which was eventually abandoned by UNHCR, since it provides insights for the future direction of UNHCR's work related to the development of refugee law.

## 5.2. WEAVING A MORE COMPLETE FRAMEWORK

The crisis in international refugee law and protection clearly demonstrated the limitations of the traditional refugee law framework, as discussed in chapter 4. This framework, with the 1951 Refugee Convention<sup>1</sup> at its centre, had been supplemented by only two other international refugee law instruments since the creation of the 1951 Refugee Convention. The 1967 Protocol<sup>2</sup> had removed the date and geographic restrictions and the 1957 Refugee Seamen Agreement, with its 1973 Protocol,<sup>3</sup> had clarified article 11 of the 1951 Refugee Convention, in particular, as to which State should serve as the asylum State and provide the refugee with a travel document.<sup>4</sup> At the time of the crisis in international refugee law, UNHCR considered that several other international instruments supplemented the protection standards offered by the 1951 Refugee Convention and thus were part of the refugee law framework.<sup>5</sup> Protocol 1 to the Universal Copyright Convention<sup>6</sup> provided additional content to article 14 of the 1951 Refugee

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<sup>1</sup> Convention relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150 [hereinafter "1951 Refugee Convention"].

<sup>2</sup> Protocol relating to the Status of Refugees, 16 Dec. 1966, 606 U.N.T.S. 267.

<sup>3</sup> Refugee Seamen Agreement, 23 Nov. 1957, 506 U.N.T.S. 125 and Protocol to the Agreement relating to Refugee Seamen, 12 June 1973, 965 U.N.T.S. 445.

<sup>4</sup> Pursuant to article 28 of the 1951 Refugee Convention, States are to "issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory". 1951 Refugee Convention, *supra* note 1, at art. 28.

<sup>5</sup> UNHCR, *Report of the UNHCR*, Annex II, U.N. Doc. A/5511/Rev.1 (1964).

<sup>6</sup> Protocol 1 to the Universal Copyright Convention, 6 Sept. 1952, 216 U.N.T.S. 132 and Protocol 1 Annexed to the Universal Copyright Convention as Revised at Paris on 24

Convention on artistic rights and industrial property and the Convention on the Recovery Abroad of Maintenance<sup>7</sup> facilitated the recovery of maintenance by a claimant in a State from a person in another State, and was therefore important where a refugee's family members were separated. In addition, the 1969 OAU Refugee Convention and the 1954 and 1961 conventions concerning stateless persons were also included in this framework.<sup>8</sup>

In the absence of States' creation of new instruments, UNHCR turned to existing international instruments, in particular human rights law agreements to supplement the traditional legal framework. In doing so, UNHCR has continued to ensure that the 1951 Refugee Convention remains the crux and centrepiece for international refugee law. This is crucial, as UNHCR has always maintained that refugee law is related to but separate from human rights law. UNHCR's emphasis on the 1951 Refugee Convention as the key international agreement for the protection of refugees therefore permits UNHCR to ensure that refugee law is neither subsumed by human rights law and that refugees maintain a distinct status apart from other persons who may require protection, such as persons who flee natural disasters. Given the emphasis placed by UNHCR on the distinctiveness of refugees through the use of the 1951 Refugee Convention, this section will first examine UNHCR's emphasis on the 1951 Refugee Convention as the central agreement prior to turning to the way in which UNHCR has utilized other international agreements to protect refugees.

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July 1971, concerning the Application of that Convention to Works of Stateless Persons and Refugees, 24 July 1971, 943 U.N.T.S. 178.

<sup>7</sup> Convention on the Recovery Abroad of Maintenance, 20 June 1956, 268 U.N.T.S. 3.

<sup>8</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept. 1969, 1001 U.N.T.S. 45. Convention relating to the Status of Stateless Persons, 28 Sept. 1954, 360 U.N.T.S. 117 and Convention on the Reduction of Statelessness, 30 August 1961, 989 U.N.T.S. 175.

### 5.2.1 The 1951 Refugee Convention as the Central Agreement

Even prior to the crisis in international refugee law, which emerged in the 1980's, UNHCR had consistently stressed, through its doctrinal positions, that the 1951 Refugee Convention was the foundation for international refugee law. When regional agreements were drafted, as noted in chapter 2,<sup>9</sup> UNHCR attempted to ensure that those instruments were consistent with and upheld the standards in the 1951 Refugee Convention/1967 Protocol. UNHCR also wanted regional agreements to supplement, rather than replace, the provisions of the 1951 Refugee Convention. Thus, UNHCR stimulated EXCOM to adopt a conclusion that provided that "regional standards which are developed conform fully with universally recognized standards".<sup>10</sup>

Indeed, UNHCR successfully obtained the inclusion of express provisions in regional instruments that affirmed the fundamental role of the 1951 Refugee Convention both prior to and following the onset of the crisis in refugee law and protection. The 1969 OAU Refugee Convention acknowledges the centrality of the 1951 Refugee Convention,<sup>11</sup> and the 1984 Cartagena Declaration on Refugees specifically requests States to accede to the 1951 Refugee Convention and the 1967 Protocol and to adopt national laws implementing these agreements.<sup>12</sup> Moreover, in Europe, the conclusions of the Tampere Summit in 1999, which

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<sup>9</sup> See conclusion to chapter 2.

<sup>10</sup> EXCOM Conclusion 81 (XLVIII), ¶ k, 1997 endorsed by G.A. Res. 52/103, ¶ 1, U.N. Doc. A/RES/52/103 (9 Feb. 1998).

<sup>11</sup> The preamble of the 1969 OAU Refugee Convention recognizes that the 1951 Refugee Convention, as supplemented by the 1967 Protocol, "constitutes the basic and universal instrument relating to the status of refugees" and calls upon Member States of the OAU who have not already done so, to accede to these agreements and in the meantime to apply their provisions. OAU Convention governing the Specific Aspects of Refugee Problems in Africa, ¶ 9-10, *supra* note 8.

<sup>12</sup> Cartagena Declaration on Refugees, §III.2, 8, OAS/Ser.L/V.II.66, doc. 10, rev.1, at 190-3, (1984), <http://www.unhcr.org/basics/BASICS/45dc19084.pdf>. While the Declaration is not legally binding on States, numerous resolutions have been adopted by the Organisation of American States endorsing the Declaration's principles. See GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW*, 38 (3<sup>rd</sup> ed., 2007).



established the agenda for European harmonization of asylum policy, recognized the "full and inclusive application of the Geneva Convention".<sup>13</sup>

The crucial importance of the 1951 Refugee Convention as the centrepiece for the refugee law framework was acknowledged by all States participating in the Global Consultations process. Specifically, in the Declaration of States Parties, States recognized "the enduring importance of the 1951 Convention, as the primary refugee protection instrument" and thus, reaffirmed the centrality of the 1951 Refugee Convention.<sup>14</sup> In this way, past criticism from academics<sup>15</sup> and even governments<sup>16</sup> was countered by UNHCR with the endorsement by States during the Global Consultations process of the current relevance, significance, and principal position of the 1951 Refugee Convention. The 1951 Refugee Convention therefore remains the guidepost for the further development of the refugee law framework.

### 5.2.2 Human Rights Instruments

Despite the reference in the preamble of the 1951 Refugee Convention to the Universal Declaration of Human Rights and the fundamental rights of individuals<sup>17</sup> and UNHCR's acknowledgement that these human rights

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<sup>13</sup> UNHCR, UNHCR TOOL BOXES ON EU ASYLUM MATTERS: TOOL BOX 2: THE INSTRUMENTS, 47 (Sept. 2002), <http://www.unhcr.org/publ/PUBL/406a8c432.pdf>.

<sup>14</sup> UNHCR, AGENDA FOR PROTECTION 23 (2003). They also acknowledged the "continuing relevance and resilience of this international regime of rights and principles". *Id.*, at 24.

<sup>15</sup> See for example, Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 Harvard Human Rights Journal 229, 229-31 (1996) which summarizes the various criticisms of the 1951 Refugee Convention.

<sup>16</sup> See footnote 37 in chapter 4.

<sup>17</sup> Universal Declaration of Human Rights, G.A. Res. 217A, art.14(1), U.N. Doc. A/810 (12 Dec. 1948). The preamble to the 1951 Refugee Convention states that "the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of [the] fundamental rights and freedoms" contained in the 1948 Universal Declaration of Human Rights and provides that the "the Charter of the United Nations and the

principles should be applied by States to refugees,<sup>18</sup> UNHCR's full embrace of human rights standards in its doctrinal positions did not occur until the 1990's. The UNHCR Handbook, for example, notes that serious violations of human rights would constitute persecution,<sup>19</sup> but does not specify which instruments provide standards for these rights. In addition, while UNHCR articulated, in the early 1980's, that the rights of refugees are human rights,<sup>20</sup> it did not always specify the precise standards to which it referred.

The evolution in UNHCR's use and citation of international human rights instruments is apparent in its doctrinal positions in the area of detention. For example, in its 1984 Note on International Protection, UNHCR suggested standards for detention, and then in 1986, provided more detailed standards in an EXCOM conclusion.<sup>21</sup> However, while the Note provides that "asylum-seekers in detention should be treated according to certain minimum standards, including the due process of law and the possibility of access to legal advice and/or to UNHCR" and the conclusion provides that the conditions of detention should be "humane",<sup>22</sup> they do

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Universal Declaration of Human Rights ... have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination". 1951 Refugee Convention, *supra* note 1, at 2<sup>nd</sup>, 1<sup>st</sup> preambular ¶. Thus, the preamble places the rights of refugees within the overall human rights framework references the Universal Declaration of Human Rights as the basis for such rights.

<sup>18</sup> In 1965, High Commissioner Schnyder, in a speech to the Hague Academy, stated that UNHCR not only supervises governments' application of international refugee law, but also principles contained in the Declaration of Human Rights. "En outre, Le Haut Commissariat se trouve dans une situation unique en ce sens qu'il remplit le rôle d'une autorité internationale qui, dans l'exercice de ses fonctions de protection des réfugiés, supervise l'application par les gouvernements de certains principes de droit international et de la Déclaration des droits de l'homme." Felix Schnyder, *Les aspects juridiques actuels du problème des réfugiés*, 114 Recueil des Cours, Hague Academy of International Law, 335, 347 (1965).

<sup>19</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 51, HCR/IP/4/Eng./Rev.1 (Jan. 1992).

<sup>20</sup> UNHCR, *Note on International Protection*, ¶ 30, U.N. Doc. A/AC.96/623 (31 July 1983).

<sup>21</sup> UNHCR, *Note on International Protection*, ¶ 30, U.N. Doc. A/AC.96/643 (9 Aug. 1984) and EXCOM Conclusion 44 (XXXXVII) 1986.

<sup>22</sup> UNHCR, *Note on International Protection*, *supra* note 21. EXCOM Conclusion 44, *supra* note 21, at ¶ f.

not reference any legal instruments for the basis for these standards. In contrast, UNHCR's 1999 Guidelines on Detention explicitly cite international human rights standards, in connection with the reasons for detention, the detention of children, and the conditions of detention.<sup>23</sup>

Notably, since the 1990's, UNHCR has encouraged EXCOM and the General Assembly to make greater reference to human rights law in relation to the protection of refugees<sup>24</sup> and has urged its staff to use human rights more extensively in their own work. As an example, UNHCR issued the "Human Rights and Refugee Protection" training module in 1995 to permit its staff to become more familiar with the use of human rights instruments and mechanisms in their work.<sup>25</sup> This document was then revised, expanded, and reissued in 2006.<sup>26</sup>

Moreover, in 1995, UNHCR issued a "Collection of International Instruments and Legal Texts concerning refugees and others of concern to UNHCR",<sup>27</sup> which updated its 1979 "Collection of International

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<sup>23</sup> UNHCR, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, 3-6 (Feb. 1999), <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

<sup>24</sup> See for example EXCOM Conclusion 101 (LV), 3<sup>rd</sup> preambular ¶, 2004; EXCOM Conclusion 100 (LV), 4<sup>th</sup> preambular ¶, 2004; EXCOM Conclusion 93 (LIII), ¶ b.i., 2002; EXCOM Conclusion 84 (XLVIII), 4<sup>th</sup> preambular ¶, 1997, which references the 1989 Convention on the Rights of the Child in the preamble, and EXCOM Conclusion 71 (XLIV), ¶ u, 1993. EXCOM Conclusion 101 is particularly notable as it specifically mentions the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the 1989 Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. Also see the following General Assembly resolutions: G.A. Res. 61/137, ¶ 10, U.N. Doc. A/RES/62/137 (18 Dec. 2007); G.A. Res. 52/103, ¶ 3, 5, 14, 16, U.N. Doc. A/RES/52/103 (12 Dec. 1997); G.A. Res. 48/116, ¶ 5, 16, 18, U.N. Doc. A/RES/48/116 (20 Dec. 1993).

<sup>25</sup> UNHCR, HUMAN RIGHTS AND REFUGEE PROTECTION, TRAINING MODULE RLD 5 (Oct. 1995).

<sup>26</sup> UNHCR, HUMAN RIGHTS AND REFUGEE PROTECTION, SELF-STUDY MODULE 5, vols. 1 & 2 (15 Dec. 2006).

<sup>27</sup> UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS (Dec. 1995).

Instruments Concerning Refugees”.<sup>28</sup> The 1995 two-volume set reflects UNHCR’s emphasis on human rights instruments as tools for the protection of refugees as it includes international and regional human rights in addition to other instruments of relevance to refugees. The 1995 edition was then further updated by a 2007 version.<sup>29</sup>

Thus, numerous international, as well as regional instruments in not only the human rights area, but also other legal domains, including international humanitarian law and international criminal law, are currently utilized by UNHCR to protect refugees. The contribution of three of the most significant international human rights conventions to the refugee law framework, the 1966 International Covenant on Civil and Political Rights,<sup>30</sup> the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>31</sup> and the 1989 Convention on the Rights of the Child,<sup>32</sup> illustrates how such instruments assist in filling gaps and clarifying ambiguities in the standards of the 1951 Refugee Convention.<sup>33</sup>

The International Covenant on Civil and Political Rights applies to "individuals within its territory" and contains a number of protections not

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<sup>28</sup> UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES (1979).

<sup>29</sup> See UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND LEGAL TEXTS CONCERNING REFUGEES AND OTHERS OF CONCERN TO UNHCR (June 2007).

<sup>30</sup> International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 [hereinafter “ICCPR”].

<sup>31</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85 [hereinafter “1984 Convention against Torture”].

<sup>32</sup> Convention on the Rights of the Child, ¶ 22, 20 Nov. 1989, 1577 U.N.T.S. 3.

<sup>33</sup> Three other international agreements could be useful in the protection of refugees’ rights, but have not yet been utilized to any great measure. These are: the International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3, the International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, 600 U.N.T.S. 195, and the Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13.

found in the 1951 Refugee Convention.<sup>34</sup> These include the right not to be subjected to arbitrary arrest, detention or exile and the right to a fair and public hearing in connection with any criminal charge.<sup>35</sup> The ICCPR therefore extends the protection of refugees and asylum-seekers through its expanded list of civil and political rights. Many of these rights are stated in broad terms, however, the comments on the ICCPR's articles, furnished by the Human Rights Committee, provide further clarification of the content of such rights, including with respect to the protection afforded asylum-seekers and refugees. For example, the Human Rights Committee has noted that pursuant to article 7, States cannot expose "individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."<sup>36</sup> In addition, the Human Rights Committee found that article 9 of the ICCPR is applicable not only to detention in criminal cases but also to others, including "immigration control".<sup>37</sup>

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has gained increasing importance in recent years in protecting refugees from return to a country where they fear persecution because it has been interpreted as enhancing the protection against *non-refoulement* contained in article 33 of the 1951 Refugee Convention. The 1984 Convention against Torture prohibits the expulsion, return or extradition of a "person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" and therefore presents an absolute bar against return if the "substantial grounds" standard of proof can be met and the torture

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<sup>34</sup> ICCPR, *supra* note 30, at art. 2.

<sup>35</sup> *Id.*, at arts. 9, 14.

<sup>36</sup> Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, (General Comment 20 to Art. 7 of ICCPR, 1992), U.N. Doc. HRI/GEN/1/Rev.7, 152 (2004)..

<sup>37</sup> *Id.*, (General Comment 8 to Art. 9 of ICCPR, 1982) at 130.

would be committed by a State or the State's agent.<sup>38</sup> In contrast, article 33 of the 1951 Refugee Convention permits an exception to return when "there are reasonable grounds for regarding as a danger to security of the country in which he [the refugee] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". As a result, the 1984 Convention against Torture ensures broader protection against return than article 33 of the 1951. On the basis of article 33 in the 1984 Convention against Torture and article 7 of the ICCPR, UNHCR has asserted the position that "international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment".<sup>39</sup>

The 1989 Convention on the Rights of the Child also is a key instrument for the protection of refugees and asylum-seekers. As noted in section 2.2.3.1 of chapter 2, UNHCR contributed to the drafting of the 1989 CRC, and as a result, it includes a specific provision, article 22, pertaining to refugee children.<sup>40</sup> Whereas nearly all of the other provisions address the rights of children in general, this article is an exceptional one with its focus on refugee children. UNHCR now extensively references the provisions in

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<sup>38</sup> 1984 Convention against Torture, *supra* note 31, at art. 3.

<sup>39</sup> UNHCR, *Note on International Protection*, ¶ 16, U.N. Doc. A/AC.96/951, (13 Sept. 2001).

<sup>40</sup> 1989 Convention on the Rights of the Child, *supra* note 32, art. 22. Article 22 provides that:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

the 1989 CRC in its work to protect refugees, both in internal documents for UNHCR staff as well as in doctrinal positions submitted to governments, non-governmental organisations, academics, and others.

The provisions of the 1989 CRC restate many of the rights that adults have under the Universal Declaration of Human Rights,<sup>41</sup> and therefore, tend to be more broadly worded than the obligations States have toward refugees in the 1951 Refugee Convention. The 1989 CRC also includes rights particular to children, such as the right to a primary education.<sup>42</sup> The purpose of the 1989 CRC is to ensure that all children, including refugee children and children seeking refugee status, have their childhood protected and that children can develop within "a family environment, in an atmosphere of happiness, love and understanding".<sup>43</sup> Of particular note among the various provisions of the 1989 CRC is article 3 that contains the principle of the "best interests of the child".<sup>44</sup> The 1989 CRC amplifies the protection obligations that States have toward children under the 1951 Refugee Convention, since the 1951 Refugee Convention does not contain any specific articles related to children.<sup>45</sup>

These three international human rights instruments, along with many others, extend the content of the refugee law framework beyond the

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<sup>41</sup> For example, rights in the 1989 Convention on the Rights of the Child that are similar to those in the Universal Declaration of Human Rights, include the right to life, freedom of association, and the right to privacy, those that are particular to the 1989 Convention on the Rights of the Child include that States should disseminate children's books and that they should ensure recognition of the principle that "both parents have common responsibilities for the upbringing and development of the child". See 1989 Convention on the Rights of the Child, *supra* note 32, at arts. 6, 15(1), 16, 17(c) and 18(a).

<sup>42</sup> *Id.*, at art. 28.

<sup>43</sup> *Id.*, at 5<sup>th</sup>-6<sup>th</sup> preambular ¶.

<sup>44</sup> *Id.*, at art. 3.¶1. Specifically, this paragraph provides that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

<sup>45</sup> The lack of specific provisions related to refugee children in the 1951 Refugee Convention is not surprising given that the refugee definition and the various articles containing the obligations of States in the 1951 Refugee Convention were drafted with adults in mind. Children would generally have been considered as merely part of the refugee's family.

protections offered by the 1951 Refugee Convention and provide standards that should apply to all States, thereby ameliorating the problem of disparate standards. They also can provide protection to asylum-seekers and refugees who are located in countries that are not parties to the 1951 Refugee Convention or the 1967 Protocol. For example, the ICCPR's provisions are applicable to over twenty States that have not ratified the 1967 Protocol, and the 1989 CRC, which has been ratified by almost all UN Member States, applies to all States that have not acceded to the 1967 Protocol.

In sum, with the onset of the crisis in States' respect for refugee law standards, UNHCR overcame concerns about the political nature of human rights, in light of UNHCR's humanitarian mandate,<sup>46</sup> and began to more actively refer to human rights standards. Not only did UNHCR use these standards more extensively, but it also has increasingly referred to such standards in its own doctrinal positions and thereby provided such positions with a stronger legal foundation. These actions were taken by UNHCR at its own initiative and only after it had done so, did UNHCR encourage EXCOM to adopt a conclusion endorsing such actions.<sup>47</sup>

### 5.2.3 Other Sources of International Refugee Law

International human rights instruments are not the only agreements used by UNHCR since the 1980's to extend the refugee law framework. As UNHCR's 2007 "Collection of International Instruments and Legal Texts concerning Refugees and Others of Concern to UNHCR" suggests, international protection can be found in a wide array of instruments. This 2007 edition, which has become quite sizeable at four volumes, demonstrates an even broader incorporation by UNHCR of standards from

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<sup>46</sup> UNHCR, HUMAN RIGHTS AND REFUGEE PROTECTION, TRAINING MODULE RLD 5, *supra* note 25, at 4.

<sup>47</sup> See EXCOM Conclusion 68 (XLIII), ¶ p, 1992 that supports UNHCR's activities related to the promotion of human rights law.



other instruments to protect refugees, as it includes among others, international criminal law, and maritime and aviation law instruments. Among these instruments, two additional types of international conventions deserve special attention: international humanitarian law instruments and international criminal law.

With the end of the Cold War, UNHCR has become more frequently involved in protecting and assisting refugees who flee their homes because of an armed conflict, including internal conflict, or general violence as well as refugees in areas where conflict is occurring. This work has posed new challenges to UNHCR as it seeks to protect not only those persons under its mandate, but also its staff members. Despite the "humanitarian nature of the problem of refugees", as stated in the preamble to UNHCR's Statute,<sup>48</sup> UNHCR's assistance and protection activities have been interpreted by parties to a conflict as partial and an impediment to their military success. For example, UNHCR convoys were attacked during the conflict in the former Yugoslavia and camps for refugees and internally displaced persons have been subjected to armed incursions in many countries.

To bolster the security of the refugees, UNHCR has increasingly relied upon international humanitarian law instruments and their provisions. UNHCR has noted in its training manual for its staff that refugees fall within the category of "protected persons" under the Fourth Geneva Convention on Humanitarian Law and Protocol 1 to the Geneva Conventions.<sup>49</sup> In addition, UNHCR has encouraged EXCOM to make reference to the civilian and humanitarian character of refugee camps; in this way, UNHCR has asserted the position that attacks should not be

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<sup>48</sup> See paragraph 2 of the Statute of the Office of the United Nations High Commissioner for Refugees, contained in the Annex to UN General Assembly Resolution 428(V) of 14 Dec. 1950. G.A. Res. 428(V) (14 Dec. 1950) [hereinafter "UNHCR Statute"].

<sup>49</sup> UNHCR, 1 HUMAN RIGHTS AND REFUGEE PROTECTION, SELF-STUDY MODULE 5, *supra* note 26, at 25. Also see UNHCR, *Handbook for the Protection of Women and Girls* 346-347 (Jan. 2008).

targeted at refugee camps, and that refugees are prohibited from undertaking armed activities.<sup>50</sup> As a result of encouragement by UNHCR, General Assembly resolutions and EXCOM conclusions have included specific references to humanitarian law in connection with the protection of refugees.<sup>51</sup>

With respect to international criminal law, the Rome Statute of the International Criminal Court<sup>52</sup> contains provisions that have been incorporated into international refugee law by UNHCR. For example, the Rome Statute's definitions of a "crime against humanity" and "war crimes", provide additional clarification to the use of the terms in the exclusion clauses of the refugee definition in the 1951 Refugee Convention.<sup>53</sup>

### 5.3. UNHCR DOCTRINE

UNHCR doctrine, the organisation's view of what the law is or should be, was presented in chapter 3 as a technique that permits UNHCR's international protection function to evolve. As noted therein, the nature and content of UNHCR doctrine has evolved significantly since UNHCR's creation. In particular, as seen in section 3.4.1, in the 1980's, UNHCR increased its formulation and issuance of doctrinal positions and then in the 1990's began making the doctrinal positions much more publicly available and used them to not just elaborate principles but also to expressly criticise States. Thus, UNHCR's doctrinal positions evolved from a primarily internal form of guidance to a tool that was actively

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<sup>50</sup> For example, see EXCOM Conclusion 48 (XXXVIII), ¶ 1-2, 1987, and EXCOM Conclusion 94 (LIII), ¶ a-c, 2002.

<sup>51</sup> For example, see G.A. Res. 61/137, ¶ 10, U.N. Doc. A/RES/61/137 (19 Dec. 2006), EXCOM Conclusion 101 (LV), ¶ g, 2004 and EXCOM Conclusion 71 (XLIV), ¶ u, 1993.

<sup>52</sup> Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

<sup>53</sup> *Id.*, at arts. 7, 8. 1951 Refugee Convention, *supra* note 1, at art. 1(F)(a).

utilised by UNHCR to address the weaknesses in the international refugee law framework, in particular, to fill the gaps, to clarify the ambiguities and to influence the development of new refugee law standards, as shown below.

### 5.3.1 Filling Gaps

The gaps in the refugee law framework became glaringly apparent as a result of the crisis in refugee protection and refugee law, as noted in chapter 4. UNHCR doctrine has helped to fill some gaps by providing principles on legal issues not covered by the 1951 Refugee Convention. Examples of UNHCR's doctrinal work, on the substantive legal issue of voluntary repatriation, as well as on the procedural issue of standards for asylum determination, should provide a more concrete understanding of the way in which UNHCR doctrine assists in filling the gaps in international refugee law.

“Refugee status” is supposed to be a temporary situation and solutions are supposed to be found for refugees. The three solutions foreseen for refugees are local integration, resettlement, and voluntary repatriation. UNHCR’s Statute establishes the organisation’s role related to voluntary repatriation by stating that as part of its international protection function UNHCR is to assist “governmental and private efforts to promote voluntary repatriation”.<sup>54</sup> However, the 1951 Refugee Convention does not contain any provisions regarding voluntary repatriation.

During the Cold War, UNHCR had emphasised the solutions of local integration and resettlement since most refugees from Eastern European countries and the former Soviet Union did not want to return to their home countries and Western countries were not interested, due to the politicised nature of the refugee issue, in encouraging refugees to return to such

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<sup>54</sup> UNHCR Statute, *supra* note 48, at ¶ 8(c). UNHCR is to assist “governmental and private efforts to promote voluntary repatriation”.

countries. However, with the end of the Cold War and the depolitization of the refugee issue, States became more interested in returning asylum-seekers to their home countries and in reducing the number of persons seeking asylum in their countries. UNHCR then began to emphasise the solution of repatriation in the 1980's.<sup>55</sup> Thus, UNHCR's interest in voluntary repatriation coincided, not incidentally, with the crisis in refugee protection and States' interests in lessening the number of refugees to whom they had to provide protection.

In order to deter States from forcing refugees to return to their countries of origin, UNHCR provided doctrinal principles applicable to the implementation of voluntary repatriation. These principles were intended to ensure that the voluntariness of the refugee's choice to return to his/her own country is respected and that refugees' rights are applied during the return process.<sup>56</sup> UNHCR then utilised these principles in its advice to States on the advisability of return in certain cases, such as with Iraqi refugees.<sup>57</sup>

UNHCR also crafted doctrinal positions on the procedural standards for the determination of refugee status. UNHCR's concern prior to the beginning of the crisis in refugee law and protection in the 1980's was to ensure consistent, harmonised asylum procedures among States. UNHCR therefore encouraged EXCOM to adopt a conclusion in 1977 that contains basic requirements for refugee status determination procedures.<sup>58</sup> However, as shown below, with the onset of the crisis in refugee

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<sup>55</sup> See for example UNHCR, *Note on International Protection*, ¶ 16, U.N. Doc. A/AC.96/609/Rev.1 (26 Aug. 1982), which stresses voluntary repatriation as "both the optimum and also the only workable solution."

<sup>56</sup> See UNHCR, *Handbook: Voluntary Repatriation: International Protection*, §2 (1996), <http://www.unhcr.org/pub/PUBL/3bfe68d32.pdf>. See also EXCOM Conclusion 40 (XXXVI), ¶ b, 1985.

<sup>57</sup> See for example, UNHCR, *UNHCR Advisory Regarding the Return of Iraqis*, Sept. 2005, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=432a89d54>.

<sup>58</sup> See EXCOM Conclusion 8 (XXVII), ¶ e, 1977.

protection and law, the purpose of its doctrinal positions significantly changed in the 1980's.

UNHCR's Statute and the 1951 Refugee Convention establish similar, but not identical, criteria for determining who qualifies as a refugee.<sup>59</sup>

Without a determination of refugee status, the individual cannot obtain the necessary protection of his/her rights under the 1951 Refugee Convention. UNHCR, like its predecessor, the International Refugee Organisation, has responsibility for determining who qualifies as a refugee under its Statute.<sup>60</sup> However, the 1951 Refugee Convention does not explicitly provide whom, whether States or UNHCR, is to make the determination as to whether a person qualifies as a refugee. Initially, UNHCR conducted refugee status determination in many countries and still does in some, such as Morocco and Turkey, but this function has become increasingly vested in States with UNHCR continuing to play an advisory or consultative role in many countries.

Beginning in the 1980's UNHCR issued doctrinal positions to curb the adoption and use by States of restrictive procedural practices. For example, UNHCR encouraged EXCOM to adopt a conclusion that would ensure that States' determination of whether an asylum application is "manifestly unfounded or abusive" would be made by the authority competent to determine refugee status and that a negative determination

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<sup>59</sup> In particular, the refugee definition in UNHCR's Statute does not contain "particular social group" as a grounds for persecution and the grounds for exclusion from refugee status on the basis of the commission of a crime are much less detailed than those contained in Article 1F of the refugee definition in the 1951 Refugee Convention.

<sup>60</sup> Report of the Secretary-General, ¶ 12, U.N. Doc. A/C.3/527 and Corr.1 (26 Oct. 1949). Interestingly, the IRO, like the UNHCR as noted in section 3.4.1.2 in chapter 3, wanted to ensure uniformity in the application of the refugee definition. Thus, the IRO, to assure that its officers were consistent in their evaluation of who qualified as a refugee, issued a Manual for Eligibility Officers. More recently, in 2005, UNHCR issued a position related to its own determination of refugee status under its mandate. See UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate, <http://www.unhcr.org/pub/PUBL/4317223c9.pdf> (1 Sept. 2005).

would be subject to an appeal or review.<sup>61</sup> While UNHCR succeeded in ensuring that the EXCOM conclusion provided that such decision was made by a qualified official, States only agreed to a simplified review of such decision before the asylum-seeker would be rejected at the frontier or forcibly removed.<sup>62</sup>

Similarly, States attempted to channel asylum applications through the use of the “safe country of origin” concept into an expedited procedure. In doing so, they were trying to avoid having to give full consideration to the claims of asylum-seekers from countries that they considered had a low risk of persecution. UNHCR then had to formulate a response to this new mechanism. Thus, UNHCR established the doctrinal position that the “safe country of origin” concept can be utilized to channel certain asylum applications into expedited or accelerated procedures, but not to completely deny access to asylum procedures.<sup>63</sup> UNHCR also provided guidance to ensure that States utilize an appropriate standard of proof and permit a right of appeal for rejected asylum applicants<sup>64</sup> to counter States’ tendencies to lower the standard of proof and limit the right to appeal of the asylum-seeker.

### 5.3.2 Clarifying Ambiguities

UNHCR doctrine also has assisted in clarifying certain provisions in the 1951 Refugee Convention following States’ adoption of restrictive interpretations of both the refugee definition and the rights to be accorded

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<sup>61</sup> UNHCR, *Follow-up on Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status, inter alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedure*, ¶ 31, EC/SCP/22/Rev.1 (3 Sept. 1982).

<sup>62</sup> EXCOM Conclusion 28 (XXXIII), ¶ d, 1982. EXCOM Conclusion 30 (XXXIV), ¶ e, 1983.

<sup>63</sup> See UNHCR, *Background Note on the Safe Country Concept and Refugee Status*, UNHCR Doc. EC/SCP/68, 26 July 1991. On safe country of origin also see EXCOM Conclusion 85 (XLIX), ¶ aa, 1998.

<sup>64</sup> See UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (16 Dec. 1998), <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

refugees under the 1951 Refugee Convention. Two topics related to the refugee definition, the exclusion clauses and asylum claims by refugee women, and another, detention, related to article 31 of the 1951 Refugee Convention, should serve to illustrate the role of UNHCR doctrine in providing further content to provisions in the 1951 Refugee Convention.

The exclusion clauses, contained in article 1(F) of the 1951 Refugee Convention, define certain categories of acts for which a person may be excluded from refugee status recognition, despite fulfilment of the inclusion clauses in part 1(A) of the definition. Civil conflicts in the former Yugoslavia, beginning with the war in Croatia in 1991, and the mass killings in Rwanda in 1994, which led to the subsequent establishment of international criminal tribunals to prosecute perpetrators of "serious violations of international humanitarian law",<sup>65</sup> gave rise to an increased focus on the use of the exclusion clauses to deny refugee status to persons who were suspected, alleged, or accused of having committed crimes in connection with the conflicts.<sup>66</sup> UNHCR then responded by issuing guidelines on the exclusion clauses, which provide information on the category of crimes for which a refugee can be excluded as well as other crimes that were emerging as excludable crimes under 1(F), and a background paper that addresses procedural issues relating to the exclusion clause.<sup>67</sup>

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<sup>65</sup> See S.C. Res. 827, U.N. Doc. S/RES/827 (25 May 1993) concerning the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and S.C. Res. 955, U.N. Doc. S/RES/955 (8 Nov. 1994) concerning the establishment of an International Criminal Tribunal for Rwanda.

<sup>66</sup> UNHCR, *Note on the Exclusion Clauses*, ¶ 2, UNHCR Doc. EC/47/SC/CRP.29 (30 May 1997).

<sup>67</sup> See UNHCR, *The Exclusion Clauses: Guidelines on their Application* (2 Dec. 1996), <http://www.unhcr.org/refworld/docid/3ae6b31d9f.html> and UNHCR, *Background Paper on the Article 1F Exclusion Clauses* (June 1998) (on file with author).

In addition, the increased interest of States in applying the exclusion clauses to limit refugee status<sup>68</sup> prompted UNHCR to include them as a topic in the Global Consultations process launched in late 2000. The timing was propitious. Following the terrorist attacks on the U.S. World Trade Center towers in 2001, States became exceedingly concerned about security, and thus, persons threatening the nation's security. UNHCR utilized the Global Consultations process to further develop its doctrinal positions on the application of the exclusion clauses and then in 2003 issued guidelines on the issue. These guidelines set forth detailed advice on the content of the grounds for which a person may be excluded, as well as guidance on procedural issues, such as whether exclusion clause should be examined prior to the evaluation of the inclusion clauses of the refugee definition.<sup>69</sup>

Another area that UNHCR doctrine helped clarify was that of the applicability of the refugee definition to asylum claims by women. The refugee definition had traditionally been interpreted by States based on the types of persecution experienced by men, yet women often experience persecution differently from men.<sup>70</sup> UNHCR therefore developed doctrinal positions on the meaning of “particular social group” in the refugee definition and on gender-related persecution.

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<sup>68</sup> Geoff Gilbert, Current Issues in the Application of the Exclusion Clauses *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 426, 429, 617 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003). This paper was prepared as a background paper for the expert roundtable discussion on exclusion as part of the Global consultations process. Also see UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, ¶ 2, (4 Sept. 2003), <http://www.unhcr.org/refworld/docid/3f5857d24.html>.

<sup>69</sup> UNHCR, *Guidelines on International Protection No. 5, Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05 (4 Sept. 2003). Surprisingly, the guidelines, while providing that inclusion should generally be considered before exclusion, do not, as had been the case in the 1996 guidelines, categorically exclude the possibility of considering exclusion before inclusion.

<sup>70</sup> EXCOM Conclusion 73 (XLIV), ¶ e, 1993.



With respect to claims to persecution based on the grounds of “membership in a particular social group”, some States had been reluctant to recognize women asylum-seekers as refugees on this ground. Therefore, UNHCR began to clarify the applicability of the refugee definition to asylum claims by women through formulation of doctrinal positions that elaborated the meaning of “membership of a particular social group” in the refugee definition. This clarification was relevant not only to women asylum claimants, but also to persons who are part of groups such as families, tribes, and homosexuals.<sup>71</sup> UNHCR’s work to clarify the applicability of the refugee definition to women asylum seekers coincided with a greater awareness of women’s issues.<sup>72</sup>

UNHCR prompted EXCOM to adopt a conclusion in 1985 suggesting that States take the view that “women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society” should be considered as a “particular social group”.<sup>73</sup> Then in 2002, UNHCR issued guidelines that essentially combine two dominant approaches, the “protected characteristics” and the “social perception” approaches, into a single standard for the meaning of “particular social group” following the discussion of the topic during the Global Consultations process.<sup>74</sup>

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<sup>71</sup> UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 1, HCR/GIP/02/02 (7 May 2002).

<sup>72</sup> The World Conferences on Women, held in Mexico in 1975, in Copenhagen in 1980, and in Nairobi in 1985 progressively raised the awareness of the rights of women. The 4<sup>th</sup> World Conference on Women in 1995 in Beijing, in which UNHCR actively participated, was particularly important in calling attention to women’s issues.

<sup>73</sup> EXCOM Conclusion 39 (XXXVI), ¶ k, 1985. Also see UNHCR, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention/1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, ¶ 32, 37-9, HCR/GIP/06/07 (7 April 2006), which notes that “women may be especially vulnerable to being trafficked and constitute a social group within the terms of the refugee definition.”

<sup>74</sup> UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, *supra* note 71, at ¶ 6, 7. The standard

On the subject of the type of persecution encountered by women refugees, UNHCR initially worked through the General Assembly and EXCOM to promote the position that women, whose claims are based upon a well-founded fear derived from sexual violence or other gender-related persecution, should be recognised as refugees. In 1993, UNHCR addressed a Note to EXCOM concerning sexual violence against refugee women<sup>75</sup> and encouraged the body to adopt a conclusion that expresses support for States' recognition of persons as refugees who claim a well-founded fear of persecution due to sexual violence, for one of the reasons in the refugee definition.<sup>76</sup> Numerous General Assembly resolutions and EXCOM conclusions in the mid to late 1990's reiterated this UNHCR position.<sup>77</sup> EXCOM also requested UNHCR, in 1995, to assist States in developing guidelines that contain this principle.<sup>78</sup>

UNHCR included the topic of gender-related persecution in the Global Consultations process. Following the discussions, UNHCR drafted guidelines that acknowledged that gender-related reasons, such as rape and dowry-related violence, a pattern of discrimination or less favourable treatment, and being trafficked for the purposes of prostitution or sexual exploitation could be considered as forms of persecution.<sup>79</sup> Moreover, UNHCR's guidelines assert that these types of persecution can be

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adopted by UNHCR, in combining these two approaches is that "a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights." *Id.*, at 11.

<sup>75</sup> UNHCR, *Note on Certain Aspects of Sexual Violence Against Refugee Women*, A/AC.96/822 (12 Oct. 1993).

<sup>76</sup> EXCOM Conclusion 73 (XLIV), ¶ d, 1993.

<sup>77</sup> See for example, EXCOM Conclusion 81 (XLVIII), ¶ t, 1997 and G.A. Res. 52/103, ¶ 15, U.N. Doc. A/RES/52/103 (12 Dec. 1997).

<sup>78</sup> EXCOM Conclusion 77 (XLVI), ¶ g, 1995.

<sup>79</sup> UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶14-18, HCR/GIP/02/01 (7 May 2002). Also see UNHCR, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention/1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, *supra* note 73, at ¶ 14-20.

committed by State and non-State actors and provide insight into how the various grounds of persecution can apply to gender-related claims.<sup>80</sup>

UNHCR doctrinal positions also have served to clarify standards in the 1951 Refugee Convention. As noted in chapter 4, one of the restrictive measures adopted by States was the detention of asylum-seekers. States detained asylum-seekers for a number of reasons: to restrict access to the State's territory, to discourage others from seeking asylum, to impede movement within the territory, and to keep the person under control in case the asylum claim is rejected and the person should need to be returned to their country of origin or first asylum country. Therefore, UNHCR found it necessary to clarify the interpretation of article 31 of the 1951 Refugee Convention, one of only three provisions therein that establishes a prohibition on States' treatment of refugees.<sup>81</sup> Under this article:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.<sup>82</sup>

UNHCR encouraged the adoption of General Assembly resolutions and EXCOM conclusions expressing concern about arbitrary and unjustified

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<sup>80</sup> *Id.*, at ¶ 19, 22-34.

<sup>81</sup> The other two articles of the 1951 Refugee Convention which establish prohibitions on States' conduct are article 32, prohibiting States from expelling refugees lawfully on their territory except on grounds of national security or public order and article 33, which prohibits the expulsion or return of refugees.

<sup>82</sup> 1951 Refugee Convention, *supra* note 1, at art. 31.

detention throughout the 1980's and 1990's.<sup>83</sup> UNHCR also pursued the adoption in 1986, by EXCOM, of a conclusion with principles concerning detention. The conclusion states that detention should normally be avoided, and establishes stringent criteria for when it can be exceptionally used.<sup>84</sup> In addition, UNHCR issued, in 1995, a publication on the detention of asylum-seekers in Europe and guidelines on the detention of asylum-seekers that established minimum standards for States' use of detention.<sup>85</sup> These guidelines were updated in 1999 to further clarify the exceptional grounds for detention; they also specify alternatives to detention.<sup>86</sup> UNHCR then addressed the topic in a report to the Standing Committee of EXCOM, which suggested a minimum set of recommended practices that were to form the basis for an EXCOM Conclusion.<sup>87</sup> However, States and UNHCR failed to reach a consensus on the content of an EXCOM conclusion on the topic and no EXCOM conclusion was adopted on detention.<sup>88</sup>

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- <sup>83</sup> See for example G.A. Res. 36/125 ¶ 9, U.N. Doc. A/RES/36/125 (14 Dec. 1981) and G.A. Res. 49/169 ¶ 11, U.N. Doc. A/RES/49/169 (23 Dec. 1994) and EXCOM Conclusion 36 (XXXVI), ¶ f, 1985 and EXCOM Conclusion 85 (XLIX), ¶ cc, 1998.
- <sup>84</sup> EXCOM Conclusion 44 (XXXVII), ¶ b, 1986. This followed UNHCR's articulation of such standards in its 1984 Note on International Protection. UNHCR, *Note on International Protection*, ¶ 26-30, U.N. Doc. A/AC.96/643 (9 Aug. 1984).
- <sup>85</sup> UNHCR, *Detention of Asylum-Seekers and Refugees: The Framework, The Problem and Recommended Practice*, UNHCR Doc. EC/49/SC/CRP.13, ¶ 12, 3 (4 June 1999).
- <sup>86</sup> UNHCR, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, 3-6 (Feb. 1999), <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.
- <sup>87</sup> UNHCR, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, *supra* note 85.
- <sup>88</sup> Also, note that Professor Goodwin-Gill prepared a paper for the Global Consultations Process concerning article 31 of the 1951 Refugee Convention. See Guy Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 185 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003). However, the Agenda for Protection only provides that "States [are] more concertedly to explore appropriate alternatives to the detention of asylum-seekers and refugees, and to abstain, in principles, from detaining children." UNHCR, AGENDA FOR PROTECTION 38 (2003). This limited reference in the Agenda for Protection attests to the fact that detention remains a difficult topic for States.

### 5.3.3 Influencing the Development of Refugee Law

UNHCR doctrine has served another very important function since the onset of the crisis in international refugee law; it has contributed to the development of the sources of international refugee law. The three primary sources of international refugee law, in accordance with the Court's Statute, are rules from international conventions, international customary rules, and general principles of law.<sup>89</sup>

UNHCR's doctrinal work to influence these three primary sources has received the implicit support from EXCOM, since several EXCOM conclusions encouraged UNHCR to promote the development of international refugee law,<sup>90</sup> and is examined in the next sections.

#### 5.3.3.1 Treaty law<sup>91</sup>

UNHCR has contributed to not only international and regional treaties specifically for the protection of refugees, but also human rights instruments and other agreements that affect their rights, as seen in chapter 2. In some cases, UNHCR doctrinal positions merely reiterated existing 1951 Refugee Convention standards, but in others UNHCR had to formulate new positions. For example, UNHCR's positions on the European Union directives, in connection with the EU harmonization process on asylum, demanded that UNHCR undertake an active

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<sup>89</sup> I.C.J. Statute, art. 38. Article 38 of the ICJ's Statute also provides for consideration of "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law". These sources are sometimes termed "secondary sources" due to the fact that States do not create them. Only UNHCR's contribution to the primary sources will be considered in this chapter, since international legal scholars and practitioners hold them to be the only true sources of international law between States. UNHCR's influence on the subsidiary sources will be discussed in chapter 6, in connection with UNHCR's promotion of international refugee law.

<sup>90</sup> EXCOM Conclusion 41 (XXXVII), ¶ h, 1986; EXCOM Conclusion 36 (XXXVI), ¶ m, 1985.

<sup>91</sup> Although directives, drafted by the European Commission and approved by the Council of Ministers of the European Union, are not treaties, EU Member States are obliged to implement such directives through their national laws, and therefore, such directives also are included within the scope of this section.

formulation of new principles and refine existing 1951 Refugee Convention standards.

However, for the moment, UNHCR doctrinal positions appear to be of less importance in the formulation of new treaties affecting refugees, since most of UNHCR's contributions ensure that such treaties complement the 1951 Refugee Convention and do not affect the current rights of refugees protected under the Convention, rather than constituting formulations of new rights for refugees. Recent examples include the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime.<sup>92</sup>

In theory, doctrinal principles articulated by UNHCR, in the past several decades, may be used in the future by States when they draft a new treaty that affects the rights of refugees. However, the recent practice of the European Union suggests that States are reluctant to expand refugee rights in a manner suggested by UNHCR doctrinal positions. Realistically, there will need to be a change in States' humanitarian approach to refugees before States are ready to draft a new universal refugee law instrument that expands, rather than contracts, the obligations States owe to refugees.

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<sup>92</sup> See the Saving clause in article 14 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (15 Nov. 2000) and a similar provision in article 19 of the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (15 Nov. 2000).

### 5.3.3.2 Customary international refugee law

UNHCR doctrinal positions also have influenced the development of customary international law.<sup>93</sup> From a theoretical perspective, UNHCR doctrine can articulate an existing customary international law standard (*lex lata*), identify a standard that is emerging as law (*in statu nascendi*), and state what the law should be (*de lege ferenda*).<sup>94</sup> However, in practice, it is not always easy to sort out which of these three applies to a particular doctrinal position as the doctrinal positions present the legal principles without generally expressing whether the principles are recognized as law, are emerging standards, or are "hoped for" standards. In order to accurately assess whether a particular doctrinal position is *lex lata*, *in statu nascendi* or *de lege ferenda*, it is necessary to consider each doctrinal position individually and evaluate States' actions and views to determine to what extent there is state practice and *opinio juris* in support of such principles. However, it must be noted that this process, in itself, involves a subjective process of assessment that is influenced by the person who undertakes the evaluation.<sup>95</sup>

General Assembly resolutions and EXCOM conclusions, particularly those endorsed by the General Assembly that contain UNHCR doctrine, may serve as evidence of the elements of customary international law, either of state practice or of *opinio juris*. If States in the General Assembly or EXCOM assert that a doctrinal position is existing law, then such statement may constitute State practice in support of a customary international law norm, provided that other States do not challenge this

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<sup>93</sup> For a consideration of the basis for UNHCR's activities to influence the development of customary international law, see Corinne Lewis, *UNHCR's Contribution to the Development of International Refugee Law: Its Foundations and Evolution*, 17 Int'l. J. Refugee L. 67, 85-6 (2005).

<sup>94</sup> This analysis is based on the influence of General Assembly resolutions on the development of customary international law. Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 Brit. Y.B. Int'l. L. 39, 68 (1988).

<sup>95</sup> JORGE CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 171 (1969).

assertion.<sup>96</sup> However, with respect to EXCOM, as not all States are members, unlike in the UN General Assembly, it is also necessary to consider the practice of non-member States. Where there is no practice, by non-member States to EXCOM, that conflicts with the potential customary international law rule, then the State practice by EXCOM members could be sufficient.<sup>97</sup> EXCOM or General Assembly resolutions may constitute not only state practice, but could also, at the same time, evidence *opinio juris* where States have the belief that the practice is required by law.<sup>98</sup>

Even where EXCOM conclusions and General Assembly resolutions that contain UNHCR doctrinal principles do not create customary international law, they may still entail certain obligations for States. While there is no legal obligation for States to act consistently with such conclusions or resolutions, States could be said to have, at a minimum, an obligation to consider the recommendations by the General Assembly, and at least EXCOM conclusions endorsed by the General Assembly, if not all EXCOM conclusions, in good faith.<sup>99</sup> Moreover, it is possible to posit that States, which have voted in favour of a resolution or a conclusion, are estopped, under an obligation of good faith from acting in a manner that contradicts such standards.<sup>100</sup>

The most prominent example of a customary international law standard to whose development UNHCR doctrinal positions have contributed is that of *non-refoulement*. *Non-refoulement* "is a concept which prohibits States from returning a refugee or asylum-seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political

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<sup>96</sup> Michael Akehurst, *Custom as a Source of International Law*, 47 Brit. Y.B. Int'l. 1, 5 (1974-5).

<sup>97</sup> *Id.*, at 18.

<sup>98</sup> Sloan, *supra* note 94, at 75.

<sup>99</sup> Paul Szasz, *General Law-Making Processes*, in THE UNITED NATIONS AND INTERNATIONAL LAW, 27, 41-2 (ed. Christopher Joyner, ed. 1997).

<sup>100</sup> OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 92-3 (1991).



opinion".<sup>101</sup> UNHCR doctrinal positions contributed to both the *opinio juris* and state practice elements of the formation of the customary rule.

UNHCR has repeatedly affirmed the *non-refoulement* obligation of States in its Notes on International Protection and its Annual Reports. UNHCR, often simply referred to it as a "principle" in documents in the 1970's, but when States began to adopt more restrictive approaches toward refugees in the 1980's, UNHCR became more assertive and began to characterise it in stronger language, as "an internationally accepted principle",<sup>102</sup> a "peremptory norm",<sup>103</sup> a "fundamental principle",<sup>104</sup> and a "mandatory principle".<sup>105</sup> In addition, UNHCR pursued the formulation of EXCOM conclusions and General Assembly resolutions that reiterated the fundamental importance of the principle.

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<sup>101</sup> Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 89, 91 (Erika Feller, Volker Türk, & Frances Nicholson eds., 2003). Some scholars have asserted that temporary refuge, for aliens in their territory who have fled for humanitarian reasons, has become a customary international law rule. For the advocacy of the norm of temporary refuge, see Deborah Perluss & Joan Hartman, *Temporary Refuge: Emergence of a Customary Norm* 26 VA. J. INT'L. L. 551, 624 (1986), Greig also supports the notion of temporary refuge as a customary rule. D.W. Greig, *The Protection of Refugees and Customary International Law*, 8 Australian Y.B. Int'l. L. 108, 141 (1983). Hailbronner, however, contends that no such customary right exists. Kay Hailbronner, *Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980's 123, 132-6 (David Martin, ed., 1988).

<sup>102</sup> UNHCR, *Note on International Protection*, ¶ 9, U.N. Doc. A/AC.96/579 (11 Aug. 1980).

<sup>103</sup> UNHCR, *Note on International Protection*, ¶ 5, U.N. Doc. A/AC.96/609/Rev.1 (26 Aug. 1982) and UNHCR, *Note on International Protection*, ¶ 15, U.N. Doc. A/AC.96/643 (9 Aug. 1984). EXCOM Conclusion 25 (XXXIII), ¶ b, 1982. Also see Jean Allain, *The jus cogens Nature of non-refoulement*, 13 Int'l. J. Refugee L. 533 (2002) noted that the principle "was progressively acquiring the character of a peremptory rule of international law. Allain finds that *non-refoulement* has acquired *jus cogens* status.

<sup>104</sup> UNHCR, *Note on International Protection*, ¶ 3, U.N. Doc. A/AC.96/660 (23 July 1985).

<sup>105</sup> UNHCR, *Note on International Protection*, ¶ 8, U.N. Doc. A/AC.96/694 (3 Aug. 1987).

UNHCR's objections to occurrences of *refoulement* in its Annual Protection Reports and its Notes on International Protection,<sup>106</sup> as well as its expression of disapproval of violations of this principle to States, both formally and informally, have served to reinforce the principle and affect state practice. UNHCR also spurred EXCOM to express concern about violations of the *non-refoulement* principle nearly every year following the creation of the Standing Committee in 1975 through the year 2000<sup>107</sup> and has provided expert legal opinions in cases involving *non-refoulement*.<sup>108</sup>

UNHCR's efforts were crowned with success when States' recognized, in the Declaration of States Parties, an important outcome to the Global Consultations process, that the principle of *non-refoulement* is "embedded in customary international law."<sup>109</sup> As a result, even States that have not ratified the 1951 Refugee Convention, with its article 33 prohibition on *refoulement*, are bound by the rule.<sup>110</sup>

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<sup>106</sup> UNHCR regularly reports the occurrence of violations of the principle in its Notes on International Protection and its Annual Reports, without mentioning the specific country. For example, see UNHCR, *Note on International Protection*, ¶ 10-11, U.N.Doc. A/AC.96/1038 (29 June 2007) and UNHCR, *Report of the UNHCR*, ¶ 23, U.N. Doc. A/RES/62/12 (2007).

<sup>107</sup> See UNHCR, *Thematic Compilation of Executive Committee Conclusions* 282-4 (2<sup>nd</sup> ed., June 2005), <http://www.unhcr.org/pub/PUBL/3d4ab3ff2.pdf>.

<sup>108</sup> *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413 (1996) and *Sale v. Haitian Centers Council*, 113 U.S. Sup. Ct. 2549 (21 June 1983).

<sup>109</sup> UNHCR, *Agenda for Protection*, *supra* note 14, at 24. However, note Hathaway's opposing views summarized in GUY GOODWIN-GILL & JANE MCADAM, *supra* note 12, at 351-4.

<sup>110</sup> The difficulty is in establishing the exact content and the parameters of this right. The text of Goodwin-Gill and McAdam posits that it covers not only *non-refoulement* to persecution, but also to torture or cruel, inhuman or degrading treatment or punishment. GUY GOODWIN-GILL & JANE MCADAM, *supra* note 12, at 354. Zoller and Hailbronner, for example, find that there is no right to *non-refoulement* with respect to refugees fleeing for humanitarian reasons, such as a civil war. Elisabeth Zoller, *Bilan de Recherches de la Section de Langue Française du Centre d'Etude et de Recherche de L'Académie*, in *THE RIGHT OF ASYLUM* 1989: HAGUE ACADEMY OF INTERNATIONAL LAW 15, 27 (1990). Kay Hailbronner, *supra* note 100, at 130-132.

### 5.3.3.3 General principles of law

Before embarking upon a discussion of how UNHCR has contributed to the development of the third category of international law created by States, 'general principles of law', the term must be clarified in light of the different meanings ascribed by different scholars. One view is that it refers to legal rules extracted from national law, while another interpretation finds that it means general international legal principles.<sup>111</sup> Cassese notes two different types of international legal principles. First, those which can be “inferred or extracted by way of induction and generalization from conventional and customary rules of international law” and second, those that relate to a certain area of international law, such as humanitarian law and overarch the whole body of law in that area.<sup>112</sup> General principles of law, while much less significant as a source of international law than the two sources of law created by States, international conventions and international custom, can nevertheless make an important contribution. In particular, general principles of law can provide guidance where there are voids in the rules of law and new laws need to be formulated, as in international refugee law.<sup>113</sup>

With respect to the meaning of general principles that holds that they are extracted from national law, UNHCR doctrinal positions may influence States' national rules thus leading to greater uniformity among States and eventually resulting in the emergence of a general principle of law. The adoption of status determination procedures to evaluate individuals' claims for refugee status could be said to be in the process of developing as a general principle. Regarding the second meaning ascribed to the term, that of general international legal principles, UNHCR doctrinal positions that advocate consistent and fair procedures may support the general

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<sup>111</sup> See Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 93 (Malcolm Evans, ed., 5<sup>th</sup> ed., 2003).

<sup>112</sup> ANTONIO CASSESE, INTERNATIONAL LAW 188-9 (2<sup>nd</sup> ed., 2005).

<sup>113</sup> MALCOLM SHAW, INTERNATIONAL LAW 92-3 (5<sup>th</sup> ed., 2003).

international legal principle of the "good administration of justice"<sup>114</sup> and the principle of *non-refoulement* could be considered to be a general principle that overarches the body of international refugee law.<sup>115</sup>

#### 5.4. THE CONVENTION PLUS INITIATIVE

The Convention Plus initiative was the third approach adopted by UNHCR to counter the weaknesses in the refugee law framework. Unlike UNHCR's use of other instruments to extend the refugee law framework and its doctrinal positions, which were oriented toward the protection of rights of refugees, the Convention Plus initiative was intended to create a normative framework on burden-sharing through multilateral special agreements<sup>116</sup> that would benefit States and at the same time contribute to the protection of refugees.

The initiative, undertaken from October 2002, when it was proposed to EXCOM by former High Commissioner Ruud Lubbers, until November 2005,<sup>117</sup> was a means for UNHCR to address the theme of burden-sharing, also referred to as "responsibility-sharing". The Agenda for Protection, the outcome document to the Global Consultations process established "sharing burdens and responsibilities" as one of the six goals for further action by States and UNHCR.<sup>118</sup> While UNHCR's follow-up activities included "work[ing] on arrangements which might be put in place to

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<sup>114</sup> This principle has been recognized by the International Court of Justice. See Richard Plender, *The Present State of Research Carried Out By the English-Speaking Section of the Centre for Studies and Research, in THE RIGHT OF ASYLUM* 1989: HAGUE ACADEMY OF INTERNATIONAL LAW 63, 83 (1990).

<sup>115</sup> While States, in the Declaration of States Parties during the Global Consultations Process, concurred that the concept of *non-refoulement* is embedded in international customary law, UNHCR has asserted that it has become a peremptory rule of international law. See for example, EXCOM Conclusion 25 (XXXIII), ¶ b, 1982.

<sup>116</sup> Alexander Betts & Jean-Francois Durieux, *Convention Plus as a Norm-Setting Exercise*, 20 J. Refugee Stud., 509, 512 (2007).

<sup>117</sup> *Id.*, at 512, 509.

<sup>118</sup> UNHCR, Agenda for Protection, *supra* note 14, at 29.

coordinate a comprehensive approach based on burden-sharing” and “develop[ing] further the capacity-building guiding principles and framework”,<sup>119</sup> they did not expressly mention the creation of a normative framework through agreements.

Burden sharing has been a subject of EXCOM conclusions since as early as 1981,<sup>120</sup> but the Convention Plus initiative attempted to provide the concept with a legal basis. The initiative was intended to improve refugee protection and to resolve refugee problems, UNHCR’s two primary functions.<sup>121</sup> Special agreements were to be drafted to improve burden sharing and to identify durable solutions to specific refugee situation, which, it was hoped, would have soft law status.<sup>122</sup> UNHCR intended for agreements to focus on three areas: i) resettlement, ii) targeting of development assistance, and iii) irregular secondary movements.<sup>123</sup>

UNHCR’s authority to carry out this work could be said to be an implied power derived from paragraph 8(b) of its Statute, which provides for UNHCR to “promot[e] through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection”.<sup>124</sup> However, special agreements have primarily been utilised by UNHCR in connection with voluntary repatriation<sup>125</sup> and thus, their use in connection with the Convention Plus initiative was a new application of such agreements for UNHCR.

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<sup>119</sup> *Id.*, at 55-56.

<sup>120</sup> See EXCOM Conclusion 22 (XXXII), ¶ II.B.2.c (1981).

<sup>121</sup> UNHCR, *Convention Plus At a Glance*, ¶ 1 (1 June 2005) <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=403b30684&query=Convention%20Plus%20at%20a%20Glance>.

<sup>122</sup> Betts & Durieux, *supra* note 116, at 512, 525.

<sup>123</sup> UNHCR, *Convention Plus At a Glance*, *supra* note 121.

<sup>124</sup> UNHCR Statute, *supra* note 48, at ¶ 8(b).

<sup>125</sup> Marjoleine Zieck, *Doomed to Fail from the Outset? UNHCR’s Convention Plus Initiative Revisited* 21 Int’l. J. Refugee L., 387, 390 (2009).

The Convention Plus initiative is the most innovative attempt, among the three studied in this section, to extend the refugee law framework, through its attempt to resolve States' problem of refugees, utilising special agreements among States that create mutual and reciprocal obligations. The initiative is also laudable for its attempt to address the political problem of the disparate burdens borne by States relative to refugee populations through the creation of law.

However, the concept is weakened by its failure of not being linked to an existing legal principle. The 1951 Refugee Convention, while referring to the need for "international co-operation" in its preamble<sup>126</sup> nowhere refers to burden or responsibility sharing. Refugee protection principles derive from the rights of refugees, based on the 1951 Refugee Convention and the extended legal framework, including human rights principles; the elaboration of burden-sharing lacked links to existing legal principles that would provide legitimacy and recognition to the principles. The failure to ground the initiative in existing legal principles left it subject to criticism that it was a "European-led containment agenda" and thus, a politically biased initiative rather than one based on principles, which southern States considered to be one of "burden-shifting" not "burden-sharing".<sup>127</sup> In undertaking an initiative that arguably only served to validate the fears of southern States, which bear the primary burden for the reception of refugees, UNHCR also endangered its credibility as the refugee organisation with a universal responsibility for refugees.

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<sup>126</sup> 1951 Refugee Convention, *supra* note 1, at preambular ¶4.

<sup>127</sup> Betts & Durieux, *supra* note 116, at 527.

## 5.5. CONCLUSION

The onset of the crisis in international refugee law and protection, coupled with States' unwillingness to create new universally applicable treaties for the protection of refugees, led UNHCR to undertake substantial work to extend and refine the international refugee law framework. In doing so, UNHCR did not seek formal approval from the General Assembly or EXCOM for its efforts to amplify the refugee law framework through its incorporation of human rights, humanitarian, and international criminal law standards into the refugee law framework. Instead, UNHCR initiated the approaches and then subsequently sought States' support for its work. UNHCR therefore demonstrated its continued independence in formulating approaches to the development of refugee law.

Two key approaches have been essential to UNHCR's efforts. First, while maintaining the centrality of the 1951 Refugee Convention, within the refugee law framework, to ensure that refugees maintain their distinct status, UNHCR has woven relevant provisions from other agreements into the framework. UNHCR's use of other legal instruments to extend international refugee law has permitted UNHCR to use law that has already been agreed to by States to supplement the refugee law framework at a time when it is clear that States do not wish to create new law extending the rights of refugees. UNHCR's use of international human rights instruments has been of particular importance in expanding States' obligations to refugees.

Human rights agreements supplement and expand the protection provided under the provisions in the 1951 Refugee Convention, such as in the case of the 1984 Convention against Torture's article 3, which is a broader protection against *non-refoulement* than the 1951 Refugee Convention's article 33. Human rights agreements also add new rights for refugees, which are not contained in the 1951 Refugee Convention, such as in the

case of the 1989 Convention on the Rights of the Child, which provides children with a right to a primary education. International humanitarian law standards as well as international criminal law provisions of the Rome Statute also have been incorporated into international refugee law. In effect, the extended legal framework provides additional standards and supplements the standards of the 1951 Refugee Convention.

Second, UNHCR doctrine permits UNHCR to provide additional content to existing standards of the 1951 Refugee Convention, where other instruments do not provide the necessary clarification. Examples of standards in the 1951 Refugee Convention to which doctrinal positions have contributed include the exclusion clauses and the refugee definition. Doctrinal positions also provide guidance to States where the 1951 Refugee Convention does not address the issue and thereby fill gaps in the standards of the 1951 Refugee Convention, such as with respect to voluntary repatriation and the procedural standards for the determination of refugee status. Doctrinal positions, such as these, are not linked to specific provisions of the 1951 Refugee Convention but do relate to UNHCR's statutory responsibilities or UNHCR's general international protection role, and therefore are arguably not as firmly based in existing law. Nevertheless, such doctrinal positions do affect States' practices.

At the same time, UNHCR has used its doctrine to establish criteria for the use of concepts created by States, and in this way to attempt to limit States' use of such practices. As a result, UNHCR doctrine is crucial to not only the creation of principles, but also to UNHCR's supervisory responsibility. As will be discussed in chapter 6, with doctrinal principles in hand, UNHCR is more easily able to counter negative trends and policies by States and thus, to attempt to reorient States' actions toward the protection of refugees.



Moreover, UNHCR doctrine can contribute to the further development of the traditional sources of international refugee law: treaty law standards; customary international law principles, as has been done with *non-refoulement*; and general principles of law. The time is not ripe for the further development of international treaties that extend the protection afforded refugees, but UNHCR could still strive to further develop customary international law and general principles of law through its doctrine. In order to do so, UNHCR will need to identify crucial rights that it would like to see developed into such norms and principles and then conceptually formulate how to further this process. However, UNHCR must be careful about how it develops doctrine, since the production of a position and then the issuance of a corrected or contradictory position undermines the weight of such positions.<sup>128</sup>

The two approaches adopted by UNHCR were new but founded upon previously established approaches already accepted by States. UNHCR's initiative related to human rights, humanitarian and criminal law, extended its prior work of incorporating regional agreements for the protection of refugees and other international agreements, discussed in chapter 2, but in this case, UNHCR did not just incorporate provisions from other treaties but a significant portion of a *corpus* of law, human rights law, and relevant portions of international humanitarian and criminal law. Similarly, UNHCR's issuance and use of doctrine was a continuation of its prior work, but in a significantly more utilitarian, public, and active manner to develop legal standards for the protection of refugees.

UNHCR's efforts to further develop international refugee law, following the onset of the crisis in refugee protection, could be criticized for not

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<sup>128</sup> See James Hathaway who criticizes UNHCR doctrinal positions for being too numerous, inconsistent, and too highly detailed to be reconciled with the jurisprudence of States. JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 116-118 (2005).

being sufficiently creative, daring, or sufficient. However, it must be borne in mind that UNHCR is an organisation that improvises in small measures to avoid condemnation or rejection of its actions by States and to ensure that it maintains consistency with its mandate and prior actions. Perhaps, the more valid criticism is that UNHCR does not always sufficiently anticipate developments and plan ahead in order to counter them.

Much remains to be done to ensure the further creation of legal standards to protect refugees. Topics such as the rights of individual asylum-seekers as well as asylum-seekers in mass influxes, when and how group determination of refugee status should be used, the content and parameters of temporary protection, and the employment of complementary protection have not been fully addressed by UNHCR and deserve further exploration. Since UNHCR's continued contribution to the development of international refugee law has been implicitly endorsed, with EXCOM's approval of the Agenda for Protection, which provides a range of activities for UNHCR to carry out to further the development of international refugee law and thereby reinforce refugee protection,<sup>129</sup> UNHCR should actively pursue the further clarification of refugee law standards.

Moreover, in light of States' current restrictive approach to refugee protection, UNHCR should further evaluate how the political difficulties among States, in particular with respect to the uneven distribution of refugees in the world and the resulting heavy economic, social and political costs for the primary refugee receiving States, can be articulated as norms, specifically in treaty form. The Convention Plus initiative should serve as guidance not only in the need for UNHCR to think

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<sup>129</sup> For example, UNHCR is to produce complementary guidelines to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and explore areas that would benefit from further standard setting. See UNHCR, Agenda for Protection, *supra* note 14, at 36.

creatively as to how best to proceed in further developing refugee law principles, but also as to the dangers inherent in attempting to accommodate States' political concerns about refugees. Any attempt to extend the refugee law framework will need to take into consideration not only the protection needs of refugees but also the interests of States. Yet, special attention should be given to the needs of those States that host the greatest numbers of refugees. In seeking a way forward in this area, UNHCR and scholars should further examine the intersection of international relations and international refugee law in order to devise appropriate means for the development of the refugee law framework.

## CHAPTER 6: UNHCR'S INNOVATIVE APPROACHES TO IMPROVE THE EFFECTIVENESS OF INTERNATIONAL REFUGEE LAW

### 6.1. INTRODUCTION

The crisis in refugee protection, discussed in chapter 4, not only brought into focus for UNHCR the need to further develop the refugee law framework, covered in chapter 5, but also highlighted the necessity of reinforcing the effectiveness of refugee law. UNHCR's actions had traditionally been oriented toward ensuring that States had acceded to international conventions for the protection of refugees, that they had implemented the standards from such international agreements into national law, and that they were applying such standards to asylum-seekers and refugees.

At the onset of the crisis in international refugee law and refugee protection in the 1980's, UNHCR appeared to think that it could maintain its traditional approach and bolster States' actions to render existing refugee law standards more effective through reinforcement of the foundation for its relationship with States, that of cooperation.<sup>1</sup> UNHCR encouraged the General Assembly to adopt resolutions that repeatedly emphasized the necessity of States' cooperation with UNHCR, through accession, full implementation, and observance of their refugee law obligations.<sup>2</sup> Yet, these were insufficient to bring States' actions into closer alignment with UNHCR's views.

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<sup>1</sup> See sections 4.2.1 of chapter 4.

<sup>2</sup> See for example, G.A. Res. 40/118, ¶ 2, U.N. Doc. A/RES/40/118 (13 Dec. 1985).

UNHCR, therefore, supplemented its traditional primarily promotional role related to the effectiveness of refugee law with innovative approaches that entailed increased involvement by UNHCR with States. UNHCR manifested its independence and autonomy as an organisation in instituting such actions and where it sought EXCOM and General Assembly support, did so after the activities had been initiated. UNHCR's innovative approaches, to ensure the effectiveness of refugee law, are considered in detail in this chapter.

With respect to accessions to conventions for the protection of refugees, UNHCR has i) launched the Global Accession Campaign in 1998, ii) included the topic of accessions in the Agenda for Protection, iii) had the primary refugee instruments included in the UN's annual treaty event, iv) widened the scope of its promotion of accessions to other relevant agreements, and v) encouraged removal of reservations to the 1951 Refugee Convention and the 1967 Protocol.

In the area of implementation, UNHCR has i) cooperated with another international organisation to produce a guide on implementation, ii) included implementation in the Agenda for Protection, iii) widened the scope of its promotion to implementation of other relevant agreements, iv) instituted capacity-building activities. Finally, in the area of application, UNHCR has i) produced internal annual reports on protection, ii) actively utilized its own doctrinal positions, iii) included its supervisory responsibility as a topic in the Global Consultations process, iv) enhanced its cooperation with international and regional bodies, v) increasingly utilized *amicus curiae* submissions and vi) actively promoted international refugee law.

## 6.2. ACCESSIONS TO CONVENTIONS FOR THE PROTECTION OF REFUGEES

In an effort to obtain universal accession to the 1951 Refugee Convention<sup>3</sup> and the 1967 Protocol, UNHCR has supplemented its traditional means, discussed in section 2.4.1 of chapter 2, of encouraging States to accede and of inciting General Assembly resolutions and EXCOM conclusions that encourage accessions, with a number of new approaches. For example, UNHCR launched the Global Accession Campaign in 1998, pursuant to which UNHCR provided information packages and held workshops on the 1951 Refugee Convention and the 1967 Protocol.<sup>4</sup> Means to improve the number of accessions to the two key refugee law instruments also are a subject of the Agenda for Protection, the concluding document for the Global Consultations process. The Agenda for Protection provides that States are to promote accessions in their contacts with other governments and in international fora and UNHCR is to carry out a survey of the difficulties States have in acceding to the 1951 Refugee Convention and the 1967 Protocol with a view to assisting States to overcome such difficulties.<sup>5</sup> In addition, UNHCR has obtained the inclusion of the 1951 Refugee Convention and the 1967 Protocol in the United Nations' annual treaty event, in which States are encouraged to ratify and/or accede to instruments deposited with the United Nations.<sup>6</sup>

As reservations to the 1951 Refugee Convention and the 1967 Protocol hinder their full application by States, UNHCR has undertaken formal

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<sup>3</sup> As noted in section 4.4.1 of chapter 4, all original signatories to the 1951 Refugee Convention have ratified the convention.

<sup>4</sup> UNHCR, Global Report 2000, 48 (June 2001).

<sup>5</sup> UNHCR, AGENDA FOR PROTECTION 32 (Oct. 2003).

<sup>6</sup> The 1951 Refugee Convention and the 1967 Protocol have been included in the UN's annual treaty event from 2004 through 2006. Other treaties that provide protection to refugees, such as international human rights instruments, are also included in the treaty event. For example, at the 2006 treaty event, Bahrain and the Maldives acceded to the 1966 Covenant on Civil and Political Rights, while Bulgaria ratified the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

initiatives to encourage States to remove reservations, which have complemented the informal requests UNHCR has traditionally made. UNHCR also has sought EXCOM conclusions that encourage States to remove reservations made to these instruments.<sup>7</sup> In addition, in the Agenda for Protection, the concluding document to the Global Consultations process, UNHCR provided that States parties to these two key refugee agreements are to consider withdrawing reservations and lifting any geographic reservation they have maintained.<sup>8</sup>

Since UNHCR considers that the international legal framework for refugees includes not only specific agreements for the protection of refugees and regional agreements, but now also international human rights agreements and international humanitarian law agreements, as seen in chapter 5, UNHCR now advocates accession to instruments that complement the 1951 Refugee Convention and the 1967 Protocol. Specifically, UNHCR has encouraged the adoption of General Assembly resolutions and EXCOM conclusions that encourage States to accede to relevant international human rights and humanitarian law agreements<sup>9</sup> as well as to regional agreements.<sup>10</sup> Pursuant to the Agenda for Protection, the organisation will encourage accessions to the 1979 Convention on the Elimination of All Forms of Discrimination against Women and its 1999 Optional Protocol.<sup>11</sup>

UNHCR also has become increasingly involved in encouraging accessions to the conventions concerning statelessness in light of its additional

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<sup>7</sup> See EXCOM Conclusion 99 (LV), ¶ c, 2004; EXCOM Conclusion 79 (XLVII), ¶ e, 1996; and EXCOM Conclusion 42 (XXXVII), ¶ g, 1986.

<sup>8</sup> UNHCR, Agenda for Protection, *supra* note 5, at 26, 32.

<sup>9</sup> See for example, G.A. Res. 56/166, ¶5, U.N. Doc. A/RES/56/166 (19 Dec. 2001) and G.A. Res. 54/180, ¶ 11, U.N. Doc. A/RES/54/180 (17 Dec. 1999). Also see EXCOM Conclusion 25 (XXXIII), ¶ g, 1982, and EXCOM Conclusion 42 (XXXVII), ¶ h, 1986.

<sup>10</sup> See, for example, G.A. Res. 50/182, ¶5, U.N. Doc. A/RES/50/182 (22 Dec. 1995) and G.A. Res. 54/180, ¶ 11, U.N. Doc. A/RES/54/180 (17 Dec. 1999). Also see EXCOM Conclusion 79 (XLVII), ¶ d, 1996 and EXCOM Conclusion 81 (XLVIII), ¶ m, 1997.

<sup>11</sup> UNHCR, Agenda for Protection, *supra* note 5, at 18.

responsibilities in this area.<sup>12</sup> Therefore, the organisation actively promotes accessions to the two conventions relating to statelessness, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. For example, UNHCR prompted the General Assembly and EXCOM to encourage UNHCR to promote accessions to both stateless conventions<sup>13</sup> and to encourage States to ratify the two statelessness conventions.<sup>14</sup> In addition, UNHCR prepared an information and accession package on the statelessness conventions<sup>15</sup> and recently, inveighed the UN to include the two statelessness conventions in its annual treaty event.<sup>16</sup>

UNHCR's mandatory responsibility to "promot[e]...the ratification of international conventions for the protection of refugees" is sufficiently generally worded so as to include UNHCR's work to promote ratifications and accessions to international human rights and humanitarian law instruments, as well as to regional instruments. In case of any doubt, such work could be considered as an implied power derived from either its

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<sup>12</sup> UNHCR's responsibility for activities on behalf of stateless persons is considered part of UNHCR's statutory function of providing international protection. See G.A. Res. 50/152 ¶ 14, U.N. Doc. A/RES/50/152 (21 Dec. 1995). UNHCR was originally requested to carry out such responsibilities on a temporary basis. G.A. Res. 3274 (XXIX) ¶ 1 (9 Dec. 1974). The General Assembly then requested UNHCR to continue to carry out such functions without establishing an end-date. G.A. Res. 31/36, U.N. Doc. A/RES/31/36 (30 Nov. 1976).

<sup>13</sup> See G.A. Res. 60/129 ¶ 4, U.N. Doc. 60/129 (16 Dec. 2005); G.A. Res. 59/170 ¶ 3, U.N. Doc. A/RES/59/170 (20 Dec. 2004); G.A. Res. 58/151 ¶ 4, U.N. Doc. A/RES/58/151 (22 Dec. 2003); G.A. Res. 57/187 ¶ 5, U.N. Doc. A/RES/57/187 (18 Dec. 2002). Also see EXCOM Conclusion 99 (LV), ¶ z, 2004.

<sup>14</sup> See EXCOM Conclusion 106 (LVII), ¶ n, s, 2006 endorsed by G.A. Res. 60/129, ¶ 1, U.N. Doc. A/RES/60/129 (16 Dec. 2005). EXCOM also has acknowledged States' accessions to the conventions. See for example, the 2005 EXCOM Conclusion acknowledging Senegal's accession to the 1961 Convention on the Reduction of Statelessness. EXCOM Conclusion 102 (LVI), ¶ y, 2005.

<sup>15</sup> UNHCR, INFORMATION AND ACCESSION PACKAGE: THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS AND THE 1961 CONVENTION ON THE REDUCTION OF STATELESSNESS, (2<sup>nd</sup> ed., 1999), <http://www.unhcr.org/protect/PROTECTION/3dc69f1d4.pdf>.

<sup>16</sup> The two statelessness conventions were included in the United Nation's 2006 treaty event. During this event, held in September 2006, Belize acceded to the 1954 Convention relating to the Status of Stateless Persons and New Zealand acceded to the 1961 Convention on the Reduction of Statelessness.



responsibility to promote the ratification of international conventions for the protection of refugees or its international protection function.

### 6.3. IMPLEMENTATION OF CONVENTIONS FOR THE PROTECTION OF REFUGEES

In the area of States' implementation of their international refugee law obligations, UNHCR was assigned a limited statutory responsibility, to obtain information about States' laws and regulations concerning refugees.<sup>17</sup> However, this responsibility served as an important wedge into States' sovereign control over their implementation of international refugee law standards into national law. With the unfolding crisis in international refugee law, UNHCR significantly increased its involvement in ensuring that States implement international law standards for the protection of refugees in the three primary areas discussed below.

#### 6.3.1 Promotion of Implementation of the 1951 Refugee Convention/1967 Protocol

Despite UNHCR's limited mandated responsibility to obtain information from governments about their laws and regulations, UNHCR has been carrying out work that extends beyond this responsibility; specifically, UNHCR has been promoting the implementation of the 1951 Refugee Convention since the 1950's, as seen in section 2.4.2 of chapter 2. In 1976, EXCOM even specifically encouraged UNHCR to continue to follow up on the implementation of the provisions of the 1951 Refugee Convention

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<sup>17</sup> Statute of the Office of the United Nations High Commissioner for Refugees, contained in the Annex to UN General Assembly Resolution 428(V) of 14 December 1950. G.A. Res. 428(V) ¶ 8(f), (14 Dec. 1950) [hereinafter "UNHCR Statute"]. See section 2.3.2 in chapter 2 for a review of UNHCR's responsibilities related to States' implementation of international refugee law standards into national law.

and the 1967 Protocol by States.<sup>18</sup> However, it was not until 1999 that the General Assembly provided formal approval of UNHCR's promotional work in this area.<sup>19</sup> Thus, prior to 1999, the organisation's work related to States' implementation of the 1951 Refugee Convention and the 1967 Protocol could be considered legally authorized as an implied power derived either from UNHCR's general international protection function, which as discussed in section 3.3 of chapter 3 permits UNHCR a great deal of flexibility, or its responsibility to supervise the application of international conventions for the protection of refugees.

With the onset of the divergence in views between States and UNHCR in the 1980's, as discussed in chapter 4, UNHCR staff continued to encourage governmental officials to implement the provisions of the 1951 Refugee Convention and the 1967 Protocol at the national level. UNHCR also fostered the adoption of resolutions by the General Assembly that encourage the implementation of the 1951 Refugee Convention/1967 Protocol<sup>20</sup> and stimulated EXCOM to adopt conclusions that exhorted States to implement their obligations under these two agreements. For example, EXCOM suggested that States adopt "appropriate legislative and/or administrative measures for the effective implementation" of the 1951 Refugee Convention and 1967 Protocol<sup>21</sup> and take "whatever steps are necessary to identify and remove possible legal or administrative obstacles to full implementation".<sup>22</sup>

The past decade has witnessed the adoption of new approaches by UNHCR in connection with its promotion of States' implementation of the

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<sup>18</sup> EXCOM Conclusion 2 (XXVII), ¶ c, 1976.

<sup>19</sup> See G.A. Res. 54/146, ¶ 3, U.N. Doc. A/RES/54/146 (17 Dec. 1999).

<sup>20</sup> See G.A. Res. 51/75 3<sup>rd</sup> preambular ¶, U.N. Doc. A/RES/51/75 (12 Dec. 1996) and G.A. Res. 44/137, ¶ 2, U.N. Doc. A/RES/44/137 (15 Dec. 1989) which endorses EXCOM Conclusion 57 (XL) 1989 concerning the implementation of the 1951 Refugee Convention and the 1967 Protocol.

<sup>21</sup> See EXCOM Conclusion 42 (XXXVII), ¶ j, 1986 and EXCOM Conclusion 57 (XL), ¶ b, 1989.

<sup>22</sup> See EXCOM Conclusion 57 (XL), ¶ c, 1989.

1951 Refugee Convention and 1967 Protocol. For example, UNHCR prepared, in cooperation with the Inter-Parliamentary Union,<sup>23</sup> a guide for Parliamentarians on international refugee law.<sup>24</sup> This guide serves, among other purposes, as a reference to assist States when they adopt or modify national legislation.<sup>25</sup> In addition, the Global Consultations process was initiated with one of its primary objectives being a more complete implementation of these instruments.<sup>26</sup> Pursuant to the Agenda for Protection, the concluding document of the Global Consultations process, UNHCR is to carry out a survey of the difficulties States have in implementing the 1951 Refugee Convention/1967 Protocol with a view to assisting States to overcome such difficulties.<sup>27</sup>

### 6.3.2 Promotion of Implementation of Other Agreements

Other international agreements, international human rights, humanitarian law and regional agreements, have been incorporated into the refugee law framework through UNHCR doctrinal positions, as seen in chapter 5. These agreements need to be implemented at the national level to facilitate States' application of their treaty obligations. Thus, UNHCR has been instrumental in encouraging the General Assembly to adopt resolutions requesting States to implement statelessness conventions,<sup>28</sup> regional refugee agreements and international human rights and humanitarian law

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<sup>23</sup> The Inter-Parliamentary Union, which is located in Geneva, is an international organisation of Parliaments of over 140 States.

<sup>24</sup> INTER-PARLIAMENTARY UNION & UNHCR, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE LAW (2001), <http://www.unhcr.org/publ/PUBL/3d4aba564.pdf>.

<sup>25</sup> *Id.*, at 102, 106-11.

<sup>26</sup> See UNHCR, Ministerial Meeting of States Parties to the 1951 Convention relating to the Status of Refugees and UNHCR's Global Consultations on International Protection: Background, 2, <http://www.unhcr.org/protect/PROTECTION/3c1622ab4.pdf>. (11 Dec. 2001).

<sup>27</sup> UNHCR, Agenda for Protection, *supra* note 5, at 32.

<sup>28</sup> See for example G.A. Res. 50/152, ¶ 16, U.N. Doc. A/RES/50/152 (21 Dec. 1995) and G.A. Res. 49/169 ¶ 20, U.N. Doc. A/RES/49/169 (23 Dec. 1994).

conventions.<sup>29</sup> The General Assembly also has articulated that the implementation of international human rights conventions is important in averting new massive flows of refugees and displaced persons.<sup>30</sup> Moreover, UNHCR formulated conclusions adopted by EXCOM, which encourage States to implement human rights and humanitarian law instruments<sup>31</sup> and statelessness conventions.<sup>32</sup>

### 6.3.3 Capacity-building

A frank assessment of the problems States have in fully implementing the provisions of the 1951 Refugee Convention into national law was provided by UNHCR to EXCOM's Standing Committee in 1989 and then again in 1992. UNHCR identified three types of obstacles to full implementation: first, socio-economic factors, such as: "economic difficulties, high unemployment, declining living standards, and shortages in housing and land" which are compounded by man-made and natural disasters; second, legal impediments, such as inconsistencies between international law obligations and national law provisions or a lack of implementing legislation; and third, practical obstacles, such as the lack of administrative, legal and other structures.<sup>33</sup> These reports constituted a

<sup>29</sup> See G.A. Res. 56/166 ¶ 5, U.N. Doc. A/RES/56/166 (19 Dec. 2001) and G.A. Res. 54/180 ¶ 11, U.N. Doc. A/RES/54/180 (17 Dec. 1999).

<sup>30</sup> As examples, see G.A. Res. 46/127, ¶ 3, U.N. Doc. A/RES/46/127 (17 Dec. 1991); G.A. Res. 45/153, ¶ 3, U.N. Doc. A/RES/45/153 (18 Dec. 1990); G.A. Res. 44/164, ¶ 3, U.N. Doc. A/RES/44/164 (15 Dec. 1989); G.A. Res. 43/154, ¶ 3, U.N. Doc. A/RES/43/154 (8 Dec. 1988); and G.A. Res. 42/144, ¶ 4, U.N. Doc. A/RES/42/144 (7 Dec. 1987). However, there is some ambiguity as to whether the use of the term "implementation" in these resolutions might not mean "application" of human rights instruments.

<sup>31</sup> EXCOM Conclusion 81 (XLVIII), ¶ e, 1997 and EXCOM Conclusion 79 (XLVII) ¶ w, 1996.

<sup>32</sup> See for example, EXCOM Conclusion 78 (XLVI), ¶ b, 1995 and EXCOM Conclusion 85 (XLIX), ¶ m, 1998.

<sup>33</sup> See UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶ 10-22, UNHCR Doc. EC/SCP/54 (7 July 1989). Also see UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees – Some Basic Questions*, ¶ 9-10, UNHCR Doc. EC/1992/SC.2/CRP.10 (15 June 1992). While the 1989 report appears to subsume implementation and application difficulties under the term "implementation", the 1992 report distinguishes between the two. Moreover, UNHCR noted that the

significant step toward understanding the reasons why States had not fully implemented their obligations under the 1951 Refugee Convention. This understanding then led to greater involvement by UNHCR in States' adoption of national legislation that implements their legal obligations toward refugees as well as in activities that shaped and influenced such national implementation. UNHCR assigned the term "capacity-building" to these various activities.

UNHCR considered capacity-building activities to be a "function inherent" in its international protection mandate<sup>34</sup> and thus, activities that it has been authorized to carry out since the inception of its Statute. However, given the distinction made between inherent and implied powers, in section 3.3.1, it is preferable to assert that UNHCR's capacity-building activities are an implied power derived from its function of international protection.

Although UNHCR had been undertaking "capacity-building activities" for decades,<sup>35</sup> it was not until the 1990's that UNHCR began to label particular activities as "capacity-building activities" and to obtain explicit endorsement from the General Assembly for such activities.<sup>36</sup> The underlying purpose of capacity-building activities, according to UNHCR, is to "enhanc[e] the capabilities of States to meet international legal obligations in the refugee protection area. Such activities also contribute

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legislation of some countries tends to define the powers of refugee officials rather than the rights of refugees. UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, *supra* note 33, at 16.

<sup>34</sup> As UNHCR has noted, "[s]trengthening protection capacities is a function inherent in UNHCR's international protection mandate." UNHCR, *Strengthening Protection Capacities in Host Countries*, ¶ 11, UNHCR Doc. EC/GC/01/19 (19 April 2002).

<sup>35</sup> UNHCR provided assistance to countries in their creation of appropriate legal and administrative arrangements even during the 1960's. See UNHCR, *Report of the UNHCR*, ¶ 18, U.N. Doc. A/5211/Rev. 1 (1962).

<sup>36</sup> However, note that as early as 1980, the General Assembly was referring to a "universal collective responsibility ... to strengthen the capacity of countries of asylum to provide adequately for the refugees" G.A. Res. 35/42, 9<sup>th</sup> preambular ¶, U.N. Doc. A/RES/35/42 (25 Nov. 1980).

to strengthening the rule of law by creating national protection structures."<sup>37</sup>

However, the term "capacity-building activities" has not always been clearly or consistently formulated. In a guide on capacity-building, UNHCR stated that the concept:

implies the reinforcement of human, institutional or community performance, skill, knowledge and attitudes on a sustainable basis. It is both an approach and a set of activities, intimately linked to nationally driven reform processes.

- As an approach, it focuses on existing initiatives, commitments and potential as distinct from relief, which addresses needs and problems. It aims to build a network of partners at various levels, is highly participatory by nature and requires shared commitments and objectives on the part of external and domestic actors.

- As a set of activities, it implies provision of technical support, including training, advisory services and specialised expertise in favour of national/local institutions or structures, aimed, in UNHCR's case, at fulfilling the Office's primary objectives of Protection and Solutions, in both countries of asylum and origin.<sup>38</sup>

More recently, a more succinct definition was provided by the General Assembly in a 2002 resolution with UNHCR's guidance. The resolution noted that "capacity-building" activities include:

training of relevant officers, disseminating information about refugee instruments and principles and providing financial,

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<sup>37</sup> UNHCR, *Strengthening Protection Capacities in Host Countries*, *supra* note 34, at ¶ 2. UNHCR has also noted that another important component of these efforts is the fostering of international cooperation to ensure a fair sharing of the burden and responsibility of receiving and hosting refugees. *Id.*

<sup>38</sup> UNHCR, *A Practical Guide to Capacity Building As a Feature of UNHCR's Humanitarian Programmes* 3 (Sept. 1999). Another elaboration of the concept can be found in UNHCR, *Strengthening Protection Capacities in Host Countries*, *supra* note 34. An earlier formulation of the concepts states that it is "providing assistance and support to States in their efforts to develop the structures and operational systems which will enable refugees, returnees and others of concern to benefit from effective national protection. It also aims at strengthening the skills, knowledge and sustained ability of Governments, other local entities and non-governmental partners in this area." UNHCR, *UNHCR's Role in National Legal and Judicial Capacity-Building*, ¶ 1, UNHCR Doc. EC/46/SC/CRP.31 (28 May 1996).

technical and advisory services to accelerate the enactment or amendment and implementation of legislation relating to refugees, strengthening emergency response and enhancing capacities for the coordination of humanitarian activities.<sup>39</sup>

Despite the lack of a clear articulation of activities,<sup>40</sup> UNHCR's identification of capacity-building activities has primarily included work related to States' implementation of international refugee law standards.<sup>41</sup> However, the organisation also has designated its promotional work related to States' accession to "international refugee instruments and other relevant human rights instruments" as a capacity-building activity.<sup>42</sup>

In 1995, the General Assembly made its first request to UNHCR to undertake capacity-building activities; UNHCR was to "intensify its protection activities by, *inter alia*, supporting the efforts of African Governments through appropriate training of relevant officers and other capacity-building activities".<sup>43</sup> Many African countries did not have refugee status determination procedures in place and had not implemented international refugee law standards at the national level. With the

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<sup>39</sup> G.A. Res. 57/183, ¶ 21, U.N. Doc. A/RES/ 57/183 (18 Dec. 2002).

<sup>40</sup> Maria Stavropoulou provides a cogent four part division of the purposes of capacity-building: (i) development of a legal framework; (ii) development of an institutional framework; (iii) networking and empowerment of local ngo and civil society actors; and (iv) provision of training to both government officials and NGO staff. Maria Stavropoulou, *Protection: The Office of the United Nations High Commissioner for Refugees Experience*, in THE HUMAN RIGHTS FIELD OPERATION: LAW, THEORY AND PRACTICE 207, 215-17 (Michael O'Flaherty, ed., 2007).

<sup>41</sup> UNHCR also has carried out certain capacity-building activities with respect to the statelessness conventions. EXCOM has requested UNHCR to improve the training of its staff and that of other UN agencies on statelessness "to enable UNHCR to provide technical advice to States Parties on the implementation of the 1954 Convention". EXCOM Conclusion 106 (LVII), ¶ x, 2006 and the General Assembly "encouraged the High Commissioner to continue his activities on behalf of stateless persons". G.A. Res. 60/129, ¶ 4, U.N. Doc. A/RES/60/129 (16 Dec. 2005). According to UNHCR, it has provided advice to more than 60 States on modifications to nationality laws to prevent and reduce cases of statelessness. UNHCR, Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda For Protection: Steps taken by States to Reduce Statelessness and to Meet the Protection Needs of Stateless Persons, ¶ 108 (Mar. 2004), <http://www.unhcr.org/protect/PROTECTION/4047002e4.pdf>.

<sup>42</sup> UNHCR, *A Practical Guide to Capacity Building as a Feature of UNHCR's Humanitarian Programmes*, *supra* note 38, at 7.

<sup>43</sup> G.A. Res. 50/149, ¶ 10, U.N. Doc. A/RES/50/149 (21 Dec. 1995).

dissolution of the former Soviet Union, Eastern European countries and former Soviet republics by and large did not have national legislation implementing the 1951 Refugee Convention. Therefore UNHCR worked closely with many of the countries to help draft legislation and assisted them with the creation of the necessary judicial and administrative structures to protect and care for refugees and asylum-seekers.<sup>44</sup>

UNHCR's performance of capacity-building activities also received a significant boost as a result of the European Union accession process. Candidate countries, which included Turkey, Cyprus, Malta and the ten Central European and Baltic States, were required, as part of the pre-accession requirements to transpose what are often termed the "European acquis", which includes not only European Community legislation but also relevant international agreements, into their national law. Thus, candidate member States were required to ensure that the provisions of the 1951 Refugee Convention and the 1967 Protocol were incorporated into national legislation.<sup>45</sup>

UNHCR offices have provided comments on draft legislation to countless governments and even assisted in the drafting of amendments, provided training to government officials, and judicial and administrative officers, and advised on the creation, structure, and functions of asylum bodies to ensure the better protection of refugees. Such advice has been particularly pertinent to countries creating national refugee laws for the first time.

When UNHCR carries out capacity-building activities, UNHCR's positions not only reflect the provisions of the 1951 Refugee Convention but also other standards incorporated into the refugee law framework, such as

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<sup>44</sup> UNHCR, A Review of Capacity Building in Central and Eastern Europe (Aug. 1996), <http://www.unhcr.org/research/RESEARCH/3ae6bcf44.html>.

<sup>45</sup> See UNHCR, UNHCR TOOL BOXES ON EU ASYLUM MATTERS: TOOL BOX 1: THE FUNDAMENTALS 141-2 (Nov. 2003), <http://www.unhcr.org/publ/PUBL/406a8aa11.pdf> and UNHCR, UNHCR TOOL BOXES ON EU ASYLUM MATTERS: TOOL BOX 2: THE INSTRUMENTS, 9-10, (Sept. 2002), <http://www.unhcr.org/publ/PUBL/406a8c432.pdf>.



international and regional human rights standards and international humanitarian law and criminal law standards. In addition, UNHCR doctrine permeates UNHCR's capacity-building activities. For example, when UNHCR provided advice on the content of European Union directives to harmonise States' asylum legislation and policies, UNHCR produced doctrinal positions on issues, such as reception and asylum procedures, which are not addressed in the 1951 Refugee Convention.<sup>46</sup> UNHCR doctrinal positions also are a crucial component in UNHCR's advice to States on their creation or modification of institutional structures that handle refugees and refugee claims. Since the 1951 Refugee Convention does not contain any standards related to such national institutions or the procedures used for evaluating claims for asylum, UNHCR doctrine serves as fundamental guidance for UNHCR's advice to States.

States demonstrated their support for building the capacity of countries, particularly developing countries and those with economies that are in transition, to receive and protect refugees in the 2001 Declaration of State Parties in connection with the Global Consultations Process.<sup>47</sup> Pursuant to the Agenda for Protection, UNHCR is to extend its activities in this area and further develop the guiding principles and framework on capacity-building that it presented in a note prepared for the Global Consultations process, develop a Handbook on Strengthening Capacities in Host

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<sup>46</sup> See UNHCR's Comments on the European Commission Proposal for a Council Directive laying down Minimum Standards on the Reception of Applicants for Asylum in Member States (COM (2001) 181 final) and UNHCR's Summary Observations on the Amended Proposal by the European Commission for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (COM (2000) 326 final/2, 18 June 2002) in UNHCR, UNHCR TOOL BOXES ON EU ASYLUM MATTERS: TOOL BOX 2: THE INSTRUMENTS, 203-210, 319-330 (Sept. 2002), <http://www.unhcr.org/publ/PUBL/406a8c432.pdf>.

<sup>47</sup> UNHCR, Agenda for Protection, *supra* note 5, at 28. States were urged by the General Assembly to enhance the capacity of countries that have received large numbers of asylum-seekers in G.A. Res. 57/187, ¶ 9, U.N. Doc. A/RES/57/187 (18 Dec. 2002).

Countries for the Protection of Refugees, and maintain an “updated catalogue of initiatives and activities in this area”.<sup>48</sup>

However, the designation and implementation of capacity-building programs is frequently quite complex since it affects numerous areas in a State ranging from economic and social issues to cultural and political ones.<sup>49</sup> UNHCR has identified a number of problems related to capacity-building, which include that governments may be too political or nongovernmental organisations too weak.<sup>50</sup> In addition to these, the experience of economic agencies, such as the World Trade Organization, suggests that UNHCR must be sensitive to how it defines the objectives of the capacity-building activities and the input provided by donors. Activities that are donor-driven may serve donor interests<sup>51</sup> rather than those of UNHCR and the State in which such activities are being carried out.

In addition, capacity-building activities in a State may draw financial and personnel resources of the State away from other areas, thereby creating deficiencies in areas that deserve greater priority.<sup>52</sup> If the activities incorporate values that are significantly different from those in the State in which the capacity-building is taking place and rely on structures and

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<sup>48</sup> UNHCR, Agenda for Protection, *supra* note 5, at 58. The document on capacity-building that was prepared for the Global Consultations process is UNHCR, *Strengthening Protection Capacities in Host Countries*, *supra* note 37 (19 Apr. 2002). This has been supplemented by UNHCR with UNHCR, *Protection Gaps Framework for Analysis: Enhancing Protection of Refugees: Strengthening Protection Capacity Project (SPCP)* (2008), <http://www.unhcr.org/41fe3ab92.pdf>. Also see EXCOM conclusion 108, which “Welcomes the development of asylum legislation and the establishment of processes for status determination and admission in a number of countries often with the help and advice of UNHCR, ... and welcomes in this regard the technical and financial support of other States and UNHCR as appropriate”. EXCOM Conclusion 108 (LIX), ¶c, 2008.

<sup>49</sup> UNHCR, *A Practical Guide to Capacity-Building as a Feature of UNHCR's Humanitarian Programmes*, ¶ 5, page 4 (September 1999), <http://www.unhcr.org/3bbd64845.pdf>. (Note: document does not contain page numbers; therefore, numbers are to the electronic page.)

<sup>50</sup> *Id.*, At ¶6 page 11.

<sup>51</sup> Gregory Shaffer, *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries*, 23 Wis. Int'l. L.J. 643, 650 (2005).

<sup>52</sup> *Id.*, at 651.

practices from developed States with very different economic, social and political sub-structures, then there is a risk that the State receiving capacity-building assistance will view such assistance as an intrusion and that such assistance will be ineffectual in the long-term. Thus, while capacity-building is viewed as an important means for the transfer of humanitarian values and the importance of legal standards concerning refugees, it must be undertaken with reflection on the precise means and their implications for the State in which such activities occur.

#### 6.4. APPLICATION OF CONVENTIONS FOR THE PROTECTION OF REFUGEES

States' adoption, in the 1980's, of restrictive measures that violated the provisions of the 1951 Refugee Convention or its humanitarian spirit, highlighted the insufficiency of the structures for ensuring States' application of international refugee law standards. As seen in chapter 4, with the only legal means under the 1951 Refugee Convention/1967 Protocol to resolve disputes related to international refugee law remaining unused by States, namely the International Court of Justice, and UNHCR declining to seek an advisory opinion from the Court, UNHCR's supervisory responsibility remained the key method for furthering States' compliance with their international refugee law obligations. However, States' lack of cooperation with UNHCR resulted in a decline in its ability to affect States' actions and meant that when UNHCR raised concerns about such restrictive measures to States they were less likely to modify their actions.

Fortunately, the flexibility in UNHCR's determination of the content of its supervisory responsibility, as noted in section 2.3.4 of chapter 2, has meant that UNHCR has had wide latitude in adjusting its work to counter the

decline in States' protection. Thus, UNHCR has supplemented its traditional supervisory work, which ranges from monitoring and gathering information on States' policies, legislation, and actions, to raising concerns about inconsistencies with international law informally and through more formal channels, such as the General Assembly, with a number of measures to encourage States to apply international protection standards for refugees.

Specifically, UNHCR had member States of EXCOM adopt resolutions that reiterate the importance of UNHCR's supervisory role and States' application of the standards contained in the 1951 Refugee Convention/1967 Protocol.<sup>53</sup> From an internal standpoint, the organisation began requiring field offices to produce an Annual Protection report, which evaluated States' compliance with international refugee law standards. In addition, UNHCR increased the training provided to staff members on protection matters, including human rights standards. Therefore, UNHCR staff not only became aware of deficiencies in States' compliance with legal standards through the Annual Protection reports, but also from their training and communications with other offices could proactively formulate strategies to strengthen States' application of such standards.

Another means used by UNHCR to encourage States to respect and apply their international obligations for the protection of refugees is the issuance of doctrinal positions.<sup>54</sup> Thus, when UNHCR undertakes actions to influence States' application of international refugee law, such as through UNHCR's creation of operational responses to meet protection needs, its

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<sup>53</sup> See for example, EXCOM Conclusion 79 (XLVII), ¶f, 1996; EXCOM Conclusion 77 (XLVI), ¶ e, 1995; EXCOM Conclusion 74 (XLV), ¶ c, 1994; EXCOM Conclusion 57 (XL), 5<sup>th</sup> preambular ¶, 1989 and EXCOM Conclusion 43 (XXXVII), ¶ 3, 1986. The General Assembly also has reiterated UNHCR's supervisory responsibility. G.A. Res. 52/103, ¶ 1, U.N. Doc. A/RES52/103 (12 Dec. 1997) which endorses EXCOM Conclusion 81 (XLVIII), ¶ e, 1997 contained in the report of EXCOM.

<sup>54</sup> See section 3.4 in chapter 3 and section 5.3 in chapter 5.

articulation of concerns about States' policies toward refugees, and its submission of its views to national refugee status determination bodies, UNHCR's positions include international human rights, humanitarian law, and criminal law standards. In addition, where a State's conduct is not covered by current, international refugee law standards, UNHCR doctrine permits it to supplement the refugee law framework and thereby utilise a principle to evaluate the State's conduct. Moreover, the issuance of a doctrinal position places States on notice of the conduct that is expected of them.<sup>55</sup>

The above-mentioned measures, to improve States application of international refugee law standards, have been supplemented by UNHCR with several significant approaches to bolster the effectiveness of international law for the protection of refugees. These additional approaches, discussed below, include: solicitation of States' support for its supervisory role, increased cooperation with international and regional bodies, submission of *amicus curiae* and enhanced promotion of international refugee law. These activities demonstrate UNHCR's increasing assumption of a managerial role with respect to the States' application of refugee law.

#### 6.4.1 Support for UNHCR's Supervisory Responsibility

Appreciating the need for additional recognition and support from States for its supervisory work, UNHCR placed the topic of its supervisory responsibility, under the 1951 Refugee Convention, on the agenda of the Global Consultations process and requested Walter Kälin to prepare a

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<sup>55</sup> See Antonio Cassese, INTERNATIONAL LAW IN A DIVIDED WORLD 150 (1986) who finds that "UN organs are authorized to call upon member States to intensify their co-operation by indicating the policy to be followed, by suggesting guidelines and goals, and by propounding possible methods for attaining the purposes set out in Article 55."

paper on the topic.<sup>56</sup> This paper then formed the basis for discussions and led to summary conclusions that identify the following activities as part of UNHCR's statutory supervisory responsibility:

- (a) working with States to design operational responses which are sensitive to and meet protection needs, including of the most vulnerable;
- (b) making representations to governments and other relevant actors on protection concerns and monitoring, reporting on and following up these interventions with governments regarding the situation of refugees (e.g. on admission, reception, treatment of asylum-seekers and refugees)
- (c) advising and being consulted on national asylum or refugee status determination procedures;
- (d) intervening and making submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements or letters;
- (e) having access to asylum applicants and refugees, either as recognized in law or in administrative practice;
- (f) advising governments and parliaments on legislation and administrative decrees affecting asylum-seekers and refugees at all stages of the process, and providing comments on and technical input into draft refugee legislation and related administrative decrees;
- (g) fulfilling an advocacy role, including through public statements, as an essential tool of international protection and the Office's supervisory responsibility;

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<sup>56</sup> See Walter Kälin, *Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 613-66 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003). Also see seven working papers on the topic of "Overseeing the Refugee Convention", prepared for a meeting of the International Council of Voluntary Agencies and the University of Michigan, <http://www.icva.ch/doc00000505.html>conference as well as James Hathaway, *Who Should Watch Over Refugee Law*, 14 Forced Migration Rev. 23 (2002). Volker Türk, the Chief of the Protection Policy and Legal Advice Section of UNHCR's Department of International Protection at the time, also contributed a valuable article to the discussion. See Volker Türk, *UNHCR's Supervisory Responsibility*, 14 Revue Québécoise de Droit International 135 (2002). Intricately intertwined into this debate is the issue of the extent to which UNHCR should carry out any type of enforcement mechanism.

(h) strengthening capacity, for example, through promotional and training activities;

(i) receiving and gathering data and information concerning asylum seekers and refugees as set out in Article 35(2) of the 1951 Convention.<sup>57</sup>

These activities are drawn from UNHCR's supervisory activities agreed to by States<sup>58</sup> and EXCOM conclusions. They are not only wide-ranging but also overlap with UNHCR's activities in the area of implementation and the promotion of international refugee law, to be discussed below. By compiling these activities and defining them as the components of UNHCR's supervisory work, in the context of the Global Consultations process, UNHCR succeeded in drawing States' attention to and acknowledgement of them and thereby strengthened their importance. Moreover, the Declaration of States Parties during the Global Consultations Process proclaims that States are to consider ways to "facilitate UNHCR's duty of supervising the application" of the 1951 Refugee Convention and the 1967 Protocol.<sup>59</sup>

As the International Court of Justice has noted, "[a] system of supervision devoid of an element of legal obligation and legal sanction can nevertheless provide a powerful degree of supervision because of the moral force inherent in its findings and recommendations...."<sup>60</sup> Greater respect by States for UNHCR's supervisory responsibility may render UNHCR's advice to States on their policies and actions more authoritative.

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<sup>57</sup> *Summary Conclusions: Supervisory Responsibility: Expert roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9-10 July 2001, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 667, 668-9 (Erika Feller, Volker Türk & Frances Nicholson, eds., 2003).

<sup>58</sup> *Id.*, at 669.

<sup>59</sup> UNHCR, Agenda for Protection, *supra* note 5, at 23.

<sup>60</sup> Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, 1955 I.C.J. 67, 120-1 (7 June) (separate opinion of Judge Lauterpacht).

#### 6.4.2 UNHCR's Enhanced Cooperation with International and Regional Human Rights Bodies

Another means employed by UNHCR to counter the decline in States' application of international standards for the protection of refugees is the reinforcement and extension of its cooperation with various regional and international bodies that can render decisions on and evaluate States' treatment of refugees.<sup>61</sup>

In the international sphere, UNHCR monitors, more closely than ever, the work of the treaty bodies to international human rights conventions.<sup>62</sup> These treaty bodies are the Human Rights Committee, under the 1976 Covenant on Civil and Political Rights,<sup>63</sup> the Committee on Economic, Social and Cultural Rights under the 1976 Covenant on Economic, Social and Cultural Rights,<sup>64</sup> the Committee against Torture under the 1984 United Nations Convention against Torture and the Sub-Committee on the Prevention of Torture under the Optional Protocol to the Convention against Torture,<sup>65</sup> the Committee on the Elimination of Racial Discrimination under the 1965 Convention on the Elimination of Racial Discrimination,<sup>66</sup> the Committee on the Elimination of Discrimination against Women under the 1979 Convention on Elimination of

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<sup>61</sup> UNHCR has always maintained contacts of various sorts with both regional and international bodies. For example, see UNHCR, *Report of the UNHCR*, ¶ 53-60, U.N. Doc. A/2394 (1953).

<sup>62</sup> Türk, *supra* note 56, at 145. In addition to the six noted by Türk, UNHCR has now added the Committee on Migrant Workers.

<sup>63</sup> International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171.

<sup>64</sup> International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3.

<sup>65</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 and Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 Dec. 2002, UN Doc. A/RES/57/199 (2003), 42 ILM 26 (2003).

<sup>66</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, 600 U.N.T.S. 195 [hereinafter "1965 Convention on the Elimination of Racial Discrimination"].



Discrimination against Women,<sup>67</sup> the Committee on the Rights of the Child, under the 1989 Convention on the Rights of the Child,<sup>68</sup> the Committee on the Rights of Persons with Disabilities under the 2006 Convention on the Rights of Persons with Disabilities,<sup>69</sup> and the Committee on Migrant Workers under the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>70</sup>

Interpretative decisions rendered by these committees on treaty provisions can significantly affect refugees. For example, the Human Rights Committee has issued a decision that concludes that the general obligations imposed upon States under the ICCPR apply not only to citizens, but also to aliens within their territory, and thus, to refugees.<sup>71</sup> Decisions on individual claims made by persons, other than asylum-seekers and refugees, also may affect the rights of asylum-seekers and refugees.<sup>72</sup> Finally, some international human rights treaties, such as the ICCPR, the 1965 Convention on Elimination of Racial Discrimination and the 1984 Convention against Torture provide for inter-state complaints and thus, decisions rendered by treaty bodies in such cases also may bear upon the rights of asylum-seekers and refugees. Therefore, UNHCR cooperates closely with treaty bodies drafting general comments to ensure they further

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<sup>67</sup> Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, 1249 U.N.T.S. 13 [hereinafter “1979 Convention on Elimination of Discrimination against Women”].

<sup>68</sup> Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3.

<sup>69</sup> International Convention on the Protection and Promotion of the Rights and Dignity of Persons With Disabilities, G.A. Res. 61/106, Annex I, U.N. Doc. A/61/49 (13 Dec. 2006). The Convention entered into force on 3 May 2008. See EXCOM Conclusion 108 (LIX), ¶i, (2008), which welcomes the entry into force of this Convention.

<sup>70</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Annex) (18 Dec. 1990) [hereinafter 1990 Convention on the Protection of Migrant Workers”]. This Convention explicitly excludes refugees unless the State has agreed otherwise.

<sup>71</sup> Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, (General Comment 15 to Art. 2 of ICCPR, 1986), U.N. Doc. HRI/GEN/1/Rev.7, 140 (2004).

<sup>72</sup> See for example, the decision by the Human Rights Committee in *Charles E. Stewart v. Canada*, Commun. No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (16 Dec. 1996), which concerns the expulsion of an alien.

refugee protection,<sup>73</sup> as UNHCR did in the case of the Committee on the Rights of the Child's drafting of comment 6 to the 1989 Convention on the Rights of the Child.<sup>74</sup>

Many of the treaty bodies can render decisions on individual claims by asylum-seekers and refugees, which not only affect the individual(s) concerned but also establish a valuable precedent for the treatment of similar cases by States.<sup>75</sup> UNHCR therefore provides information on the situation of refugees as well as doctrinal positions on legal issues concerning refugees to these bodies. UNHCR's doctrinal positions may be implicitly or sometimes even explicitly reflected in the decisions of the treaty bodies. For example, the Committee against Torture cited the UNHCR Handbook as an international standard, noting that it provides that the "asylum-seeker has an obligation to make an effort to support his/her statements by any available evidence and to give a satisfactory explanation for any lack of evidence."<sup>76</sup> In another case, it referred to EXCOM Conclusion 12 concerning the extraterritorial effect of the determination of refugee status.<sup>77</sup> Treaty bodies also may make comments

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<sup>73</sup> UNHCR, 1 HUMAN RIGHTS AND REFUGEE PROTECTION, SELF-STUDY MODULE 5, 17 (15 Dec. 2006).

<sup>74</sup> *Id.*, at 82.

<sup>75</sup> Treaty bodies that can hear individual claims include those under the ICCPR, the 1979 Convention on Elimination of Discrimination against Women, 1965 Convention on Elimination of Racial Discrimination, 1984 Convention against Torture, the 2006 International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, and the 1990 Convention on the Protection of Migrant Workers. For an example of an important decision by the Committee against Torture concerning whether return to the country of origin would constitute a violation of article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see *Mutombo v. Switzerland*, Commun. No. 13/1993, U.N. Doc. A/RES/49/44 at 45 (27 April 1994). An example of an important decision made by the Human Rights Committee is *A v. Australia*, Commun. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) with respect to detention of an asylum seeker.

<sup>76</sup> *A.S. v. Sweden*, ¶ 8.5, Commun. No. 149/1999, U.N. Doc. CAT/C/25/D/149/1999 (15 Feb. 2001).

<sup>77</sup> *Ms. Elif Pelit v. Azerbaijan*, ¶ 11, Commun. No. 281/2005, U.N. Doc. CAT/C/38/D/281/2005 (5 June 2007).

on refugee issues raised, or avoided, in States' periodic reports.<sup>78</sup> UNHCR provides information and its views on the situation of refugees, which may then be reflected in the committees' comments on such reports.

At the regional level, UNHCR also has reinforced its cooperation with treaty bodies to regional human rights conventions. The treaty bodies for the main regional human rights conventions in Africa, Central America, and Europe have all rendered decisions of relevance to refugees. These bodies include: the African Commission on Human and Peoples' Rights under the African Charter on Human Rights and Peoples' Rights with its two protocols,<sup>79</sup> the Inter-American Commission and Court for Human Rights, for the American Convention on Human Rights with its Additional Protocol,<sup>80</sup> and the European Court of Human Rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, with its numerous protocols.<sup>81</sup> In addition, there are treaty

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<sup>78</sup> For some examples, see See Brian Gorlick, *Human Rights and Refugees: Enhancing Protection through the International Human Rights Law*, 69 Nordic J. of Int'l. L., 117, 161-4, 166-70, 172-4 (2000).

<sup>79</sup> The African Charter on Human Rights and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1982). For example, see Organisation Mondiale Contre la Torture et al. v. Rwanda, Commun. Nos. 27/89, 46/91, 49/91, 99/93, African Commission of Human and Peoples' Rights (1996) concerning the right of refugees to a fair trial in cases of expulsion. The Commission also has decided cases related to detention, collective expulsion, protection of the family, and freedom of expression, among others. An African Court on Human and Peoples' Rights was established by a 1998 protocol, which entered into force on 1 January 2004. Judges for the court were elected in 2006.

<sup>80</sup> American Convention on Human Rights, 22 Nov. 1969, 1144 U.N.T.S. 123. For example, see The Haitian Centre for Human Rights et al. v. U.S., Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L/VII.95, doc. 7 rev. (1997) concerning the right to seek and receive asylum and *non-refoulement*. The Inter-American Commission on Human Rights also has issued other decisions relevant to the right to asylum and with respect to women and children. The Inter-American Court also has issued decisions of relevance to refugees, such as that of the Juridical status and human rights of the Child, Advisory Opinion, 2002 Inter-Am. Ct. H.R. (Ser. A) No. 17 (28 Aug. 2002). In addition, the Court has heard cases related to a fair trial, family, and the right to education that impact upon refugees' rights.

<sup>81</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 U.N.T.S. 222. The European Court has heard numerous cases related to refugees' rights, which have covered issues of expulsion, *non-refoulement*, rape as torture, the right to personal security, detention, due process, right to property, and the protection of the family. For examples of two important decisions by the European Court of Human Rights on *non-refoulement* see *Chahal v. United*

bodies for regional conventions on specific human rights topics, such as torture, women and children.<sup>82</sup>

Furthermore, States' application of international refugee law standards may be affected by the work of special rapporteurs, members of working groups, representatives, and independent experts, who are part of the "special procedures" established by the Commission on Human Rights, now the Human Rights Council. In particular, these persons often follow up their examination and monitoring with public reports, which are read by States, non-governmental organisations and others.

Therefore, UNHCR provides information about the situation of refugees and applicable international laws, as well as its doctrinal views, to these persons and groups. International refugee law standards as well as UNHCR doctrinal positions may then be reflected in their findings. For example, a study by the Special Rapporteur on Housing and Property Restitution, Paulo Sérgio Pinheiro, pursuant to a request by the Sub-Commission on Protection and Promotion of Human Rights,<sup>83</sup> titled "The return of refugees or displaced persons property" cites the UNHCR

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Kingdom, 23 Eur. Ct. H.R. 413 (1996) and Ahmed v. Austria, 24 Eur. Ct. H.R. 278 (1996). The European Commission on Human Rights also heard cases until 1999, but is no longer in existence.

<sup>82</sup> In addition to the regional bodies described above, in Africa, there is the African Committee of Experts on the Rights and Welfare of the Child for the African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU doc. CAB/LEG/24.9/49. In Latin America there is the Inter-American Commission of Women for the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994 33 I.L.M. 1534. In Europe, there are also supervisory bodies to the European Social Charter, 18 Oct. 1961, 529 U.N.T.S. 89, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 Nov. 1987, 27 I.L.M. 1152 and the Framework Convention for the Protection of National Minorities, 1 Feb. 1995, Europ.T.S. No. 157.

<sup>83</sup> Sub-Comm. on Promotion & Prot. of Human Rights, Dec. 2001/122 (16 Aug. 2001). When the Commission on Human Rights was replaced by the Human Rights Council, the Sub-Commission was replaced by the Advisory Committee.

Handbook on Voluntary Repatriation as well as EXCOM conclusions in its discussion of voluntary repatriation as a durable solution.<sup>84</sup>

Moreover, UNHCR has strengthened its cooperation with the United Nations Human Rights Commission and its successor the Human Rights Council. In 1998, the Commission on Human Rights expressed appreciation for UNHCR's contributions to the body and other "international human rights bodies and mechanisms" and invited the High Commissioner to address the Commission on Human Rights at each future session.<sup>85</sup> In the same resolution, the Commission requested

all United Nations bodies, including the human rights treaty bodies, acting within their mandates, and the specialized agencies, as well as governmental, intergovernmental and non-governmental organizations and the special rapporteurs, special representatives and working groups of the Commission to provide the High Commissioner for Human Rights with all relevant information in their possession on human rights situations that create or affect refugees and displaced persons for appropriate action in fulfillment of her mandate in consultation with the United Nations High Commissioner for Refugees.<sup>86</sup>

The increased involvement of UNHCR in the work and meetings of the Commission, and now the Human Rights Council, has been reflected in the resolutions of the Commission on Human Rights that refer to specific UNHCR doctrinal principles.<sup>87</sup>

Finally, UNHCR has encouraged the use of the work of such human rights bodies through its training materials for staff, through the availability of human rights materials on its web-sites, and training provided to not only

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<sup>84</sup> Special Rapporteur on Housing and Property Restitution, *The Return of Refugees or Displaced Persons' Property*, ¶ 20, U.N. Doc. E/CN.4/Sub.2/2002/17 (12 June 2002).

<sup>85</sup> Comm. on Human Rights Res. 1988/49, ¶ 12, U.N. Doc. E/CN.4/RES/1998/49 (17 Apr. 1998).

<sup>86</sup> *Id.*, at ¶ 11.

<sup>87</sup> See for example Comm. on Human Rights Res. 2005/48, ¶ 7, U.N. Doc. E/CN.4/RES/2005/48 (19 Apr. 2005), which requests States to respect the right to seek and enjoy asylum under the Universal Declaration of Human Rights and the principle of *non-refoulement*.

government officials, but also non-governmental organisations, lawyers, and others concerned with the protection of refugees. UNHCR's enhanced cooperation with such human rights bodies is clearly consistent with paragraph 8(g) of UNHCR's Statute that provides for UNHCR to "keep[] in close touch with...inter-governmental organisations concerned".<sup>88</sup>

#### 6.4.3 *Amicus Curaie*

The submission of *amicus curaie* by UNHCR, to both national and regional courts and administrative or quasi-judicial institutions, relate to the 1951 Refugee Convention, the 1967 Protocol and other legislative provisions concerning international protection.<sup>89</sup> States have generally accepted this activity as part of UNHCR's supervisory role<sup>90</sup> and such work is legally authorized as an implied power derived from UNHCR's supervisory responsibility. The issues before these bodies, in deciding specific refugee cases, do not generally concern whether or not the governmental body or institution has actually applied the standards contained in the 1951 Refugee Convention, but rather what are the parameters and content of the law based on the Convention.

UNHCR's briefs, on issues such as *non-refoulement*, well-founded fear, and the exclusion and cessation clauses, are a key means for UNHCR to bring its doctrinal positions to the attention of judicial and administrative institutions. The positions may then be incorporated into the decisions of such bodies and thus, binding in the State/States concerned. UNHCR has recently broadened its submission of such briefs from primarily developed countries to also include the regional institution, the Court of Justice of the

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<sup>88</sup> UNHCR Statute, *supra* note 17, ¶8(g).

<sup>89</sup> UNHCR, *Submissions by UNHCR*, in R (Saeedi) v. Secretary of State for the Home Department - Submissions by UNHCR, ¶ 2 (15 Feb. 2010), <http://www.unhcr.org/refworld/docid/4b83fceb2.htm>.

<sup>90</sup> Walter Kalin, *Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 624 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003).

European Communities. Admittedly, the submission of such briefs is primarily a tool that is used in individual cases and in countries with developed asylum systems, but despite the limited fora, these decisions can affect the consideration of similar issues by courts and administrative bodies in other States.

Additionally, UNHCR is increasingly utilising human rights instruments, as well as decisions of human rights treaty bodies,<sup>91</sup> in support of its positions. This is consistent with UNHCR's incorporation of human rights agreements into the refugee law framework. Moreover, UNHCR has recently addressed the issue of the relationship of refugee status to diplomatic protection concepts.<sup>92</sup>

UNHCR's submissions have been recognized as useful even where no formal *amicus curiae* procedure is provided in a State. For example, in Ireland, the Supreme Court found that despite the lack of statutory provisions or rules of the court for the appointment of an *amicus curiae*, except in Human Rights Commission cases "the court is satisfied that it does have an inherent jurisdiction to appoint an *amicus curiae* where it appears that this might be of assistance in determining an issue before the court."<sup>93</sup> Thus, the decision of the Ireland Supreme Court provides

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<sup>91</sup> See for example UNHCR, *UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures: Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Article 39, Asylum Procedures Directive (APD); and Articles 6 and 13 ECHR*, ¶ 23-25, 30-32, 42-49 (21 May 2010), <http://www.unhcr.org/refworld/docid/4bf67fa12.html>.

<sup>92</sup> UNHCR, *Written Submissions on Behalf of the Intervener (UNHCR)*, in *The Queen on the Application of Al Rawi and Others (Appellants) and (1) The Secretary of State for Foreign and Commonwealth Affairs and (2) The Secretary of State for the Home Department (Respondents) and The Office of the United Nations High Commissioner for Refugees (Intervener)* (12 July 2006), <http://www.unhcr.org/refworld/docid/45c350974.html>. In this case, two persons recognized as refugees by the United Kingdom were detained in Guantanamo Bay under the authority of the U.S. and the issue considered was whether the diplomatic protection of the UK applied to refugees recognized by the UK, not just citizens.

<sup>93</sup> See *I. v. The Minister for Justice, Equality and Law Reform, On the Application of the United Nations High Commissioner for Refugees*, 1 ILRM 27, Ireland: Supreme Court (14 July 2003), <http://www.unhcr.org/refworld/docid/42cb9ac34.html>.

support for the fact that UNHCR's views are extremely valuable to national bodies hearing cases involving refugee issues.

#### 6.4.4 The Promotion of International Refugee Law

UNHCR has countered States' unwillingness to assure the necessary protection to refugees by a third key approach, namely, the promotion of international refugee law. UNHCR's promotion of the importance of and standards for international protection can contribute to a State's decision to accede to instruments for the protection of refugees and to implement the standards contained in such instruments into national law. Most importantly, such promotional activities affect States' application of their international refugee law obligations and are therefore considered in relation to this latter crucial aspect of the effectiveness of international refugee law.

Like capacity-building, the promotion of refugee law can be said to be an implied power derived from its international protection function. Yet, it was not until the late 1980's, with the need for additional measures to ensure a more widespread and consistent application of international refugee law standards, that UNHCR had its work explicitly acknowledged by EXCOM and endorsed by the General Assembly.<sup>94</sup> As a result of UNHCR's initiative, EXCOM resolutions have encouraged UNHCR to broadly disseminate refugee law and its principles, including through training,<sup>95</sup> through cooperation with States, non-governmental

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<sup>94</sup> See the key 1988 Conclusion, EXCOM Conclusion 51 (XXXIX), 1st preambular ¶, 1988. EXCOM reiterated UNHCR's responsibility in this area in a number of subsequent conclusions. For example, see EXCOM Conclusion 71 (XLIV), ¶ aa, 1993; EXCOM Conclusion 74 (XLV), ¶ kk, 1994; and EXCOM Conclusion 79 (XLVII), ¶ n, 1996. Also see the following General Assembly resolutions: G.A. Res. 43/117, ¶ 18, U.N. Doc. A/RES/43/117 (8 Dec. 1988) and G.A. Res. 48/116, ¶ 16, U.N. Doc. A/RES/48/116 (20 Dec. 1993).

<sup>95</sup> See for example, EXCOM Conclusion 81 (XLVIII), ¶ u, 1997 endorsed by G.A. Res. 52/103, ¶ 1, U.N. Doc. A/RES/52/103 (12 Dec. 1997) and EXCOM Conclusion 65 (XLII), ¶ s, 1991 endorsed by G.A. Res. 46/106, ¶ 6, U.N. Doc. A/RES/46/106 (16 Dec. 1991).



organisations, academic institutions, and others,<sup>96</sup> as well as the International Institute of Humanitarian Law in San Remo,<sup>97</sup> and through the organisation of round tables, seminars and discussion groups in different areas of the world.<sup>98</sup> EXCOM also has requested UNHCR to promote greater knowledge and understanding of international refugee law<sup>99</sup> and recognised the value of UNHCR's continuing activities that "encourag[e] the teaching ... of international refugee law".<sup>100</sup>

Therefore, UNHCR has expanded its training activities so as to provide extensive training on law applicable to refugees to government officials, judges and administrative law officers, non-governmental organisation staff, lawyers and others and is involved in the teaching of refugee law courses at universities. In addition, UNHCR staff members attend national, regional, and international conferences, round-tables and seminars of relevance to UNHCR's work. These fora may be organized by non-governmental organisations and academic institutions, governments or other organisations. UNCHR also initiates such conferences itself.

The Global Consultations process is UNHCR's most significant organisational undertaking to date to promote international refugee law through discussions with persons from a range of organisations. This process, begun in 2000, provided "an important forum for open discussion on complex legal and operational protection issues", as stated in an EXCOM conclusion endorsed by the General Assembly.<sup>101</sup> UNHCR's

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<sup>96</sup> EXCOM Conclusion 77 (XLVI), ¶ m, 1995.

<sup>97</sup> EXCOM Conclusion 36 (XXXVI), ¶ m, 1995.

<sup>98</sup> EXCOM Conclusion 41 (XXXVII), ¶ h, 1986.

<sup>99</sup> EXCOM Conclusion 46 (XXXVIII), ¶ o, 1987, EXCOM Conclusion 33 (XXV), ¶ j, 1984, EXCOM Conclusion 25 (XXXIII), ¶ i, 1982, EXCOM Conclusion 21 (XXXII), ¶ j, 1981, and EXCOM Conclusion 16 (XXXI), ¶ k, 1980.

<sup>100</sup> EXCOM Conclusion 29 (XXXIV), ¶ k, 1983. See also EXCOM Conclusion 25 (XXXIII), ¶ j, 1982 concerning the High Commissioner's "initiative to organize courses of lectures on refugee law in cooperation with the International Institute of Humanitarian Law (San Remo)".

<sup>101</sup> EXCOM Conclusion 90 (LII), ¶ g, 2001 endorsed by G.A. Res. 56/137, ¶ 1, U.N. Doc. A/RES/56/137 (19 Dec. 2001).

creation of the process, identification of topics to be addressed, and its substantive positions on various issues helped create a unique forum through which UNHCR could promote international refugee law.

With its promotional activities, UNHCR works to enhance awareness and understanding of international refugee law and thereby ensure greater application of such principles in practice by States. Such promotion also encourages States to implement their international obligations into national law, as noted above, and thereby overlaps with UNHCR's definition of its capacity-building activities. In fact such promotional activities can be said to bear upon all three areas of effectiveness. UNHCR's promotional efforts are directed not only toward national, regional and international bodies and their officials, but also toward other groups of persons that can influence the views of governments and citizens. Three special groups: academics, nongovernmental organisations, and the media, merit particular attention given the important roles, but often undervalued role they play in influencing governments' legislation, policies and practices related to refugees.

The views of academics, disseminated through articles and books, seminar papers, and their teachings, among other means, can have a significant impact upon national bodies determining refugee status, the rights accorded by governments to refugees, as well as the regional and international bodies discussed above. From a legal standpoint, the views of the most highly qualified publicists constitute a subsidiary source of law under the article 38 of the Statute of the International Court of Justice. Although the influence of such academics has decreased significantly since the drafting of the Statute of the International Court of Justice,<sup>102</sup>

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<sup>102</sup> Schwarzenberger found, even in 1967, that the writings of the most highly qualified publicists in the various nations, as stated in article 38 of the ICJ Statute, has "considerably decreased in significance". Georg Schwarzenberger, *A MANUAL OF INTERNATIONAL LAW* 40 (5<sup>th</sup> ed. 1967). Van Hoof correctly notes, in this author's view, that "[t]here are no hard and fast criteria to decide what part of

their views remain influential in the refugee law field given the absence of international treaty standards on many refugee issues.

Non-governmental organisations affect the drafting or amendment of legislation concerning refugees as well as governments' policies through their advocacy work. Many are in the frontline of ensuring the protection of refugees through their interactions with refugees. In refugee camps, such organisations may be involved in assistance activities, such as health care and educational services for refugees, and therefore are well placed to monitor the refugees' day-to-day protection situation. In urban areas, they may provide advice, counselling and assistance to refugees. Since in many cases, refugees, while the subject of States' conduct, are not able to effectively advocate their own rights, non-governmental organisations serve as important representatives for these essentially voiceless refugees.

The media is undeniably one of the most powerful sources of influence on the perceptions, attitudes, and values of the public and national officials in the field of refugee protection. The media can aggravate misunderstandings, such as the confusion about the distinction between migrants, sometimes termed 'economic refugees' in the press, and 'refugees'. On the other hand, to the extent that the media understands and appreciates the special protection needs of refugees, then this can lead to more sympathetic stories and coverage of the plight and problems of refugees as well as questions about governments' treatment of refugees. UNHCR has a public information office in its headquarters and officers responsible for dealing with the media in offices around the globe in order

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doctrine is highly qualified and what is not". G.J.H. van Hoof, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 177 (1983).

to ensure a direct link to the media. Through these contacts, UNHCR provides background information as well as its doctrinal positions.<sup>103</sup>

## 6.5. CONCLUSION

Following the appearance of the international refugee law crisis in the 1980's, UNHCR was faced with the question of how to counter the restrictive policies and practices of States and in particular, how to address the weaknesses in the means for ensuring the effectiveness of refugee law. In essence, UNHCR had to make refugee law effective, that is, it had to ensure that refugees received the legal protection they required. Thus, UNHCR had to look beyond the provisions of the 1951 Refugee Convention.

UNHCR continued to demonstrate its organisational autonomy with respect to its role and responsibilities related to international refugee law. Essentially, UNHCR designed and undertook activities at its own initiative, thereby demonstrating and exercising its institutional independence, and then had the General Assembly and EXCOM endorse such activities.

Based on its responsibilities under paragraphs 8(a) and (g) of its Statute, which provide for UNHCR to "[p]romot[e]...the ratification of international conventions for the protection of refugees", "supervis[e] their application", and "[k]eep[] in close touch with the Governments and inter-governmental organisations concerned",<sup>104</sup> UNHCR supplemented the

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<sup>103</sup> Schachter has noted that "public opinion as an element in achieving compliance... is an amorphous factor, but it may be given more concrete form through the activities of nongovernmental organisations that are dedicated to achieving implementation of one or more specific international norms." Oscar Schachter, *The UN Legal Order: An Overview*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 3, 19 (Christopher Joyner, ed. 1997).

<sup>104</sup> UNHCR Statute, *supra* note 17, at ¶ 8(a), (g).

treaty-oriented activities, which it had established prior to the crisis, with innovative approaches.

These approaches were linked to an enhanced understanding within the organisation of the importance and role of protection principles. The preparation of Annual Protection reports by UNHCR staff members contributed to this understanding as staff members became more knowledgeable about States' application of legal standards and principles and the ways in which they could employ international law and UNHCR doctrinal positions to ensure States' protection of refugees.

UNHCR complemented its greater institutional awareness and understanding of protection principles by engaging in an extended dialogue with States related to effectiveness. UNHCR included the topics of accession to and implementation of refugee law agreements and UNHCR's supervisory role in the Global Consultations process. Through this process, States became greater stakeholders in supporting UNHCR's mandated responsibilities related to international refugee law.

Furthermore, the enumeration of specific follow-up actions for UNHCR in the Agenda for Protection in these areas and helped deepen UNHCR's understanding of the obstacles that States encounter in making refugee law effective and therefore assisted UNHCR in its work with States to counter such obstacles.

UNHCR has not only furthered its dialogue with States, but also has enhanced its cooperation with other organisations. UNHCR had the UN Secretariat include the 1951 Refugee Convention and the 1967 Protocol in the Annual Treaty Event and prepared a brochure on implementation in cooperation with the Inter-Parliamentary Union. UNHCR also has more actively provided information to and utilised the work of international and regional human rights bodies. UNHCR's cooperation with such bodies not only assists in helping to ensure more effective protection of refugees'

rights, but also facilitates the development of regional and international refugee law standards since decisions of these bodies further the articulation and clarification of future legal standards.

In addition, UNHCR has become more integrally involved in States' policies, laws, and practices related to refugees. UNHCR has intensified its submission of *amicus curiae* briefs in order to influence decisions made by judicial and administrative bodies hearing cases involving asylum-seekers and refugees. Of crucial importance has been UNHCR's expansion of its capacity-building activities in order to impact States' policy structures and processes related to asylum-seekers and refugees. This greater involvement has led to a closer working relationship with States and a more pronounced influence by UNHCR on their decisions and policies concerning asylum-seekers and refugees.

The key components of UNHCR's capacity-building work include assisting States with the drafting of legislation that affects refugees as well as the creation of the necessary structures, whether administrative, legal, or judicial, to recognize refugees and ensure respect for their rights. Through its direct involvement with States in creating legislation and structures to ensure protection of refugees, UNHCR can work toward having States incorporate into their national legislation and policies, not only the 1951 Refugee Convention standards, but also relevant legal standards from human rights and humanitarian law, criminal law, and regional instruments, as well as UNHCR's doctrinal positions.

However, UNHCR must be sensitive to how it carries out capacity-building. In particular, UNHCR should ensure that these activities are devised with a thorough understanding and sensitivity to the needs of the States where capacity-building is being undertaken and that the capacity-building is not driven solely by the desire of donor States to keep refugees in the regions of origin and deny them access to asylum. Moreover, as

developing States are often struggling with severe resource constraints, UNHCR must remain sensitive to the fact that capacity-building activities may drain human and material resources from other priorities in the affected State.

Finally, UNHCR has enhanced its promotional role with respect to refugee law to further the knowledge, understanding, acceptance and application of standards and principles applicable to refugees, including those derived from international human rights, humanitarian, and criminal law as well as UNHCR doctrinal positions. UNHCR's promotional work also has been extended to include States' accession and implementation of treaties from these other legal domains, which are applicable to refugees, and States' removal of reservations to the 1951 Refugee Convention. UNHCR has significantly augmented its participation in and hosting of conferences, round-tables and seminars. This work is directed toward and affects not only persons in national, regional and international bodies concerned with refugees, but also other groups of persons that influence the perception and understanding of refugee law, such as academics, non-governmental organisations and the media.

While many of these measures have lead to a more in-depth collaboration with States and thus, a more active understanding of the needs, motivations, and difficulties of States with respect to the protection of refugees, more remains to be done in the prevailing climate of States' continued reluctance to permit asylum-seekers to enter onto their territories, to recognize refugees, and to accord them effective protection. In the area of accessions, nearly fifty countries have still not acceded to the 1951 Refugee Convention or the 1967 Protocol and thus, these agreements still lack universal applicability. Moreover, not all States have enacted national legislation that incorporates the necessary international standards for the protection of refugees and other States continue to maintain national legislation or regulations that violate either express standards for

the protection of refugees or the humanitarian spirit of the 1951 Refugee Convention. Finally, States' application of international law standards for the protection of refugees is still woefully inadequate. Although it is unreasonable to expect that States will always treat refugees consistently with international refugee law standards, more work remains to be done to determine how UNHCR can ensure greater compliance with these standards.

Thus, UNHCR should develop a more profound understanding of what motivates States to accord refugees protection and to comply with not only the 1951 Refugee Convention, but also other agreements that provide protection to them as well as UNHCR doctrinal positions. An exclusive focus on the ability of UNHCR to supervise States' policies and actions is too limited, since it considers only the organisation's powers and not the effectiveness of the protection provided by States. In this connection, international relations studies have a great deal to offer as to why States provide protection and comply not only with treaty law, but also soft law principles.

The approaches taken by UNHCR to improve effectiveness can be criticized for remaining too tempered in light of States' policies. These approaches have primarily built upon its work undertaken prior to the 1980's and thus, while innovative, have not sufficiently resolved the problems associated with the effectiveness of refugee law. They establish important bases for the future in terms of working with States and other organisations, but more creativity is required by UNHCR and is possible, given the autonomy that UNHCR has vis-à-vis States. UNHCR should further consider how to utilise its ability to define the activities that it can carry out with respect to international refugee law to enhance its work. For example, secondments of national staff to UNHCR, increasing UNHCR staff from developing countries, and further reflection and



dialogue with States on the needs of refugee producing countries might enable UNHCR to improve the effectiveness of refugee law.

## **Conclusion**

UNHCR was created by States, through the General Assembly, in order to serve as a means for States to collectively continue to deal with the problem of refugees. UNHCR's Statute specifies that UNHCR is to carry out two principal functions related to refugees: one, the provision of international protection to refugees and two, seeking permanent solutions to the problem of refugees. As part of its international protection function, States granted UNHCR certain responsibilities related to international refugee law. These responsibilities are contained in paragraph 8 of its Statute and concern both the development of international refugee law and the effectiveness of such law, that is, whether refugees receive legal protection from States.

With respect to the development of international refugee law, UNHCR's Statute provides the organisation with the responsibilities of "[p]romoting the conclusion ... of international conventions for the protection of refugees" and "proposing amendments thereto". In the area of effectiveness, the Statute assigns UNHCR responsibilities for "promoting the ratification of international conventions for the protection of refugees", "supervising their application", and "obtaining from Governments information concerning ... the laws and regulations concerning" refugees.

In assigning UNHCR such responsibilities, States maintained their primacy not only in the development of treaty law for the protection of refugees, but also concerning their ratification, implementation and application of such treaties. UNHCR's role related to international refugee law, under its Statute, is one of assisting and supporting States. UNHCR's responsibilities related to the creation of a refugee law framework and States' ratification and accession to conventions for the protection of refugees is a promotional one. In the area of States' implementation, UNHCR's responsibility is merely one of seeking

information from States on their implementation of international refugee law obligations into national law standards. The limited role assigned to UNHCR by the drafters of its Statute is consistent with the view at the time that implementation was a State domain. Finally, in the area of States' application of international refugee law standards in practice, UNHCR was provided with a supervisory role under its Statute, but one that has no enforcement mechanisms and thus, is dependent upon the cooperation of States.

UNHCR's statutory responsibilities related to international refugee law are firmly rooted in the mandates and experiences of its predecessors, international organisations which had been assigned responsibilities for refugees, beginning with the first High Commissioner, Fridtjof Nansen, appointed by the League of Nations. Whether or not UNHCR's predecessors were specifically mandated to do so, nearly all of these organisations were involved in the creation of instruments for the protection of refugees. New refugee situations required new instruments to establish the obligations of States toward refugees. Therefore, some of these earlier organisations encouraged governments to draft agreements or amendments to agreements; others actually prepared the agreement, while still others provided suggestions on the content of such agreements. These early refugee organisations also were involved in ensuring that the refugee law standards were effective. They encouraged accessions, facilitated States' actual application of the agreements in a practical manner, and supervised States' application of agreements to protect refugees. Underpinning the work undertaken by these early refugee organisations, was the notion that States should have binding legal obligations toward refugees and that these obligations should be respected by States in practice.

Throughout UNHCR's existence, its work related to the creation and effectiveness of international refugee law has been based on its statutory

responsibilities. In carrying out its responsibilities to promote the conclusion and amendment of international conventions for the protection of refugees, UNHCR has encouraged States to formulate treaties for the protection of refugees and has actively participated in the drafting of such treaties and conventions. In particular, UNHCR played a key part in the creation of the only universal refugee law treaties to follow the 1951 Refugee Convention, the 1957 Agreement relating to Refugee Seamen and the 1967 Protocol relating to the Status of Refugees. In addition, UNHCR monitors the formulation of instruments initiated by States or by other regional and international bodies, which might affect the rights of refugees. Specifically, UNHCR works toward ensuring that the instruments do not contradict or abrogate any of the protections afforded to refugees under the 1951 Refugee Convention/1967 Protocol and that such agreements enhance the protections afforded refugees. Consequently, UNHCR has contributed to numerous other agreements that provide protections to refugees, including regional refugee instruments, human rights agreements, and agreements on particular topics, ranging from social security to organised crime.

Similarly, in the area of effectiveness, UNHCR's work since its creation has been grounded in the responsibilities articulated in its Statute. Over the years, UNHCR has consistently encouraged States to undertake international obligations concerning refugees, through the promotion of ratification and accession to the 1951 Refugee Convention and accession to the 1967 Protocol. Moreover, it also encouraged States to become bound by other conventions for the protections of refugees to which UNHCR had contributed. In the area of States' implementation of their international refugee law obligations into national law standards, UNHCR, with its statutory responsibility for obtaining information, attempts to gather information on States' implementation of the 1951 Refugee Convention/1967 Protocol from governments through informal and formal

requests. And in the area of States' application of their international refugee law obligations, UNHCR has carried out its supervisory responsibility through a variety of activities. These include monitoring and gathering information on States' policies and legislation, analysing such information, and following up on States' actions, such as by raising concerns about inconsistencies with international refugee law with States as well as in reports to the General Assembly. UNHCR also participates in refugee determination procedures, in various capacities depending on the country concerned.

The traditional work that UNHCR has carried out, pursuant to its statutory responsibilities concerning the development and effectiveness of international refugee law, takes as its centre point international treaties for the protection of refugees. UNHCR is to ensure that sufficient treaties exist to protect refugees' rights and that these treaties become binding upon States and are respected by them. With the drafting of the 1951 Refugee Convention, the first concrete and practical link between UNHCR and international refugee law was established. The Convention also established States' obligation to cooperate with UNHCR, as article 35 provides: "in the exercise of [UNHCR's] functions, and shall in particular facilitate [UNHCR's] duty of supervising the application of the provisions of this Convention". As a result, UNHCR and States became partners in ensuring protection for refugees through the bias of international law.

The international protection crisis, which initially appeared in the 1980's, constituted a true test of UNHCR's ability to adapt and remain relevant. The crisis resulted from States' actions and policies that demonstrated an unwillingness to protect refugees. They included actions and policies to limit the number of refugees reaching their territory, to reduce the number of persons eligible for refugee status, and the provision of lower levels of protection. These actions, and the unwillingness of States to modify their actions in response to UNHCR's objections, signalled that States were

reassuming greater control over refugee matters and were conferring upon UNHCR less influence over their actions. Consequently, a degree of strain was introduced into the relationship between UNHCR and States, which was one based on cooperation. UNHCR's relationship with States became more complicated and significant differences in views relating to the content of international refugee law appeared.

States' actions capitalized on the gaps and ambiguities in the provisions of the 1951 Refugee Convention/1967 Protocol. For example, some States adopted overly restrictive interpretations of the refugee definition that took advantage of the ambiguities in the Convention's refugee definition, while others adopted concepts, such as first country of asylum, which do not explicitly violate the Convention's standards, but nevertheless contradict the humanitarian and protection spirit of the 1951 Refugee Convention. Regional standards became increasingly important, but resulted in different standards for different regions. As the weaknesses in the framework permitted States greater latitude in interpreting and applying their obligations towards refugees, they therefore, understandably, did not manifest any intention to remedy these weaknesses through an instrument that would update the 1951 Refugee Convention and the 1967 Protocol.

The crisis also highlighted the weaknesses in the means for ensuring the effectiveness of the protection of refugees. Not all States had acceded to the 1951 Refugee Convention or the 1967 Protocol and some had made reservations that limited certain protections for refugees. Although some States did not have national legislation in place that reflected their international obligations towards refugees, others adopted legislative provisions that expressly violated the Convention's standards or contradicted the humanitarian spirit of the Convention and the notion of international protection. Moreover, with no multi-national mechanism in place to ensure that States applied their international refugee law obligations in practice, UNHCR's supervisory mechanism was the sole

means to help ensure the enforcement of such obligations. UNHCR's means for persuading States to respect their refugee law obligations were primarily soft ones, those of encouragement, persuasion and inducement. Although UNHCR could bring violations to the attention of EXCOM or the General Assembly, in order to obtain, respectively, a conclusion or resolution, these were not legally binding on States. Essentially, the responsibility for taking the necessary actions to ensure the effectiveness of international refugee law rested squarely within States' domain.

Faced with a crisis in the protection of refugees, UNHCR has employed two key techniques to assure it continues to influence both the development and effectiveness of refugee law by States. First, pursuant to its implied powers, UNHCR has adopted a flexible interpretation of its international protection function in order to alter and extend its responsibilities related to international refugee law. Second, independently, based on its implied powers, or following requests by EXCOM, UNHCR has formulated and articulated doctrinal positions on refugee law issues. States did not use the formal means available to them to render UNHCR able to meet changing circumstances, namely General Assembly resolutions and EXCOM conclusions, except at the encouragement of UNHCR to express support for activities it had already commenced.

As concerns the development of international refugee law, UNHCR has continued to carry out the traditional work linked to influencing States' creation of treaties that affect refugees and supplemented this work with three approaches, two of which are still in use. First, UNHCR has helped to create a more comprehensive legal framework for the protection of refugees through the incorporation of standards from other international instruments that relate to refugees' rights. International human rights law instruments have been particularly important to UNHCR's effort to expand and supplement the coverage of the 1951 Refugee Convention.

International humanitarian law and criminal law standards also have contributed to the development of the international refugee law framework. Thus, these standards assist in filling in the gaps and can extend the protections contained in the 1951 Refugee Convention/1967 Protocol.

Second, UNHCR has further developed its doctrinal positions to counter States' restrictive interpretations of the refugee definition and standards in the 1951 Refugee Convention and to impede their adoption of concepts that restrict refugees' rights but do not explicitly violate provisions in the 1951 Refugee Convention. UNHCR has been formulating its views on refugee law since shortly after its creation. However, following the appearance of the crisis in refugee protection in the 1980's, UNHCR's positions increasingly articulated new principles and became more widely and more publicly disseminated. Such positions have assisted in filling in the gaps and resolving ambiguities in the coverage of the provisions of the 1951 Refugee Convention, in numerous areas, including with respect to voluntary repatriation, the procedural standards for the determination of refugee status, the exclusion clauses related to the refugee definition, the application of the refugee definition in connection with claims by women asylum-seekers, and detention.

Thus, UNHCR has maintained the 1951 Refugee Convention and the 1967 Protocol as the basis for international refugee law standards, while extending the refugee law framework so as to include other types of agreements, such as regional instruments and international human rights and humanitarian law conventions. The provisions in treaties remain the key source of obligation and a form of "hard law" for States to ensure the protection of refugees, but UNHCR doctrine has assumed increasing importance as "soft law" to fill in the gaps and resolve ambiguities in the hard law standards, particularly those in the 1951 Refugee Convention.



Moreover, UNHCR doctrinal positions serve as a means to further the development of international refugee law. UNHCR doctrine may influence provisions in future treaties and can impact upon the development of customary international law standards, as is amply illustrated by UNHCR's role in the evolution of *non-refoulement* into a customary international law standard. Doctrinal positions may even serve as a catalyst for the development of general principles of international law. If they lead to more consistent State action and therefore greater uniformity among States, and as a result, a general principle of law could emerge. For example, status determination procedures may be in the process of developing into a general principle.

These two approaches were based upon work that UNHCR had carried out and States had accepted prior to the crisis in refugee protection and refugee law and thereby were innovations in how UNHCR contributes to the development of refugee law. Specifically, UNHCR's incorporation of human rights, humanitarian and criminal law standards extended its previous work of incorporating relevant provisions from regional and international agreements on non-refugee topics, but which contained provisions relevant to refugees. UNHCR's extensive use and public articulation of doctrinal positions on refugee law issues was an evolution from UNHCR's initial primarily internal and infrequent use of such positions.

A third approach adopted by UNHCR in 2002 but abandoned after three years, the Convention Plus initiative, was UNHCR's most innovative attempt yet to contribute to the development of the refugee law framework. The initiative, which attempted to provide legal content to the concepts of burden-sharing and responsibility sharing in order to address the political problem of disparate refugee burdens borne by States, was admirable for its creativity in utilising treaties containing standards that would evolve into norms. The initiative was weakened, however, by its failure to be

linked to existing refugee law principles and by the perception that it served the interests of northern States, rather than the southern States, which contain the largest refugee populations.

The crisis in refugee protection also has led UNHCR to develop other innovative approaches to help ensure the effectiveness of international refugee law. To ensure that as many States as possible are bound by the 1951 Refugee Convention/1967 Protocol, UNHCR has employed some new activities to encourage accessions, such as the Global Accession campaign in 1998, inclusion of the agreements in the UN's annual treaty event, and the expression of additional activities by UNHCR and States to further States' accessions in the Agenda for Protection, the concluding document of the Global Consultations process. UNHCR also has encouraged the removal of reservations to the 1951 Refugee Convention and 1967 Protocol.

Moreover, since UNHCR has articulated a refugee law framework that includes international human rights, humanitarian and regional law standards, among others; it also encourages the ratification of such additional instruments. These various activities are a continuation of UNHCR's independent determination of the activities that it shall carry out pursuant to its statutory responsibility to promote ratifications to international conventions for the protection of refugees.

To ensure that States implement their international obligations towards refugees in the form of national legislation and administrative measures, UNHCR has prompted the General Assembly to authorise it to promote the implementation of the 1951 Refugee Convention and 1967 Protocol. In addition to cooperatively creating a guide on implementation with another organisation, UNHCR included the topic of States' implementation of the 1951 Refugee Convention and the 1967 Protocol in the Global Consultations process. Pursuant to the Agenda for Protection,

UNHCR is to survey States in order to obtain a better understanding of the problems they have with the implementation of such agreements.

Furthermore, since UNHCR considers that the refugee law framework encompasses other instruments, including international human rights, international humanitarian law, and regional agreements, UNHCR promotes States' accession to these instruments as well.

One of the most important developments in UNHCR's responsibilities related to States' implementation of their international refugee law obligations toward refugees is the addition of capacity-building activities. These activities include the provision of comments on draft legislation, training for governmental officials and others concerned with refugees, and advice on the creation, structure and functions of asylum bodies. As part of such capacity-building activities, UNHCR works with States to create the necessary legal structures and national legal framework for the protection of refugees. This work has led to a closer involvement by UNHCR in States' work related to refugees and has generally enhanced the working relationship that UNHCR has with such States. While capacity-building activities allow UNHCR to more easily shape and influence the actions of States in an area that was traditionally viewed as one solely within the State's discretion and authority, UNHCR must carry out such work in a manner that is sensitive to not only the needs, but also the constraints, of such States.

In the crucial area of States' application of international refugee law standards for the protection of refugees, UNHCR has pursued several innovations. First, UNHCR has increased the awareness of its own staff of refugee law principles and how they can be utilised to bolster States' protection of refugees and has utilised the Global Consultations process as a means to solidify State support for its supervisory responsibility. UNHCR also reinforced and extended its cooperation with a multitude of regional and international bodies, which can issue decisions and evaluate

States' treatment of refugees, and has intensified its use of *amicus curiae* positions, which now use not only 1951 Refugee Convention standards but also human rights law principles.

In addition, UNHCR has intensified its promotional activities relating to international refugee law. Thus, UNHCR actively disseminates refugee law principles, conducts training and teaching activities, and attends seminars relevant to refugees. Not only do such promotional activities enhance States' application of international refugee law, but they also serve as an additional incentive to States' implementation of international refugee law standards as well as their accession to not only the 1951 Refugee Convention/1967 Protocol, but also to other agreements that provide protections to refugees.

UNHCR doctrine plays an integral role in the organisation's work to ensure the effectiveness of international refugee law. Standards for the protection of refugees, from not only international instruments but also UNHCR doctrinal positions, are woven into UNHCR's activities related to States' implementation of international standards into national law and therefore, UNHCR doctrine may find concrete form in national law standards. Similarly, in carrying out its supervisory responsibility, UNHCR's evaluation of States' legislation, policies, and actions is based on standards from international and regional instruments and on principles articulated in its doctrinal positions. Non-governmental organisations and States also may use such standards and doctrinal positions to assess States' treatment of refugees.

A number of UNHCR's new activities, instituted since the 1980's, such as capacity-building as well as the work UNHCR is to undertake pursuant to the Agenda for Protection, are important means for UNHCR to move beyond a simple promotional role to a greater understanding and involvement with States and thereby strengthen its managerial role related

to the protection of refugees. In particular, these approaches strengthen the relationship between States and UNHCR and allow UNHCR greater access to the governmental officials and staff concerned with refugees, and thereby contribute to an improvement in the level of cooperation between them. UNHCR's focus is no longer simply one of ensuring that States comply with the provisions of the 1951 Refugee Convention, but of ensuring that refugees receive protection, that is, that refugee law is effective.

UNHCR also becomes, through closer involvement with States, more knowledgeable about the governmental and societal forces that shape governmental policies and practices and thus, more able to craft approaches that strengthen refugee protection and are responsive to States' needs, and UNHCR can then be more integrally involved in States' decisions relative to refugees. Furthermore, UNHCR garners government support for the principles it considers should apply to refugees.

Thus, UNHCR's response to the crisis in refugee protection and consequently, refugee law, can be characterised as a significant attempt to continue to influence the development and effectiveness of such law. UNHCR manifested its organisational autonomy as it decided how to respond to States' restrictive practices and then carried out such activities without the prior approval of the General Assembly or EXCOM. Many of these activities were a continuation or expansion of activities that UNHCR had instituted in practice prior to the crisis in order to fulfil its statutory responsibilities related to refugee law. States, through the adoption of General Assembly resolutions and EXCOM conclusions, then endorsed UNHCR's additional activities at UNHCR's request.

While UNHCR's initiation of new activities, with subsequent endorsement by the General Assembly and EXCOM, demonstrates UNHCR's continued independence as an organisation vis-à-vis States, it also resulted

in an incremental approach by UNHCR to the development of its refugee law responsibilities. Since UNHCR had to be careful not to undertake activities that might be criticized by States, UNHCR has had difficulty undertaking activities that are more radical innovations despite a statutory mandate that permits it a great deal of flexibility. Consequently, UNHCR generally exercised its flexibility in an overly cautious manner.

UNHCR continues to maintain a prominent role in the creation and effectiveness of international refugee law, but its responsibilities in these areas deserve further review and enhancement. Significant gaps and ambiguities remain in the legal standards applicable to asylum-seekers and refugees. The rights of asylum-seekers, the parameters and content of temporary protection, the means and approach for determining the status of asylum-seekers in mass influxes, to name a few, remain unclear and without the necessary content to permit States to handle these matters in a consistent and harmonised manner. Admittedly, UNHCR is on stronger ground when it clarifies and extends the standards in the 1951 Refugee Convention through the employment of standards from other international instruments, in particular, human rights agreements. Thus, it is easier for UNHCR to clarify provisions in the 1951 Refugee Convention than to articulate new standards that complete gaps in this convention or in the refugee law framework in general. Yet, UNHCR needs to continue to do so if it is to ensure the necessary protection to refugees.

UNHCR could enhance the refugee law framework through further identification and clarification of ongoing gaps and ambiguities in the protection of refugees and asylum-seekers under the 1951 Refugee Convention and 1967 Protocol and clarification of the relationship of international human rights standards to the Convention's provisions. At the same time, a compilation of UNHCR doctrine would assist refugee advocates and governmental officials dealing with refugees as well as UNHCR staff to better understand and employ such doctrine.

The abandonment of the Convention Plus initiative should not serve as a deterrent to the development of creative approaches to norm creation by UNHCR, but rather an example of UNHCR's ability to be creative in devising new approaches. However, the limitations and weaknesses of the initiative, which led to its demise, need to be better understood in order to ensure that UNHCR utilises its personnel and its institutional capacities to create and implement more successful approaches to the development of refugee principles and standards in the future.

In general, the development of refugee law should be more responsive and sensitive to the needs of those States that host most of the refugees, which are primarily States in the southern hemisphere. UNHCR is, in theory, an international organisation that is supposed to address the protection of refugees worldwide, but it is frequently more responsive to the demands of the northern, more developed States. Not only are the developed States major donors to UNHCR, but they also have more governmental officials available to work on refugee matters. These problems are compounded by the fact that UNHCR still lacks sufficient staff from the southern States in high-level and influential protection positions.

As States do not always respect the rights of asylum-seekers and refugees, UNHCR also must consider what additional measures should be taken to ensure the effectiveness of international refugee law. Greater thought needs to be given as to how to be more integrally involved in States' processes, but without jeopardising UNHCR's neutrality.

One area in which UNHCR is perhaps too close to governments is where it is part of refugee status determination bodies. Given the changed relationship between UNHCR and States, UNHCR's involvement in national refugee status determination processes in certain States can be questioned with regard to whether UNHCR can maintain its principles and role of ensuring protection in such States when it does not agree with the

decision taken or where compromise is necessary in rendering a decision. UNHCR might be better placed outside of such processes. As an alternative, UNHCR may wish to consider further intensifying and developing its provision of *amicus curiae* briefs.

UNHCR should continue to develop and strengthen its relationships with international human rights tribunals, treaty bodies for international human rights treaties, and the international criminal law courts, since the decisions of these bodies may impact upon the content and parameters of refugee law principles.<sup>1</sup> In particular, their decisions can affect the general meaning of the term “persecution” in the refugee definition and their recognition of enslavement and rape as crimes against humanity bolster the legal status of these crimes as persecution and clarify forms of gender persecution.

As UNHCR cites the international tribunals’ decisions in support of its doctrinal positions,<sup>2</sup> UNHCR also could contribute to and facilitate the tribunals’ understanding of persecution by providing its doctrinal views to them. UNHCR doctrinal documents, which contain legal principles related to the concept of persecution and gender-related persecution, and documents produced by UNHCR on the background for such principles could assist the tribunals in obtaining a broader understanding and thus, the necessary context for its consideration of relevant legal issues. UNHCR’s doctrinal views might then be reflected in the tribunals’ rulings

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<sup>1</sup> As Chaloka Beyani has noted, the International Criminal Tribunals for the former Yugoslavia and Rwanda “provide a wind of opportunity for determining the existence of persecution as a crime against humanity on essentially the same grounds as those covered by the Refugee Convention”. Chaloka Beyani, *The Role of Human Rights Bodies in Protecting Refugees*, in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS: ESSAYS IN MEMORY OF JOAN FITZPATRICK AND ARTHUR HELTON, 269, 276 (Anne Bayefsky, ed. 2006).

<sup>2</sup> See for example, UNHCR, 1 HUMAN RIGHTS AND REFUGEE PROTECTION, SELF-STUDY MODULE 5, at 27-8 (15 Dec. 2006).



thereby strengthening the legal status of UNHCR's doctrine and creating increasingly normative standards with which States must comply.

Several issues related to UNHCR's role to ensure the effectiveness of refugee law would benefit from additional research. In particular, UNHCR's supervisory role still needs to be further elaborated. There also is room for the continued legal development of States' obligation to cooperate with UNHCR, including the principle of good faith.

UNHCR should look beyond refugee law to the law of international organisations and international relations studies. These areas can provide insights into the interaction between States and UNHCR as well as new perspectives on States' compliance with refugee law. An inter-disciplinary consideration of the relative influence of political factors and legal standards on the formation of doctrine would assist UNHCR in determining how it could better formulate and articulate positions that further the protection of refugees but are accepted by States and would therefore be more readily applied by them.

In addition, while UNHCR has been mandated to protect other groups, such as asylum-seekers, returnees, internally displaced persons and persons fleeing generalised violence or internal conflict, its work related to the protection of these groups has not been delineated to cover these persons to the same extent as they cover refugees. The use of UNHCR doctrine to create more complete legal frameworks for other groups of persons requiring protection could also be explored. While the Guiding Principles on Internal Displacement<sup>3</sup> are becoming increasingly accepted by States for the protection of internally displaced persons, no clear legal framework exists for other groups, such as persons fleeing situations of conflict.

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<sup>3</sup> Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add2 (17 Apr. 1998).

As a final note, it must be remembered that UNHCR remains uniquely situated to influence both the development and the effectiveness of the refugee law framework. Yet, UNHCR must be viewed through a realistic lens in order to assure the enhancement of its capacities. UNHCR is based on international law, but operates in a political environment and is subject to the financial constraints placed by States. With continuing changes in the political, economic and social situation within States as well as their relationships with other States, the approach of States to refugees continues to fluctuate and evolve. Thus, while taking into account the political currents of the time, UNHCR's actions must be soundly based in law and framed by the overall objective of its primary function, international protection.

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