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Asylum seekers attending computer classes held by AGORA, an organization that provides resources in Geneva, 2005. UNHCR/S. Hopper

Complementary Protection

The issue of complementary forms of protection has been identified in the Agenda for Protection as an important protection tool to add to the Refugee Convention. The issue will be discussed at this year's Executive Committee meeting in October. For this discussion paper, UNHCR's Regional Office in Canberra invited perspectives on this issue and how it relates to our region from the Australian Government, the Refugee Council of Australia, and academic Jane McAdam. UNHCR's position drawn from Standing Committee papers, is also provided.

Complementary protection: A Comparative Perspective

by * Dr. Jane McAdam

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Ever since the international community has sought to regulate the movement of refugees through international law, States have recognized that not all persons seeking protection fit neatly within legal definitions. Accordingly, some countries have allowed persons who are not technically 'refugees', but who nonetheless have a valid need for protection, to remain in their territories.

Australia is one of the only western States not to have a system of codified complementary protection. Although the term 'complementary protection' only emerged in the 1990s, the concept itself is an old one, encompassed by notions such as 'externally displaced persons', 'de facto refugee status', 'B status', 'war refugees' and 'humanitarian asylum'.

In general terms, 'complementary protection' describes protection granted by States on the basis of an international protection need outside the 1951 Refugee Convention framework. Such protection may be based on a human rights treaty, such as the ICCPR, the Convention against Torture or the Convention on the Rights of the Child, or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence. Its chief function is to provide an alternative basis for eligibility for protection. Understood in this way, it does not mandate a lesser duration or quality of status, but simply assesses international protection needs on a wider basis than the 1951 Convention.

On 29 April 2004, the European Union adopted the 'Qualification Directive'.[1] This instrument forms part of the first step towards a Common European Asylum System, which aims to reduce disparities between Member States' legislation and practices to ensure a consistent minimum level of protection throughout the EU, thereby reducing secondary movement between EU States based solely on differing rights and benefits accorded by different countries.[2] Member States must make sure that their national laws comply with the Qualification Directive by 10 October 2006.[3]

In addition to Convention refugees, the Qualification Directive establishes a further category of persons in need of international protection: beneficiaries of 'subsidiary protection'. A person eligible for subsidiary protection is defined as:

> *a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.*[4]

'Serious harm' comprises:

(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Accordingly, persons seeking asylum in the EU are assessed against criteria far broader than the refugee definition in article 1A(2) of the 1951 Refugee Convention, and, if found in need of protection, are accorded a formal legal status.

Similarly, in Canada, protection is afforded not only to Convention refugees, but also to other persons 'in need of protection'. Both protection criteria are considered in a single process, and successful claimants are granted

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The UN Refugee Agency

Asylum seekers in the waiting room of the UNHCR refugee reception center in Moscow, 2004.
UNHCR/V. Sokolova

permanent residence and the rights which that entails. Persons 'in need of protection' encompass people falling outside the Refugee Convention who face a personal danger of being tortured (as defined in article 1 of the Convention against Torture), as well as those who face a personal risk to life or a risk of cruel and unusual treatment or punishment where:

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.[5]

Regulations may prescribe further classes of such persons.

In addition to these 'front-end' protection categories, anyone who has been issued with a removal order in Canada may apply for Pre-Removal Risk Assessment (PRRA). This procedure acts as a safeguard for people facing imminent deportation, although unsuccessful asylum seekers may only apply for it where new information has come to light since the asylum decision was made. PRRA assesses the same grounds for protection as the 'protected person' claim (risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment), and may lead to permanent residency for persons identified as having protection needs.

In the US, people may also apply for protection on the basis of torture. If applicants can show that they are 'more likely than not' to be tortured if removed to a particular country, then protection based on the Convention against Torture (CAT) will issue.

There are two types of protection within the CAT protection framework: 'withholding of removal' and 'deferral of removal'. 'Withholding of removal' is the more generous form of CAT protection, as it accords beneficiaries some of the same benefits as Convention refugees, but not family reunification or access to a special process to adjust to permanent residence. Once granted, the onus is on the Department of Homeland Security to show that return is safe.

Deferral of removal is a more transient form of relief. It is granted to persons who are more likely than not to be tortured if removed, but who are ineligible for withholding of removal. It does not confer a lawful or permanent immigration status[6] or necessarily require that an applicant be released from detention or prison if held in such a facility.[7] Furthermore, the grant is subject to review and can be withdrawn quickly and easily once the risk of torture has diminished.[8] It effectively amounts to nothing more than a 'tolerated' status.

By comparison to Australia, the protection regimes in the EU, Canada and the US appear generous and expansive. Nevertheless, there remain significant protection 'gaps' in national versions of complementary protection - in particular, the question of status for persons excluded from protection but who cannot be removed due to prohibitions on refoulement under international law. Furthermore, the quality of the domestic status granted to beneficiaries of complementary protection varies considerably. For example, Canada grants an identical status to Convention refugees and other persons in need of protection, whereas the EU accords beneficiaries of subsidiary protection a secondary status - a decision reflecting political motivations but which is not justified by international law. Similarly, beneficiaries of subsidiary protection are given shorter residence permits than Convention refugees, despite the lack of empirical evidence to support subsidiary protection as a temporary status. Nevertheless, though the EU Directive is hallmarked by political compromise, it importantly recognizes States' broader *non-refoulement* obligations under international law and allows individuals to claim protection on those bases. In spite of its drawbacks, it is still preferable to Australia's narrow protection regime.

In any case, the shortcomings of national complementary protection systems, relative to the widened categories of persons protected by them, are an inadequate excuse to delay the implementation of complementary protection in Australia. Ultimately, it is the standards and obligations contained in international law, both in relation to eligibility for protection and substantive rights, that provide the crucial legal foundations for any domestic complementary protection regime.

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1. Council Directive 2004/83/EC of 29 April 2004 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] OJ L304/12.
2. Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third-Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' (COM(2001) 510 final- 2001/0207 (CNS)) (2002/C 221/11) OJ C221/43 (17 September 2002) (Brussels 29 May 2002) [1.9].
3. The Directive does not apply to Denmark, in accordance with articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C325/5 and the Treaty establishing the European Community [2002] OJ C325/33: Directive recital 40.
4. 7944/04 ASILE 21 (31 March 2004) art 2(e). It was originally art 5, but was moved to the definitions section in art 2 by 11356/02 ASILE 40 (6 September 2002).
5. Immigration and Refugee Protection Act 2001 s 97(1).
6. CFR §208.17(b)(i) (2000).
7. CFR §208.17(b)(ii) (2000).
8. CFR §208.17(b)(iii) (2000).

Complementary Protection and Australian Practice

by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA)

The 1951 United Nations Convention Relating to the Status of Refugees is the cornerstone of the international protection of refugees. A full and inclusive application of the Refugees Convention ensures that persons who meet its requirements are recognized as refugees and are protected.

The Refugees Convention does not provide for protection of people who do not meet the Convention definition of a refugee. Practices which have come to be known as "complementary protection" are used by some European countries to provide temporary or permanent residence to people who are not owed refugee protection. The concept has been developed in individual countries through domestic legislation and is not defined or specified in any international treaty.

The nature and application of complementary protection differs between countries. It can include permanent or temporary residence on various grounds based on humanitarian concerns, obligations under international human rights treaties, or judgement by a State as to whether it is unsafe, inappropriate or not practicable to effect return to the country of origin. In general, the practice in those countries which offer complementary protection is that it affords fewer benefits and entitlements than those provided to refugees.

For example, in the UK, a person granted 'humanitarian protection' is initially given a three-year residence permit, access to social security and health care and limited travel rights, but is not eligible for family reunion. They may apply at the end of the three-year period for indefinite leave to remain. Applications for indefinite leave to remain are assessed to determine whether the applicant still qualifies for humanitarian protection. It may be refused if protection is no longer required. Many other European countries (such as Denmark, Finland, France, Germany, the Netherlands) provide temporary residence initially to persons with complementary protection status with varying standards of access to benefits. Family reunion may be available in some countries (eg Denmark) but not in others (eg Germany).

Countries providing some form of complementary protection often have lower refugee status approval rates than is the case in Australia for applicants of a given nationality. In Europe, there is a tendency for complementary protection status to be granted more often than refugee status. For example, in 2002, the UK granted only 10% of asylum applications from asylum seekers on Refugee Convention grounds, but over 21% were given some status on humanitarian or other grounds. Sweden granted only 1.1% of asylum applications from asylum seekers on Convention grounds, but over 20% were granted some status on humanitarian or other grounds[1]. By comparison, Australia provided protection under the Refugees Convention to 29.4% of asylum seekers in 2001/02.[2]

Whilst other countries continue to have quite different practices with regards to complementary protection, it appears the European Commission is moving towards harmonising the approach to complementary protection (termed 'subsidiary protection') in European Union countries. The Council Directive on *'Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection'* was adopted in April 2004. This Directive provides a framework for an international protection regime based on existing international refugee and human rights instruments obligations, which emphasises the primacy of refugee status. Member States are required to have implementing national legislation in place by October 2006.

The EC Council Directive sets out minimum standards, with flexibility for States to give lesser benefits to holders of complementary protection (subsidiary protection) reflecting the potentially more temporary nature of this category. For example, the Directive dictates that persons with subsidiary protection status are provided with an initial one year residence permit, automatically renewed until protection is no longer required. Member states need only issue travel documents to persons with complementary protection status when they are unable to obtain a national passport from their consular authorities. Access to social security is immediate and access to employment is available after six months of subsidiary protection status.

Australia's commitment to assisting refugees and others in humanitarian need is reflected in its Humanitarian Program. Under this program Australia resettles some of the refugees in greatest need of protection and others of humanitarian concern and provides protection to refugees who arrived in Australia who

Refugees from Kosovo at the East Hills Safe Haven, Sydney.
UNHCR/H. J. Davies

engage our protection obligations under the Refugees Convention. Australia has resettled over 645 000 people fleeing persecution since World War Two. In 2003-04, more than 2 000 people already in Australia received protection under the Humanitarian Program, a significant proportion of the total of more than 13 800 people who received protection in Australia that year.

Australia provides appropriate temporary or permanent solutions to those in humanitarian need, although it has not in the past sought to label such responses as forms of "complementary protection". For example, the Minister for Immigration and Multicultural and Indigenous Affairs' public interest powers to intervene and grant a visa is one means by which Australia meets the needs of those people in Australia whose circumstances do not fit the criteria of the Refugees Convention, but to whom Australia may owe protection under other international treaties. Included in this group is a small number of cases relating to Australia's obligations under the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment (CAT), the International Covenant on Civil and Political Rights (ICCPR), or the Convention on the Rights of the Child (CROC).

These arrangements allow protection claims to be tested first against the Refugees Convention definition which confers higher levels of entitlements to refugees than required under these other instruments. There is no indication that there are significant numbers of persons entitled to CAT, ICCPR or CROC protection against return who do not also meet the Refugees Convention definition of a refugee.

Australia also has classes of visas which have been used to provide temporary haven for certain prescribed groups. For example, in 1999 Temporary Safe Haven visas were used to provide temporary residence to some 4 000 Kosovars who were brought to Australia for temporary protection because they could not return home due to conflict. An equivalent 'Safe Haven Visa' was used to provide temporary protection to some 1 900 East Timorese evacuated by Australia from Dili in 1999. Similarly, the offshore humanitarian visa classes provide protection to persons on grounds broader than those set out under the Refugees Convention.

There have been other occasions in the past where groups in humanitarian need have benefited from Australian Government protection. In 1990 some 6 900 people were granted visas under a new visa category to allow certain people who were in Australia illegally prior to 19 December 1989 to apply to regularise their status. In November 1993, over 42 700 people from the People's Republic of China, the former Yugoslavia, Sri Lanka and other countries were accommodated under three special visa categories. A further group of 7 200 people who did not meet the criteria for the November 1993 visas benefited from a further special initiative known as 'Resolution of Status' in June 1997.

The Australian Government's willingness to provide flexible arrangements for those with particular differentiating circumstances can also be demonstrated through the Government's legislative initiative in August 2004 to introduce the Return Pending Visa for those people who were formerly recognised as refugees and who are no longer in need of Refugee Convention protection. The Return Pending Visa could also be seen as providing a form of complementary protection, as it provides 18 months of lawful stay in Australia with continued access to the same benefits and visa conditions as the Temporary Protection Visa, while the holder makes arrangements to depart Australia or to access other stay options. The Removal Pending Bridging Visa is a more recent initiative that could also be used as a form of complementary protection in certain circumstances where conditions in a country of origin made returns impracticable.

The above visa arrangements provide a range of mechanisms to provide continued lawful stay in Australia on general humanitarian grounds with considerable flexibility to respond appropriately to individual circumstances. It is not possible to anticipate and codify all human circumstances. Accordingly, the Ministerial intervention power plays a significant additional role in providing the capacity to flexibly and compassionately respond to other exceptional individual circumstances where there are public interest grounds in providing some form of continued stay in Australia. At the same time the migration framework allows the Government to develop regulations as necessary tailored to the particular circumstances of new groups as the need arises.

1. Data from UNHCR Statistical Yearbook 2002.
2. Data from DIMIA source.

Complementary Protection

Complementary Protection – A New Model for Australia
by the Refugee Council of Australia

Complementary Protection, or subsidiary protection as it sometimes known, is a concept that is being talked about a great deal in Australia at present. To many people involved in refugee and asylum issues, however, while the name might be familiar, the concept remains something of a mystery.

To understand complementary protection you need to realise that not everyone in need of protection is a refugee and thus can get access to the protection that refugee status affords. The Refugee Convention does not, for example, encompass all people who, for example:

- are stateless; and/or
- come from a country enveloped in civil war; and/or
- have been subject to gross violations of their human rights for non-Convention reasons; and/or
- would face torture on return to their country; and/or
- come from a country where the rule of law and order no longer applies.

Yet clearly these people have legitimate protection needs.

Some countries, such as Canada, have responded to this protection gap by expanding the definition of a refugee. This is also sometimes done on a regional basis such as in the Organisation of African Unity (OAU) Convention that covers refugees throughout Africa.

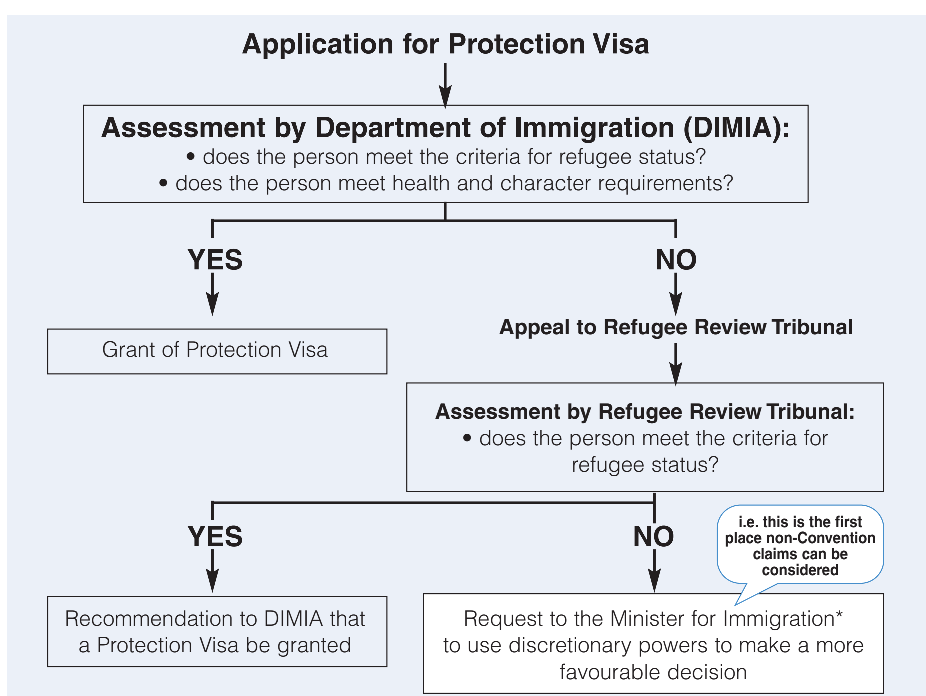
Most asylum countries, however, have elected to leave the definition of a refugee unchanged and instead introduce a separate – or complementary – form of protection to cover those people who fall outside the Refugee Convention. This is the approach being adopted by the states of the European Union in their harmonized legal framework.

This second option (to introduce a separate form of complementary protection) is currently the one in greatest favour and it is consistent with the current direction of international protection. Not only is it being adopted by all 25 European Union states, it is also a concept endorsed by all of the members of the UNHCR Executive Committee, including Australia. This was done when they adopted the **Agenda for Protection** in 2002. The Agenda is the product of the wide-ranging Global Consultation process and sets out the framework for action by UNHCR, States and other players to further refugee protection and one of its core objectives is:

> *Provision of complementary forms of protection to those who might not fall within the scope of the 1951 Convention but require international protection.*

Current practice in Australia is not, however, consistent with this international trend. Australia does not have an administrative process to assess protection applications from people with valid non-Convention reasons not to be returned to their country of origin or habitual residence. These claims can only be considered after the person has been rejected by each stage of the refugee determination process and then seeks personal intervention by the Minister for Immigration. The Minister has non-compellable, non-reviewable powers under Section 417 of the Migration Act to grant a visa to any failed visa applicant. In other words, the applicant has to go through an entire administrative determination process where his or her claims cannot be considered in order to get to the only place where they can.

Table 1: Current Procedure



Outside Baxter detention centre, near Port Augusta.
UNHCR/R. Mignone

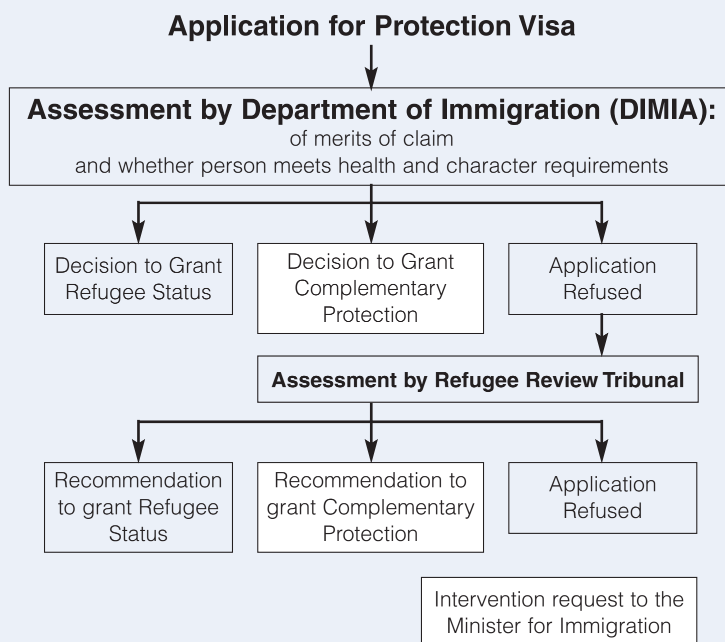
By leaving any consideration of non-Convention related protection claims to the very end of the process and by consigning the decision to Ministerial discretion, it can be argued that Australia's current practice is inefficient, unnecessarily expensive, places an unrealistic burden on the Minister for Immigration, lacks transparency and accountability, does not contain sufficient safeguards and is detrimental to both Convention refugees (by clogging up the system) and to those with non-Convention protection needs.

A New Model for Australia

In order to address the identified deficiencies in Australia's current procedures and to ensure that Australian practice is both consistent with internationally recognized best practice and the promises made by the Government when adopting the Agenda for Protection, Australian refugee groups are arguing that changes are required to the way that protection applications are considered.

Most of the advocates believe, and international practice would support this, that the most efficient and cost effective way to consider whether a person is in need of complementary protection is to use a single administrative procedure. This can first consider whether a person is a refugee and then, if the answer is no, assess whether there are grounds for the grant of complementary protection. Table 2 gives a graphic representation of this process.

Table 2: Proposed Model



Under the proposed model, an applicant's eligibility for complementary protection can be assessed at each stage of the determination process, thereby ensuring that those entitled to protection receive it at the earliest possible time.

When considering the criteria for the grant of complementary protection, the first point that is necessary to stress is that it should be used only as a supplement to refugee status and never as a replacement for it. Refugee status affords particular protection under international law (most importantly protection from forced return to his or her country of origin) and where a person meets the criteria for the grant of refugee status, this form of protection should be used.

The deliberation process would necessarily involve the decision maker considering a series of questions in the following order:

a. Does the person have a well-founded fear of persecution under the terms of the 1951 Convention (and thus meet the criteria for the grant of refugee status)? And if not:
b. Does Australia have obligations to the person under other human rights treaties?
c. Are there other protection-related reasons why a person should not be returned to his/her country of origin?

As the criteria for the grant of refugee status are already defined in Australian law, it is relevant to move on to how a decision maker should go about answering questions b and c.

The starting point for this consideration must be Australia's international treaty obligations. Australia is a party to a number of relevant international human rights treaties:

Complementary Protection

- The Convention relating to the Status of Stateless Persons (1954);
- The Convention on the Reduction of Statelessness (1961);
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- The International Covenant on Civil and Political Rights (1966);
- The International Covenant on Economic, Social and Cultural Rights (1966);
- The International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- The Convention on the Elimination of all Forms of Discrimination Against Women (1979);
- The Convention on the Rights of the Child (1989).

Two of these treaties place specific obligations on States Parties that they cannot ignore:

- the Statelessness Conventions require States to provide assistance and protection (including the grant of nationality) to persons who are not considered as a national by any other State;
- the Convention Against Torture obliges a State not to return a person to a country where there are substantial grounds for believing that he or she will be subjected to torture, taking into account the existence in the State concerned of a pattern of gross, flagrant or mass violations of human rights.

In addition, the International Covenant on Civil and Political Rights imposes an obligation on States not to return a person who, as a foreseeable consequence of their removal or deportation, would face a real risk of violation of his/her rights under Article 6 (right to life) or Article 7 (freedom from torture and cruel, inhumane of degrading treatment or punishment).

The criteria for the grant of complementary protection must therefore make specific reference to people who are stateless and to people who would face torture or death if returned to their country of origin or habitual residence.

The other treaties do not impose such specific obligations on other States but they do provide a framework of internationally accepted human rights standards against which protection applications can be assessed. Naturally there needs to be some form of test applied to assess whether the violation of rights is sufficiently serious to warrant protection being granted. The European Union, for example, has adopted the threshold of *"well founded fear of unjustified serious harm"*, noting that such harm can be direct physical harm or substantial deprivation of fundamental rights.

Advantages of Complementary Protection

It is argued that if the model of complementary protection proposed in this paper if adopted, it would:

- bring Australia into line with international best practice, ensure compliance with its obligations under the Convention Against Torture and the Statelessness Conventions and fulfil one of the commitments Australia made when endorsing the Agenda for Protection;
- result in consistency between Australia's policy with respect to off-shore and on-shore refugees;
- result in significant cost savings for the determination bodies and also reduce welfare (ASAS) payments to asylum seekers and detention costs;
- enhance the efficiency and productivity of both the Department of Immigration and the Refugee Review Tribunal;
- make it easier for applicants to

More than 200,000 East Timorese who had fled widespread violence in 1999 returned to their homes after independence was gained in 2002.
UNHCR/M. Kobayashi

Asylum seekers from various countries at the Sangatte Red Cross Centre near Calais, 2002.
UNHCR/H. J. Davies

present their claims as it will reduce the perceived need to find tenuous links between their fears of returning and Convention grounds;

- ensure necessary transparency, accountability and consistency in decision making;
- reduce the burden on the Minister for Immigration and enable the Minister's discretionary powers to be used for the exceptional cases for which such powers were intended;
- ensure that those entitled to Australia's protection receive it in a timely fashion and thus enhance their ability to become productive members of the Australian community;
- enable detained asylum seekers to have all relevant claims considered simultaneously and thus reduce the duration and trauma of the detention experience;
- benefit Convention refugees by freeing up the determination processes;
- benefit holders of Temporary Protection Visas by enabling a thorough examination of the implications of changed country circumstances when their applications for a Further Protection Visa are being considered;
- reduce the incentive for people to abuse the protection application process to extend their stay in the country as decisions will be made faster.

Further, it can be argued that the proposed model:

- is simply the transfer of existing decision making powers and as such, cannot be seen as creating a pull-factor;
- need not result in abusive applications for judicial review if appropriate safeguards are incorporated. It is suggested that such safeguards might include clearly enunciated regulatory requirements and judicially controlled leave provisions.

The introduction of Complementary Protection provisions in Australia would require amending Section 36(2)(b) of the Migration Act (1958) to set out the criteria for the grant of a visa and introduce a new visa subclass. It would also require that a new regulation be introduced to set out the framework for the grant of a visa and the rights and entitlements afforded to successful applicants.

The community sector considers that the introduction of a mechanism to provide complementary protection would not only enhance the efficiency and fairness of the current protection system in Australia but would also address many of the challenges currently facing the Government. Key amongst these, of course, is the dilemma of how to deal with Afghans, Iraqis and others (including those on Nauru) who cannot be returned to their country of origin because of ongoing instability and with people who cannot be removed because no country will recognise them as citizens. Many of these people are currently destined to remain in indefinite detention. Complementary protection is a concept whose time has come.

To read an expanded version of this paper, go to www.refugeecouncil.org.au.

Refugees from Kosovo at the East Hills Safe Haven, Sydney. UNHCR/H.J. Davis

Complementary Protection

Complementary Forms of Protection – Evolving Best Practices
by the UNHCR Regional Office Canberra

Introduction

A number of asylum countries have in place administrative or legislative mechanisms for regularising the stay of persons who are not recognised as refugees but who cannot safely return to their home country. UNHCR welcomes these mechanisms, in as far as they address international protection needs which may not be covered by the 1951 Convention and 1967 Protocol relating to the Status of Refugees (the Refugee Convention), and refers to them as "complementary" forms of protection.

Beneficiaries of Complementary Protection

States that allow people who are not recognised under the Refugee Convention to stay, do so for a variety of reasons. The reasons may be compassionate, such as when stay is permitted for reasons of age, medical condition, other specific vulnerabilities, or family connections. In other cases the reasons may be practical, such as when removal is not possible, either because transportation is not feasible, travel documents are unavailable or cannot be obtained, or readmission otherwise proves infeasible. Where grounds for stay are purely compassionate or practical, the permission to stay is not related to international protection needs. Persons who have been given permission to stay on purely humanitarian grounds must be clearly distinguished from persons in need of international protection, where an obligation to respect the principle of *non-refoulement* applies. With regard to persons permitted to stay on humanitarian grounds, UNHCR will generally have no direct role to play.

A restrictive interpretation of the Convention refugee definition in some States has left persons with an alternative status, even though they could have been and should have been granted refugee status. It is UNHCR's view that such persons should be covered by the Refugee Convention rather than being given a complementary form of protection. Similarly, complementary protection should not be a substitute for the application, in good faith, of the Statelessness Conventions.[1]

Persons who are unable to return to their countries because of serious and indiscriminate threats to life, liberty or security of person resulting from generalised violence or events seriously disturbing public order, may be regarded by States as not covered by the Refugee Convention, when such threats are not linked to one of the specific Refugee Convention grounds (race, religion, nationality or member of a particular social group). For example, people fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation with no specific element of persecution, might not fall under a strict interpretation of the Convention refugee definition. They may nevertheless still require international protection, and be assisted by UNHCR.

The regional refugee instruments in Africa and Latin America specifically include such people under the refugee definition. In other regions, States provide complementary forms of protection.

UNHCR's mandate with regard to this refugee group derives from successive resolutions of the UN General Assembly and has also been confirmed by the Executive Committee of the High Commissioner's Programme (EXCOM).[2]

Discussions on Complementary Forms of Protection at Excom

EXCOM meets each October in Geneva to review and approve UNHCR's programmes and budget, advise on international protection and discuss a wide range of other issues with UNHCR and its intergovernmental and non-governmental partners.

The consensus reached by EXCOM in the course of its discussions on international protection is expressed in the form of Conclusions on International Protection (EXCOM Conclusions). Although not formally binding, they are relevant to the interpretation of the international protection regime and constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of EXCOM, and the fact that its Conclusions are taken by consensus, gives EXCOM Conclusions weight as a guide to international protection standards.

EXCOM has recognised that, while persons who are unable to return in safety to their countries of origin as a result of situations of conflict may not all be refugees within the terms of the Refugee Convention, they are nonetheless often in need of international protection, humanitarian assistance and a solution to their plight. EXCOM has encouraged

Asylum seekers arriving in Nauru. Part of Australia's "Pacific Solution".
UNHCR/M. Bandharangshi

UNHCR to continue to provide international protection to such persons and to seek solutions to the problems arising from their forced displacement. It also called upon all States to assist and support UNHCR's efforts in this regard[3].

EXCOM has also emphasised that complementary protection should not come at the expense of the protection already afforded by the Refugee Convention and other human rights treaties, nor should it undermine the integrity of the existing international protection regime. Indeed, developments in relation to complementary protection have been accompanied by a renewed commitment by States to fully and effectively implement the Refugee Convention, including its exclusion provisions for people not deserving of refugee protection, and to maximize their use of other existing protection tools.[4]

One of the goals of the Agenda of Protection, a programme of action adopted by States and UNHCR in 2002, is strengthening implementation of the Refugee Convention. The Agenda identifies provision of complementary forms of protection to those who might not fall within the scope of the Convention, but require international protection, as one way of achieving this goal.

The Agenda calls upon EXCOM to:

Within the framework of its mandate...work on a Conclusion containing guidance on general principles upon which complementary forms of protection should be based, on the persons who might benefit from it, and on the compatibility of these protections with the 1951 Convention and other relevant international and regional instruments.

States are asked to:

... consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for the grant of complementary forms of protection.

Both of these items are expected to be discussed at the EXCOM session in October 2005.

What Standard of Treatment for Complementary Forms of Protection?

There is a growing consensus among States about the protection needs of persons who may not be covered by the 1951 Convention, even if it is fully and inclusively applied. However, as regards standards of treatment, State practice varies. To achieve greater harmonisation, the standards contained in the Refugee Convention could be used as a guide. Furthermore, the obligations deriving from international and/or regional human rights instruments need to be taken into account.

Beneficiaries of complementary forms of protection should enjoy a formal legal status with defined rights and obligations, and should be issued with documents certifying that status. The status should extend for a period of time which is long enough to allow the beneficiaries to regain a sense of normalcy in their lives. It should last for as long as protection is required.

The status afforded to beneficiaries should reflect basic rights as defined in relevant international and regional instruments. In some States or regions, domestic or regional human rights provisions may require standards of treatment which are higher than those of other States or regions, but the standards to be respected should not fall below a certain minimal level.[5]

In the area of civil and political rights, beneficiaries should, in particular:

- be protected from *refoulement* and expulsion;
- not be subjected to discrimination on the basis or race, religion, political opinion, nationality, country of origin, gender, physical incapacity or other such basis;
- never be subjected to torture or cruel, inhuman or degrading treatment or punishment;
- enjoy basic freedom of movement, and in any case, not be subject to restrictions on their freedom of movement, other than those which are necessary in the interest of public health and public order;
- have access to the courts of justice and administrative authorities.

Their protection should, moreover, include basic social and economic rights comparable to those generally available in the host country, including, in particular:

- access to adequate housing;
- access to assistance or employment;
- access to health care as needed;
- access to primary and secondary education.

The family is acknowledged in human rights instruments as the natural and fundamental group unit of society. The importance of putting in place measures that ensure respect for the unity of the refugee family has been highlighted by EXCOM on a number of occasions.[6] Maintaining or reinstating family unity is one of the most important ways in which persons in need of international protection can enjoy the stability and certainty they require to continue their lives. Accordingly,

any complementary protection regime should similarly build in appropriate provisions for close family members to be reunited, over time, in the host country.

Complementary forms of protection need not necessarily be permanent in nature. However, the ending of complementary status, just like the cessation of refugee status, should be based on objective legal criteria, and should never be arbitrary. It also needs to be based on objective and reliable country of origin information. UNHCR has particular expertise in this area, and can play a consultative role in deciding whether it is appropriate to end complementary protection measures.

In some States there are separate procedures for determining whether a person is a refugee within the terms of the Refugee Convention, or whether a person is in need of a complementary form of protection. More efficient may be a single procedure for determining whether a person is in need of international protection. This would entail first an examination of the Refugee Convention grounds, to be followed, as necessary and appropriate, by an examination of the possible grounds for the grant of a complementary form of protection. A single procedure would also make it easier to ensure that appropriate legal guarantees, including a right of appeal to an independent body, are available in relation to all decisions concerning a person's entitlement to international protection.

Conclusion

The Refugee Convention remains the cornerstone of the international protection of refugees and provides the basic framework for such protection. A full, inclusive and dynamic interpretation of the Refugee Convention, in accordance with its object and purpose, diminishes the need for complementary forms of protection.

Persons who are unable to return to their countries because of serious and indiscriminate threats to life, liberty or security of person resulting from generalised violence, or events seriously disturbing public order, may be regarded by States as not fulfilling the refugee definition of the Refugee Convention, if no link to a Convention ground can be established. However, they may nevertheless be in need of international protection.

The absence of a definitive legal framework agreed unanimously by all States may result in a protection gap for such persons. Two approaches have been developed to close such a potential gap: some States have accorded Convention refugee status to such people. In other States, complementary forms of protection provide a pragmatic response to such international protection needs.

The standards elaborated in the Convention, together with developments in international human rights law, provide an important guide to the treatment that should be afforded to all persons who are in need of international protection.

The standards of treatment afforded to persons not formally recognised as refugees, but nevertheless acknowledged to be in need of international protection, should provide for the protection of basic civil, political, social and economic rights. Complementary forms of protection should be implemented in such a way as to ensure the highest degree of stability and certainty possible, including through measures to ensure respect for other important principles, such as the fundamental principle of family unity.

UNHCR would encourage greater consistency in the provision of complementary forms of protection through the adoption of guiding principles, possibly in an EXCOM conclusion.

1, 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.
2. For a more detailed view and full references to the resolutions, please see the article by Volker Turk "The role of UNHCR in the development of international refugee law" in Refugee Rights and Realities: Evolving International Concepts and Regimes, Cambridge University Press, 1999, ed. Frances Nicholson and Patrick Twomey.
3. EXCOM Conclusion No. 74 (XLV) - 1994.
4. Excom Conclusion No. 89 (LI) - 2000, paragraph 10.
5. The International Bill of Rights (consisting of the Universal Declaration of Human Rights and the two International Covenants, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights) sets out fundamental rights. Important is furthermore the Convention on the Rights of the Child. Regional instruments such as the European Convention for the Protection of Human Fundamental freedoms, the African Charter on Human and Peoples' Rights and the American Convention Human Rights ("Pact of San Jose") also provide useful guidance regarding fundamental human rights.
6. See for example Conclusions 9(XXVII)-1977; 24 (XXXII) - 1981, 88(L)-1999.

Refugee from Kosovo at the East Hills Safe Haven, Sydney.
UNHCR/H. J. Davies