

Refugee Protection in International Law

UNHCR's Global Consultations on International
Protection

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Contents

<i>List of annexes</i>	page viii
<i>Notes on contributors and editors</i>	ix
<i>Foreword</i>	xv
<i>Preface</i>	xvii
<i>Acknowledgments</i>	xx
<i>Expert roundtables and topics under the ‘second track’ of the Global Consultations</i>	xxi
<i>Table of cases</i>	xxii
<i>Table of treaties and other international instruments</i>	xlv
<i>List of abbreviations</i>	lv

Part 1 **Introduction**

- 1.1 Refugee protection in international law: an overall perspective 3
VOLKER TÜRK AND FRANCES NICHOLSON
- 1.2 Age and gender dimensions in international refugee law 46
ALICE EDWARDS
- 1.3 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees 81

Part 2 ***Non-refoulement* (Article 33 of the 1951 Convention)**

- 2.1 The scope and content of the principle of *non-refoulement*:
Opinion 87
SIR ELIHU LAUTERPACHT QC AND DANIEL BETHLEHEM
- 2.2 Summary Conclusions: the principle of *non-refoulement*, expert
roundtable, Cambridge, July 2001 178
- 2.3 List of participants 180

Part 3 **Illegal entry (Article 31)**

- 3.1 Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection 185
GUY S. GOODWIN-GILL
- 3.2 Summary Conclusions: Article 31 of the 1951 Convention, expert roundtable, Geneva, November 2001 253
- 3.3 List of participants 259

Part 4 **Membership of a particular social group (Article 1A(2))**

- 4.1 Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’ 263
T. ALEXANDER ALEINIKOFF
- 4.2 Summary Conclusions: membership of a particular social group, expert roundtable, San Remo, September 2001 312
- 4.3 List of participants 314

Part 5 **Gender-related persecution (Article 1A(2))**

- 5.1 Gender-related persecution 319
RODGER HAINES QC
- 5.2 Summary Conclusions: gender-related persecution, expert roundtable, San Remo, September 2001 351
- 5.3 List of participants 353

Part 6 **Internal protection/relocation/flight alternative**

- 6.1 Internal protection/relocation/flight alternative as an aspect of refugee status determination 357
JAMES C. HATHAWAY AND MICHELLE FOSTER
- 6.2 Summary Conclusions: internal protection/relocation/flight alternative, expert roundtable, San Remo, September 2001 418
- 6.3 List of participants 420

Part 7 **Exclusion (Article 1F)**

- 7.1 Current issues in the application of the exclusion clauses 425
GEOFF GILBERT

7.2	Summary Conclusions: exclusion from refugee status, expert roundtable, Lisbon, May 2001	479
7.3	List of participants	486
<i>Part 8</i> Cessation (Article 1C)		
8.1	Cessation of refugee protection JOAN FITZPATRICK AND RAFAEL BONOAN	491
8.2	Summary Conclusions: cessation of refugee status, expert roundtable, Lisbon, May 2001	545
8.3	List of participants	551
<i>Part 9</i> Family unity (Final Act, 1951 UN Conference)		
9.1	Family unity and refugee protection KATE JASTRAM AND KATHLEEN NEWLAND	555
9.2	Summary Conclusions: family unity, expert roundtable, Geneva, November 2001	604
9.3	List of participants	609
<i>Part 10</i> Supervisory responsibility (Article 35)		
10.1	Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond WALTER KÄLIN	613
10.2	Summary Conclusions: supervisory responsibility, expert roundtable, Cambridge, July 2001	667
10.3	List of participants	672
	<i>Index</i>	674

Annexes

- 2.1 Status of ratifications of key international instruments which include a *non-refoulement* component *page* 164
- 2.2 Constitutional and legislative provisions importing the principle of *non-refoulement* into municipal law 171
- 3.1 Incorporation of Article 31 of the 1951 Convention into municipal law: selected legislation 234

1.1 Refugee protection in international law: an overall perspective

VOLKER TÜRK AND FRANCES NICHOLSON*

Contents

I. Background	page 3
II. The structure of the book and the purpose of this overview	6
III. The nine different topics of the papers and roundtable Summary	
Conclusions	9
A. The scope and content of the principle of <i>non-refoulement</i>	9
B. Article 31 of the 1951 Convention Relating to the Status of Refugees: illegal entry	14
C. Membership of a particular social group	16
D. Gender-related persecution	19
E. Internal flight, relocation, or protection alternative	22
F. Exclusion	28
G. Cessation	31
H. Family unity and refugee protection	33
I. UNHCR's supervisory responsibility	35
IV. Protection from persecution in the twenty-first century	37
V. Conclusion	42

I. Background

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention¹ are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin. For half a century, they have clearly demonstrated

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

1 189 UNTS 150; 606 UNTS 267.

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

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

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

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

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

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

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

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

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

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

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

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

the Rights of the Child⁴ have on asylum procedures and the treatment of refugee children?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The second track consultations process, including notably the Summary Conclusions, is already feeding into the policy-making process at the international level. Drawing on this process, UNHCR is in the process of revising, updating and publicizing its guidelines on many of the issues discussed at the roundtables. These are being issued as a series of 'UNHCR Guidelines on International Protection', the first two of which were issued in May 2002, followed by the third in February 2003.¹⁰ These Guidelines are issued pursuant to UNHCR's supervisory role under

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

its Statute¹¹ in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol. They are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field. At the regional level, the Summary Conclusions from the second track roundtable meetings have also begun to feed into discussions in other forums. One example concerns the Council of Europe's Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), as is described in greater detail below in section III.C on membership of a particular social group.

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

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

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

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

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

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

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

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

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

The Opinion shows that States' responsibility for their actions encompasses any measure resulting in *refoulement*, including certain interception practices, rejection at the frontier, or indirect *refoulement*, as determined by the law on State responsibility. On this issue, the Opinion brings into the analysis the draft Articles on State responsibility adopted by the International Law Commission of the United Nations on 31 May 2001¹⁴ and endorsed by the General Assembly at the end of that year,¹⁵ demonstrating how they affect State action. Such action may be taken beyond a State's borders or carried out by individuals or bodies acting on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc. These actions are frequently carried out at borders far from public scrutiny, beyond borders in other countries, or on the high seas – the prohibition on *refoulement* applies in all such situations.

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

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

13 The Declaration acknowledged:

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

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

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

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

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

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

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

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

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

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

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

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

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

These issues have come under scrutiny in the judgment concerning *Suresh* issued by the Supreme Court of Canada in January 2002.²¹ The Court accepted UNHCR's argument in its *factum* before the Court that Article 33 of the 1951 Convention should not be used to deny rights that other legal instruments make available to everyone without exception. It concluded that international law generally rejects deportation to torture, even where national security interests are at stake. In a key passage, the Court ruled:

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

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

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

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

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

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

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

23 *Suresh* judgment, above n. 21, para. 73. 24 Ibid., para. 76.

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

26 28 April 1983, ETS No. 114.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Membership of a particular social group

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

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

33 *Ibid.*, para. 11(g).

34 *Ibid.*, para. 11(i).

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

For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who: . . .

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

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

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

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

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

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

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

37 See the paper by T. A. Aleinikoff in Part 4.1 of this book. 38 Ibid.

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

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

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

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

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

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

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

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

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

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

D. Gender-related persecution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Another issue of particular contemporary concern relates to the potential international refugee protection needs of individuals – particularly women and minors – who are trafficked⁵⁰ into forced prostitution or other forms of sexual exploitation. Such practices represent 'a form of gender-related violence or abuse that can even lead to death'.⁵¹ They can be considered a form of torture and cruel or inhuman or degrading treatment and can 'impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents'.⁵² Trafficked women and minors may also 'face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination'.⁵³ Such

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

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

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

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

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

52 UNHCR Guidelines, *ibid.* 53 *Ibid.*

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

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

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

E. Internal flight, relocation, or protection alternative

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

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

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

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