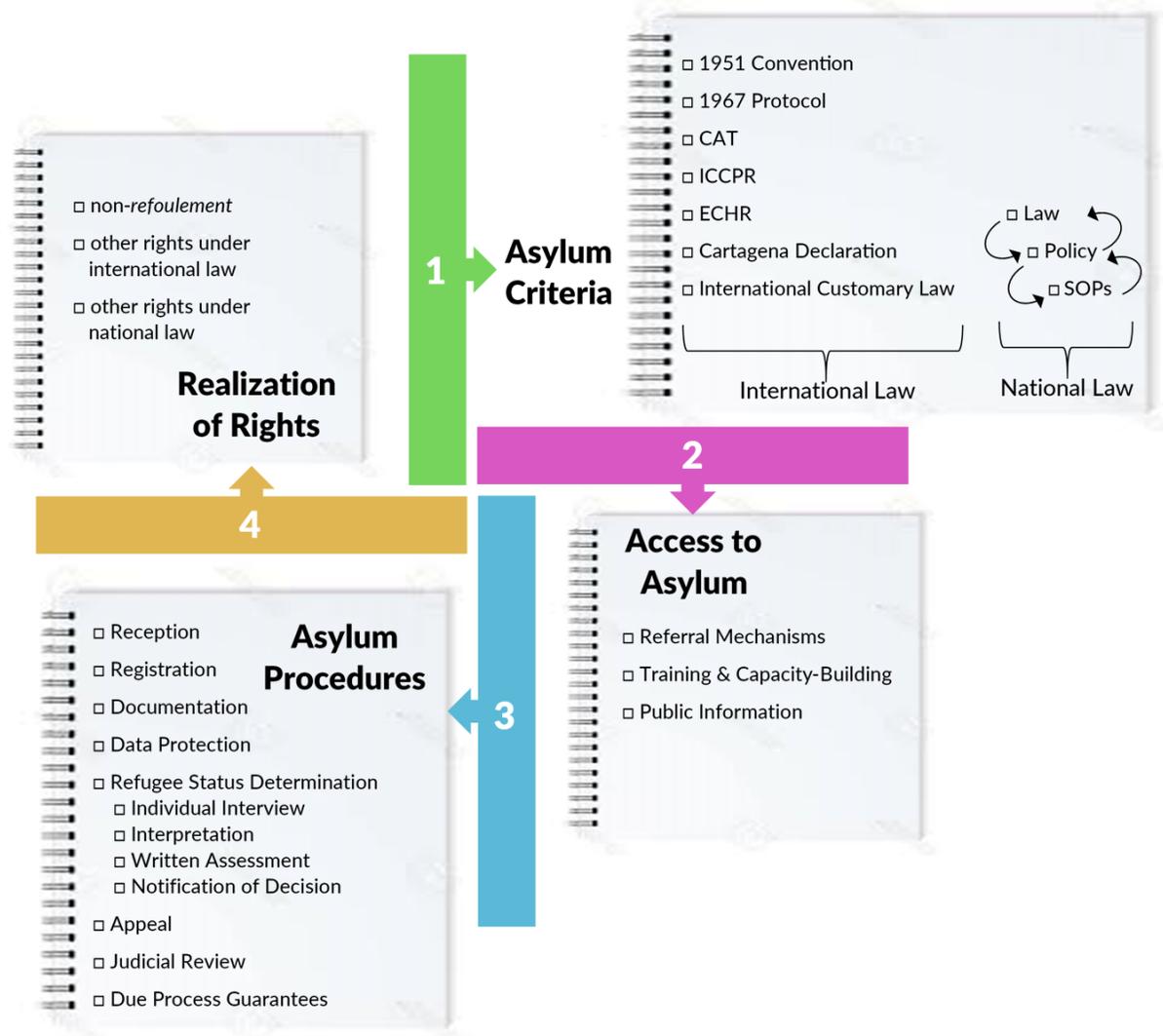


“Checklist” for a Comprehensive Asylum System

Presented by UNHCR at the 2017 Caribbean Migration Consultations (CMC)

4-6 December 2017 | The Bahamas

During the Caribbean Migration Consultations (CMC) 2016 meeting hosted by the Government of Trinidad and Tobago, one of the tools requested by States to be developed by UNHCR was a “checklist” of the components of a comprehensive asylum system. Particularly in the Caribbean, where many States are parties to the *1951 Convention relating to the Status of Refugees* and/or its *1967 Protocol* but lack domestic legislation or policies regarding asylum procedures or refugees’ rights, questions emerged regarding the necessary order in which to implement the components of a comprehensive asylum system. States asked, for example, whether adopting legislation (along the lines of the *Technical Guidance for the Development of Refugee Legislation* presented by UNHCR) was a necessary first step, or if other components could come first. Other States – including non-State parties to the *1951 Convention* or its *1967 Protocol* – inquired regarding the extent of their obligations to asylum-seekers and refugees, and had implemented some elements of an asylum procedure in lieu of either national legislation or a national refugee policy. This “checklist” was developed by UNHCR to respond to requests made by States in the framework of the CMC for guidance on the practical steps necessary to implement asylum systems in a variety of legal contexts.



The “checklist” is divided into four parts: **Step 1, Defining Asylum Criteria; Step 2, Ensuring Access to Asylum; Step 3, Formalizing Asylum Procedures; and Step 4, the Realization of Rights.** These four steps, while an attempt to suggest a logical chronology to the process of developing an asylum system, also contain processes that must occur one after the other in any given case of an asylum-seeker requesting international protection, in order to ensure respect for the principle of non-*refoulement*. For example, Step 4, the realization of the right to be protected from *refoulement*, must necessarily occur as a result of registration as an asylum-seeker, which is described in Step 3, in order to meet the obligations of the State that are defined in Step 1. And this can only be accomplished if an asylum-seeker has information on or is referred to the asylum procedure, as discussed in Step 2. The steps should thus be viewed as part of a constant cycle that occurs in individual cases of asylum-seekers requesting international protection, as well as chronological steps to be taken to institutionalize those processes.

Definitions

Definitions of the terms “asylum-seeker,” “asylum” and “refugee” are as follows:

- A “refugee,” according to the *1951 Convention* and its *1967 Protocol*, is someone who “owing to a 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 to, or owing to such fear, is unwilling to avail himself of the protection of that country.” There are also other refugee definitions that States may refer to and incorporate in their national laws and policies: for example, the *1984 Cartagena Declaration on Refugees* also defines as refugees “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.” Within this Checklist, a “refugee” refers to a person who meets the *1951 Convention / 1967 Protocol* definition.
- “Asylum-seeker” refers to persons seeking international protection through recognition as refugees under the *1951 Convention / 1967 Protocol*, or persons seeking asylum in States under other criteria as defined in the international legal obligations and national laws of the State in question. Article 14 of the Universal Declaration on Human Rights states that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.”
- “Asylum” is the grant, by a State, of protection in its territory to refugees or other persons who meet the criteria defined in their international obligations and/or national laws. Asylum encompasses a variety of elements, including protection from *refoulement* and permission to remain legally in the territory of the asylum country. See, e.g., UNHCR Executive Committee Conclusion No. 5 (1977).

It is important to note that a person does not *become* a refugee *because* a State or UNHCR recognizes them as such: a refugee is a refugee from the moment he or she satisfies the conditions of being outside his or her country of origin and being unable to return due to a well-founded fear of persecution. An asylum-seeker either is or is not a refugee, and the status determination process merely recognizes them as such – even though paradoxically, they were actually a refugee even before they were registered as an asylum-seeker. The obligation to protect refugees from *refoulement* thus extends to the need to have procedures in place to identify people who may be refugees and ensure they have access to asylum procedures in order to secure protection from *refoulement*. Asylum-seekers should be treated under the presumption that they qualify as refugees until a fair, effective and efficient refugee status determination procedure has taken place in the country of asylum, either conducted by the State or by UNHCR, and a final decision has been reached.

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STEP 1: Defining Asylum Criteria

As noted above, asylum is the grant by a State of protection from forced return, or *refoulement*, to an individual who would face torture, persecution or other forms of harm in their country of origin. The full scope of the rights enjoyed upon a grant of asylum depend on the State's international treaty obligations (for example, a State party to the *1951 Convention* commits to recognize additional rights for refugees in the country of asylum) as well as on any national legislation regarding asylum (which at a minimum should incorporate a State's international obligations, but could also go further in granting rights and privileges to refugees). The scope of who qualifies for asylum at a minimum must meet the State's international legal obligations to refugees.

Step 1 of developing any asylum system, therefore, should be to understand the criteria of who must be protected by the State through a grant of asylum (or at a minimum, who must be protected from forced return or *refoulement*) which can be determined by reviewing the State's international treaty obligations. This checklist therefore includes a list of international legal instruments with non-*refoulement* provisions and definitions of who should be protected under them, for States to review which apply to them.

- ✓ **1951 Convention relating to the Status of Refugees (1951 Convention) Article 33:** "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
- ✓ **Convention against Torture (CAT) Article 3:** "No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."
- ✓ **International Covenant on Civil and Political Rights (ICCPR) Article 7:** "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This has been interpreted to prohibit returning a person to a country where they would likely be subjected to torture.
- ✓ **European Convention on Human Rights (ECHR) Article 3:** "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The European Court of Human Rights (ECtHR) has interpreted Article 3 to prohibit any country returning – either indirectly or directly – a person to a territory where he or she may face inhumane treatment, including "treatment as deliberately causing severe suffering, mental or physical."¹ The ECtHR has also found the lack of necessary medical treatment in some cases to qualify as inhumane treatment.²
- ✓ **1984 Cartagena Declaration on Refugees:** "[P]ersons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order" shall be protected from *refoulement* as refugees.
- ✓ **International Customary Law:** The protection against *refoulement* to a country where a person would face torture, mass violations of human rights, and other forms of persecution, has obtained the status of customary international law.³ It is thus not necessary for a State to be party to one of

¹ *Greek Case*, Judgement of 18 November 1969, Yearbook of the European Convention on Human Rights, No. 12.

² *D. v. United Kingdom*, Judgement of 2 May 1997, Appl. No. 30240/96.

³ See, e.g., UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, & 2 BvR 1954/93 (31 January 1994), <http://www.refworld.org/docid/437b6db64.html>.

the aforementioned instruments in order for the prohibition against returning a person to a place where they would face torture and other forms of persecution to apply.

States can use this checklist to identify the criteria for who must be protected from *refoulement* under the various international legal instruments to which they are a party, and then, work to incorporate those protections into national law, policy and administrative regulations or standard operating procedures (SOPs) on asylum. Because these international instruments do not specify the procedures for how States ensure compliance with their international protection obligations, it is only through the adoption of national legislation, policies and administrative regulations or SOPs that such procedures are formalized. There are three main instruments for the formalization of asylum procedures at the national level:

- ✓ **Refugee or Asylum Law:** a specific statute, piece of legislation, act or amendment to an act that is adopted by a legislative body to govern asylum procedures and refugees' rights in the territory.
- ✓ **Refugee or Asylum Policy:** an administrative regulation or decree, not necessarily adopted by the full legislature but rather by a ministry or other authority with oversight responsibilities for asylum procedures, which directs various agencies or actors to take steps to ensure access to asylum procedures, guarantee non-*refoulement* and protect refugees' rights, often to comply with national legislation on these topics. The policy could also direct agencies of the Government to work together with UNHCR under its mandate to assist with refugee identification and protection.
- ✓ **Refugee or Asylum Standard Operating Procedures (SOPs):** technical guidance on the mechanics of implementing asylum procedures, meant to be used by those with operational functions in asylum procedures and the practicalities of the protection of refugees' rights.

If a State lacks national law, policy and/or SOPs on asylum, it is an important first step to establish something in writing that gives effect to those international obligations in the national legal context. It is important to eventually have refugees' rights and asylum procedures codified into national law, rather than leaving these procedures at the level of a policy or more administrative declaration, given the legal effect of such protections. However, given the length of time it takes to adopt legislation, it is also not necessary that all other elements of the procedure must await the approval of a refugee law. Instead, the formulation of a national policy, or the drafting of specific administrative SOPs on asylum procedures, can serve as an important first step towards implementing a cohesive procedure for the various actors involved in ensuring non-*refoulement*. A policy or administrative regulations or SOPs can also inform the future development of legislation.

Step 2: Ensuring Access to Asylum

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As noted above, a refugee is actually a refugee even before being registered as an asylum-seeker, but is only recognized as a refugee and granted asylum by a State after going through a refugee status determination procedure. The asylum process requires that people specialized in refugee status determination carefully examine an asylum-seeker's individual circumstances as well as circumstances in their country of origin and make a legal determination as to whether or not they meet the definition of a refugee or other person eligible for asylum in the territory. However, it is not these refugee law specialists or asylum officers to whom asylum-seekers have immediate access. Instead, they are more likely to come into contact with immigration officials at points of entry, or police engaging in immigration enforcement activities, or to try to find information about seeking asylum through public sources, such as the internet. Ensuring access to asylum procedures can thus be thought of as a separate – and very necessary – step in the asylum procedure itself. That can be accomplished through three principal means, and ideally, a combination of all three:

- ✓ **Referral Mechanisms:** There should be a procedure in place for officials at points of entry, including air, land and sea borders, to refer foreign nationals who express a fear of return to their countries of origin into asylum procedures. This is also the case if this fear is expressed in the context of removal

proceedings, during which it is necessary to have the possibility to seek asylum in order to ensure non-*refoulement*. Other governmental agencies, as well as civil society groups and UN agencies, should also be involved in referral procedures, including non-governmental organizations known to provide services to immigrants and refugees, and UNHCR.

- ✓ **Training & Capacity-Building:** Referral procedures are only effective if the individuals involved in those procedures are aware of them and trained on how to implement them. Once referral procedures are established, as well as asylum procedures, immigration officers, police, and others involved require ongoing training and capacity-building to properly implement them.
- ✓ **Public Information:** Refugees and asylum-seekers cannot be expected to proactively comply with procedures if there is no information publically available about those procedures. Making information about asylum procedures public helps to avoid a situation where people in need of asylum only present themselves when faced with the imminent danger of deportation. Information about how to seek asylum should be available at points of entry as well as through multiple media platforms (online, print, radio, etc) to reach target audiences.

In the period before a national asylum procedure is established, information about how to access asylum could refer asylum-seekers to UNHCR for registration and refugee status determination under its mandate.

Step 3: Formalization of Asylum Procedures

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The UNHCR *Technical Guidance for the Development of Refugee Legislation* presented at the 2016 CMC, in its Articles 11 through 24, contains a detailed list of the necessary elements of an asylum procedure. What follows is a checklist of the various components that should be considered and incorporated in some way in a State's asylum procedures.

- ✓ **Reception Conditions:** UNHCR Executive Committee Conclusion No. 93 (2002) provides standards and guidance to States on reception conditions for asylum-seekers. UNHCR Executive Committee Conclusion No. 44 (1986) specified that States should not detain asylum-seekers, except under very limited circumstances, on grounds prescribed by law, for a minimal period, with full consideration first given to alternatives to detention. States can work with civil society and UNHCR to identify and implement alternatives to detention that work in their unique contexts.
- ✓ **Registration:** UNHCR Executive Committee Conclusions No. 91 (2001) and No. 107 (2007) provide relevant guidance on registration and documentation of asylum-seekers. Most importantly, asylum-seekers should be registered immediately upon indicating their intent to seek asylum.
- ✓ **Documentation:** According to the above-referenced UNHCR Executive Committee Conclusions, asylum-seekers should be issued individual certificates, free of charge, to document them as such. Providing such documentation to asylum-seekers is with a view to ensure their protection against *refoulement* and to facilitate their access to associated rights and available services.
- ✓ **Data Protection:** Any asylum procedure must determine how to manage sensitive and confidential information about asylum-seekers and refugees. There are a number of resources available from UNHCR regarding the confidentiality of asylum information and data management.
- ✓ **Refugee Status Determination:** At the core of any asylum procedure is the refugee status determination process. Registration, documentation and data protection are crucial components and/or precursors of this process. A State must determine who will have the responsibility and the authority to recognize (or deny recognition of) refugees and grant asylum. Necessary sub-components of the refugee status determination process include:

- **Individual Interview:** to allow the asylum-seeker the opportunity to present all facts relevant to their claim to be in need of international protection.
 - **Interpretation:** to allow the asylum-seeker to express him or herself adequately.
 - **Written Assessment:** to examine the facts presented by the asylum-seeker during their interview, together with other available information about the individual and their country of origin, and provide an informed opinion regarding their eligibility for asylum.
 - **Notification of Decision:** to inform the individual concerned with the outcome of their process, and give them either notice of refugee recognition, or the opportunity to appeal a negative decision issued in the first instance.
- ✓ **Appeal:** an appeal procedure is a necessary component of a comprehensive asylum system.
 - ✓ **Judicial Review:** a court of law should have jurisdiction to review procedures associated with the granting or denial of asylum, and associated rights and benefits in the country of asylum.
 - ✓ **Due Process Guarantees:** the asylum procedure should ensure that the due process rights of asylum-seekers and refugees are respected, including any due process rights under national law.

Step 4: Realization of Refugees' Rights



The most important result of any asylum procedure is to ensure protection against *refoulement* for persons in need of international protection, including refugees. Beyond that, refugees also have a number of rights in the country of asylum which are articulated in the *1951 Convention*, and others which may be recognized under national law, policies or administrative regulations. The UNHCR *Technical Guidance for the Development of Refugee Legislation*, Articles 25 through 40, reference refugees' rights under international law and provide suggested language to incorporate these into national law.

The practical realization of refugees' rights, however, involves working across multiple different Government ministries and agencies, including those responsible for public security, health, education, labor, public services and more, as well as with civil society groups, to make refugees' rights a reality in practice. The practical elements of how to give effect to those rights in Step 4, therefore, depend very much on the establishment of national laws, policies or administrative regulations or SOPs to outline refugees' rights as detailed in Step 1. Those rights include:

- ✓ **non-refoulement** (as detailed in the various legal instruments identified in Step 1).
- ✓ **other refugee rights under international law** (particularly under the *1951 Convention / 1967 Protocol*, but also, under other international treaty obligations, including those for women, children and persons with disabilities, which also apply to refugees).
- ✓ **other rights under national law** (which will depend on the national legal instruments adopted in Step 1, but also, other associated rights to due process, non-discrimination, and others that apply to all persons present in the territory).