SENT VIA ELECTRONIC MAIL

William P. Barr, Attorney General
United States Department of Justice

James McHenry, Director
Executive Office for Immigration Review
United States Department of Justice

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
United States Department of Justice

Chad Wolf, Acting Secretary
United States Department of Homeland Security

Chad R. Mizelle, Senior Official Performing the Duties of the General Counsel, United States Department of Homeland Security

Kenneth Cuccinelli, Senior Official Performing the Duties of the Director, Citizenship and Immigration Services
United States Department of Homeland Security

Andrew Davidson, Asylum Division Chief, Refugee, Asylum and International Affairs Directorate, Citizenship and Immigration Services United States Department of Homeland Security

Paul Ray, Administrator
Office of Information & Regulatory Affairs
Office of Management and Budget
Executive Office of the President

July 24, 2020

RE: Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (the Departments) Joint Notice of Proposed Rulemaking (NPRM): *Security Bars and Processing;* RIN 1615-AC57/ Docket No. USCIS 2020-0013

Dear Attorney General Barr, Director McHenry, Assistant Director Reid, Acting Secretary Wolf, Senior Official Mizelle, Senior Official Cuccinelli, Division Chief Davidson, and Administrator Ray:

We, the undersigned organizations, write to urge the Departments to extend the current comment period and allow at least 60 days for public comment on the above referenced NPRM. We make this request due to the complexity of the rule, the critical interests it implicates, and the inherent challenges of meaningfully engaging in the public comment process during an unprecedented global pandemic.

On July 9, the Departments published the proposed rule, *Security Bars and Processing*, to make a number of fundamental changes to asylum processing and the immigration system in light of the COVID-19 pandemic and potentially other communicable diseases. In addition to barring virtually every potential applicant for asylum from relief based on the COVID-19 outbreak (as well as other communicable diseases), the rule would fundamentally alter the processing for applicants for withholding of removal and protection under the Convention Against Torture.

Executive Order 12866 requires agencies to "…afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*." Executive Order 13563 likewise directs agencies to "...afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally

be *at least 60 days*." There is no compelling reason to except the NPRM from the Executive Orders' general rule of providing a minimum of 60 days for public comment. Rather, the highly technical, nuanced, legal and policy issues the NPRM addresses—and, above all, the severe human cost it is certain to inflict—illustrate why a minimum of 60 days must be allowed for the public to file comments in response to the rule. Despite this, the Departments have provided no justification for providing only 30 days for public comment.

The Departments do note that the NPRM would make "fundamental" changes to the immigration system and cite a "critical need to reduce the risk of further spread" of disease into the United States as justifications for the NPRM. However, the rule's extensive proposed changes to the asylum process process are hardly needed at a time when the border is closed to asylum seekers indefinitely. Although the undersigned organizations have outstanding questions over consistency and appropriateness of current measures, Customs and Border Protection (CBP) has itself said it is able to "implement effective containment and mitigation strategies to fight COVID-19" that have allowed the agency to "dramatically reduce[] human contact, the risk of spread, and the strain on U.S. healthcare facilities." Moreover, the NPRM claims that most traffic at the borders with Canada and Mexico has been limited since March 20, 2020. Given CBP's purportedly "effective" response to the pandemic and the virtual elimination of asylum protections at the northern and southern U.S. borders - restrictions which were recently extended until at least August 20, 2020 -- there is no compelling reason for the Departments' decision not to provide the public the standard length of time to comment on the NPRM.

Earlier this year, in light of the COVID-19 crisis, the National Governors Association and state, local, and county organizations, as well as twenty-two Senators and fourteen House Committee Chairs urged the Office of Management and Budget (OMB) to immediately direct federal agencies to extend or postpone public comment periods to preserve the public's right to fully engage in the administrative process as contemplated by our laws. In response, the OMB Office of Information and Regulatory Affairs (OIRA) acknowledged that COVID-19 has disrupted the lives of those potentially responding to NPRMs. OIRA further advised that work must continue on regulations that "respond to the COVID-19 outbreak…support measures to secure the prosperity of American workers and small businesses, … [and respond] to urgent needs." Agencies could extend comment periods for certain NPRMs if, in consultation with OIRA, it determines that "the need to allow more time…*outweighs any need for urgency in the rulemaking*" (emphasis added) and OIRA staff are prepared to coordinate with agency staff "to evaluate these competing priorities." Given the effective elimination of asylum protections at U.S. borders and the ongoing disruption caused by the pandemic, there is no reasonable justification for refusing to provide the public with sufficient time to engage in careful review and analysis of the rule contemplated by the Administrative Procedure Act (APA).

We respectfully request that the Departments extend the comment period to *a minimum* of 60 days and notify the public of such extension. To do otherwise violates the spirit and intent of the APA. Thank you in advance for your time and consideration of this request. Please contact Ursela Ojeda at Women's Refugee Commission at urselao@wrcommission.org with any questions or concerns, and we look forward to your prompt response.

Sincerely,

National Organizations:
Amnesty International USA
Asylum Seeker Advocacy Project (ASAP)
AsylumWorks
Catholic Legal Immigration Network, Inc.
Center for Gender & Refugee Studies

Church World Service
Freedom for Immigrants
Harvard Immigration and Refugee Clinical Program
Human Rights First
Immigration Equality
International Refugee Assistance Project
International Rescue Committee
Kids in Need of Defense
Latin America Working Group (LAWG)
National Immigrant Justice Center
Oxfam America
Refugees International
Tahirih Justice Center
The Advocates for Human Rights
U.S. Committee for Refugees and Immigrants
Women's Refugee Commission

State Organizations:
Capital Area Immigrants' Rights (CAIR) Coalition
Center Global, a program of the DC Center for the LGBT Community
Northern Illinois Justice for Our Neighbors
The Florence Immigrant & Refugee Rights Project

Local Organizations:
Human Rights Initiative of North Texas
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Safe Horizon
Sueños Sin Fronteras de Tejas
University of the District of Columbia Law Immigration and Human Rights Clinic

August 6, 2020

Chad F. Wolf
Acting Secretary
U.S. Department of Homeland Security
301 7th Street, S.W.
Washington, D.C. 20528

William Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Acting Secretary Wolf and Attorney General Barr:

As public health and medical experts at leading public health schools, medical schools, hospitals, and other U.S. institutions, we write to express our grave concerns about the rule[1] proposed on July 9, 2020 that would bar refugees from asylum and other humanitarian protections in the United States purportedly to protect public health during pandemics.

The rule ignores and misuses the science and core principles of public health. It would grant the Department of Homeland Security (DHS) and the Department of Justice (DOJ)—agencies that lack public health expertise—authority to label asylum seekers as a national security threat, scapegoating them as vectors for a potentially vast array of diseases and denying them protection. These sweeping new bans would direct immigration authorities to deport people seeking refugee and torture protection to life-threatening dangers in violation of U.S. law and treaty obligations. Like the March 20, 2020 order[2]from the Centers for Disease Control and Prevention (CDC) that DHS has been using to evade humanitarian protections at the border under the pretext[3]of COVID-19, the proposed regulation is based on specious justifications and would be detrimental.

We urge DHS and DOJ to rescind the proposed rule and instead direct U.S. officials to use rational, evidence-based public health measures to safeguard both the health of the public and the lives of adults, families, and children seeking protection from persecution and torture. Public health cannot justify this discriminatory policy that imperils the lives of people seeking protection in the United States.

The Proposed Regulation Is Not Based on Sound Public Health Principles

Despite its pretext of protecting public health during pandemics, the proposed rule would undermine public health and further endanger people seeking protection in the United States.

While purporting to address current and future diseases that could cause a pandemic, the rule would, in fact, allow DHS and DOJ to ban refugees based on a host of other diseases[4] including those that are not subject to U.S. quarantine laws, are treatable, and/or do not present risk of widespread public transmission, such as gonorrhea, syphilis, tuberculosis, and Hansen's disease (leprosy), among others.

There is no public health rationale to applying public health measures differently based on immigration status. Yet the rule bars asylum seekers who have even briefly transited through a country where a covered disease is prevalent without regard to whether an individual has been exposed. While States may use health measures such as testing or quarantine, as needed, the U.N. Refugee Agency (UNHCR) has explained in legal guidance regarding asylum access during the COVID-19 pandemic that states may not

impose measures that preclude refugees from admission or deny them an effective opportunity to seek asylum, and that "(d)enial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk."[5]

The rule is disproportionate and not designed to halt disease transmission. It would mandatorily bar a refugee who "has come into contact" with a communicable disease covered by the rule at any point in the past and does not limit its application to recent exposure or infection. Asylum seekers infected with a covered disease while *in* the United States would be barred from protection—potentially even years after arriving in the United States—and subject to deportation, including asylum-seeking doctors, nurses, or other essential personnel engaged in vital work to address the disease. Perversely, the rule punishes asylum seekers, including those in U.S. immigration detention, for the failure of U.S. authorities to prevent and mitigate communicable disease outbreaks. Public trust is essential for the success of public health measures. By explicitly linking health concerns to immigration enforcement, this rule will likely erode trust, discourage care-seeking, and undermine public health goals.

In bypassing public health experts, the rule would authorize unqualified government functionaries who lack public health or medical training to make assessments with profound implications for access to asylum and other humanitarian protections. For instance, DHS and DOJ lack the expertise and ability to assess the prevalence of a communicable disease in another country. Immigration judges and DHS officers are not qualified to make medical diagnoses yet would be directed by the rule to determine whether an asylum seeker's symptoms are indicative of a covered disease. This is particularly troubling during preliminary fear screening interviews when the vast majority of asylum seekers are detained, unrepresented, and have virtually no access to independent medical assessments.

Our Recommendations for an Alternative Approach

Rather than banning people seeking protection, U.S. authorities should adopt measures grounded in the best available public health guidance. With respect to SARS-COV-2, leading public health experts have recommended measures—detailed in the attached letter[6] and paper[7]—to protect U.S. border officers, those exercising their legal right to request protection in the United States, and the public health of our nation. In addition, U.S. authorities should heed the recommendations of public health and prison experts to stem infections by drastically reducing the populations in Immigration and Customs Enforcement detention facilities by releasing asylum seekers and other immigrants to shelter with family or friends.

Public health measures in the United States have moved on from the days when individuals with communicable diseases were treated merely as vectors of disease and immigrants were scapegoated for outbreaks and barred from the United States. Just ten years ago, the CDC lifted[8] an immigration ban on individuals living with HIV—first adopted in the 1980s when there were more known cases of HIV/AIDS in the United States than anywhere else in the world—acknowledging that the restrictions were not an effective or necessary public health measure. The United States should not repeat past mistakes by adopting another discriminatory and ineffective ban on the pretext of public health.

This proposed rule, like the March 20 CDC order, is xenophobia masquerading as a public health measure, and both must be rescinded. These policies undermine the credibility of public health practice and expertise in the United States, with devastating results for the safety and well-being of both asylum

seekers and the American public. The United States can and must both safeguard public health during emergencies and uphold U.S. laws and treaties protecting the lives of those seeking safety and freedom here.

Sincerely,*

Pooja Agrawal, MD, MPH, Director of Global Health Education, Assistant Professor of Emergency Medicine, Department of Emergency Medicine, Yale University School of Medicine

Lucy Allbaugh, PhD, Assistant Professor, University of Dayton

Brandon Allport Altillo, MD, MPH, Assistant Professor of Population Health, Dell Medical School, The University of Texas at Austin

Joe Amon, PhD, MSPH, Clinical Professor, Community Health and Prevention, Director of Global Health, Dornsife School of Public Health, Drexel University

Douglas Ander, MD, Professor of Emergency Medicine, Emory University School of Medicine

Jocelyn Anderson, PhD, RN, Assistant Professor, Pennsylvania State University College of Nursing

Miranda Aragón, MD, Assistant Professor and Faculty, University of New Mexico School of Medicine

Bonnie H. Arzuaga, MD, Instructor of Pediatrics, Harvard Medical School

Anika Backster, MD, MSCR, Assistant Professor, Department of Emergency Medicine, Emory University School of Medicine

Jared Baeten, MD, PhD, Professor, Global Health, Epidemiology, Medicine - Allergy and Infectious Disease, Vice Dean for Strategy, Faculty Affairs and New Initiatives, University of Washington School of Public Health

Jen Balkus, PhD, MPH, Assistant Professor, Department of Epidemiology, University of Washington School of Public Health

Ruanne V. Barnabas, DPhil, MSc, MBChB, Associate Professor, Global Health, Allergy and Infectious Diseases, Department of Global Health, University of Washington

Mary Bassett, MD, PhD, François-Xavier Bagnoud Professor of the Practice of Health and Human Rights, Director of the François-Xavier Bagnoud Center for Health and Human Rights, Harvard T.H. Chan School of Public Health

Gilberte ("Gigi") Bastien, PhD, MA, Assistant Professor, Department of Psychiatry and Behavioral Sciences, Associate Director of Office of Global Health Equity, Morehouse School of Medicine

Nicole Battaglioli, MD, Assistant Professor, Emergency Medicine, Emory University School of Medicine

Stefano M. Bertozzi, MD, PhD, Professor of Health Policy and Management, Dean Emeritus, UC Berkeley School of Public Health

Jacqueline Bhabha, JD, MsC, Professor of the Practice of Health and Human Rights, Harvard T.H.Chan School of Public Health, Director of Research, FXB Center for Health and Human Rights

Eliot Blum, MD, FACEP, Assistant Professor, Department of Emergency Medicine, Emory University School of Medicine

Jacob Bor, SD, Assistant Professor of Global Health, Boston University School of Public Health

Joel G. Breman, MD, DTPH, FIDSA, FASTMH, President, American Society of Tropical Medicine & Hygiene

Jesse B. Bump, PhD, MPH, Executive Director, Takemi Program in International Health, Harvard T.H. Chan School of Public Health

Scott Burris, JD, Professor, Director of the Center for Public Health Law Research, Temple University Beasley School of Law

Jada Bussey-Jones, MD, Professor of Medicine, Emory University School of Medicine

Jose E. Campo Maldonado, MD, MSCI, FACP, Assistant Professor, University of Texas Rio Grande Valley School of Medicine

Valeria Cantos Lucio, MD, Assistant Professor, Department of Medicine, Emory University School of Medicine

Sara Casey, DrPH, Assistant Professor, Heilbrunn Department of Population and Family Health, Columbia University Mailman School of Public Health

Ted Cohen, MD, MPH, DPH, Professor, Epidemiology of Microbial Diseases, Yale School of Public Health

Sarah Cook, MD, Assistant Professor of Psychiatry, Emory University School of Medicine

Cheryl Conner, MD, MPH, Assistant Professor of Clinical Medicine, University of Illinois at Chicago

José F. Cordero, MD, MPH, FAAP, FACMG, Patel Distinguished Professor of Public Health, Department Head, Epidemiology and Biostatistics, University of Georgia College of Public Health

Joanne Csete, PhD, MPH, Associate Professor, Columbia University Mailman School of Public Health

Paula J. Davis-Olwell, PhD, MA, Clinical Assistant Professor, Global Health Institute, Department of Epidemiology and Biostatistics, University of Georgia

Joseph Eisenberg, PhD, MPH, Chair and Professor, Epidemiology, Professor, Global Public Health, University of Michigan School of Public Health

Wafaa El-Sadr, MD, MPH, MPA, Director, ICAP at Columbia University, University Professor of Epidemiology and Medicine, Mathilde Krim-amfAR Chair of Global Health, Columbia University Mailman School of Public Health

Eleanor Emery, MD, Cambridge Health Alliance; Department of Internal Medicine, Northern Navajo Medical Center, Shiprock, New Mexico

Eugenia Eng, DrPH, MPH, Professor of Health Behavior, Gillings School of Global Public Health, University of North Carolina at Chapel Hill

Kacey Ernst, PhD, MPH, Professor & Program Director, Epidemiology, Epidemiology and Biostatistics Department, Mel and Enid Zuckerman College of Public Health, University of Arizona

Dabney P. Evans, PhD, MPH, Associate Professor, Emory University Rollins School of Public Health

Eugene Farber, PhD, ABPP, Professor of Psychiatry and Behavioral Sciences, Emory University School of Medicine

Shannon Farley, DrPH, Associate Research Scientist, Columbia University Mailman School of Public Health

Glenn J. Fennelly, MD, MPH, Department of Pediatrics, Rutgers New Jersey Medical School, Rutgers Global Health Institute

Hope Ferdowsian, MD, MPH, FACP, FACPM, Associate Professor of Medicine, University of New Mexico School of Medicine; Medical Expert, Physicians for Human Rights

Paul Fleming, PhD, MPH, Assistant Professor, University of Michigan School of Public Health

Giorgio Franyuti, MD, Director General, Medical IMPACT

Linda P. Fried, MD, MPH, Dean and DeLamar Professor of Public Health, Columbia University Mailman School of Public Health

Eric A. Friedman, JD, Global Health Justice Scholar, O'Neill Institute for National and Global Health Law, Georgetown University Law Center

Brittany Friend, MD, Child and Adolescent Psychiatry Fellow, Emory University School of Medicine

Meghan Gallagher, PhD, MPH, Lecturer, Columbia University Mailman School of Public Health

Lauren Gensler, MD, Assistant Professor, Emory University School of Medicine

Rahel M. Gizaw, MD, Emergency Medicine Resident, Emory University School of Medicine

Nancy Glass, PhD, MPH, MS, RN, Professor, Independence Foundation Chair, Johns Hopkins School of Nursing, Associate Director, Johns Hopkins Center for Global Health

Gregg Gonsalves, PhD, Assistant Professor, Epidemiology of Microbial Diseases, Yale School of Public Health

David R. Goldsmith, MD, Assistant Professor, Department of Psychiatry and Behavioral Sciences, Emory University School of Medicine

Lawrence O. Gostin, JD, LLD, University Professor, Founding O'Neill Chair in Global Health Law, Faculty Director, O'Neill Institute for National and Global Health Law, Director, World Health Organization Collaborating Center on National & Global Health Law, Georgetown University

Karen A. Goraleski, Chief Executive Officer, American Society of Tropical Medicine and Hygiene

Megan Gray, MD, Assistant Professor of Pediatrics and Population Health, Dell Medical School, The University of Texas at Austin

M. Claire Greene, PhD, MPH, Program on Forced Migration and Health, Columbia University Mailman School of Public Health

Sofia Gruskin, JD, MIA, Director, USC Institute on Inequalities in Global Health, Professor, Keck School of Medicine, Gould School of Law, University of Southern California

Jill Guernsey de Zapien, Director, Border, Transborder, and Binational Public Health Collaborative Research, Health Promotion Sciences, Mel and Enid Zuckerman College of Public Health, University of Arizona

Michele Heisler, MD, MPA, Professor, Department of Internal Medicine, Health Behavior and Health Education, University of Michigan School of Public Health

Linda Hill, MD, Clinical Professor, Department of Family Medicine and Public Health, Medical Director of the Refugee Health Assessment Program, UC San Diego School of Medicine

Tom Inglesby, MD, Director, Center for Health Security, Professor, Department of Environmental Health and Engineering, Johns Hopkins Bloomberg School of Public Health, Infectious Disease Epidemiology Division, Johns Hopkins Department of Medicine

Julie Jacobson, MD, DTM&H, Managing Partner, Bridges to Development; President-elect, American Society of Tropical Medicine & Hygiene

Monik C. Jiménez, ScD, SM, FAHA, Assistant Professor, Department of Epidemiology, Harvard TH Chan School of Public Health, Harvard Medical School/Brigham and Women's Hospital

Elena Jiménez Gutiérrez, MD, Assistant Professor, Division of General and Hospital Medicine, Department of Medicine, The University of Texas Health Science Center at San Antonio

Chandy C. John, MD, MS, FASTMH, Ryan White Professor of Pediatrics, Director of the Ryan White Center for Pediatric Infectious Disease and Global Health at Indiana University School of Medicine; Past-President, American Society of Tropical Medicine & Hygiene

Danielle Jones, MD, FACP, Associate Professor of Medicine, Associate Program Director, Department of Medicine, Emory University School of Medicine

Eric C. Jones, PhD, Assistant Professor of Social Epidemiology, University of Texas Health Science Center at Houston School of Public Health

S. Patrick Kachur, MD, MPH, FACPM, FASTMH, Professor, Columbia University Mailman School of Public Health, Heilbrunn Department of Population and Family Health, Columbia University Irving Medical Center

Ameeta Kalokhe, MD, MSc, Assistant Professor, Division of Infectious Diseases, Emory University School of Medicine, Department of Global Health, Emory University Rollins School of Public Health

Nadine Kaslow, PhD, Professor, Emory University School of Medicine

Jennifer Kasper, MD, MPH, Assistant Professor of Pediatrics and Global Health and Social Medicine, and Chair, Faculty Advisory Committee on Global Health, Harvard Medical School

Kaveh Khoshnood, PhD, Associate Professor, Yale School of Public Health

Michael Khoury, MD, Assistant Professor, The Georgia Human Rights Clinic at Emory University School of Medicine

Elizabeth J. King, PhD, MPH, Assistant Professor, Department of Health Behavior and Health Education, University of Michigan School of Public Health

Nolan Kline, PhD, MPH, Assistant Professor, Rollins College

Brent Langellier, PhD, Assistant Professor, Dornsife School of Public Health, Drexel University

Ling San Lau, MBBS, MPH, Senior Program Officer, Columbia University Mailman School of Public Health

Kathryn Laughon, PhD, RN, FAAN, Associate Professor, University of Virginia School of Nursing

Neil S. Lava, MD, Associate Professor, Neurology, Emory University School of Medicine

Alan Lifson, MD, PhD, Professor of Epidemiology and Community Health, University of Minnesota School of Public Health

Marc Lipsitch, DPhil, Professor of Epidemiology, Harvard T.H. Chan School of Public Health

Danielle Loeb, MD, MPH, Associate Professor of Medicine, Division of General Internal Medicine, University of Colorado School of Medicine

Jennifer Lom, MD, Assistant Professor of Medicine, Emory University School of Medicine

Stuart L. Lustig, MD, MPH, Legal-Medical Advisor, Center for Gender & Refugee Studies, UC Hastings College of the Law

Dominic H. Mack, MD, MBA, Professor, Family Medicine, Director, National Center for Primary Care, Morehouse School of Medicine

Suzanne Maman, PhD, MHS, Professor of Health Behavior, University of North Carolina Gillings School of Global Public Health

Robert P. Marlin, MD, PhD, MPH, Chief, Metta Health Center, Lowell Community Health Center, Lowell, Massachusetts

Hon. Keith Martin, MD, PC, Executive Director, Consortium of Universities for Global Health

Natasha Martin, DPhil, Associate Professor, Division of Infectious Diseases and Global Public Health, UC San Diego

William Martinez, PhD, Assistant Professor, Department of Psychiatry and Behavioral Sciences, UC San Francisco

Ana Martinez-Donate, PhD, Associate Professor, Dornsife School of Public Health, Drexel University

Alexandria Maybury, MD, Assistant Professor, Emory University School of Medicine

Patrick McColloster, MD, Associate Professor, Baylor College of Medicine

Joseph B. McCormick, MD, MS, James Steele Professor of Epidemiology, University of Texas, Health Science Center at Houston, School of Public Health Brownsville

Terry McGovern, JD, Harriet and Robert H. Heilbrunn Professor and Chair, Director, Global Health Justice and Governance, Heilbrunn Department of Population and Family Health, Columbia University Mailman School of Public Health

Brian McGregor, PhD, Adjunct Clinical Assistant Professor, Morehouse School of Medicine

Katherine McKenzie, MD, Assistant Professor, Yale School of Medicine

Benjamin Mason Meier, JD, LLM, PhD, Associate Professor of Global Health Policy, University of North Carolina at Chapel Hill

Ranit Mishori, MD, MHS, FAAFP, Professor, Family Medicine, Georgetown School of Medicine, Director, Global Health Initiatives, Director, Robert L. Phillips, Jr. Health Policy Fellowship

Cecilia Menjívar, PhD, MA, MS, Professor and Dorothy L. Meier Social Equities Chair, University of California, Los Angeles

Nicolas A. Menzies, PhD, Assistant Professor of Global Health, Harvard TH Chan School of Public Health

AmyCecilia Mogal, MD, PhD, Clinical Instructor, Department of Anesthesia, Stanford University; Attending Physician, Critical Care Unit, Washington Hospital Healthcare System, Fremont, California

Karin E. Montero, MD, FACS, Medical Director, Center for Survivors of Torture, Austin, Texas

Alejandro Moreno, MBBS, MPH, JD, FACP, Assistant Dean and Director, Department of Medical Education, Associate Professor, Department of Internal Medicine, Dell Medical School, The University of Texas at Austin

Rachel T. Moresky, MD, MPH, FACEP, Associate Professor, Population and Family Health Department, Columbia University Mailman School of Public Health & Associate Professor, Emergency Medicine Department, Columbia University College of Physicians and Surgeons

Juliana E. Morris, MD, EdM, Clinical Instructor, School of Medicine, UC San Francisco

Peter Navario, PhD, MPH, Clinical Assistant Professor, Department of Public Health Policy and Management at New York University School of Global Public Health; Executive Director, HealthRight International

Laura B. Nellums, PhD, MSc, Assistant Professor in Global Health, School of Medicine, University of Nottingham

Aliza Norwood, MD, Assistant Professor of Internal Medicine and Population Health, Dell Medical School, The University of Texas at Austin

D. Daphne Owen, MD, Assistant Professor of Emergency Medicine, University of Pennsylvania

Ashli Owen-Smith, PhD, SM, Assistant Professor of Health Policy and Behavioral Sciences, School of Public Health, Georgia State University

Kathleen Page, MD, Associate Professor, Division of Infectious Diseases, Johns Hopkins University School of Medicine, Center for Humanitarian Health, Johns Hopkins University

Kimberly Page, PhD, MPH, MS, Professor, Epidemiology, Biostatistics and Preventive Medicine, University of New Mexico Health Sciences Center

Kathleen A. Parker, MA, MPH, CHES ret., Public Health Education Specialist, 1983-2004, Centers for Disease Control and Prevention

Parveen Parmar, MD, MPH, Associate Professor, Clinical Emergency Medicine, Chief, Division of Global Emergency Medicine, Keck School of Medicine, University of Southern California

Snehal Patel, MD, Assistant Professor, Department of Internal Medicine, Dell Medical School, The University of Texas at Austin

Andrés Patiño, MD, Assistant Professor, Department of Emergency Medicine, Emory University

Elizabeth Peacock, MD, PhD, Clinical Faculty, Department of Emergency Medicine, Emory University

Jose Quiroga, MD, Board Member, Physicians for Social Responsibility - Los Angeles

Tracy L. Rabin, MD, SM, Associate Professor of Medicine and Director, Office of Global Health, Department of Internal Medicine, Yale University School of Medicine

Nalini Ranjit, PhD, MS, Associate Professor, Health Promotion and Behavioral Sciences, University of Texas School of Public Health, University of Texas Health Science Center at Houston – Austin

Paulina Rebolledo, MD, MSc, Assistant Professor of Medicine and Global Health, Emory University

Les Roberts, PhD, Professor, Program on Forced Migration and Health, Columbia University Mailman School of Public Health

W. Courtland Robinson, PhD, Associate Professor, Center for Humanitarian Health, Johns Hopkins Bloomberg School of Public Health

Barbara Robles-Ramamurthy, MD, Assistant Professor in Psychiatry, University of Texas Health - San Antonio

Roger Rochat, MD, Professor, Global Health, Epidemiology, Rollins School of Public Health, Emory University

Francis Rollin, MD, MPH, Assistant Professor of Medicine, Emory University School of Medicine

Cynthia Romero, MD, Assistant Professor of Emergency Medicine, Emory University School of Medicine and Emory Healthcare

Robert K. Ross, MD, President and Chief Executive Officer, The California Endowment

Richard Rothenberg, MD, MPH, Regents' Professor, Georgia State University School of Public Health

Andrew S. Rowland, PhD, MA, Associate Professor, Epidemiology, University of New Mexico College of Population Health

Leonard Rubenstein, JD, LLM, Professor of the Practice, Johns Hopkins Bloomberg School of Public Health

Samantha Sabo, DrPH, MPH, Associate Professor, Department of Health Sciences, Northern Arizona University

William M. Sage, MD, JD, Professor, School of Law and Dell Medical School, The University of Texas at Austin

Goleen Samari, PhD, MPH, MA, Assistant Professor of Population and Family Health, Program on Forced Migration and Health, Columbia University Mailman School of Public Health

John Santelli, MD, MPH, Professor, Population and Family Health and Pediatrics, Columbia University Mailman School of Public Health

Stacie Schmidt, MD, Assistant Professor, Department of Medicine, Emory University School of Medicine

Jaime Sepulveda, MD, MPH, MSc, DrSc, Haile T. Debas Distinguished Professor of Global Health, Executive Director, Institute for Global Health Sciences, UC San Francisco

Josefa Simkin, MD, Chair Family Practice Department, Watsonville Community Hospital, Watsonville, California

Adria Simon, MD, Assistant Professor of Emergency Medicine, Columbia University

B. R. Simon Rosser, PhD, MPH, LP, Professor, Division of Epidemiology and Community Health, University of Minnesota School of Public Health

Hina Shaikh, JD, MPH, Research Director and Ethics Oversight Staff, George Washington University Milken Institute School of Public Health

Joshua M. Sharfstein, MD, Professor of the Practice of Health Policy and Management, Johns Hopkins Bloomberg School of Public Health

Anandi Sheth, MD, MSc, Assistant Professor, Department of Medicine, Division of Infectious Diseases, Emory University School of Medicine

Neha S. Singh, PhD, MPH, Co-Director, Health in Humanitarian Crises Centre and Assistant Professor, London School of Hygiene and Tropical Medicine, UK

Kumi Smith, PhD, MPIA, Assistant Professor, Division of Epidemiology and Community Health, University of Minnesota

Craig Spencer, MD, MPH, Director of Global Health in Emergency Medicine at New York-Presbyterian/Columbia University Medical Center, Assistant Professor of Emergency Medicine and Population and Family Health at the Columbia University Medical Center, Heilbrunn Department of Population and Family Health - Program on Forced Migration and Health, Columbia University Mailman School of Public Health

Paul B. Spiegel, MD, MPH, Professor of Practice, Johns Hopkins Bloomberg School of Public Health; Director, Center for Humanitarian Health

Andrew Springer, DrPH, MPH, Associate Professor, Health Promotion and Behavioral Sciences, University of Texas Health Science Center, School of Public Health - Austin

Mia Stange, MPH, Terra Firma Medical-Legal Partnership, Montefiore Medical Center

Steffanie Strathdee, PhD, MSc, Associate Dean of Global Health Sciences and Harold Simon Professor in the Department of Medicine, Co-Director of the Center for Innovative Phage Applications and Therapeutics, UC San Diego School of Medicine

Til Stürmer, MD, PhD, MPH, Nancy A. Dreyer Distinguished Professor and Chair, Department of Epidemiology, Gillings School of Global Public Health, University of North Carolina at Chapel Hill

Parmi S. Suchdev, MD, MPH, FAAP, Associate Director, Emory Global Health Institute, Director, Global Health Office of Pediatrics, Professor, Department of Pediatrics and Hubert Department of Global Health, Emory University

Nina Sun, JD, Assistant Clinical Professor and Deputy Director, Global Health and Human Rights, Dornsife School of Public Health, Drexel University

Andrea Swartzendruber, PhD, MPH, Assistant Professor, Epidemiology and Biostatistics, University of Georgia College of Public Health

Sofia Tenorio Martínez, MD, MPH, Clinical Research Coordinator, Department of Pediatrics, Emory University School of Medicine

Lisa M. Thompson, PhD, FNP, RN, Associate Professor, Emory University Nell Hodgson School of Nursing

Liza Vertinsky, PhD, JD, Associate Professor, Emory Law School

Rachel Waford, PhD, ABPP, Assistant Professor, Rollins School of Public Health, Emory University, Department of Psychiatry and Behavioral Sciences, Emory University School of Medicine

Ron Waldman, MD, MPH, President, Doctors of the World - USA

Karen Wang, MD, MHS, Assistant Professor, Yale School of Medicine

Martha Ward, MD, Associate Professor, Emory University School of Medicine

Jon Warkentin, MD, MPH, President-Elect, National Society of TB Clinicians

Scott C. Weaver, PhD, Fellow of the American Society for Microbiology, John Sealy Distinguished University Chair in Human Infections and Immunity, Chair, Department of Microbiology and Immunology, University of Texas Medical Branch

Aliza Wingo, MD, Assistant Professor, Department of Psychiatry and Behavioral Sciences, Emory University School of Medicine

Andrea L. Wirtz, PhD, MHS, Assistant Professor, Johns Hopkins Bloomberg School of Public Health

Negar Yaghooti, MD, University of New Mexico Hospital

Monette Zard, MA, Allan Rosenfield Associate Professor of Forced Migration and Health, Director of the Forced Migration and Health Program, Heilbrunn Department of Population and Family Health, Columbia University Mailman School of Public Health

Amy Zeidan, MD, Assistant Professor, Emergency Medicine, Co-director, Human Rights/Asylum Clinic, Emory University School of Medicine

** Institutional affiliation is provided for identification purposes only and does not constitute institutional endorsement.*

---

[1] U.S. Citizenship and Imm. Services, Dep't of Homeland Security; Exec. Office for Imm. Review, Dep't of Justice, "Security Bars and Processing," 85 FR 41202, July 9, 2020, https://www.govinfo.gov/content/pkg/FR-2020-07-09/pdf/2020-14758.pdf.

[2] U.S. Dep't of Health and Human Services & Centers for Disease Control and Prevention, "Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists," Mar. 20, 2020, https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf.

[3] Human Rights First, "Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger," May 2020, https://www.humanrightsfirst.org/sites/default/files/PandemicAsPretextFINAL.pdf.

[4] 42 C.F.R. § 34.2.

[5] UNHCR, "Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response," Mar. 16, 2020, https://www.unhcr.org/cz/wp-content/uploads/sites/20/2020/04/UNHCR-Legal-Considerations-on-Access-to-Territory-in-the-Covid-19-Pandemic-March-2020.pdf.

[6] Letter to HHS Secretary Azar and CDC Director Redfield signed by leaders of public health schools, medical schools, hospitals, and other U.S. institutions, May 18, 2020, https://www.publichealth.columbia.edu/public-health-now/news/public-health-experts-urge-us-officials-withdraw-order-enabling-mass-expulsion-asylum-seekers.

[7] "Public Health Measures to Safely Manage Asylum Seekers and Children at the Border," May 2020, https://www.humanrightsfirst.org/resource/public-health-measures-safely-manage-asylum-seekers-and-children-border.

[8] Centers for Disease Control and Prevention, Dep't of Health and Human Services, "Medical Examination of Aliens—Removal of Human Immunodeficiency Virus (HIV) Infection From Definition of Communicable Disease of Public Health Significance," 74 FR 56547, Nov. 2, 2009, https://www.govinfo.gov/content/pkg/FR-2009-11-02/pdf/E9-26337.pdf.

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

Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response

This paper sets out key legal considerations, based on international refugee and human rights law, on access to territory for persons seeking international protection in the context of measures taken by States to restrict the entry of non-nationals for the protection of public health in response to the COVID-19 pandemic. It reconfirms that while States may put in place measures which may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement.

1. Under international law, States have the sovereign power to regulate the entry of non-nationals. However, international law also provides that measures to this effect may not prevent them from seeking asylum from persecution.[i]

2. Central to the right to seek asylum is the principle of non-refoulement,[ii] which prohibits, without discrimination,[iii] any State conduct leading to the 'return in any manner whatsoever' to an unsafe foreign territory, including rejection at the frontier or non-admission to the territory.[iv]

3. States are responsible for ensuring protection from refoulement to all persons who are within its jurisdiction, including at national frontiers,[v] as soon as a person presents him- or herself at the border claiming to be at risk or fearing return to his or her country of origin or any other country. There is no single correct formula or phrase for how this fear or desire to seek asylum needs to be conveyed in order to benefit from the principle of *non-refoulement*.[vi] In order to give effect to their international legal obligations, including the right to seek asylum and the principle of non-refoulement, States have a duty vis-à-vis persons who have arrived at their borders, to make independent inquiries as to the persons' need for international protection and to ensure they are not at risk of *refoulement*.[vii] If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned.[viii]

4. At the outset, persons seeking international protection must have access to relevant information in a language they understand and the ability to make a formal asylum claim with the competent authority. Further, persons seeking international protection must be given the opportunity to contact UNHCR. Simultaneously, pursuant to its mandate,[ix] UNHCR should be given the possibility, subject to the reasonable application of protective public health

measures taken by the authorities, to contact and visit such persons to assess and supervise their well-being and provide assistance when needed.[x]

5. States are entitled to take measures to ascertain and manage risks to public health, including risks that could arise in connection with non-nationals arriving at their border. Such measures must be non-discriminatory as well as necessary, proportionate and reasonable to the aim of protecting public health. In response to the COVID-19 pandemic States have, or are considering putting in place public health measures such as the screening of travellers on arrival and the use of quarantine for persons who have been identified as suffering from the disease or who may have been exposed to the virus. Such efforts, multilateral or national, are directed at containing this infectious disease and preventing its spread.

6. However, imposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards, in particular as linked to the principle of non-refoulement. In case health risks are identified in the case of individual or a group of refugees or asylum-seekers, other measures could be taken, such as testing and/or quarantine, which would enable authorities to manage the arrival of asylum-seekers in a safe manner, while respecting the principle of non-refoulement. Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.

7. Reasonable measures to ascertain and manage risks to public health that could arise in connection with people arriving from other countries could include temporary limitations on movement for a limited period. Such restrictions must however be in accordance with the law, necessary for the legitimate purpose of managing the identified health risk, proportionate, and subject to regular review. Where such restrictions amount to detention, that detention must not be arbitrary or discriminatory, must be in accordance with and authorized by law in accordance with applicable procedural safeguards, for a limited time period and otherwise in line with international standards.[xi] Health concerns do not justify the systematic use of immigration detention against individuals or groups of asylum-seekers or refugees.

8. While such public health measures may not specifically target persons seeking international protection, they may have far-reaching consequences for such persons. States' measures to protect public health may affect persons seeking international protection. While such measures may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement. Not only would this be at variance with international law, it could send the persons into "orbit" in search of a State willing to receive them and as such may contribute to the further spread of the disease.

UNHCR
16 March 2020

[i] Article 14 of the *Universal Declaration of Human Rights* provides that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution'. The right to seek and enjoy asylum is affirmed in various regional legal instruments: Organization of American States, *American Declaration on the Rights and Duties of Man*, 2 May 1948, Article XXVII, www.unhcr.org/refworld/docid/3ae6b3710.html, referring to the right to seek and receive asylum. Organization of American States, *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, Article 22(7), www.unhcr.org/refworld/docid/3ae6b36510.html, referring to the right to seek and be granted asylum. *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 12(3), www.refworld.org/docid/3ae6b3630.html referring to the right to seek and obtain asylum. European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 18, www.refworld.org/docid/3ae6b3b70.html (EU Charter of Fundamental Rights), referring to the right to asylum to be guaranteed with due respect to the 1951 Convention and EU law.

[ii] The principle of *non-refoulement* prohibits states from expelling or returning a refugee in any manner whatsoever to a territory where she or he would be at risk of threats to life or freedom. The principle of *non-refoulement* is most prominently expressed in Article 33 of the 1951 Convention relating to the Status of Refugees (*Convention Relating to the Status of Refugees* (28 July 1951) 189 UNTS 137)), having been recognized as a norm of customary international law. *Non-refoulement* obligations are also codified in regional refugee law instruments, see: Organization of American States, American Convention on Human Rights, note 2 above, Article 22(8) and 1984 Cartagena Declaration, note 5 above, Conclusion III.5, reiterating the importance of the principle of *non-refoulement* and the need for acknowledging and observing it as a rule of *jus cogens*. Non-refoulement obligations are also enshrined in international and regional human rights law, see for an overview: UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, Part B, www.refworld.org/docid/45f17a1a4.html, in which reference is made to various human rights law instruments, including the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Articles 6 and 7; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Article 3; 1969 American Convention on Human Rights, note 2 above, Article 22(8); Banjul Charter, note 2 above, Article 5; *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Articles 2 and 3. See also: EU Charter of Fundamental Rights, note 2 above, Article 19(2).

[iii] According to the 1951 Convention relating to the Status of Refugees, note 3 above, Article 3, '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.

[iv] ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 22 (XXXII), 1981, para. II.A.2; ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q).

[v] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protoco*l, 26 January 2007, paras. 9 and 20, www.unhcr.org/refworld/docid/45f17a1a4.html. The principle of *non-refoulement* also applies extraterritorially, i.e. wherever the state in question is acting outside its territory and has effective control over the person, see: UNHCR, *UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy*, 22 June 2011, Application No. 27765/09, www.refworld.org/docid/4e0356d42.html. UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protoco*l, 26 January 2007, paras. 24, 26, 32-43, www.unhcr.org/refworld/docid/45f17a1a4.html; UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy*, March 2010, paras. 4.1.1-4.2.3, www.unhcr.org/refworld/docid/4b97778d2.html. UNHCR, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, 17 February 2012, para. 2(4), www.refworld.org/docid/4f4c959f2.html. UN Human Rights Committee General Comment No. 31, Nature of the General Legal Obligations imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10, www.refworld.org/docid/478b26ae2.html. See also: *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, paras. 109 to 113, www.refworld.org/cases,ICJ,414ad9a719.html, considering that states are bound to fulfil their international human rights obligations wherever they exercise jurisdiction. *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014, para. 61, www.refworld.org/cases,IACRTHR,54129c854.html.

[vi] UN High Commissioner for Refugees (UNHCR), *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Malevanaya & Sadyrkulov v. Ukraine (Application No. 18603/12)*, 15 July 2013, www.refworld.org/docid/51e515794.html, para. 3.1.4; UNHCR, UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy, 22 June 2011, Application No. 27765/09, www.refworld.org/docid/4e0356d42.html.

[vii] UNHCR, *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, paras, 74-75, www.refworld.org/docid/510a74ce2.html. The "duty of independent inquiry" has been recognized by various courts: *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, paras. 146-148, www.refworld.org/docid/4f4507942.html; *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras. 286,298,315,321,359, www.refworld.org/docid/4d39bc7f2.html; *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004, para. 26, www.refworld.org/docid/41c17ebf4.html; *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56, 64, www.refworld.org/docid/515010a52.html. European Union: Council of the European Union, *Directive 2013/32/EU*

of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, www.refworld.org/docid/51d29b224.html, Article 6(1), 3rd indent: 'Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.'

[viii] UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977, para. 22.

[ix] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: www.refworld.org/docid/3ae6b3628.html. UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, www.refworld.org/docid/5268c9474.html.

[x] ExCom Conclusion No. 22 (XXXII), 1981, para. III. EXCOM Conclusion No. 33 (XXXV), 1984, para. (h). EXCOM Conclusion No. 72 (XLIV), 1993, at para (b). EXCOM Conclusion No. 73 (XLIV), 1993, at para. (b) (iii). EXCOM Conclusion No. 79 (XLVII), 1996, at para. (p). See also UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, p. 7, www.refworld.org/docid/5268c9474.html, setting out UNHCR's mandate.

[xi] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, www.refworld.org/docid/503489533b8.html.

World Health Organization

OHCHR, IOM, UNHCR and WHO joint press release: the rights and health of refugees, migrants and stateless must be protected in COVID-19 response

31 March 2020 | Joint News Release

In the face of the COVID-19 crisis, we are all vulnerable. The virus has shown that it does not discriminate - but many refugees, those forcibly displaced, the stateless and migrants are at heightened risk.

Three-quarters of the world's refugees and many migrants are hosted in developing regions where health systems are already overwhelmed and under-capacitated. Many live in overcrowded camps, settlements, makeshift shelters or reception centers, where they lack adequate access to health services, clean water and sanitation.

The situation for refugees and migrants held in formal and informal places of detention, in cramped and unsanitary conditions, is particularly worrying. Considering the lethal consequences a COVID-19 outbreak would have, they should be released without delay. Migrant children and their families and those detained without a sufficient legal basis should be immediately released.

This disease can be controlled only if there is an inclusive approach which protects every individual's rights to life and health. Migrants and refugees are disproportionately vulnerable to exclusion, stigma and discrimination, particulary when undocumented. To avert a catastrophe, governments must do all they can to protect the rights and the health of everyone. Protecting the rights and the health of all people will in fact help control the spread of the virus.

It is vital that everyone, including all migrants and refugees, are ensured equal access to health services and are effectively included in national responses to COVID-19, including prevention, testing and treatment. Inclusion will help not only to protect the rights of refugees and migrants, but will also serve to protect public health and stem the global spread of COVID-19. While many nations protect and host refugee and migrant populations, they are often not equipped to respond to crises such as Covid-19. To ensure refugees and migrants have adequate access to national health services, States may need additional financial support. This is where the world's financial institutions can play a leading role in making funds available.

While countries are closing their borders and limiting cross-border movements, there are ways to manage border restrictions in a manner which respects international human rights and refugee protection standards, including the principle of non-refoulement, through quarantine and health checks.

More than ever, as COVID-19 poses a global threat to our collective humanity, our primary focus should be on the preservation of life, regardless of status. This crisis demands a coherent, effective international approach that leaves no-one behind. At this crucial moment we all need to rally around a common objective, fighting this deadly virus. Many refugees, displaced, stateless people and migrants have skills and resources that can also be part of the solution.

We cannot allow fear or intolerance to undermine rights or compromise the effectiveness of responses to the global pandemic. We are all in this together. We can only defeat this virus when each and every one of us is protected.

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

UNHCR

1775 K Street, NW
Suite 300
Washington, DC 20006

Tel.: 2022965191
Fax: 2022965660
Email: painter@unhcr.ch

6 January 2006

BY FACSIMILE (212-230-8888) AND OVERNIGHT MAIL

Paul Engelmayer, Esq.
WilmerHale
399 Park Avenue
New York, NY 10022

Re: Request for Advisory Opinion

Dear Mr. Engelmayer,

I am writing in response to your law firm's request for an advisory opinion from the United Nations High Commissioner for Refugees (UNHCR) "regarding the scope of the national security exception under Article 33(2) of the 1951 Convention" relating to the Status of Refugees.

As discussed in more detail below, the principle of *non-refoulement*, codified at article 33(1) of the 1951 Convention relating to the Status of Refugees [1951 Convention],[1] is of central importance to the international refugee protection regime. It is a fundamental obligation of States Parties to the 1951 Convention and/or its 1967 Protocol,[2] to which no reservation is allowed. Article 33(2) allows for an exception to this obligation in two limited circumstances, one of which is related to refugees who pose "a danger to the security of the country in which [they are]," that is, the country of refuge; while the other relates to refugees who, having been convicted by a final judgement of a particularly serious crime, constitute a danger to the community of that country.

The threat to security exception to States' *non-refoulement* obligations, like any exception to human rights guarantees, must be interpreted restrictively and with full respect to the principle of proportionality. It must therefore be shown that the danger posed by the refugee is sufficient to justify *refoulement*. The danger posed must be to the country of refuge itself; the danger must be very serious; and the finding of dangerousness must be based on reasonable grounds and therefore supported by credible and reliable evidence. The act of *refoulement* should also be a proportionate response to the perceived

[1] The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereafter "1951 Convention"].
[2] The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967 [hereafter "1967 Protocol"].

danger. 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 or alleviate the danger; and, the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement*.

The Office of the United Nations High Commissioner for Refugees

UNHCR has been charged by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organizations.[3] As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[4] UNHCR's supervisory responsibility is mirrored in article II of the 1967 Protocol relating to the Status of Refugees, to which the United States acceded in 1968. The Protocol incorporates the substantive provisions of the 1951 Convention relating to the Status of Refugees.

The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. UNHCR provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations and also conducts such determinations under its mandate. UNHCR's interpretation of the provisions of the 1951 Convention and 1967 Protocol is an authoritative view which would need to be taken into account by States when deciding questions of refugee law, given the Office's supervisory role under its Statute in connection with Article 35 of the 1951 Convention and Article II of the 1967 Protocol and the ensuing obligation of States to cooperate with UNHCR in the exercise of this function.[5]

Analysis

A. Obligation of *Non-Refoulement* under Article 33(1)

The purpose of the 1951 Convention, as stated expressly in its Preamble, is to protect the fundamental rights and freedoms of refugees. Article 33 is considered the

[3] *See Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, paras. 1, 6 (1950).
[4] *Id.*, para. 8(a).
[5] Professor Walter Kälin has asserted that States Parties have a duty to take into account the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* ["UNHCR *Handbook*"], guidelines and other positions when applying the 1951 Convention and 1967 Protocol. "'Taking into account' does not mean that these documents are legally binding. Rather, it means that they must not be dismissed as irrelevant but regarded as authoritative statements whose disregard requires justification." *See* W. Kälin, "Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and beyond," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (ed. Erika Feller, Volker Türk and Frances Nicholson), at 627 (Cambridge University Press, 2003). *See also*, Volker Türk, "UNHCR's Supervisory Responsibility," *Revue québécoise de droit internationale*, Vol. 14.1 (2001), at 135-158. The US Supreme Court has found that, while not legally binding on US officials, the UNHCR *Handbook* provides "significant guidance" in construing the1967 Protocol and in giving content to the obligations established therein. *See, I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439, n. 22 (1987).

cornerstone of the 1951 Convention, codifying the principle of *non-refoulement* of refugees. Under article 33(1), Contracting States may not "expel or return…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."[6] Reservations to article 33 are specifically prohibited under both the Convention[7] and Protocol.[8] The principle of *non-refoulement* is a "fundamental humanitarian principle"[9] that has attained the status of customary international law.[10]

The prohibition of return to a danger of persecution under international refugee law is also fully applicable in the context of extradition. This is clear from the wording of article 33(1), which refers to expulsion or return "in any manner whatsoever." Thus, article 33(1) of the 1951 Convention precludes the surrender of a wanted person if this would amount to *refoulement*.[11]

Article 33(2) of the 1951 Convention provides for an exception to the obligation of *non-refoulement* in two situations: (1) where there are "reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is"; and, (2) where the refugee, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[12] This opinion focuses on the first of these two exceptions.

B. The Exceptional Nature of Article 33(2) Calls for a Restrictive Interpretation

It is a general principle of law that exceptions to international human rights treaties must be interpreted restrictively.[13] According to Paul Weis, a leading refugee law scholar who was a delegate for the International Refugee Organization during the drafting of the 1951 Convention, article 33(2) "constitutes an exception to the general principle embodied in paragraph 1 and has, like all exceptions, to be interpreted restrictively. Not every reason

[6] 1951 Convention, *supra* note 1, article 33(1).
[7] 1951 Convention, *supra* note 1, article 42(1).
[8] 1967 Protocol, *supra* note 2, article VII(1).
[9] UNHCR Executive Committee, Conclusion No. 6 (XXVIII), "*Non-Refoulement,*" at para. (a) (1977).
[10] *See, e.g.*, "Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees," UN doc. HCR/MMSP/2001/09 (16 January 2002), at para. 4 ("Acknowledging the continuing relevance of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law."); UNHCR Executive Committee Conclusion No. 25 (XXXII) (1982) (reaffirming "the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law"); Sir Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (ed. Erika Feller, Volker Türk and Frances Nicholson), at 140-164 (paras. 193-253) (Cambridge University Press, 2003).
[11] *See* Lauterpacht and Bethlehem, supra note 10, at paras. 71-75. *See also* UNHCR Executive Committee Conclusion No. 17 (XXXI), "Problems of Extradition Affecting Refugees," at para. (d) (1980).
[12] 1951 Convention, *supra* note 1, article 33(2).
[13] Eur. Ct. H.R., *Klass v. Germany*, at para. 42 (1978); Eur. Ct. H.R., *Winterwerp v The Netherlands*, at para. 37 (1979).

of national security may be invoked…"[14] Thus, while states clearly maintain a margin of discretion in applying the exceptions to article 33(1), this margin of appreciation is not unlimited.[15]

The exceptional nature of article 33(2) was recognized by the delegates to a Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons who introduced this clause when they met at the United Nations Office in Geneva in 1951.[16] The *travaux préparatoires* make clear that the exceptions set out in article 33(2) were intended to be interpreted restrictively. There was initial reluctance by the drafters of the Convention to include any exception to the Convention's non-refoulement obligation.[17] While the threat to security exception was ultimately included, the drafters intended that its application be restrictive. The United Kingdom delegate, for example, stated that "the authors of [article 33(2)] …sought to restrict its scope so as not to prejudice the efficiency of the article as a whole."[18]

C. The Danger Must Be Sufficient to Justify *Refoulement*

A "danger" under article 33(2) must be: (1) a danger to the security of the country; and, (2) a danger to the country where the refugee is. There also must be reasonable grounds for considering that the individual concerned constitutes such a danger.

1. *Danger to the Security of the Country*

The use of the term "danger to the security of the country" implies that the seriousness of the danger must reach a sufficiently high threshold.

The *travaux préparatoires* makes clear that the drafters were concerned only with significant threats to the security of the country. The nature of the concerns that led to the inclusion of the threat to security provision is captured in the following statement by the United Kingdom representative:

> Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign power against the country of

[14] Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires Analyzed with a Commentary by Dr. Paul Weis*, at 342 (Cambridge University Press, 1995). *See also*, Lauterpacht and Bethlehem, *supra* note 10, at para. 159(iii).
[15] *See*, Lauterpacht and Bethlehem, *supra* note 10, at paras. 167-68.
[16] Nehemiah Robinson, *Convention Relating to the Status of Refugees - Its History, Contents and Interpretation: A Commentary*, at 136-137 (Institute of Jewish Affairs, World Jewish Congress, 1953, *reprinted* by UNHCR, 1997).
[17] The Report of the *ad hoc* Committee stated that "[w]hile some question was raised as to the possibility of exceptions to article 28 [later article 33(1)] the Committee felt strongly that the principle here expressed was fundamental and should not be impaired." UN doc. E/AC.32/8, at 13 (25 August 1950). The United States delegate stated that "it would be highly undesirable to suggest in the text of [article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death persecution." UN doc. E/AC.32/SR.40, at 31 (22 August 1950).
[18] UN doc. A/CONF.2/SR.16, at 8 (23 November 1951).

> their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency.[19]

Indeed, during the drafting process, the Danish delegate raised a question as to whether the "danger to the security" test would be met by the creation of political tension in inter-state relations when the country of origin demanded the return of a refugee from the country of refuge. There was general agreement among the drafters that article 33(2) was not intended to have this effect.[20]

UNHCR concurs with the opinion of noted international law scholars Sir Elihu Lauterpacht and Daniel Bethlehem that "the fundamental character of the prohibition against *refoulement*, and the humanitarian character of the 1951 Convention more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention."[21] As a result, "the danger to the security of the country in contemplation in article 33(2) must…be taken to be very serious danger rather than danger of some lesser order."[22] The provision also "hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past."[23]

Other leading refugee law scholars have concluded the same. Professor Atle Grahl-Madsen, a leading international refugee law scholar, has stated with respect to article 33(2) that

> …the security of the country is invoked against acts of a rather serious nature endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.[24]

Similarly, Professor Walter Kälin, a European expert in international refugee law, has noted that article 33(2) covers conduct such as "attempts to overthrow the government of the host State through violence or otherwise illegal means, activities against another State which may result in reprisals against the host State, acts of terror and espionage," and that the requirement of a danger to the security of the country "can only mean that the refugee must pose a serious danger to the foundations or the very existence of the State, for his or her return to the country of persecution to be permissible."[25]

---

[19] UN doc. A/CONF.2/SR.16, at 8 (23 November 1951).
[20] Weis, *supra* note 14, at 331, 332.
[21] Lauterpacht and Bethlehem, *supra* note 10, at para. 169.
[22] *Id.*
[23] Lauterpacht and Bethlehem, *supra* note 10, at para. 147.
[24] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951: Article 2-11, 13-37,* at 236 (manuscript, 1963, published by UNHCR, 1997).
[25] Walter Kälin, *Das Prinzip des Non-refoulement*, Europäische Hochschulschriften Bd./Vol. 298, at 131 (Bern, Frankfurt am Main: Peter Lang, 1982) (unofficial translation from the German original).

2. Danger to the Security of the "Country in Which He Is"

The phrase "country in which he is" in article 33(2) refers to the country of refuge. Article 31(1) of the Vienna Convention provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purposes."[26] On a plain reading, article 33(2) requires that the refugee must be "a danger to the security of *the country in which he is*" (emphasis added). Article 33(2) makes no references to the security of other countries. To justify *refoulement* under article 33(2), the danger must therefore be a danger to the security of the country of refuge.

3. "Reasonable grounds"

There must be reasonable grounds for considering that the individual concerned constitutes a serious danger to the security of the host country.

Under article 33(2), States Parties must demonstrate that there exist "reasonable grounds" for regarding a refugee as a danger to the security of the country of refuge. A finding of dangerousness can only be "reasonable" if it is adequately supported by reliable and credible evidence. "The relevant authorities must specifically address the question of whether there is a future risk; and their conclusion on the matter must be supported by evidence."[27]

The New Zealand Court of Appeal has held that the requirement of "reasonable grounds" under article 33(2) means "that the State concerned cannot act arbitrarily or capriciously and that it must specifically address the question of whether there is a future risk and the conclusion on the matter must be supported by evidence."[28]

D. *Refoulement* Must be Proportionate to the Danger Presented

As with any exception to a human rights guarantee, the exception to *non-refoulement* protection must be applied in a manner proportionate to its objective. Consideration of proportionality is an important safeguard in the application of article 33(2). It represents a fundamental principle of international human rights law[29] and international humanitarian law.[30]

---

[26] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* 27 January 1980.
[27] Lauterpacht and Bethlehem, *supra* note 10, at para. 168.
[28] *Attorney General* v. *Zaoui*, Dec. No. CA20/04 (NZ CA, 30 September 2004), at para. 133.
[29] *See, e.g.*, Eur. Ct. H.R., *Silver v. United Kingdom* (1983) (summarizing principles to determine whether an interference to a right under the European Convention on Human Rights was "necessary in a democratic society," including a requirement that the interference be "proportionate to the legitimate aim pursued"); UN Human Rights Committee, *Guerrero v. Colombia*, UN doc. CCPR/C/15/D/45/1979, at para. 13.3 (31 March 1982) (finding a breach of article 6(1)(right to life) of the International Covenant on Civil and Political Rights on the basis that use of force by police was disproportionate to the law enforcement requirements of the situation, resulting in the arbitrary death of the individual concerned).
[30] *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S 3, *entered into force* 7 December

To justify proportionality in the context of article 33(2) of the 1951 Convention: (1) there must be a rational connection between the removal of the refugee and the elimination of the danger: (2) *refoulement* must be the last possible resort to eliminate the danger; and, (3) the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement*.

1. *Rational Connection*

In order to justify *refoulement* under article 33(2), there must be a rational connection between the means – *refoulement* – and the ends – elimination or alleviation of the danger to security. As Professor Grahl-Madsen has stated, the removal of a refugee must "have a salutary effect on those public goods."[31] If *refoulement* will not have this "salutary effect," then it cannot be justified under article 33(2).

To demonstrate this rational connection, a state must show that the refugee's presence or activities in the state is causing the danger to the security of the country of refuge and that the removal of the individual would eliminate or alleviate the danger. "[T]here must be a real connection between the individual in question, the prospective danger to the security of the country of refuge and the significant alleviation of the danger consequent upon the *refoulement* of that individual. If the removal of the individual would not achieve this end, the *refoulement* would not be justifiable."[32]

2. *Last Resort*

Refoulement must also be the last possible resort for eliminating the danger to the security of the country of refuge. To send the refugee back into the hands of his or her persecutors must be the only available means to eliminate the danger to the security of the country. If there are less restrictive and equally effective means available, such as prosecution in the country of refuge, restrictions on freedom of movement, or removal to a third country, then *refoulement* cannot be justified under article 33(2). [33]

3. *Danger Must Outweigh Risks of Refoulement*

In reaching a decision on the application of article 33(2), it is necessary to weigh the gravity of the danger which the individual presents against the possible consequences

---

1978, article 51(5)(b) (prohibiting indiscriminate attacks, including attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

[31] Grahl-Madsen, *supra* note 24, at 200.

[32] Lauterpacht and Bethlehem, *supra* note 10, at para. 176.

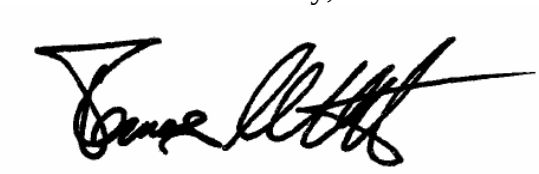
[33] *See, e.g.*, Walter Kälin, *Grundriss des Asylverfahrens* (Guide to the Asylum Procedure), at 226-227 (1990) ("*[R]efoulement* to the country of persecution is in any case not permissible, if a less serious measure such as expulsion to a third country, prosecution, imprisonment, etc., would suffice to remove the threat to state security. State practice confirms this, since *refoulement* because of activities endangering the state is exceptionally rare.") (unofficial translation from the German original).

of *refoulement*, including the degree of persecution feared. If the applicant is likely to face severe persecution, the danger to the security of the country must be very serious to justify return.[34]

Conclusion

We hope the above analysis is useful to you and the US courts considering your case. Please do not hesitate to contact us if we can be of any further assistance.

Sincerely,



Thomas Albrecht
Deputy Regional Representative

[34] *See*, Lauterpacht and Bethlehem, *supra* note 10, at para. 176 ("In the light of the limitations on the application of the exceptions to article 33(2), the State proposing to remove a refugee or asylum-seeker to his or her country of origin must give specific consideration to the nature of the risk faced by the individual concerned.")

HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS and GUIDELINES ON INTERNATIONAL PROTECTION

UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

REISSUED
GENEVA, FEBRUARY 2019

UNHCR
The UN Refugee Agency

HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION

UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

REISSUED
GENEVA, FEBRUARY 2019

UNHCR
The UN Refugee Agency

HCR/1P/4/ENG/REV. 4

CONTENTS

GUIDELINES ON INTERNATIONAL PROTECTION

FOREWORD

For over 65 years, the 1951 Convention relating to the Status of Refugees (1951 Convention), complemented by its 1967 Protocol, has served as the foundation of the refugee protection regime. It provides a universal code for the treatment of refugees uprooted from their countries as a result of persecution, including serious human rights violations or other forms of serious harm, as well as in the context of violence or armed conflict. Its key elements include: a definition of the term refugee (with provisions for inclusion, exclusion and cessation); a guarantee of protection against *refoulement*; and a set of minimum civil, political, economic, social and cultural rights. Complemented by the General Assembly resolution which created UNHCR, and made it functionally responsible for providing international protection and seeking durable solutions for refugees, as well as regional instruments such as the 1969 OAU Convention governing Specific Aspects of Refugee Problems in Africa, the 1984 Cartagena Declaration on Refugees and the Common European Asylum System, the 1951 Convention and its 1967 Protocol have been lifesaving instruments for some of the world's most vulnerable people.

The centrality of the 1951 Convention and its 1967 Protocol to the refugee protection regime is reinforced in two seminal texts: the 2016 New York Declaration for Refugees and Migrants, and the Global Compact on Refugees, affirmed by the General Assembly in 2018. These offer a meaningful set of common undertakings that have the potential to make a real difference in the lives of refugees and their host communities; notably, in the case of the Compact, by building on and complementing the 1951 Convention and relevant regional instruments through the establishment of more predictable and equitable responsibility-sharing arrangements with countries hosting large numbers of refugees. Creating an architecture of support for the countries most affected is fundamental to improvements in refugee protection and assistance, and a stronger focus on solutions from the outset.

The "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status" (the Handbook) is issued in accordance with UNHCR's supervisory responsibility under its Statute, the 1951 Convention, its 1967 Protocol and regional instruments. It is intended to guide government officials, judges, practitioners, as well as UNHCR colleagues in applying the refugee definition. The Handbook was first issued in September 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme. A second edition was released in January 1992, which updated information concerning States Parties to the 1951 Convention and 1967 Protocol, and a third edition was issued in December 2011 on the occasion of the 60th anniversary of the 1951 Convention.

The 1951 Convention has proven to be a living and dynamic instrument, and its interpretation and application has continued to evolve through State practice, UNHCR Executive Committee conclusions, academic literature and judicial decisions at national, regional and international levels. To capture this evolution and in line with its mandate, UNHCR has issued a series of legal positions on specific questions of international refugee law entitled "Guidelines on International Protection".[1] Included in this edition are the thirteen Guidelines developed by the Office between 2002 and 2017. They complement and update the Handbook and should be read in combination with it. Amongst other issues, they illustrate the potential of the 1951 Convention, together with regional instruments, to ensure international protection for persons fleeing a wide range of socio-political events, including:

[1] See Goal 1, para 6, second point of the Agenda for Protection, endorsed by the Executive Committee of UNHCR's Programme and welcomed by the General Assembly: UN High Commissioner for Refugees (UNHCR), *Agenda for Protection*, October 2003, Third edition, available at: https://www.refworld.org/docid/4714a1bf2.htm

- armed conflict, which is often rooted in and/or conducted along lines of real or perceived racial, ethnic, religious, political, gender or social group divides (Guidelines on International Protection No. 12);

- persecution on the basis of sexual orientation or gender identity (Guidelines on International Protection No. 9); and

- violence perpetrated by organized gangs, traffickers, and other non-State actors, against which the State is unable or unwilling to protect (including Guidelines on International Protection No. 7 and No. 12).

I trust that this latest edition of the Handbook, together with the accompanying Guidelines, will continue to support the full and inclusive application of the 1951 Convention and regional refugee instruments, and ensure international protection for those who need it worldwide.

Volker Türk
Assistant High Commissioner for Refugees (Protection)
UNHCR
Geneva, January 2019

HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS

UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

INTRODUCTION – INTERNATIONAL INSTRUMENTS DEFINING THE TERM "REFUGEE"

A. EARLY INSTRUMENTS (1921-1946)

1. Early in the twentieth century, the refugee problem became the concern of the international community, which, for humanitarian reasons, began to assume responsibility for protecting and assisting refugees.

2. The pattern of international action on behalf of refugees was established by the League of Nations and led to the adoption of a number of international agreements for their benefit. These instruments are referred to in Article 1 A (1) of the 1951 Convention relating to the Status of Refugees (see paragraph 32 below).

3. The definitions in these instruments relate each category of refugees to their national origin, to the territory that they left and to the lack of diplomatic protection by their former home country. With this type of definition "by categories" interpretation was simple and caused no great difficulty in ascertaining who was a refugee.

4. Although few persons covered by the terms of the early instruments are likely to request a formal determination of refugee status at the present time, such cases could occasionally arise. They are dealt with below in Chapter II, A. Persons who meet the definitions of international instruments prior to the 1951 Convention are usually referred to as "statutory refugees".

B. 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES

5. Soon after the Second World War, as the refugee problem had not been solved, the need was felt for a new international instrument to define the legal status of refugees. Instead of ad hoc agreements adopted in relation to specific refugee situations, there was a call for an instrument containing a general definition of who was to be considered a refugee. The Convention relating to the Status of Refugees was adopted by a Conference of Plenipotentiaries of the United Nations on 28 July 1951, and entered into force on 21 April 1954. In the following paragraphs it is referred to as "the 1951 Convention". (The text of the 1951 Convention will be found in Annex II.)

C. PROTOCOL RELATING TO THE STATUS OF REFUGEES

6. According to the general definition contained in the 1951 Convention, a refugee is a person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted ... is outside his country of nationality ...

7. The 1951 dateline originated in the wish of Governments, at the time the Convention was adopted, to limit their obligations to refugee situations that were known to exist at that time, or to those which might subsequently arise from events that had already occurred.[1]

8. With the passage of time and the emergence of new refugee situations, the need was increasingly felt to make the provisions of the 1951 Convention applicable to such new refugees. As a result, a Protocol relating to the Status of Refugees was prepared. After consideration by the General Assembly of the United Nations, it was opened for accession on 31 January 1967 and entered into force on 4 October 1967.

[1] The 1951 Convention also provides for the possibility of introducing a geographic limitation (see paras. 108 to 110 below).

9. By accession to the 1967 Protocol, States undertake to apply the substantive provisions of the 1951 Convention to refugees as defined in the Convention, but without the 1951 dateline. Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to States parties to the Convention.

10. In the following paragraphs, the 1967 Protocol relating to the Status of Refugees is referred to as "the 1967 Protocol". (The text of the Protocol will be found in Annex III.)

11. At the time of writing, 78 States are parties to the 1951 Convention or to the 1967 Protocol or to both instruments. (A list of the States parties will be found in Annex IV.)

D. MAIN PROVISIONS OF THE 1951 CONVENTION AND THE 1967 PROTOCOL

12. The 1951 Convention and the 1967 Protocol contain three types of provisions:

(i) Provisions giving the *basic definition* of who is (and who is not) a refugee and who, having been a refugee, has ceased to be one. The discussion and interpretation of these provisions constitute the main body of the present Handbook, intended for the guidance of those whose task it is to determine refugee status.

(ii) Provisions that define the *legal status* of refugees and their rights and duties in their country of refuge. Although these provisions have no influence on the process of determination of refugee status, the authority entrusted with this process should be aware of them, for its decision may indeed have far-reaching effects for the individual or family concerned.

(iii) Other provisions dealing with the *implementation* of the instruments from the administrative and diplomatic standpoint. Article 35 of the 1951 Convention and Article 11 of the 1967 Protocol contain an undertaking by Contracting States to co-operate with the Office of the United Nations High Commissioner for Refugees in the exercise of its functions and, in particular, to facilitate its duty of supervising the application of the provisions of these instruments.

E. STATUTE OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

13. The instruments described above under A-C define the persons who are to be considered refugees and require the parties to accord a certain status to refugees in their respective territories.

14. Pursuant to a decision of the General Assembly, the Office of the United Nations High Commissioner for Refugees ("UNHCR") was established as of 1 January 1951. The Statute of the Office is annexed to Resolution 428 (V), adopted by the General Assembly on 14 December 1950. According to the Statute, the High Commissioner is called upon – *inter alia* – to provide international protection, under the auspices of the United Nations, to refugees falling within the competence of his Office.

15. The Statute contains definitions of those persons to whom the High Commissioner's competence extends, which are very close to, though not identical with, the definition contained in the 1951 Convention. By virtue of these definitions the High Commissioner is competent for refugees irrespective of any dateline[2] or geographic limitation.[3]

16. Thus, a person who meets the criteria of the UNHCR Statute qualifies for the protection of the United Nations provided by the High Commissioner, regardless of whether or not he is in a country that is a party to the 1951 Convention or the 1967 Protocol or whether or not he has been recognized

[2] See paras. 35 and 36 below.
[3] See paras. 108 and 110 below.

by his host country as a refugee under either of these instruments. Such refugees, being within the High Commissioner's mandate, are usually referred to as "mandate refugees".

17. From the foregoing, it will be seen that a person can simultaneously be both a mandate refugee *and* a refugee under the 1951 Convention or the 1967 Protocol. He may, however, be in a country that is not bound by either of these instruments, or he may be excluded from recognition as a Convention refugee by the application of the dateline or the geographic limitation. In such cases he would still qualify for protection by the High Commissioner under the terms of the Statute.

18. The above mentioned Resolution 428 (V) and the Statute of the High Commissioner's Office call for co-operation between Governments and the High Commissioner's Office in dealing with refugee problems. The High Commissioner is designated as the authority charged with providing international protection to refugees, and is required *inter alia* to promote the conclusion and ratification of international conventions for the protection of refugees, and to supervise their application.

19. Such co-operation, combined with his supervisory function, forms the basis for the High Commissioner's fundamental interest in the process of determining refugee status under the 1951 Convention and the 1967 Protocol. The part played by the High Commissioner is reflected, to varying degrees, in the procedures for the determination of refugee status established by a number of Governments.

F. REGIONAL INSTRUMENTS RELATING TO REFUGEES

20. In addition to the 1951 Convention and the 1967 Protocol, and the Statute of the Office of the United Nations High Commissioner for Refugees, there are a number of regional agreements, conventions and other instruments relating to refugees, particularly in Africa, the Americas and Europe. These regional instruments deal with such matters as the granting of asylum, travel documents and travel facilities, etc. Some also contain a definition of the term "refugee", or of persons entitled to asylum.

21. In Latin America, the problem of diplomatic and territorial asylum is dealt with in a number of regional instruments including the Treaty on International Penal Law, (Montevideo, 1889); the Agreement on Extradition, (Caracas, 1911); the Convention on Asylum, (Havana, 1928); the Convention on Political Asylum, (Montevideo, 1933); the Convention on Diplomatic Asylum, (Caracas, 1954); and the Convention on Territorial Asylum, (Caracas, 1954).

22. A more recent regional instrument is the Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 10 September 1969. This Convention contains a definition of the term "refugee", consisting of two parts: the first part is identical with the definition in the 1967 Protocol (i.e. the definition in the 1951 Convention without the dateline or geographic limitation). The second part applies the term "refugee" to:

> every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

23. The present Handbook deals only with the determination of refugee status under the two international instruments of universal scope: the 1951 Convention and the 1967 Protocol.

G. ASYLUM AND THE TREATMENT OF REFUGEES

24. The Handbook does not deal with questions closely related to the determination of refugee status e.g. the granting of asylum to refugees or the legal treatment of refugees after they have been recognized as such.

25. Although there are references to asylum in the Final Act of the Conference of Plenipotentiaries as well as in the Preamble to the Convention, the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol. The High Commissioner has always pleaded for a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum, adopted by the General Assembly of the United Nations on 10 December 1948 and on 14 December 1967 respectively.

26. With respect to the treatment within the territory of States, this is regulated as regards refugees by the main provisions of the 1951 Convention and 1967 Protocol (see paragraph 12(ii) above). Furthermore, attention should be drawn to Recommendation E contained in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Convention:

> The Conference
>
> Expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.

27. This recommendation enables States to solve such problems as may arise with regard to persons who are not regarded as fully satisfying the criteria of the definition of the term “refugee”.

PART ONE

CRITERIA FOR THE DETERMINATION OF REFUGEE STATUS

CHAPTER I – GENERAL PRINCIPLES

28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

29. Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.

30. The provisions of the 1951 Convention defining who is a refugee consist of three parts, which have been termed respectively “inclusion”, “cessation” and “exclusion” clauses.

31. The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. They form the positive basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be a refugee and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses.

CHAPTER II – INCLUSION CLAUSES

A. DEFINITIONS

(1) Statutory Refugees

32. Article 1 A (1) of the 1951 Convention deals with statutory refugees, i.e. persons considered to be refugees under the provisions of international instruments preceding the Convention. This provision states that:

> For the purposes of the present Convention, the term 'refugee' shall apply to any person who:
>
> (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
>
> Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugees being accorded to persons who fulfil the conditions of paragraph 2 of this section.

33. The above enumeration is given in order to provide a link with the past and to ensure the continuity of international protection of refugees who became the concern of the international community at various earlier periods. As already indicated (para. 4 above), these instruments have by now lost much of their significance, and a discussion of them here would be of little practical value. However, a person who has been considered a refugee under the terms of any of these instruments is automatically a refugee under the 1951 Convention. Thus, a holder of a so-called "Nansen Passport"[4] or a "Certificate of Eligibility" issued by the International Refugee Organization must be considered a refugee under the 1951 Convention unless one of the cessation clauses has become applicable to his case or he is excluded from the application of the Convention by one of the exclusion clauses. This also applies to a surviving child of a statutory refugee.

(2) General definition in the 1951 Convention

34. According to Article 1 A (2) of the 1951 Convention the term "refugee" shall apply to any person who:

> As a result of events occurring before 1 January 1951 and 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.

This general definition is discussed in detail below.

B. INTERPRETATION OF TERMS

(1) "Events occurring before 1 January 1951"

35. The origin of this 1951 dateline is explained in paragraph 7 of the Introduction. As a result of the 1967 Protocol this dateline has lost much of its practical significance. An interpretation of the word "events" is therefore of interest only in the small number of States parties to the 1951 Convention that are not also party to the 1967 Protocol.[5]

[4] "Nansen Passport": a certificate of identity for use as a travel document, issued to refugees under the provisions of prewar instruments.
[5] See Annex IV.

36. The word "events" is not defined in the 1951 Convention, but was understood to mean "happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution which are after-effects of earlier changes".[6] The dateline refers to "events" as a result of which, and not to the date on which, a person becomes a refugee, not does it apply to the date on which he left his country. A refugee may have left his country before or after the datelines, provided that his fear of persecution is due to "events" that occurred before the dateline or to after-effects occurring at a later date as a result of such events.[7]

(2) "well founded fear of being persecuted"

(a) General analysis

37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.

38. To the element of fear – a state of mind and a subjective condition – is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted" – for the reasons stated – by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

40. An evaluation of the *subjective element* is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences – in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

42. As regards the objective clement, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background

[6] UN Document E/1618 page 39.
[7] *Loc. cit.*

situation. A knowledge of conditions in the applicant's country of origin –while not a primary objective – is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

43. These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the country of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well-founded".

44. While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called "group determination" of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.

45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

46. The expressions "fear of persecution" or even "persecution" are usually foreign to a refugee's normal vocabulary. A refugee will indeed only rarely invoke "fear of persecution" in these terms, though it will often be implicit in his story. Again, while a refugee may have very definite opinions for which he has had to suffer, he may not, for psychological reasons, be able to describe his experiences and situation in political terms.

47. A typical test of the well-foundedness of fear will arise when an applicant is in possession of a valid national passport. It has sometimes been claimed that possession of a passport signifies that the issuing authorities do not intend to persecute the holder, for otherwise they would not have issued a passport to him. Though this may be true in some cases, many persons have used a legal exit from their country as the only means of escape without ever having revealed their political opinions, a knowledge of which might place them in a dangerous situation vis-à-vis the authorities.

48. Possession of a passport cannot therefore always be considered as evidence of loyalty on the part of the holder, or as an indication of the absence of fear. A passport may even be issued to a person who is undesired in his country of origin, with the sole purpose of securing his departure, and there may also be cases where a passport has been obtained surreptitiously. In conclusion, therefore, the mere possession of a valid national passport is no bar to refugee status.

49. If, on the other hand, an applicant, without good reason, insists on retaining a valid passport of a country of whose protection he is allegedly unwilling to avail himself, this may cast doubt on the validity of his claim to have "well-founded fear". Once recognized, a refugee should not normally retain his national passport.

50. There may, however, be exceptional situations in which a person fulfilling the criteria of refugee status may retain his national passport-or be issued with a new one by the authorities of his country of origin under special arrangements. Particularly where such arrangements do not imply that the

holder of the national passport is free to return to his country without prior permission, they may not be incompatible with refugee status.

(b) Persecution

51. There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.

52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

(c) Discrimination

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.[8]

(d) Punishment

56. Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.

57. The above distinction may, however, occasionally be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition. Moreover, penal prosecution for a reason mentioned in the definition (for example, in respect of "illegal" religious instruction given to a child) may in itself amount to persecution.

[8] See also para. 53.

58. Secondly, there may be cases in which a person, besides fearing prosecution or punishment for a common law crime, may also have "well founded fear of persecution". In such cases the person concerned is a refugee. It may, however, be necessary to consider whether the crime in question is not of such a serious character as to bring the applicant within the scope of one of the exclusion clauses.[9]

59. In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against "public order", e.g. for distribution of pamphlets, could for example be a vehicle for the persecution of the individual on the grounds of the political content of the publication.

60. In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.

(e) Consequences of unlawful departure or unauthorized stay outside country of origin

61. The legislation of certain States imposes severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article 1 A (2) of the 1951 Convention (see paragraph 66 below).

(f) Economic migrants distinguished from refugees

62. A migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

63. The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.

64. Whether the same would apply to victims of general economic measures (i.e. those that are applied to the whole population without discrimination) would depend on the circumstances of the case. Objections to general economic measures are not by themselves good reasons for claiming refugee status. On the other hand, what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.

(g) Agents of persecution

65. Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country

[9] See para. 144 to 156.

concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

(3) "for reasons of race, religion, nationality, membership of a particular social group or political opinion"

(a) General analysis

66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.

67. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one clement combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.

(b) Race

68. Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population. Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution.

69. Discrimination on racial grounds will frequently amount to persecution in the sense of the 1951 Convention. This will be the case if, as a result of racial discrimination, a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences.

70. The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status. There may, however, be situations where, due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution.

(c) Religion

71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.

72. Persecution for "reasons of religion" may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.

73. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.

(d) Nationality

74. The term "nationality" in this context is not to be understood only as "citizenship". It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.

75. The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific "nationality".

76. Whereas in most cases persecution for reason of nationality is feared by persons belonging to a national minority, there have been many cases in various continents where a person belonging to a majority group may fear persecution by a dominant minority.

(e) Membership of a particular social group

77. A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

(f) Political opinion

80. Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant. The political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position. The relative importance or tenacity of the applicant's opinions – in so far as this can be established from all the circumstances of the case – will also be relevant.

81. While the definition speaks of persecution "for reasons of political opinion" it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on "opinion". More frequently, such measures take the form of sanctions for alleged criminal acts against the ruling power. It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.

82. As indicated above, persecution "for reasons of political opinion" implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

83. An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant's true state of mind and give rise to fear of persecution. In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned. This applies particularly to the so-called refugee "sur place".[10]

84. Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political *opinion* or for politically-motivated *acts*. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee.

85. Whether a political offender can also be considered a refugee will depend upon various other factors. Prosecution for an offence may, depending upon the circumstances, be a pretext for punishing the offender for his political opinions or the expression thereof. Again, there may be reason to believe that a political offender would be exposed to excessive or arbitrary punishment for the alleged offence. Such excessive or arbitrary punishment will amount to persecution.

86. In determining whether a political offender can be considered a refugee, regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; finally, also, the nature of the law on which the prosecution is based. These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment – within the law – for an act committed by him.

(4) "is outside the country of his nationality"

(a) General analysis

87. In this context, "nationality" refers to "citizenship". The phrase "is outside the country of his nationality" relates to persons who have a nationality, as distinct from stateless persons. In the majority of cases, refugees retain the nationality of their country of origin.

88. It is a general requirement for refugee status that an applicant who has a nationality be outside the country of his nationality. There are no exceptions to this rule. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.[11]

89. Where, therefore, an applicant alleges fear of persecution in relation to the country of his nationality, it should be established that he does in fact possess the nationality of that country. There may, however, be uncertainty as to whether a person has a nationality. He may not know himself, or he may wrongly claim to have a particular nationality or to be stateless. Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account. (See paragraphs 101 to 105 below.)

90. As mentioned above, an applicant's well-founded fear of persecution must be in relation to the country of his nationality. As long as he has no fear in relation to the country of his nationality, he can be expected to avail himself of that country's protection. He is not in need of international protection and is therefore not a refugee.

[10] See paras. 94 to 96.
[11] In certain countries, particularly in Latin America, there is a custom of "diplomatic asylum", i.e. granting refuge to political fugitives in foreign embassies. While a person thus sheltered may be considered to be outside his country's jurisdiction, he is not outside its territory and cannot therefore be considered under the terms of the 1951 Convention. The former notion of the "extraterritoriality" of embassies has lately been replaced by the term "inviolability" used in the 1961 Vienna Convention on Diplomatic Relations.

91. The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

92. The situation of persons having more than one nationality is dealt with in paragraphs 106 and 107 below.

93. Nationality may be proved by the possession of a national passport. Possession of such a passport creates a *prima facie* presumption that the holder is a national of the country of issue, unless the passport itself states otherwise. A person holding a passport showing him to be a national of the issuing country, but who claims that he does not possess that country's nationality, must substantiate his claim, for example, by showing that the passport is a so-called "passport of convenience" (an apparently regular national passport that is sometimes issued by a national authority to non-nationals). However, a mere assertion by the holder that the passport was issued to him as a matter of convenience for travel purposes only is not sufficient to rebut the presumption of nationality. In certain cases, it might be possible to obtain information from the authority that issued the passport. If such information cannot be obtained, or cannot be obtained within reasonable time, the examiner will have to decide on the credibility of the applicant's assertion in weighing all other elements of his story.

(b) Refugees *"sur place"*

94. The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee *"sur place"*.

95. A person becomes a refugee *"sur place"* due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.

96. A person may become a refugee *"sur place"* as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.

(5) "and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"

97. Unlike the phrase dealt with under (6) below, the present phrase relates to persons who have a nationality. Whether unable or unwilling to avail himself of the protection of his Government, a refugee is always a person who does not enjoy such protection.

98. Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.

99. What constitutes a refusal of protection must be determined according to the circumstances of the case. If it appears that the applicant has been denied services (e.g., refusal of a national passport or extension of its validity, or denial of admittance to the home territory) normally accorded to his co-nationals, this may constitute a refusal of protection within the definition.

100. The term *unwilling* refers to refugees who refuse to accept the protection of the Government of the country of their nationality.[12] It is qualified by the phrase "owing to such fear". Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution". Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.

(6) "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"

101. This phrase, which relates to stateless refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality. In the case of stateless refugees, the "country of nationality" is replaced by "the country of his former habitual residence", and the expression "unwilling to avail himself of the protection..." is replaced by the words "unwilling to return to it". In the case of a stateless refugee, the question of "availment of protection" of the country of his former habitual residence does not, of course, arise. Moreover, once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return.

102. It will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.

103. Such reasons must be examined in relation to the country of "former habitual residence" in regard to which fear is alleged. This was defined by the drafters of the 1951 Convention as "the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned".[13]

104. A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.

105. Once a stateless person has been determined a refugee in relation to "the country of his former habitual residence", any further change of country of habitual residence will not affect his refugee status.

(7) Dual or multiple nationality

Article 1 A (2), paragraph 2, of the 1951 Convention:

> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

106. This clause, which is largely self-explanatory, is intended to exclude from refugee status all persons with dual or multiple nationality who can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection.

[12] UN Document E/1618, p. 39.
[13] *Loc. cit.*

107. In examining the case of an applicant with dual or multiple nationality, it is necessary, however, to distinguish between the possession of a nationality in the legal sense and the availability of protection by the country concerned. There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals. In such circumstances, the possession of the second nationality would not be inconsistent with refugee status. As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of a reply within reasonable time may be considered a refusal.

(8) Geographical scope

108. At the time when the 1951 Convention was drafted, there was a desire by a number of States not to assume obligations the extent of which could not be foreseen. This desire led to the inclusion of the 1951 dateline, to which reference has already been made (paragraphs 35 and 36 above). In response to the wish of certain Governments, the 1951 Convention also gave to Contracting States the possibility of limiting their obligations under the Convention to persons who had become refugees as a result of events occurring in Europe.

109. Accordingly, Article 1 B of the 1951 Convention states that:

> (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either
>
> (a) "events occurring in Europe before 1 January 1951"; or
>
> (b) "events occurring in Europe and elsewhere before 1 January 1951";
>
> and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purposes of its obligations under this Convention.
>
> (2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

110. Of the States parties to the 1951 Convention, at the time of writing 9 still adhere to alternative (a), "events occurring in Europe".[14] While refugees from other parts of the world frequently obtain asylum in some of these countries, they are not normally accorded refugee status under the 1951 Convention.

[14] See Annex IV.

CHAPTER III – CESSATION CLAUSES

A. GENERAL

111. The so-called "cessation clauses" (Article 1 C (1) to (6) of the 1951 Convention) spell out the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified.

112. Once a person's status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses.[15] This strict approach towards the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin.

113. Article 1 C of the 1951 Convention provides that:

> This Convention shall cease to apply to any person falling under the terms of section A if:
>
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
>
> (2) Having lost his nationality, he has voluntarily re-acquired it; or
>
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
>
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

114. Of the six cessation clauses, the first four reflect a change in the situation of the refugee that has been brought about by himself, namely:

1. voluntary re-availment of national protection;

2. voluntary re-acquisition of nationality;

3. acquisition of a new nationality;

4. voluntary re-establishment in the country where persecution was feared.

115. The last two cessation clauses, (5) and (6), are based on the consideration that international protection is no longer justified on account of changes in the country where persecution was feared, because the reasons for a person becoming a refugee have ceased to exist.

116. The cessation clauses are negative in character and are exhaustively enumerated. They should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status. Needless to say, if a refugee, for whatever reasons, no longer

[15] In some cases refugee status may continue, even though the reasons for such status have evidently ceased to exist. Cf sub-sections (5) and (6) (paras. 135 to 139 below).

wishes to be considered a refugee, there will be no call for continuing to grant him refugee status and international protection.

117. Article 1 C does not deal with the cancellation of refugee status. Circumstances may, however, come to light that indicate that a person should never have been recognized as a refugee in the first place; e.g. if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that the person concerned possesses another nationality, or that one of the exclusion clauses would have applied to him had all the relevant facts been known. In such cases, the decision by which he was determined to be a refugee will normally be cancelled.

B. INTERPRETATION OF TERMS

(1) Voluntary re-availment of national protection

Article 1 C (1) of the 1951 Convention:

> He has voluntarily re-availed himself of the protection of the country of his nationality;

118. This cessation clause refers to a refugee possessing a nationality who remains outside the country of his nationality. (The situation of a refugee who has actually returned to the country of his nationality is governed by the fourth cessation clause, which speaks of a person having "re-established" himself in that country.) A refugee who has voluntarily re-availed himself of national protection is no longer in need of international protection. He has demonstrated that he is no longer "unable or unwilling to avail himself of the protection of the country of his nationality".

119. This cessation clause implies three requirements:

(a) voluntariness: the refugee must act voluntarily;

(b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;

(c) re-availment: the refugee must actually obtain such protection.

120. If the refugee does not act voluntarily, he will not cease to be a refugee. If he is instructed by an authority, e.g. of his country of residence, to perform against his will an act that could be interpreted as a re-availment of the protection of the country of his nationality, such as applying to his Consulate for a national passport, he will not cease to be a refugee merely because he obeys such an instruction. He may also be constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to apply for a divorce in his home country because no other divorce may have the necessary international recognition. Such an act cannot be considered to be a "voluntary re-availment of protection" and will not deprive a person of refugee status.

121. In determining whether refugee status is lost in these circumstances, a distinction should be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities. If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality. On the other hand, the acquisition of documents from the national authorities, for which non-nationals would likewise have to apply – such as a birth or marriage certificate – or similar services, cannot be regarded as a re-availment of protection.

122. A refugee requesting protection from the authorities of the country of his nationality has only "re-availed" himself of that protection when his request has actually been granted. The most frequent case of "re-availment of protection" will be where the refugee wishes to return to his country of nationality. He will not cease to be a refugee merely by applying for repatriation. On the other hand,

obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status.[16] This does not, however, preclude assistance being given to the repatriant – also by UNHCR – in order to facilitate his return.

123. A refugee may have voluntarily obtained a national passport, intending either to avail himself of the protection of his country of origin while staying outside that country, or to return to that country. As stated above, with the receipt of such a document he normally ceases to be a refugee. If he subsequently renounces either intention, his refugee status will need to be determined afresh. He will need to explain why he changed his mind, and to show that there has been no basic change in the conditions that originally made him a refugee.

124. Obtaining a national passport or an extension of its validity may, under certain exceptional conditions, not involve termination of refugee status (see paragraph 120 above). This could for example be the case where the holder of a national passport is not permitted to return to the country of his nationality without specific permission.

125. Where a refugee visits his former home country not with a national passport but, for example, with a travel document issued by his country of residence, he has been considered by certain States to have re-availed himself of the protection of his former home country and to have lost his refugee status under the present cessation clause. Cases of this kind should, however, be judged on their individual merits. Visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays or for the purpose of establishing business relations.

(2) Voluntary re-acquisition of nationality

Article 1 C (2) of the 1951 Convention:

> Having lost his nationality, he has voluntarily re-acquired it;

126. This clause is similar to the preceding one. It applies to cases where a refugee, having lost the nationality of the country in respect of which he was recognized as having well-founded fear of persecution, voluntarily re-acquires such nationality.

127. While under the preceding clause (Article 1 C (1)) a person having a nationality ceases to be a refugee if he re-avails himself of the protection attaching to such nationality, under the present clause (Article 1 C (2)) he loses his refugee status by re-acquiring the nationality previously lost.[17]

128. The re-acquisition of nationality must be voluntary. The granting of nationality by operation of law or by decree does not imply voluntary reacquisition, unless the nationality has been expressly or impliedly accepted. A person does not cease to be a refugee merely because he could have reacquired his former nationality by option, unless this option has actually been exercised. If such former nationality is granted by operation of law, subject to an option to reject, it will be regarded as a voluntary re-acquisition if the refugee, with full knowledge, has not exercised this option; unless he is able to invoke special reasons showing that it was not in fact his intention to re-acquire his former nationality.

(3) Acquisition of a new nationality and protection

Article 1 C (3) of the 1951 Convention:

> He has acquired a new nationality and enjoys the protection of the country of his new nationality;

[16] The above applies to a refugee who is still outside his country. It will be noted that the fourth cessation clause provides that any refugee will cease to be a refugee when he has voluntarily "re-established" himself in his country of nationality or former habitual residence.
[17] In the majority of cases a refugee maintains the nationality of his former home country. Such nationality may be lost by individual or collective measures of deprivation of nationality. Loss of nationality (statelessness) is therefore not necessarily implicit in refugee status.

129. As in the case of the re-acquisition of nationality, this third cessation clause derives from the principle that a person who enjoys national protection is not in need of international protection.

130. The nationality that the refugee acquires is usually that of the country of his residence. A refugee living in one country may, however, in certain cases, acquire the nationality of another country. If he does so, his refugee status will also cease, provided that the new nationality also carries the protection of the country concerned. This requirement results from the phrase "and enjoys the protection of the country of his new nationality".

131. If a person has ceased to be a refugee, having acquired a new nationality, and then claims well-founded fear in relation to the country of his new nationality, this creates a completely new situation and his status must be determined in relation to the country of his new nationality.

132. Where refugee status has terminated through the acquisition of a new nationality, and such new nationality has been lost, depending on the circumstances of such loss, refugee status may be revived.

(4) Voluntary re-establishment in the country where persecution was feared

Article 1 C (4) of the 1951 Convention:

> He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution;

133. This fourth cessation clause applies both to refugees who have a nationality and to stateless refugees. It relates to refugees who, having returned to their country of origin or previous residence, have not previously ceased to be refugees under the first or second cessation clauses while still in their country of refuge.

134. The clause refers to "voluntary re-establishment". This is to be understood as return to the country of nationality or former habitual residence with a view to permanently residing there. A temporary visit by a refugee to his former home country, not with a national passport but, for example, with a travel document issued by his country of residence, does not constitute "re-establishment" and will not involve loss of refugee status under the present clause.[18]

(5) Nationals whose reasons for becoming a refugee have ceased to exist

Article 1 C (5) of the 1951 Convention:

> He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

135. Circumstances" refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution. A mere – possibly transitory – change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable. A refugee's status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide.

136. The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the

[18] See para. 125 above.

exception applies to "statutory refugees". At the time when the 1951 Convention was elaborated, these 'formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.

(6) Stateless persons whose reasons for becoming a refugee have ceased to exist

Article 1 C (6) of the 1951 Convention:

> Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

137. This sixth and last cessation clause is parallel to the fifth cessation clause, which concerns persons who have a nationality. The present clause deals exclusively with stateless persons who are able to return to the country of their former habitual residence.

138. "Circumstances" should be interpreted in the same way as under the fifth cessation clause.

139. It should be stressed that, apart from the changed circumstances in his country of former habitual residence, the person concerned must be *able* to return there. This, in the case of a stateless person, may not always be possible.

CHAPTER IV – EXCLUSION CLAUSES

A. GENERAL

140. The 1951 Convention, in Sections D, E and F of Article 1, contains provisions whereby persons otherwise having the characteristics of refugees, as defined in Article 1, Section A, are excluded from refugee status. Such persons fall into three groups. The first group (Article 1 D) consists of persons already receiving United Nations protection or assistance; the second group (Article 1 E) deals with persons who are not considered to be in need of international protection; and the third group (Article 1 F) enumerates the categories of persons who are not considered to be deserving of international protection.

141. Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken.

B. INTERPRETATION OF TERMS

(1) Persons already receiving United Nations protection or assistance

Article 1 D of the 1951 Convention:

> This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
>
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

142. Exclusion under this clause applies to any person who is in receipt of protection or assistance from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees. Such protection or assistance was previously given by the former United Nations Korean Reconstruction Agency (UNKRA) and is currently given by the United Nations Relief and Works Agency for Palestine Refugees In the Near East (UNRWA). There could be other similar situations in the future.

143. With regard to refugees from Palestine, it will be noted that UNRWA operates only in certain areas of the Middle East, and it is only there that its protection or assistance are given. Thus, a refugee from Palestine who finds himself outside that area does not enjoy the assistance mentioned and may be considered for determination of his refugee status under the criteria of the 1951 Convention. It should normally be sufficient to establish that the circumstances which originally made him qualify for protection or assistance from UNRWA still persist and that he has neither ceased to be a refugee under one of the cessation clauses nor is excluded from the application of the Convention under one of the exclusion clauses.

(2) Persons not considered to be in need of international protection

Article 1 E of the 1951 Convention:

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

144. This provision relates to persons who might otherwise qualify for refugee status and who have been received in a country where they have been granted most of the rights normally enjoyed by nationals, but not formal citizenship. (They are frequently referred to as "national refugees".) The country that has received them is frequently one where the population is of the same ethnic origin as themselves.[19]

145. There is no precise definition of "rights and obligations" that would constitute a reason for exclusion under this clause. It may, however, be said that the exclusion operates if a person's status is largely assimilated to that of a national of the country. In particular he must, like a national, be fully protected against deportation or expulsion.

146. The clause refers to a person who has "taken residence" in the country concerned. This implies continued residence and not a mere visit. A person who resides outside the country and does not enjoy the diplomatic protection of that country is not affected by the exclusion clause.

(3) Persons considered not to be deserving of international protection

Article 1 F of the 1951 Convention:

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

147. The pre-war international instruments that defined various categories of refugees contained no provisions for the exclusion of criminals. It was immediately after the Second World War that for the first time special provisions were drawn up to exclude from the large group of then assisted refugees certain persons who were deemed unworthy of international protection.

148. At the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected. There was also a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order.

149. The competence to decide whether any of these exclusion clauses are applicable is incumbent upon the Contracting State in whose territory the applicant seeks recognition of his refugee status. For these clauses to apply, it is sufficient to establish that there are "serious reasons for considering" that one of the acts described has been committed. Formal proof of previous penal prosecution is not required. Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive.

(a) War crimes, etc.

> (a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

150. In mentioning crimes against peace, war crimes or crimes against humanity, the Convention refers generally to "international instruments drawn up to make provision in respect of such crimes". There are a considerable number of such instruments dating from the end of the Second World War up to the present time. All of them contain definitions of what constitute "crimes against peace, war

[19] In elaborating this exclusion clause, the drafters of the Convention had principally in mind refugees of German extraction having arrived in the Federal Republic of Germany who were recognized as possessing the rights and obligations attaching to German nationality.

crimes and crimes against humanity". The most comprehensive definition will be found in the 1945 London Agreement and Charter of the International Military tribunal. The definitions contained in the above-mentioned London Agreement and a list of other pertinent instruments are given in Annexes V and VI.

(b) Common crimes

> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

151. The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.

152. In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

153. Only a crime committed or presumed to have been committed by an applicant "outside the country of refuge prior to his admission to that country as a refugee" is a ground for exclusion. The country outside would normally be the country of origin, but it could also be another country, except the country of refuge where the applicant seeks recognition of his refugee status.

154. A refugee committing a serious crime in the country of refuge is subject to due process of law in that country. In extreme cases, Article 33 paragraph 2 of the Convention permits a refugee's expulsion or return to his former home country if, having been convicted by a final judgement of a "particularly serious" common crime, he constitutes a danger to the community of his country of refuge.

155. What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. in some countries the word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as "crimes" in the penal law of the country concerned.

156. In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.

157. In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

158. Considerations similar to those mentioned in the preceding paragraphs will apply when a crime – in the widest sense – has been committed as a means of, or concomitant with, escape from the country where persecution was feared. Such crimes may range from the theft of a means of locomotion to endangering or taking the lives of innocent people. While for the purposes of the present exclusion clause it may be possible to over-look the fact that a refugee, not finding any other means of escape, may have crashed the border in a stolen car, decisions will be more difficult where he has hijacked an aircraft, i.e. forced its crew, under threat of arms or with actual violence, to change destination in order to bring him to a country of refuge.

159. As regards hijacking, the question has arisen as to whether, if committed in order to escape from persecution, it constitutes a serious non-political crime within the meaning of the present exclusion clause. Governments have considered the unlawful seizure of aircraft on several occasions within the framework of the United Nations, and a number of international conventions have been adopted dealing with the subject. None of these instruments mentions refugees. However, one of the reports leading to the adoption of a resolution on the subject states that "the adoption of the draft Resolution cannot prejudice any international legal rights or duties of States under instruments relating to the status of refugees and stateless persons". Another report states that "the adoption of the draft Resolution cannot prejudice any international legal rights or duties of States with respect to asylum".[20]

160. The various conventions adopted in this connexion[21] deal mainly with the manner in which the perpetrators of such acts have to be treated. They invariably give Contracting States the alternative of extraditing such persons or instituting penal proceedings for the act on their own territory, which implies the right to grant asylum.

161. While there is thus a possibility of granting asylum, the gravity of the persecution of which the offender may have been in fear, and the extent to which such fear is well-founded, will have to be duly considered in determining his possible refugee status under the 1951 Convention. The question of the exclusion under Article 1 F (b) of an applicant who has committed an unlawful seizure of an aircraft will also have to be carefully examined in each individual case.

(c) Acts contrary to the purposes and principles of the United Nations

> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

162. It will be seen that this very generally-worded exclusion clause overlaps with the exclusion clause in Article 1 F (a); for it is evident that a crime against peace, a war crime or a crime against humanity is also an act contrary to the purposes and principles of the United Nations. While Article 1 F (c) does not introduce any specific new element, it is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses. Taken in conjunction with the latter, it has to be assumed, although this is not specifically stated, that the acts covered by the present clause must also be of a criminal nature.

163. The purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. They enumerate fundamental principles that should govern the conduct of their members in relation to each other and in relation to the international community as a whole. From this it could be inferred that an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles. However, there are hardly any precedents on record for the application of this clause, which, due to its very general character, should be applied with caution.

[20] Reports of the Sixth Committee on General Assembly resolutions 2645 (XXV). United Nations document A/8716, and 2551 (XXIV), United Nations document A/7845.
[21] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963. Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 16 December 1970. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971.

CHAPTER V – SPECIAL CASES

A. WAR REFUGEES

164. Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol.[22] They do, however, have the protection provided for in other international instruments, e.g. the Geneva Conventions of 1949 on the Protection of War Victims and the 1977 Protocol additional to the Geneva Conventions of 1949 relating to the protection of Victims of International Armed Conflicts.[23]

165. However, foreign invasion or occupation of all or part of a country can result – and occasionally has resulted – in persecution for one or more of the reasons enumerated in the 1951 Convention. In such cases, refugee status will depend upon whether the applicant is able to show that he has a "well-founded fear of being persecuted" in the occupied territory and, in addition, upon whether or not he is able to avail himself of the protection of his government, or of a protecting power whose duty it is to safeguard the interests of his country during the armed conflict, and whether such protection can be considered to be effective.

166. Protection may not be available if there are no diplomatic relations between the applicant's host country and his country of origin. If the applicant's government is itself in exile, the effectiveness of the protection that it is able to extend may be open to question. Thus, every case has to be judged on its merits, both in respect of well-founded fear of persecution and of the availability of effective protection on the part of the government of the country of origin.

B. DESERTERS AND PERSONS AVOIDING MILITARY SERVICE

167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The Penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.

168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement

[22] In respect of Africa, however, see the definition in Article 1 (2) of the OAU Convention concerning the Specific Aspects of Refugee Problems in Africa, quoted in para. 22 above.
[23] See Annex VI, items (6) and (7).

with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.[24] In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

C. PERSONS HAVING RESORTED TO FORCE OR COMMITTED ACTS OF VIOLENCE

175. Applications for refugee status are frequently made by persons who have used force or committed acts of violence. Such conduct is frequently associated with, or claimed to be associated with, political activities or political opinions. They may be the result of individual initiatives, or may have been committed within the framework of organized groups. The latter may either be clandestine groupings or political cum military organizations that are officially recognized or whose activities are widely acknowledged.[25] Account should also be taken of the fact that the use of force is an aspect of the maintenance of law and order and may – by definition – be lawfully resorted to by the police and armed forces in the exercise of their functions.

176. An application for refugee status by a person having (or presumed to have) used force, or to have committed acts of violence of whatever nature and within whatever context, must in the first place – like any other application – be examined from the standpoint of the inclusion clauses in the 1951 Convention (paragraphs 32-110 above).

177. Where it has been determined that an applicant fulfils the inclusion criteria, the question may arise as to whether, in view of the acts involving the use of force or violence committed by him, he may not be covered by the terms of one or more of the exclusion clauses. These exclusion clauses, which figure in Article 1 F (a) to (c) of the 1951 Convention, have already been examined (paragraphs 147 to 163 above).

[24] Cf Recommendation 816 (1977) on the Right of Conscientious Objection to Military Service, adopted at the Parliamentary Assembly of the Council of Europe at its Twenty-ninth Ordinary Session (5-13 October 1977).
[25] A number of liberation movements, which often include an armed wing, have been officially recognized by the General Assembly of the United Nations. Other liberation movements have only been recognized by a limited number of governments. Others again have no official recognition.

178. The exclusion clause in Article 1 F (a) was originally intended to exclude from refugee status any person in respect of whom there were serious reasons for considering that he has "committed a crime against peace, a war crime, or a crime against humanity" in an official capacity. This exclusion clause is, however, also applicable to persons who have committed such crimes within the framework of various non-governmental groupings, whether officially recognized, clandestine or self-styled.

179. The exclusion clause in Article 1 F (b), which refers to "a serious non-political crime", is normally not relevant to the use of force or to acts of violence committed in an official capacity. The interpretation of this exclusion clause has already been discussed. The exclusion clause in Article 1 F (c) has also been considered. As previously indicated, because of its vague character, it should be applied with caution.

180. It will also be recalled that, due to their nature and the serious consequences of their application to a person in fear of persecution, the exclusion clauses should be applied in a restrictive manner.

CHAPTER VI – THE PRINCIPLE OF FAMILY UNITY

181. Beginning with the Universal Declaration of Human Rights, which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.

182. The Final Act of the Conference that adopted the 1951 Convention:

> Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
>
> (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.
>
> (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.[26]

183. The 1951 Convention does not incorporate the principle of family unity in the definition of the term refugee. The above-mentioned Recommendation in the Final Act of the Conference is, however, observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol.

184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them.

186. The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.

187. Where the unity of a refugee's family is destroyed by divorce, separation or death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees.

188. If the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him.

[26] See Annex 1.

PART TWO

PROCEDURES FOR THE DETERMINATION OF REFUGEE STATUS

A. GENERAL

189. It has been seen that the 1951 Convention and the 1967 Protocol define who is a refugee for the purposes of these instruments. It is obvious that, to enable States parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure.

190. It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.

191. Due to the fact that the matter is not specifically regulated by the 1951 Convention, procedures adopted by States parties to the 1951 Convention and to the 1967 Protocol vary considerably. In a number of countries, refugee status is determined under formal procedures specifically established for this purpose. In other countries, the question of refugee status is considered within the framework of general procedures for the admission of aliens. In yet other countries, refugee status is determined under informal arrangements, or *ad hoc* for specific purposes, such as the issuance of travel documents.

192. In view of this situation and of the unlikelihood that all States bound by the 1951 Convention and the 1967 Protocol could establish identical procedures, the Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements. These basic requirements, which reflect the special situation of the applicant for refugee status, to which reference has been made above, and which would ensure that the applicant is provided with certain essential guarantees, are the following:

(i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.

(ii) The applicant should receive the necessary guidance as to the procedure to be followed.

(iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance.

(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.

(v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.

(vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.[27]

193. The Executive Committee also expressed the hope that all States parties to the 1951 Convention and the 1967 Protocol that had not yet done so would take appropriate steps to establish such procedures in the near future and give favourable consideration to UNHCR participation in such procedures in appropriate form.

194. Determination of refugee status, which is closely related to questions of asylum and admission, is of concern to the High Commissioner in the exercise of his function to provide international protection for refugees. In a number of countries, the Office of the High Commissioner participates in various forms, in procedures for the determination of refugee status. Such participation is based on Article 35 of the 1951 Convention and the corresponding Article 11 of the 1967 Protocol, which provide for co-operation by the Contracting States with the High Commissioner's Office.

B. ESTABLISHING THE FACTS

(1) Principles and methods

195. The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

[27] Official Records of the General Assembly, Thirty second Session, Supplement No. 12 (A/32/12/Add.1), para. 53 (6) (e).

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

198. A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.

199. While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case.

200. An examination in depth of the different methods of fact-finding is outside the scope of the present Handbook. It may be mentioned, however, that basic information is frequently given, in the first instance, by completing a standard questionnaire. Such basic information will normally not be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required. It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statements will be treated as confidential and that he be so informed.

201. Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above the others, sometimes a small incident may be "the last straw"; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear "well-founded" (see paragraph 53 above).

202. Since the examiner's conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding and his judgement should not, of course, be influenced by the personal consideration that the applicant may be an "undeserving case".

(2) Benefit of the doubt

203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.

204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

(3) Summary

205. The process of ascertaining and evaluating the facts can therefore be summarized as follows:

(a) The *applicant* should:

(i) Tell the truth and assist the examiner to the full in establishing the facts of his case.

(ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.

(iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.

(b) The *examiner* should:

(i) Ensure that the applicant presents his case as fully as possible and with all available evidence.

(ii) Assess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case.

(iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status.

C. CASES GIVING RISE TO SPECIAL PROBLEMS IN ESTABLISHING THE FACTS

(1) Mentally disturbed persons

206. It has been seen that in determining refugee status the subjective element of fear and the objective element of its well-foundedness need to be established.

207. It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.

208. The examiner should, in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case (see paragraph 205 (a) above). The conclusions of the medical report will determine the examiner's further approach.

209. This approach has to vary according to the degree of the applicant's affliction and no rigid rules can be laid down. The nature and degree of the applicant's "fear" must also be taken into consideration, since some degree of mental disturbance is frequently found in persons who have been exposed to severe persecution. Where there are indications that the fear expressed by the applicant may not be based on actual experience or may be an exaggerated fear, it may be necessary, in arriving at a decision, to lay greater emphasis on the objective circumstances, rather than on the statements made by the applicant.

210. It will, in any event, be necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.

211. In examining his application, therefore, it may not be possible to attach the same importance as is normally attached to the subjective element of "fear", which may be less reliable, and it may be necessary to place greater emphasis on the objective situation.

212. In view of the above considerations, investigation into the refugee status of a mentally disturbed person will, as a rule, have to be more searching than in a "normal" case and will call for a close examination of the applicant's past history and background, using whatever outside sources of information may be available.

(2) Unaccompanied minors

213. There is no special provision in the 1951 Convention regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals, regardless of their age. When it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criteria of "well-founded fear" in his case. If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity (paragraphs 181 to 188 above).

214. The question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enrol the services of experts conversant with child mentality. A child – and for that matter, an adolescent – not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests. In the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.

215. Where a minor is no longer a child but an adolescent, it will be easier to determine refugee status as in the case of an adult, although this again will depend upon the actual degree of the adolescent's maturity. It can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have fear and a will of their own, but these may not have the same significance as in the case of an adult.

216. It should, however, be stressed that these are only general guidelines and that a minor's mental maturity must normally be determined in the light of his personal, family and cultural background.

217. Where the minor has not reached a sufficient degree of maturity to make it possible to establish well-founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors. Thus, if an unaccompanied minor finds himself in the company of a group of refugees, this may – depending on the circumstances – indicate that the minor is also a refugee.

218. The circumstances of the parents and other family members, including their situation in the minor's country of origin, will have to be taken into account. If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution, the child himself may be presumed to have such fear.

219. If the will of the parents cannot be ascertained or if such will is in doubt or in conflict with the will of the child, then the examiner, in cooperation with the experts assisting him, will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.

CONCLUSION

220. In the present Handbook an attempt has been made to define certain guidelines that, in the experience of UNHCR, have proved useful in determining refugee status for the purposes of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. In so doing, particular attention has been paid to the definitions of the term "refugee" in these two instruments, and to various problems of interpretation arising out of these definitions. It has also been sought to show how these definitions may be applied in concrete cases and to focus attention on various procedural problems arising in regard to the determination of refugee status.

221. The Office of the High Commissioner is fully aware of the shortcomings inherent in a Handbook of this nature, bearing in mind that it is not possible to encompass every situation in which a person may apply for refugee status. Such situations are manifold and depend upon the infinitely varied conditions prevailing in countries of origin and on the special personal factors relating to the individual applicant.

222. The explanations given have shown that the determination of refugee status is by no means a mechanical and routine process. On the contrary, it calls for specialized knowledge, training and experience and – what is more important – an understanding of the particular situation of the applicant and of the human factors involved.

223. Within the above limits it is hoped that the present Handbook may provide some guidance to those who in their daily work are called upon to determine refugee status.

ANNEXES

ANNEX I

EXCERPT FROM THE FINAL ACT OF THE UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS[28]

IV

The Conference adopted unanimously the following recommendations:

A.

"THE CONFERENCE,

"*Considering* that the issue and recognition of travel documents is necessary to facilitate the movement of refugees, and in particular their resettlement,

"*Urges* Governments which are parties to the Inter-Governmental Agreement on Refugee Travel Documents signed in London 15 October 1946, or which recognize travel documents issued in accordance with the Agreement, to continue to issue or to recognize such travel documents, and to extend the issue of such documents to refugees as defined in article 1 of the Convention relating to the Status of Refugees or to recognize the travel documents so issued to such persons, until they shall have undertaken obligations under article 28 of the said Convention."

B.

"THE CONFERENCE,

"*Considering* that the unity of the family, the natural and fundamental group of society, is an essential right of the refugee, and that such unity is constantly threatened, and

"*Noting* with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems the rights granted to a refugee are extended to members of his family,

"*Recommends* Governments to take the necessary measure protection of the refugee's family, especially with a view to:

"(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,

"(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

[28] United Nations Treaty Series, vol. 189, p. 37.

C.

"THE CONFERENCE,

"*Considering* that, in the moral, legal and material spheres, refugees need the help of suitable welfare services, especially that of appropriate non-governmental organizations,

"*Recommends* Governments and inter-governmental bodies to facilitate, encourage and sustain the efforts of properly qualified or organizations."

D.

"THE CONFERENCE,

"*Considering* that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position,

"*Recommends* that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement."

E.

"THE CONFERENCE,

"*Expresses* the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

ANNEX II

1951 CONVENTION RELATING TO THE STATUS OF REFUGEES[29]

PREAMBLE

THE HIGH CONTRACTING PARTIES

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature the cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of Refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

CHAPTER I – GENERAL PROVISIONS

Article 1

Definition of the term "Refugee"

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

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

[29] United Nations Treaty Series, vol. 189, p. 137.

(2) As a result of events occurring before 1 January 1951 and 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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either:

(a) "events occurring in Europe before 1 January 1951" or

(b) "events occurring in Europe or elsewhere before 1 January 1951"

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of Section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily re-acquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2

General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3

Non-Discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4

Religion

The Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

Article 5

Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6

The term "in the same circumstances"

For the purpose of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7

Exemption from reciprocity

1. Except where this Convention contains more favorable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favorably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8

Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favor of such refugees.

Article 9

Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10

Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11

Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that state shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them on their temporary admissions to its territory particularly with a view to facilitating their establishment in another country.

CHAPTER II – JURIDICAL STATUS

Article 12

Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13

Movable and immovable property

The Contracting States shall accord to a refugee treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14

Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the

country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has habitual residence.

Article 15

Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16

Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

CHAPTER III – GAINFUL EMPLOYMENT

Article 17

Wage-earning employment

1. The Contracting State shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting States concerned, or who fulfills one of the following conditions:

(a) He has completed three years residence in the country;

(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse;

(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18

Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19

Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

CHAPTER IV – WELFARE

Article 20

Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21

Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances.

Article 22

Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favorable as possible, and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23

Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24

Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

CHAPTER V – ADMINISTRATIVE MEASURES

Article 25

Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26

Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 27

Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28

Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such document. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29

Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30

Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31

Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

Prohibition of expulsion or return ("refoulement")

1. 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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 34

Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and cost of such proceedings.

CHAPTER VI – EXECUTORY AND TRANSITORY PROVISIONS

Article 35

Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees,

(b) the implementation of this Convention, and

(c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36

Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37

Relation to previous conventions

Without prejudice to article 28, Paragraph 2, of this Convention, this Convention replaces, as between parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

CHAPTER VII – FINAL CLAUSES

Article 38

Settlement of disputes

Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39

Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European office of the United Nations from 28 July to 31 August 1951 and shall be reopened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States members of the United Nations and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this Article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40

Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the States concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject where necessary for constitutional reasons, to the consent of the governments of such territories.

Article 41

Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States,

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favorable recommendation, to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment.

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42

Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36 to 46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43

Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the day of deposit by such State of its instrument of ratification or accession.

Article 44

Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45

Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46

Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) of declarations and notifications in accordance with Section B of Article 1;

(b) of signatures, ratifications and accessions in accordance with article 39;

(c) of declarations and notifications in accordance with article 40;

(d) of reservations and withdrawals in accordance with article 42;

(e) of the date on which this Convention will come into force in accordance with article 43;

(f) of denunciations and notifications in accordance with article 44;

(g) of requests for revision in accordance with article 45.

In faith whereof the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments,

Done at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

SCHEDULE

Paragraph 1

1. The travel document referred to in article 28 of this Convention shall be similar to the specimen annexed hereto.

2. The document shall be made out in at least two languages, one of which shall be in English or French.

Paragraph 2

Subject to the regulations obtaining in the country of issue, children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee.

Paragraph 3

The fees charged for issue of the document shall not exceed the lowest scale of charges for national passports.

Paragraph 4

Save in special or exceptional cases, the document shall be made valid for the largest possible number of countries.

Paragraph 5

The document shall have a validity of either one or two years, at the discretion of the issuing authority.

Paragraph 6

1. The renewal or extension of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document.

2. Diplomatic or consular authorities, specially authorized for the purpose, shall be empowered to extend, for a period not exceeding six months, the validity of travel documents issued by the Governments.

3. The Contracting States shall give sympathetic consideration to renewing or extending the validity of travel documents or issuing new documents to refugees no longer lawfully resident in their territory who are unable to obtain a travel document from the country of their lawful residence.

Paragraph 7

The Contracting States shall recognize the validity of the documents issued in accordance with the provisions of article 28 of this Convention.

Paragraph 8

The competent authorities of the country to which the refugee desires to proceed shall, if they are prepared to admit him and if a visa is required, affix a visa on the document of which he is the holder.

Paragraph 9

1. The Contracting States undertake to issue transit visas to refugees who have obtained visas for a territory of final destination.

2. The issue of such visas may be refused on grounds which would justify refusal of a visa to any alien.

Paragraph 10

The fees for the issue of exit, entry or transit visas shall not exceed the lowest scale of charges for visas on foreign passports.

Paragraph 11

When a refugee has lawfully taken up residence in the territory of another Contracting State, the responsibility for the issue of a new document, under the terms and conditions of article 28, shall be that of the competent authority of that territory, to which the refugee shall be entitled to apply.

Paragraph 12

The authority issuing a new document shall withdraw the old document and shall return it to the country of issue, if it is stated in the document that it should be so returned; otherwise it shall withdraw and cancel the document.

Paragraph 13

1. Each Contracting State undertakes that the holder of a travel document issued by it in accordance with article 28 of this Convention shall be readmitted to its territory at any time during the period of its validity.

2. Subject to the provisions of the preceding sub-paragraph, a Contracting State may require the holder of the document to comply with such formalities as may be prescribed in regard to exit from or return to its territory.

3. The Contracting States reserve the right, in exceptional cases, or in cases where the refugee's stay is authorized for a specific period, when issuing the document, to limit the period during which the refugee may return to a period of not less than three months.

Paragraph 14

Subject only to the terms of paragraph 13, the provisions of this Schedule in no way affect the laws and regulations governing the conditions of admission to, transit through, residence and establishment in, and departure from, the territories of the Contracting States.

Paragraph 15

Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality.

Paragraph 16

The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection.

ANNEX – SPECIMEN TRAVEL DOCUMENT

[not reproduced here]

ANNEX III

1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES[30]

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

Article I

General provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "... as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

Article II

Co-operation of the national authorities with the United Nations

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(a) The condition of refugees;

[30] United Nations, Treaty Series, vol 606, p. 267.

(b) The implementation of the present Protocol;

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article III

Information on national legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article IV

Settlement of disputes

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article V

Accession

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article VI

Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article 1, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII

Reservations and Declarations

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declarations made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

Article VIII

Entry into force

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article IX

Denunciation

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article X

Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto.

Article XI

Deposit in the Archives of the Secretariat of the United Nations

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.

ANNEX IV

LIST OF STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL

Date of entry into force:
22 April 1954 (Convention)
4 October 1967 (Protocol)

As of 10 December 2018

Total number of States Parties to the 1951 Convention: 146
Total number of States Parties to the 1967 Protocol: 147
States Parties to both the Convention and Protocol: 144
States Parties to one or both of these instruments: 149

States Parties to the 1951 Convention only:

Madagascar and Saint Kitts and Nevis

States Parties to the 1967 Protocol only:

Cape Verde, United States of America, Venezuela

The dates indicated are the dates of deposit of the instrument of ratification or accession by the respective States Parties with the Secretary-General of the United Nations in New York. In accordance with article 43(2), the Convention enters into force on the ninetieth day after the date of deposit. The Protocol enters into force on the date of deposit (article VIII (2)). Exceptions are indicated below.

Country[31]	Convention	Protocol
Afghanistan	30 Aug 2005 a	30 Aug 2005 a
Albania	18 Aug 1992 a	18 Aug 1992 a
Algeria	21 Feb 1963 d	08 Nov 1967 a
Angola	23 Jun 1981 a	23 Jun 1981 a
Antigua and Barbuda	07 Sep 1995 a	07 Sep 1995 a
Argentina	15 Nov 1961 a	06 Dec 1967 a
Armenia	06 Jul 1993 a	06 Jul 1993 a
Australia	22 Jan 1954 a	13 Dec 1973 a
Austria	01 Nov 1954 r	05 Sep 1973 a
Azerbaijan	12 Feb 1993 a	12 Feb 1993 a
Bahamas	15 Sep 1993 a	15 Sep 1993 a
Belarus	23 Aug 2001 a	23 Aug 2001 a
Belgium	22 Jul 1953 r	08 Apr 1969 a
Belize	27 Jun 1990 a	27 Jun 1990 a
Benin	04 Apr 1962 d	06 Jul 1970 a
Bolivia, Plurinational State of	09 Feb 1982 a	09 Feb 1982 a
Bosnia and Herzegovina	01 Sep 1993 d	01 Sep 1993 d
Botswana	06 Jan 1969 a	06 Jan 1969 a
Brazil	16 Nov 1960 r	07 Apr 1972 a
Bulgaria	12 May 1993 a	12 May 1993 a

[31] Notes:
* Ratification (r), Accession (a), Succession (d).
** (C) denotes States Parties to the 1951 Convention only; (P) denotes States Parties to the 1967 Protocol only.

Country	Convention	Protocol
Burkina Faso	18 Jun 1980 a	18 Jun 1980 a
Burundi	19 Jul 1963 a	15 Mar 1971 a
Cambodia	15 Oct 1992 a	15 Oct 1992 a
Cameroon	23 Oct 1961 d	19 Sep 1967 a
Canada	04 Jun 1969 a	04 Jun 1969 a
Cape Verde (P)		09 Jul 1987 a
Central African Republic	04 Sep 1962 d	30 Aug 1967 a
Chad	19 Aug 1981 a	19 Aug 1981 a
Chile	28 Jan 1972 a	27 Apr 1972 a
China	24 Sep 1982 a	24 Sep 1982 a
Colombia	10 Oct 1961 r	04 Mar 1980 a
Congo	15 Oct 1962 d	10 Jul 1970 a
Congo, Democratic Republic of	19 July 1965 a	13 Jan 1975 a
Costa Rica	28 Mar 1978 a	28 Mar 1978 a
Côte d'Ivoire	08 Dec 1961 d	16 Feb 1970 a
Croatia	12 Oct 1992 d	12 Oct 1992 d
Cyprus	16 May 1963 d	09 Jul 1968 a
Czech Republic	11 May 1993 d	11 May 1993 d
Denmark	04 Dec 1952 r	29 Jan 1968 a
Djibouti	09 Aug 1977 d	09 Aug 1977 d
Dominica	17 Feb 1994 a	17 Feb 1994 a
Dominican Republic	04 Jan 1978 a	04 Jan 1978 a
Ecuador	17 Aug 1955 a	06 Mar 1969 a
Egypt	22 May 1981 a	22 May 1981 a
El Salvador	28 Apr 1983 a	28 Apr 1983 a
Equatorial Guinea	07 Feb 1986 a	07 Feb 1986 a
Estonia	10 Apr 1997 a	10 Apr 1997 a
Ethiopia	10 Nov 1969 a	10 Nov 1969 a
Fiji	12 Jun 1972 d	12 Jun 1972 d
Finland	10 Oct 1968 a	10 Oct 1968 a
France	23 Jun 1954 r	03 Feb 1971 a
Gabon	27 Apr 1964 a	28 Aug 1973 a
Gambia	07 Sep 1966 d	29 Sep 1967 a
Georgia	09 Aug 1999 a	09 Aug 1999 a
Germany	01 Dec 1953 r	05 Nov 1969 a
Ghana	18 Mar 1963 a	30 Aug 1968 a
Greece	05 Apr 1960 r	07 Aug 1968 a
Guatemala	22 Sep 1983 a	22 Sep 1983 a
Guinea	28 Dec 1965 d	16 May 1968 a
Guinea-Bissau	11 Feb 1976 a	11 Feb 1976 a
Haiti	25 Sep 1984 a	25 Sep 1984 a
Holy See	15 Mar 1956 r	08 Jun 1967 a
Honduras	23 Mar 1992 a	23 Mar 1992 a
Hungary	14 Mar 1989 a	14 Mar 1989 a
Iceland	30 Nov 1955 a	26 Apr 1968 a
Iran, Islamic Republic of	28 Jul 1976 a	28 Jul 1976 a
Ireland	29 Nov 1956 a	06 Nov 1968 a
Israel	01 Oct 1954 r	14 Jun 1968 a
Italy	15 Nov 1954 r	26 Jan 1972 a
Jamaica	30 Jul 1964 d	30 Oct 1980 a
Japan	03 Oct 1981 a	01 Jan 1982 a
Kazakhstan	15 Jan 1999 a	15 Jan 1999 a
Kenya	16 May 1966 a	13 Nov 1981 a
Kyrgyzstan	08 Oct 1996 a	08 Oct 1996 a
Korea, Republic of	03 Dec 1992 a	03 Dec 1992 a
Latvia	31 Jul 1997 a	31 Jul 1997 a

Country	Convention	Protocol
Lesotho	14 May 1981 a	14 May 1981 a
Liberia	15 Oct 1964 a	27 Feb 1980 a
Liechtenstein	08 Mar 1957 r	20 May 1968 a
Lithuania	28 Apr 1997 a	28 Apr 1997 a
Luxembourg	23 Jul 1953 r	22 Apr 1971 a
Macedonia, The Former Yugoslav Republic of	18 Jan 1994 d	18 Jan 1994 d
Madagascar (C)	18 Dec 1967 a	
Malawi	10 Dec 1987 a	10 Dec 1987 a
Mali	02 Feb 1973 d	02 Feb 1973 a
Malta	17 Jun 1971 a	15 Sep 1971 a
Mauritania	05 May 1987 a	05 May 1987 a
Mexico	07 June 2000 a	07 June 2000 a
Moldova, Republic of	31 Jan 2002 a	31 Jan 2002 a
Monaco	18 May 1954 a	16 June 2010 a
Montenegro	10 Oct 2006 d	10 Oct 2006 d
Morocco	07 Nov 1956 d	20 Apr 1971 a
Mozambique	16 Dec 1983 a	01 May 1989 a
Namibia	17 Feb 1995 a	17 Feb 1995 a
Nauru	28 June 2011 a	28 June 2011 a
Netherlands	03 May 1956 r	29 Nov 1968 a
New Zealand	30 Jun 1960 a	06 Aug 1973 a
Nicaragua	28 Mar 1980 a	28 Mar 1980 a
Niger	25 Aug 1961 d	02 Feb 1970 a
Nigeria	23 Oct 1967 a	02 May 1968 a
Norway	23 Mar 1953 r	28 Nov 1967 a
Panama	02 Aug 1978 a	02 Aug 1978 a
Papua New Guinea	17 Jul 1986 a	17 Jul 1986 a
Paraguay	01 Apr 1970 a	01 Apr 1970 a
Peru	21 Dec 1964 a	15 Sep 1983 a
Philippines	22 Jul 1981 a	22 Jul 1981 a
Poland	27 Sep 1991 a	27 Sep 1991 a
Portugal	22 Dec 1960 a	13 Jul 1976 a
Romania	07 Aug 1991 a	07 Aug 1991 a
Russian Federation	02 Feb 1993 a	02 Feb 1993 a
Rwanda	03 Jan 1980 a	03 Jan 1980 a
Saint Kitts and Nevis (C)	01 Feb 2002 a	
Saint Vincent and the Grenadines	03 Nov 1993 a	03 Nov 2003 a
Samoa	21 Sep 1988 a	29 Nov 1994 a
Sao Tome and Principe	01 Feb 1978 a	01 Feb 1978 a
Senegal	02 May 1963 d	03 Oct 1967 a
Serbia	12 Mar 2001 d	12 Mar 2001 d
Seychelles	23 Apr 1980 a	23 Apr 1980 a
Sierra Leone	22 May 1981 a	22 May 1981 a
Slovakia	04 Feb 1993 d	04 Feb 1993 d
Slovenia	06 Jul 1992 d	06 Jul 1992 d
Solomon Islands	28 Feb 1995 a	12 Apr 1995 a
Somalia	10 Oct 1978 a	10 Oct 1978 a
South Africa	12 Jan 1996 a	12 Jan 1996 a
South Sudan	10 Dec 2018 a	10 Dec 2018 a
Spain	14 Aug 1978 a	14 Aug 1978 a
Sudan	22 Feb 1974 a	23 May 1974 a
Suriname	29 Nov 1978 d	29 Nov 1978 d
Swaziland	14 Feb 2000 a	28 Jan 1969 a
Sweden	26 Oct 1954 r	04 Oct 1967 a
Switzerland	21 Jan 1955 r	20 May 1968 a

Country	Convention	Protocol
Tajikistan	07 Dec 1993 a	07 Dec 1993 a
Tanzania, United Republic of	12 May 1964 a	04 Sep 1968 a
Timor-Leste	07 May 2003 a	07 May 2003 a
Togo	27 Feb 1962 d	01 Dec 1969 a
Trinidad and Tobago	10 Nov 2000 a	10 Nov 2000 a
Tunisia	24 Oct 1957 d	16 Oct 1968 a
Turkey	30 Mar 1962 r	31 Jul 1968 a
Turkmenistan	02 Mar 1998 a	02 Mar 1998 a
Tuvalu	07 Mar 1986 d	07 Mar 1986 d
Uganda	27 Sep 1976 a	27 Sep 1976 a
Ukraine	10 Jun 2002 a	04 Apr 2002 a
United Kingdom of Great Britain and Northern Ireland	11 Mar 1954 r	04 Sep 1968 a
United States of America (P)		01 Nov 1968 a
Uruguay	22 Sep 1970 a	22 Sep 1970 a
Venezuela, Bolivarian Republic of (P)		19 Sep 1986 a
Yemen	18 Jan 1980 a	18 Jan 1980 a
Zambia	24 Sep 1969 d	24 Sep 1969 a
Zimbabwe	25 Aug 1981 a	25 Aug 1981 a

Limitations:

Article 1 B(1) of the 1951 Convention provides: "For the purposes of this Convention, the words 'events occurring before 1 January 1951' in article 1, Section A, shall be understood to mean either (a) 'events occurring in Europe before 1 January 1951'; or (b) 'events occurring in Europe or elsewhere before 1 January 1951', and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purposes of its obligations under this Convention."

The following States adopted alternative (a), the geographical limitation: Congo, Madagascar, Monaco and Turkey. Turkey expressly maintained its declaration of geographical limitation upon acceding to the 1967 Protocol. Madagascar has not yet acceded to the Protocol.

All other States Parties ratified, acceded or succeeded to the Convention without a geographical limitation by selecting option (b), 'events occurring in Europe or elsewhere before 1 January 1951'.

ANNEX V

EXCERPT FROM THE CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL[32]

Article 6

"The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

"Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

[32] See "*The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*" Appendix II – United Nations General Assembly-International Law Commission 1949 (A/CN.4/5 of 3 March 1949).

ANNEX VI

INTERNATIONAL INSTRUMENTS RELATING TO ARTICLE 1 F(A) OF THE 1951 CONVENTION

The main international instruments which pertain to Article 1 F (a) of the 1951 Convention are as follows:

(1) The London Agreement of 8 August 1945 and Charter of the International Military Tribunal;

(2) Law No. 10 of the Control Council for Germany of 20 December 1945 for the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity;

(3) United Nations General Assembly Resolution 3 (1) of 13 February 1946 and 95 (1) of 11 December 1946 which confirm war crimes and crimes against humanity as they are defined in the Charter of the International Military Tribunal of 8 August 1945;

(4) Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (Article III); (entered into force 12 January 1951);

(5) Geneva Conventions for the protection of victims of war of 12 August 1949 (Convention I for the protection of the wounded, and sick, Articles 3 and 50; Convention II for the protection of wounded, sick and shipwrecked, Articles 3 and 51; Convention III relative to the treatment of prisoners of war, Articles 3 and 130; Convention IV relative to the protection of civilian persons, Articles 3 and 147);

(6) Convention of the Non-Applicability of Statutory Limitations of War Crimes and Crimes against Humanity of 26 November 1968 (entered into force 11 November 1970);

(7) International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973 (entered into force 18 July 1976);

(8) Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Article 85 on the repression of breaches of this Protocol);

(9) Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II);

(10) Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) of 25 May 1993;

(11) Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) of 8 November 1994;

(12) Rome Statute of the International Criminal Court (ICC) of 17 July 1998 (entered into force 1 July 2002).

ANNEX VII

STATUTE OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

CHAPTER I

General Provisions

1. The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities. In the exercise of his functions, more particularly when difficulties arise, and for instance with regard to any controversy concerning the international status of these persons, the High Commissioner shall request the opinion of an advisory committee on refugees if it is created.

2. The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees,

3. The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council.

4. The Economic and Social Council may decide, after hearing the views of the High Commissioner on the subject, to establish an advisory committee on refugees, which shall consist of representatives of States Members and States non-members of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem.

5. The General Assembly shall review, not later than at its eighth regular session, the arrangements for the Office of the High Commissioner with a view to determining whether the Office should be continued beyond 31 December 1953.

CHAPTER II

Functions of the High Commissioner

6. The competence of the High Commissioner shall extend to:

A. (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

(ii) Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, 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, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.

Decisions as to eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of the present paragraph;

The competence of the High Commissioner shall cease to apply to any person defined in section A above if:

(a) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(b) Having lost his nationality, he has voluntarily reacquired it; or

(c) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(d) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(e) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, claim grounds other than those of personal convenience for continuing to refuse to avail himself of the protection of the country of his nationality. Reasons of a purely economic character may not be invoked; or

(f) Being a person who has no nationality, he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist and he is able to return to the country of his former habitual residence, claim grounds other than those of personal convenience for continuing to refuse to return to that country;

B. Any other person who is outside the country of his nationality or, if he has no nationality, the country of his former habitual residence, because he has or had wellfounded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.

7. Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:

(a) Who is a national of more than one country unless he satisfies the provisions of the preceding paragraph in relation to each of the countries of which he is a national; or

(b) Who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or

(c) Who continues to receive from other organs or agencies of the United Nations protection or assistance; or

(d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.[33]

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

(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;

[33] See resolution 217 A (III).

(b) Promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;

(d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;

(e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;

(f) Obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;

(g) Keeping in close touch with the governments and inter-governmental organizations concerned;

(h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;

(i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

9. The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.

10. The High Commissioner shall administer any funds, public or private, which he receives for assistance to refugees, and shall distribute them among the private and, as appropriate, public agencies which he deems best qualified to administer such assistance. The High Commissioner may reject any offers which he does not consider appropriate or which cannot be utilized. The High Commissioner shall not appeal to governments for funds or make a general appeal, without the prior approval of the General Assembly. The High Commissioner shall include in his annual report a statement of his activities in this field.

11. The High Commissioner shall be entitled to present his views before the General Assembly, the Economic and Social Council and their subsidiary bodies. The High Commissioner shall report annually to the General Assembly through the Economic and Social Council; his report shall be considered as a separate item on the agenda of the General Assembly.

12. The High Commissioner may invite the co-operation of the various specialized agencies.

CHAPTER III

Organization and Finances

13. The High Commissioner shall be elected by the General Assembly on the nomination of the Secretary-General. The terms of appointment of the High Commissioner shall be proposed by the Secretary-General and approved by the General Assembly. The High Commissioner shall be elected for a term of three years, from 1 January 1951.

14. The High Commissioner shall appoint, for the same term, a Deputy High Commissioner of a nationality other than his own.

15. (a) Within the limits of the budgetary appropriations provided, the staff of the Office of the High

Commissioner shall be appointed by the High Commissioner and shall be responsible to him in the exercise of their functions.

(b) Such staff shall be chosen from persons devoted to the purposes of the Office of the High Commissioner.

(c) Their conditions of employment shall be those provided under the staff regulations adopted by the General Assembly and the rules promulgated thereunder by the Secretary-General.

(d) Provision may also be made to permit the employment of personnel without compensation.

16. The High Commissioner shall consult the governments of the countries of residence of refugees as to the need for appointing representatives therein. In any country recognizing such need, there may be appointed a representative approved by the government of that country. Subject to the foregoing, the same representative may serve in more than one country.

17. The High Commissioner and the Secretary-General shall make appropriate arrangements for liaison and consultation on matters of mutual interest.

18. The Secretary-General shall provide the High Commissioner with all necessary facilities within budgetary limitations.

19. The Office of the High Commissioner shall be located in Geneva, Switzerland.

20. The Office of the High Commissioner shall be financed under the budget of the United Nations. Unless the General Assembly subsequently decides otherwise, no expenditure, other than administrative expenditures relating to the functioning of the Office of the High Commissioner, shall be borne on the budget of the United Nations, and all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions.

21. The administration of the Office of the High Commissioner shall be subject to the Financial Regulations of the United Nations and to the financial rules promulgated thereunder by the Secretary-General.

22. Transactions relating to the High Commissioner's funds shall be subject to audit by the United Nations Board of Auditors, provided that the Board may accept audited accounts from the agencies to which funds have been allocated. Administrative arrangements for the custody of such funds and their allocation shall be agreed between the High Commissioner and the Secretary-General in accordance with the Financial Regulations of the United Nations and rules promulgated thereunder by the Secretary-General.

GUIDELINES ON INTERNATIONAL PROTECTION

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

Distr. GENERAL | HCR/GIP/02/01 | 7 May 2002 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 1:

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

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992). They further replace UNHCR's Position Paper on Gender-Related Persecution (Geneva, January 2000) and result from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in San Remo in September 2001.

These Guidelines 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.

I. INTRODUCTION

1. "Gender-related persecution" is a term that has no legal meaning *per se*. Rather, it is used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status. These Guidelines specifically focus on the interpretation of the refugee definition contained in Article 1A(2) of the *1951 Convention relating to the Status of Refugees* (hereinafter "1951 Convention") from a gender perspective, as well as propose some procedural practices in order to ensure that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognised as such.

2. It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR's Programme.[1]

3. In order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms "gender" and "sex". 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 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. Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.

4. Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

II. SUBSTANTIVE ANALYSIS

A. Background

5. Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognised. In the past decade, however, the analysis and understanding of sex and gender in the refugee context have advanced substantially in case law, in State practice generally and in academic writing. These developments have run parallel to, and have been assisted by, developments in international human rights law and standards,[2] as well as in related areas of international law, including through jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court. In this regard, for instance, it should be noted that harmful practices

[1] In its Conclusions of October 1999, No. 87 (n), the Executive Committee "not[ed] with appreciation special efforts by States to incorporate gender perspectives into asylum policies, regulations and practices; encourage[d] States, UNHCR and other concerned actors to promote wider acceptance, and inclusion in their protection criteria of the notion that persecution may be gender-related or effected through sexual violence; further encourage[d] UNHCR and other concerned actors to develop, promote and implement guidelines, codes of conduct and training programmes on gender-related refugee issues, in order to support the mainstreaming of a gender perspective and enhance accountability for the implementation of gender policies." See also Executive Committee Conclusions: No. 39, Refugee Women and International Protection, 1985; No. 73, Refugee Protection and Sexual Violence, 1993; No. 77(g), General Conclusion on International Protection, 1995; No. 79(o), General Conclusion on International Protection, 1996; and No. 81(t), General Conclusion on International Protection, 1997.

[2] Useful texts include the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the Convention on the Political Rights of Women 1953, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989, and in particular, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and the Declaration on the Elimination of Violence against Women 1993. Relevant regional instruments include the European Convention on Human Rights and Fundamental Freedoms. 1950, the American Convention on Human Rights 1969, and the African Charter on Human and Peoples' Rights 1981.

in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds.

6. Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention definition.[3]

7. In attempting to apply the criteria of the refugee definition in the course of refugee status determination procedures, it is important to approach the assessment holistically, and have regard to all the relevant circumstances of the case. It is essential to have both a full picture of the asylum-seeker's personality, background and personal experiences, as well as an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin. Making generalisations about women or men is not helpful and in doing so, critical differences, which may be relevant to a particular case, can be overlooked.

8. The elements of the definition discussed below are those that require a gender-sensitive interpretation. Other criteria (e.g. being outside the country of origin) remain, of course, also directly relevant to the holistic assessment of any claim. Throughout this document, the use of the term "women" includes the girl-child.

B. Well-founded fear of persecution

9. 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. International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution.[4] In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act. 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,[5] are acts which 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.

10. Assessing a law to be persecutory in and of itself has proven to be material to determining some gender-related claims. This is especially so given the fact that relevant laws may emanate from traditional or cultural norms and practices not necessarily in conformity with international human rights standards. However, as in all cases, a claimant must still establish that he or she has a well-founded fear of being persecuted as a result of that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced.

11. Even though a particular State may have prohibited a persecutory practice (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. In such cases, the practice would still amount to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual's claim to refugee status is not valid.

12. Where the penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution.[6] Even if the law is one of general applicability, circumstances of punishment or treatment cannot be so severe

[3] See Summary Conclusions – Gender-Related Persecution, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, nos.1 and 3 ("Summary Conclusions – Gender-Related Persecution").
[4] See UNHCR, *Handbook*, para. 51.
[5] See below at para. 18.
[6] Persons fleeing from prosecution or punishment for a common law offence are not normally refugees, however, the distinction may be obscured, in particular, in circumstances of excessive punishment for breach of a legitimate law. See UNHCR, *Handbook*, paras. 56 and 57.

as to be disproportionate to the objective of the law. Severe punishment for women who, by breaching a law, transgress social mores in a society could, therefore, amount to persecution.

13. Even where laws or policies have justifiable objectives, methods of implementation that lead to consequences of a substantially prejudicial nature for the persons concerned, would amount to persecution. For example, it is widely accepted that family planning constitutes an appropriate response to population pressures. However, implementation of such policies, through the use of forced abortions and sterilisations, would breach fundamental human rights law. Such practices, despite the fact that they may be implemented in the context of a legitimate law, are recognised as serious abuses and considered persecution.

Discrimination amounting to persecution

14. While it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would, for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one's livelihood, the right to practice one's religion, or access to available educational facilities.[7]

15. Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analysed in this context.

Persecution on account of one's sexual orientation

16. Refugee claims based on differing sexual orientation contain a gender element. 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.

17. Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.

Trafficking for the purposes of forced prostitution or sexual exploitation as a form of persecution[8]

18. Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incar-

[7] See UNHCR, *Handbook*, para. 54.

[8] For the purposes of these Guidelines, "trafficking" is defined as per article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000. Article 3(1) provides that trafficking in persons means "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

ceration, and/or confiscation of passports or other identify documents. In addition, trafficked women and minors may 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. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.[9]

Agents of Persecution

19. There is scope within the refugee definition to recognise both State and non-State actors of persecution. While persecution is most often perpetrated by the authorities of a country, serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.[10]

C. The causal link ("for reasons of")

20. The well-founded fear of being persecuted must be related to one or more of the Convention grounds. That is, it must be "for reasons of" race, religion, nationality, membership of a particular social group, or political opinion. The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link ("for reasons of") must be explicitly established (e.g. some Common Law States) while in other States causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis of the refugee definition. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground. Attribution of the Convention ground to the claimant by the State or non-State actor of persecution is sufficient to establish the required causal connection.

21. In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.[11]

D. Convention grounds

22. Ensuring that a gender-sensitive interpretation is given to each of the Convention grounds is important in determining whether a particular claimant has fulfilled the criteria of the refugee definition. In many cases, claimants may face persecution because of a Convention ground which is attributed or imputed to them. In many societies a woman's political views, race, nationality, religion or social affiliations, for example, are often seen as aligned with relatives or associates or with those of her community.

23. It is also important to be aware that in many gender-related claims, the persecution feared could be for one, or more, of the Convention grounds. For example, a claim for refugee status based on transgression of social or religious norms may be analysed in terms of religion, political opinion or membership of a particular social group. The claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted.

[9] Trafficking for other purposes could also amount to persecution in a particular case, depending on the circumstances.
[10] See UNHCR, *Handbook*, para. 65.
[11] See Summary Conclusions – Gender-Related Persecution, no. 6.

Race

24. Race for the purposes of the refugee definition has been defined to include all kinds of ethnic groups that are referred to as "races" in common usage.[12] Persecution for reasons of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and persecuted in a different way, such as through sexual violence or control of reproduction.

Religion

25. In certain States, the religion assigns particular roles or behavioural codes to women and men respectively. Where a woman does not fulfil her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion. Failure to abide by such codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes. A woman may face harm for her particular religious beliefs or practices, or those attributed to her, including her refusal to hold particular beliefs, to practise a prescribed religion or to conform her behaviour in accordance with the teachings of a prescribed religion.

26. There is some overlap between the grounds of religion and political opinion in gender-related claims, especially in the realm of imputed political opinion. While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion. For example, in certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows. This is particularly true in societies where there is little separation between religious and State institutions, laws and doctrines.

Nationality

27. Nationality is not to be understood only as "citizenship". It also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term "race".[13] Although persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls.

Membership of a Particular Social Group[14]

28. Gender-related claims have often been analysed within the parameters of this ground, making a proper understanding of this term of paramount importance. However, in some cases, the emphasis given to the social group ground has meant that other applicable grounds, such as religion or political opinion, have been over-looked. Therefore, the interpretation given to this ground cannot render the other four Convention grounds superfluous.

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

30. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who

[12] See UNHCR, *Handbook*, para. 68.
[13] See UNHCR, *Handbook*, para. 74.
[14] For more information, see UNHCR's *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002).

are frequently treated differently than men.[15] Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.[16] Equally, this definition would encompass homosexuals, transsexuals, or transvestites.

31. The size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate,[17] or that every member of the group is at risk of persecution.[18] It is well-accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context.[19]

Political Opinion

32. Under this ground, a claimant must show that he or she has a well-founded fear of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because the holding of such opinions has been attributed to him or her. Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature. A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant. It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.

33. The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. Women are less likely than their male counterparts to engage in high profile political activity and are more often involved in 'low level' political activities that reflect dominant gender roles. For example, a woman may work in nursing sick rebel soldiers, in the recruitment of sympathisers, or in the preparation and dissemination of leaflets. Women are also frequently attributed with political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives. While this may be analysed in the context of an imputed political opinion, it may also be analysed as being persecution for reasons of her membership of a particular social group, being her "family". These factors need to be taken into account in gender-related claims.

34. Equally important for gender-related claims is to recognise that a woman may not wish to engage in certain activities, such as providing meals to government soldiers, which may be interpreted by the persecutor(s) as holding a contrary political opinion.

[15] See Summary Conclusions – Gender-Related Persecution, no. 5.
[16] See also Executive Committee Conclusion No. 39, Refugee Women and International Protection, 1985: "States … are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as 'a particular social group' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention".
[17] See Summary Conclusions – Membership of a Particular Social Group, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 4 ("Summary Conclusions – Membership of a Particular Social Group").
[18] See Summary Conclusions – Membership of a Particular Social Group, *Ibid*., no. 7.
[19] See Summary Conclusions – Membership of a Particular Social Group, *Ibid*., no. 6.

III. PROCEDURAL ISSUES[20]

35. Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.[21]

36. Against this background, in order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process, the following measures should be borne in mind:

i. Women asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right.

ii. It is essential that women are given information about the status determination process, access to it, as well as legal advice, in a manner and language that she understands.

iii. Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves,[22] and they should be provided automatically for women claimants. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education.

iv. An open and reassuring environment is often crucial to establishing trust between the interviewer and the claimant, and should help the full disclosure of sometimes sensitive and personal information. The interview room should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances.

v. The interviewer should take the time to introduce him/herself and the interpreter to the claimant, explain clearly the roles of each person, and the exact purpose of the interview.[23] The claimant should be assured that his/her claim will be treated in the strictest confidence, and information provided by the claimant will not be provided to members of his/her family. Importantly, the interviewer should explain that he/she is not a trauma counselor.

vi. The interviewer should remain neutral, compassionate and objective during the interview, and should avoid body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate. The interviewer should allow the claimant to present his/her claim with minimal interruption.

vii. Both 'open-ended' and specific questions which may help to reveal gender issues relevant to a refugee claim should be incorporated into all asylum interviews. Women who have been involved in indirect political activity or to whom political opinion has been attributed, for example, often do not provide relevant information in interviews due to the male-oriented nature of the questioning. Female claimants may also fail to relate questions that are about 'torture' to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, 'honour killings', forced marriage, etc.).

---

[20] This Part has benefited from the valuable guidance provided by various States and other actors, including the following guidelines: *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (Immigration and Naturalization Service, United States, 26 May 1995); *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (Department of Immigration and Humanitarian Affairs, Australia, July 1996) (hereinafter "Australian Guidelines on Gender Issues for Decision Makers"); *Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Immigration and Refugee Board, Canada, 13 November 1996); *Position on Asylum Seeking and Refugee Women*, (European Council on Refugees and Exiles, December 1997) (hereinafter "ECRE Position on Asylum Seeking and Refugee Women"); *Gender Guidelines for the Determination of Asylum Claims in the UK* (Refugee Women's Legal Group, July 1998) (hereinafter "Refugee Women's Group Gender Guidelines"); *Gender Guidelines for Asylum Determination* (National Consortium on Refugee Affairs, South Africa, 1999); *Asylum Gender Guidelines* (Immigration Appellate Authority, United Kingdom, November 2000); and *Gender-Based Persecution: Guidelines for the investigation and evaluation of the needs of women for protection* (Migration Board, Legal Practice Division, Sweden, 28 March 2001).

[21] See also *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (UNHCR, Geneva, 1995) and *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* (Report of Inter-Agency Lessons Learned Conference Proceedings, 27-29 March 2001, Geneva).

[22] See also Executive Committee Conclusion No. 64, Refugee Women and International Protection, 1990, (a) (iii): Provide, wherever necessary, skilled female interviewers in procedures for the determination of refugee status and ensure appropriate access by women asylum-seekers to such procedures, even when accompanied by male family members.

[23] *Ibid*., para. 3.19.

viii. Particularly for victims of sexual violence or other forms of trauma, second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information. In this regard, interviewers should be responsive to the trauma and emotion of claimants and should stop an interview where the claimant is becoming emotionally distressed.

ix. Where it is envisaged that a particular case may give rise to a gender-related claim, adequate preparation is needed, which will also allow a relationship of confidence and trust with the claimant to be developed, as well as allowing the interviewer to ask the right questions and deal with any problems that may arise during an interview.

x. Country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status.

xi. The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility. Interviewers and decision-makers should understand that cultural differences and trauma play an important and complex role in determining behaviour. For some cases, it may be appropriate to seek objective psychological or medical evidence. It is unnecessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as, use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers, civilians) etc.) as well as the motivation of the perpetrator may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse.

xii. Mechanisms for referral to psycho-social counseling and other support services should be made available where necessary. Best practice recommends that trained psycho-social counselors be available to assist the claimant before and after the interview.

Evidentiary Matters

37. No documentary proof as such is required in order for the authorities to recognise a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.

IV. METHODS OF IMPLEMENTATION

38. Depending on the respective legal traditions, there have been two general approaches taken by States to ensure a gender-sensitive application of refugee law and in particular of the refugee definition. Some States have incorporated legal interpretative guidance and/ or procedural safeguards within legislation itself, while others have preferred to develop policy and legal guidelines on the same for decision-makers. UNHCR encourages States who have not already done so to ensure a gender-sensitive application of refugee law and procedures, and stands ready to assist States in this regard.

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

Distr. GENERAL HCR/GIP/02/02 7 May 2002 Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 2:

"Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in *the Statute of the Office of the United Nations High Commissioner for Refugees*, and Article 35 of the *1951 Convention relating to the Status of Refugees* and/or its *1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992). They further supersede IOM/132/1989 – FOM/110/1989 Membership of a Particular Social Group (UNHCR, Geneva, 12 December 1989), and result from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in San Remo in September 2001.

These Guidelines 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 determinations in the field.

I. INTRODUCTION

1. "Membership of a particular social group" is one of the five grounds enumerated in Article 1A(2) of the 1951 *Convention relating to the Status of Refugees* ("1951 Convention"). It is the ground with the least clarity and it is not defined by the 1951 Convention itself. It is being invoked with increasing frequency in refugee status determinations, with States having recognised women, families, tribes, occupational groups, and homosexuals, as constituting a particular social group for the purposes of the 1951 Convention. The evolution of this ground has advanced the understanding of the refugee definition as a whole. These Guidelines provide legal interpretative guidance on assessing claims which assert that a claimant has a well-founded fear of being persecuted for reasons of his or her membership of a particular social group.

2. While the ground needs delimiting – that is, it cannot be interpreted to render the other four Convention grounds superfluous – a proper interpretation must be consistent with the object and purpose of the Convention.[1] Consistent with the language of the Convention, this category cannot be interpreted as a "catch all" that applies to all persons fearing persecution. Thus, to preserve the structure and integrity of the Convention's definition of a refugee, a social group cannot be defined *exclusively* by the fact that it is targeted for persecution (although, as discussed below, persecution may be a relevant element in determining the visibility of a particular social group).

3. There is no "closed list" of what groups may constitute a "particular social group" within the meaning of Article 1A(2). The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.

4. The Convention grounds are not mutually exclusive. An applicant may be eligible for refugee status under more than one of the grounds identified in Article 1A(2).[2] For example, a claimant may allege that she is at risk of persecution because of her refusal to wear traditional clothing. Depending on the particular circumstances of the society, she may be able to establish a claim based on political opinion (if her conduct is viewed by the State as a political statement that it seeks to suppress), religion (if her conduct is based on a religious conviction opposed by the State) or membership in a particular social group.

II. SUBSTANTIVE ANALYSIS

A. Summary of State Practice

5. Judicial decisions, regulations, policies, and practices have utilized varying interpretations of what constitutes a social group within the meaning of the 1951 Convention. Two approaches have dominated decision-making in common law jurisdictions.

6. The first, the "protected characteristics" approach (sometimes referred to as an "immutability" approach), examines whether a group is united by an immutable characteristic or by a characteristic that is 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). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that

[1] See Summary Conclusions – Membership of a Particular Social Group, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 2 ("Summary Conclusions – Membership of a Particular Social Group").
[2] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992), paras. 66-67, 77; and see also Summary Conclusions – Membership of a Particular Social Group, no. 3.

is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).

7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the "social perception" approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.

8. In civil law jurisdictions, the particular social group ground is generally less well developed. Most decision-makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group. Nonetheless, both the protected characteristics and the social perception approaches have received mention.

9. Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity – such as, perhaps, occupation or social class.

B. UNHCR's Definition

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

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

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.[3]

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.

[3] For more information on gender-related claims, see UNHCR's *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* (HCR/GIP/02/01, 10 May 2002), as well as Summary Conclusions of the Expert Roundtable on Gender-Related Persecution, San Remo, 6-8 September 2001, no. 5.

The role of persecution

14. As noted above, a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted. Nonetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.[4] To use an example from a widely cited decision, "[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 recognizable 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."[5]

No requirement of cohesiveness

15. It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be "cohesive."[6] The relevant inquiry is whether there is a common element that group members share. This is similar to the analysis adopted for the other Convention grounds, where there is no requirement that members of a religion or holders of a political opinion associate together, or belong to a "cohesive" group. Thus women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.

16. In addition, mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.[7]

Not all members of the group must be at risk of being persecuted

17. An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group.[8] As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution. Certain members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.

Relevance of size

18. The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society – perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

19. Cases in a number of jurisdictions have recognized "women" as a particular social group. This does not mean that all women in the society qualify for refugee status. A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria.

[4] See Summary Conclusions – Membership of a Particular Social Group, no. 6.
[5] McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 264, 142 ALR 331.
[6] See Summary Conclusions – Membership of a Particular Social Group, no. 4.
[7] See UNHCR, *Handbook*, para. 79.
[8] See Summary Conclusions – Membership of a Particular Social Group, no. 7.

Non-State actors and the causal link ("for reasons of")

20. Cases asserting refugee status based on membership of a particular social group frequently involve claimants who face risks of harm at the hands of non-State actors, and which have involved an analysis of the causal link. For example, homosexuals may be victims of violence from private groups; women may risk abuse from their husbands or partners. Under the Convention a person must have a well-founded fear of being persecuted and that fear of being persecuted must be based on one (or more) of the Convention grounds. There is no requirement that the persecutor be a State actor. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.[9]

21. Normally, an applicant will allege that the person inflicting or threatening the harm is acting for one of the reasons identified in the Convention. So, if a non-State actor inflicts or threatens persecution based on a Convention ground and the State is unwilling or unable to protect the claimant, then the causal link has been established. That is, the harm is being visited upon the victim for reasons of a Convention ground.

22. There may also arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-State actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State's unwillingness to protect her for reasons of a Convention ground.

23. This reasoning may be summarized as follows. The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.

[9] See UNHCR, *Handbook*, para. 65.

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

Distr. GENERAL | HCR/GIP/03/03 | 10 February 2003 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 3:

Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992). They replace UNHCR's *The Cessation Clauses: Guidelines on their Application* (Geneva, April 1999) in so far as these concern the "ceased circumstances" clauses and result, *inter alia*, from the Second Track of the Global Consultations on International Protection which examined this subject at an expert meeting in Lisbon in May 2001.

These Guidelines 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.

I. INTRODUCTION

1. The *1951 Convention relating to the Status of Refugees* (hereinafter "1951 Convention") recognises that refugee status ends under certain clearly defined conditions. This means that once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of the cessation clauses or their status is cancelled or revoked.[1] Under Article 1C of the 1951 Convention, refugee status may cease either through the actions of the refugee (contained in sub-paragraphs 1 to 4), such as by re-establishment in his or her country of origin,[2] or through fundamental changes in the objective circumstances in the country of origin upon which refugee status was based (sub-paragraphs 5 and 6). The latter are commonly referred to as the "ceased circumstances" or "general cessation" clauses. These Guidelines are concerned only with the latter provisions.

2. Article 1C(5) and (6) provides that the 1951 Convention shall cease to apply to any person falling under the terms of Article 1(A) if:

> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; 141,6
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

3. UNHCR or States may issue formal declarations of general cessation of refugee status for a particular refugee caseload.[3] UNHCR has such competence under Article 6A of the Statute of the Office of the High Commissioner for Refugees in conjunction with Article 1C of the 1951 Convention. Due to the fact that large numbers of refugees voluntarily repatriate without an official declaration that conditions in their countries of origin no longer justify international protection, declarations are infrequent. Furthermore, many States Parties grant permanent residence status to refugees in their territories after several years, eventually leading to their integration and naturalisation. Similarly, cessation determinations on an individual basis as well as periodic reviews are rare, in recognition of the "need to respect a basic degree of stability for individual refugees".[4]

4. The grounds identified in the 1951 Convention are exhaustive; that is, no additional grounds would justify a conclusion that international protection is no longer required.[5] Operation of the cessation clauses should, in addition, be distinguished from other decisions that terminate refugee status. Cessation differs from cancellation of refugee status. Cancellation is based on a determination that an individual should not have been recognised as a refugee in the first place. This is, for instance, so where it is established that there was a misrepresentation of material facts essential to the outcome of the determination process or that one of the exclusion clauses would have been applicable had all the relevant facts been known. Cessation also differs from revocation, which may take place if a refugee subsequently engages in conduct coming within the scope of Article 1F(a) or 1F(c).

---

[1] See, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, (hereinafter "UNHCR, *Handbook*") (1979, Geneva, re-edited Jan. 1992), para. 112. For distinction between cessation and cancellation/revocation see, para. 4 below.

[2] In these Guidelines, "country of origin" is understood to cover both the country of nationality and the country of former habitual residence, the latter in relation to refugees who are stateless. For more on Article 1C(1–4), see UNHCR, "The Cessation Clauses: Guidelines on their Application", April 1999.

[3] See, for example, UNHCR's formal declarations of general cessation: "Applicability of the Cessation Clauses to Refugees from Poland, Czechoslovakia and Hungary", 15 Nov. 1991, "Applicability of Cessation Clauses to Refugees from Chile", 28 March 1994, "Applicability of the Cessation Clauses to Refugees from the Republics of Malawi and Mozambique", 31 Dec. 1996, "Applicability of the Cessation Clauses to Refugees from Bulgaria and Romania", 1 Oct. 1997, "Applicability of the Ceased Circumstances; Cessation Clauses to pre-1991 refugees from Ethiopia", 23 Sept. 1999, and "Declaration of Cessation – Timor Leste", 20 December 2002.

[4] "Summary Conclusions on Cessation of Refugee Status, Global Consultations on International Protection, Lisbon Expert Roundtable", May 2001, no. B (17). See also, UNHCR, *Handbook*, para. 135.

[5] See, amongst others, UNHCR, *Handbook*, para. 116.

II. SUBSTANTIVE ANALYSIS

5. The following framework for substantive analysis is drawn from the terms of Article 1C(5) and 1C(6) of the 1951 Convention and takes into account Executive Committee Conclusion No. 69, subsequent legal developments, and State practice.

A. GENERAL CONSIDERATIONS

6. When interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Numerous Executive Committee Conclusions affirm that the 1951 Convention and principles of refugee protection look to durable solutions for refugees.[6] Accordingly, cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should therefore not result in persons residing in a host State with an uncertain status. It should not result either in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution and could also cause additional or renewed instability in an otherwise improving situation, thus risking future refugee flows. Acknowledging these considerations ensures refugees do not face involuntary return to situations that might again produce flight and a need for refugee status. It supports the principle that conditions within the country of origin must have changed in a profound and enduring manner before cessation can be applied.

7. Cessation under Article 1C(5) and 1C(6) does not require the consent of or a voluntary act by the refugee. Cessation of refugee status terminates rights that accompany that status. It may bring about the return of the person to the country of origin and may thus break ties to family, social networks and employment in the community in which the refugee has become established. As a result, a premature or insufficiently grounded application of the ceased circumstances clauses can have serious consequences. It is therefore appropriate to interpret the clauses strictly and to ensure that procedures for determining general cessation are fair, clear, and transparent.

B. ASSESSMENT OF CHANGE OF CIRCUMSTANCES IN THE COUNTRY OF ORIGIN

8. Article 1C(5) and (6) provides for the cessation of a person's refugee status where "the circumstances in connexion with which he [or she] has been recognized as a refugee have ceased to exist". To assist assessment of how and to what extent conditions in the country of origin must have changed before these "ceased circumstances" clauses can be invoked, UNHCR's Executive Committee has developed guidance in the form of Executive Committee Conclusion No. 69 (XLIII) (1992), which reads in part:

> [I]n taking any decision on application of the cessation clauses based on "ceased circumstances", States must carefully assess the fundamental character of the changes in the country of nationality or origin, including the general human rights situation, as well as the particular cause of fear of persecution, in order to make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist.
>
> ... [A]n essential element in such assessment by States is the fundamental, stable and durable character of the changes, making use of appropriate information available in this respect, *inter alia*, from relevant specialized bodies, including particularly UNHCR.

9. Key elements relevant to assessment of the extent and durability of change required before it can be said that the circumstances in connection with which refugee status was recognised have ceased to exist are outlined below.

[6] See, e.g., Executive Committee Conclusions No. 29 (XXXIV) (1983), No. 50 (XXXIX) (1988), No. 58 (XL) (1989), No. 79 (XLVII) (1996), No. 81 (XLVIII) (1997), No. 85 (XLIX) (1998), No. 87 (L) (1999), No. 89 (L) (2000), and No. 90 (LII) (2001).

The fundamental character of change

10. For cessation to apply, the changes need to be of a fundamental nature, such that the refugee "can no longer … continue to refuse to avail himself of the protection of the country of his nationality" (Article 1C(5)) or, if he has no nationality, is "able to return to the country of his former habitual residence" (Article 1C(6)). Cessation based on "ceased circumstances" therefore only comes into play when changes have taken place which address the causes of displacement which led to the recognition of refugee status.

11. Where indeed a "particular cause of fear of persecution"[7] has been identified, the elimination of that cause carries more weight than a change in other factors. Often, however, circumstances in a country are inter-linked, be these armed conflict, serious violations of human rights, severe discrimination against minorities, or the absence of good governance, with the result that resolution of the one will tend to lead to an improvement in others. All relevant factors must therefore be taken into consideration. An end to hostilities, a complete political change and return to a situation of peace and stability remain the most typical situation in which Article 1C(5) or (6) applies.

12. Large-scale spontaneous repatriation of refugees may be an indicator of changes that are occurring or have occurred in the country of origin. Where the return of former refugees would be likely to generate fresh tension in the country of origin, however, this itself could signal an absence of effective, fundamental change. Similarly, where the particular circumstances leading to flight or to non-return have changed, only to be replaced by different circumstances which may also give rise to refugee status, Article

1C(5) or (6) cannot be invoked.

The enduring nature of change

13. Developments which would appear to evidence significant and profound changes should be given time to consolidate before any decision on cessation is made. Occasionally, an evaluation as to whether fundamental changes have taken place on a durable basis can be made after a relatively short time has elapsed. This is so in situations where, for example, the changes are peaceful and take place under a constitutional process, where there are free and fair elections with a real change of government committed to respecting fundamental human rights, and where there is relative political and economic stability in the country.

14. A longer period of time will need to have elapsed before the durability of change can be tested where the changes have taken place violently, for instance, through the overthrow of a regime. Under the latter circumstances, the human rights situation needs to be especially carefully assessed. The process of national reconstruction must be given sufficient time to take hold and any peace arrangements with opposing militant groups must be carefully monitored. This is particularly relevant after conflicts involving different ethnic groups, since progress towards genuine reconciliation has often proven difficult in such cases. Unless national reconciliation clearly starts to take root and real peace is restored, political changes which have occurred may not be firmly established.

Restoration of protection

15. In determining whether circumstances have changed so as to justify cessation under Article 1C(5) or (6), another crucial question is whether the refugee can effectively re-avail him- or herself of the protection of his or her own country.[8] Such protection must therefore be effective and available. It requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.

[7] See Executive Committee Conclusion No. 69 (XLIII) (1992), para. a.
[8] See Art. 12(4) of the 1966 International Covenant on Civil and Political Rights declaring: "No one shall be arbitrarily deprived of the right to enter his own country" and Human Rights Committee, General Comment No. 27, Article 12 (freedom of movement), 1999.

16. An important indicator in this respect is the general human rights situation in the country. Factors which have special weight for its assessment are the level of democratic development in the country, including the holding of free and fair elections, adherence to international human rights instruments, and access for independent national or international organisations freely to verify respect for human rights. There is no requirement that the standards of human rights achieved must be exemplary. What matters is that significant improvements have been made, as illustrated at least by respect for the right to life and liberty and the prohibition of torture; marked progress in establishing an independent judiciary, fair trials and access to courts: as well as protection amongst others of the fundamental rights to freedom of expression, association and religion. Important, more specific indicators include declarations of amnesties, the repeal of oppressive laws, and the dismantling of former security services.

C. PARTIAL CESSATION

17. The 1951 Convention does not preclude cessation declarations for distinct sub-groups of a general refugee population from a specific country, for instance, for refugees fleeing a particular regime but not for those fleeing after that regime was deposed.[9] In contrast, changes in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status. Refugee status can only come to an end if the basis for persecution is removed without the precondition that the refugee has to return to specific safe parts of the country in order to be free from persecution. Also, not being able to move or to establish oneself freely in the country of origin would indicate that the changes have not been fundamental.

D. INDIVIDUAL CESSATION

18. A strict interpretation of Article 1C(5) and (6) would allow their application on an individual basis. It reads: "The Convention shall cease to apply to any person [if] ... [h]e can no longer, *because the circumstances in connexion with which he has been recognized as a refugee* have ceased to exist, continue to refuse to avail himself of the protection" of his country of origin (emphasis supplied). Yet Article 1C(5) and (6) have rarely been invoked in individual cases. States have not generally undertaken periodic reviews of individual cases on the basis of fundamental changes in the country of origin. These practices acknowledge that a refugee's sense of stability should be preserved as much as possible. They are also consistent with Article 34 of the 1951 Convention, which urges States "as far as possible [to] facilitate the assimilation and naturalization of refugees". Where the cessation clauses are applied on an individual basis, it should not be done for the purposes of a re-hearing *de novo*.

E. EXCEPTIONS TO CESSATION

Continued international protection needs

19. Even when circumstances have generally changed to such an extent that refugee status would no longer be necessary, there may always be the specific circumstances of individual cases that may warrant continued international protection. It has therefore been a general principle that all refugees affected by general cessation must have the possibility, upon request, to have such application in their cases reconsidered on international protection grounds relevant to their individual case.10[10]

"Compelling reasons"

20. Both Article 1C(5) and (6) contain an exception to the cessation provision, allowing a refugee to invoke "compelling reasons arising out of previous persecution" for refusing to re-avail

[9] This approach has been taken by UNHCR on one occasion.
[10] Executive Committee, Conclusion No. 69 (XLIII) (1992), para. d.

himself or herself of the protection of the country of origin. This exception is intended to cover cases where refugees, or their family members, have suffered atrocious forms of persecution and therefore cannot be expected to return to the country of origin or former habitual residence.[11] This might, for example, include "ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons. It is presumed that such persons have suffered grave persecution, including at the hands of elements of the local population, and cannot reasonably be expected to return."[12] Children should also be given special consideration in this regard, as they may often be able to invoke "compelling reasons" for refusing to return to their country of origin.

21. Application of the "compelling reasons" exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice.[13]

Long-term residents

22. In addition, the Executive Committee, in Conclusion No. 69, recommends that States consider "appropriate arrangements" for persons "who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links". In such situations, countries of asylum are encouraged to provide, and often do provide, the individuals concerned with an alternative residence status, which retains previously acquired rights, though in some instances with refugee status being withdrawn. Adopting this approach for long-settled refugees is not required by the 1951 Convention per se, but it is consistent with the instrument's broad humanitarian purpose and with respect for previously acquired rights, as set out in the aforementioned Executive Committee Conclusion No. 69 and international human rights law standards.[14]

F. CESSATION AND MASS INFLUX

Prima facie group determinations under the 1951 Convention

23. Situations of mass influx frequently involve groups of persons acknowledged as refugees on a group basis because of the readily apparent and objective reasons for flight and circumstances in the country of origin. The immediate impracticality of individual status determinations has led to use of a *prima facie* refugee designation or acceptance for the group.[15] For such groups, the general principles described for cessation are applicable.

Temporary protection in mass influx situations that include persons covered by the 1951 Convention

24. Some States have developed "temporary protection" schemes[16] under which assistance and protection against *refoulement* have been extended on a group basis, without either a determination of *prima facie* refugee status for the group or individual status determinations for members of the group. Even though the cessation doctrine does not formally come into play, this form of protection is built upon the 1951 Convention framework and members of the group may well be or include refugees under the Convention. Decisions by States to withdraw temporary protection should therefore be preceded by a thorough evaluation of the changes in the country of origin. Such decisions should also be accompanied by an opportunity for those unwilling to return and requesting international protection to have access to an asylum procedure. In this context, it is also appropriate for States to provide exceptions for individuals with "compelling reasons" arising out of prior persecution.

---

[11] See amongst others, UNHCR, *Handbook*, para. 136.
[12] See UNHCR and UNHCHR Study, "Daunting Prospects Minority Women: Obstacles to their Return and Integration", Sarajevo, Bosnia and Herzegovina, April 2000.
[13] See generally, J. Fitzpatrick and R. Bonoan, "Cessation of Refugee Protection" in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, eds E. Feller, V. Türk and F. Nicholson, (Cambridge University Press, 2003 forthcoming).
[14] See e.g., above footnote 8.
[15] See "Protection of Refugees in Mass Influx Situations: Overall Protection Framework, Global Consultations on International Protection", EC/GC/01/4, 19 Feb. 2001.
[16] See, e.g., the European Union Directive on Temporary Protection, 2001/55/EC, 20 July 2001.

III. PROCEDURAL ISSUES

25. As mentioned earlier, a declaration of general cessation has potentially serious consequences for recognised refugees. It acknowledges loss of refugee status and the rights that accompany that status, and it may contemplate the return of persons to their countries of origin. Thus, the following procedural aspects should be observed:

General considerations

i. In making an assessment of the country of origin, States and UNHCR must "make sure in an objective and verifiable way that the situation which justified the granting of refugee status has ceased to exist".[17] As noted above, this assessment should include consideration of a range of factors, including the general human rights situation.

ii. The burden rests on the country of asylum to demonstrate that there has been a fundamental, stable and durable change in the country of origin and that invocation of Article 1C(5) or (6) is appropriate. There may be instances where certain groups should be excluded from the application of general cessation because they remain at risk of persecution.

iii. It is important that both the declaration process and implementation plans be consultative and transparent, involving in particular UNHCR, given its supervisory role.[18] NGOs and refugees should also be included in this consultative process. "Go and see" visits to the country of origin could, where feasible, be facilitated to examine conditions there, as well as an examination of the situation of refugees who have already returned voluntarily.

iv. General cessation declarations should be made public.

v. Counselling of refugees, information sharing and, if necessary, the provision of assistance to returnees are critical to the successful implementation of general cessation.

vi. Procedures operationalising a declaration of cessation need to be carried out in a flexible, phased manner, particularly in developing countries hosting large numbers of refugees. There needs to be a certain time lapse between the moment of declaration and implementation, allowing for preparations for return and arrangements for long-term residents with acquired rights.

vii. Noting the potential impact of a general cessation declaration on refugees and their families, they should be given an opportunity, upon request, to have their case reconsidered on grounds relevant to their individual case, in order to establish whether they come within the terms of the exceptions to cessation.[19] In such cases, however, no action should be taken to withdraw rights of the refugee until a final decision has been taken.

viii. UNHCR retains a role in assisting the return of persons affected by a declaration of cessation or the integration of those allowed to stay, since they remain under UNHCR's Mandate for a period of grace.

Post–declaration applications for refugee status

ix. A declaration of general cessation cannot serve as an automatic bar to refugee claims, either at the time of a general declaration or subsequent to it. Even though general cessation may have been declared in respect of a particular country, this does not preclude individuals leaving this country from applying for refugee status. For example, even if fundamental changes have occurred in a State, members of identifiable sub-groups – such as those based on ethnicity, religion, race, or political opinion – may still face particular circumstances that

[17] This rigorous standard is reflected in Executive Committee Conclusion No. 69 (XLIII) (1992), para. a.
[18] See para. 8(a) of the UNHCR Statute, Article 35 of the 1951 Convention and Article II of the 1967 Protocol, as well as in particular, the second preambular paragraph of Executive Committee Conclusion No. 69 (XLIII) (1992).
[19] See paras. 19–22 of these Guidelines and Executive Committee Conclusion No. 69 (XLIII) (1992).

warrant refugee status. Alternatively, a person may have a well-founded fear of persecution by a private person or group that the government is unable or unwilling to control, persecution based on gender being one example.

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

Distr. GENERAL | HCR/GIP/03/04 | 23 July 2003 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 4:

"Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, and Article 35 of the *1951 Convention relating to the Status of Refugees* and/or its *1967 Protocol*. These Guidelines supplement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992). They further supersede UNHCR's Position Paper, *Relocating Internally as a Reasonable Alternative to Seeking Asylum – (The So-Called "Internal Flight Alternative" or "Relocation Principle")* (Geneva, February 1999). They result, *inter alia*, from the Second Track of the Global Consultations on International Protection which examined this subject at its expert meeting in San Remo, Italy, in September 2001 and seek to consolidate appropriate standards and practice on this issue in light of recent developments in State practice.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

I. INTRODUCTION

1. Internal flight or relocation alternative is a concept that is increasingly considered by decision-makers in refugee status determination. To date, there has been no consistent approach to this concept and consequently divergent practices have emerged both within and across jurisdictions. Given the differing approaches, these Guidelines are designed to offer decision-makers a more structured approach to analysis of this aspect of refugee status determination.

2. The concept of an internal flight or relocation alternative is not a stand-alone principle of refugee law, nor is it an independent test in the determination of refugee status. A Convention refugee is a person who meets the criteria set out in Article 1A(2) of the *1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (hereinafter "1951 Convention"). These criteria are to be interpreted in a liberal and humanitarian spirit, in accordance with their ordinary meaning, and in light of the object and purpose of the 1951 Convention. The concept of an internal flight or relocation alternative is not explicitly referred to in these criteria. The question of whether the claimant has an internal flight or relocation alternative may, however, arise as part of the refugee status determination process.

3. Some have located the concept of internal flight or relocation alternative in the "well- founded fear of being persecuted" clause of the definition, and others in the "unwilling … or unable … to avail himself of the protection of that country" clause. These approaches are not necessarily contradictory, since the definition comprises one holistic test of interrelated elements. How these elements relate, and the importance to be accorded to one or another element, necessarily falls to be determined on the facts of each individual case.[1]

4. International law does not require threatened individuals to exhaust all options within their own country first before seeking asylum; that is, it does not consider asylum to be the last resort. The concept of internal flight or relocation alternative should therefore not be invoked in a manner that would undermine important human rights tenets underlying the international protection regime, namely the right to leave one's country, the right to seek asylum and protection against refoulement. Moreover, since the concept can only arise in the context of an assessment of the refugee claim on its merits, it cannot be used to deny access to refugee status determination procedures. A consideration of internal flight or relocation necessitates regard for the personal circumstances of the individual claimant and the conditions in the country for which the internal flight or relocation alternative is proposed.[2]

5. Consideration of possible internal relocation areas is not relevant for refugees coming under the purview of Article I(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969. Article I(2) specifically clarifies the definition of a refugee as follows: "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".[3]

II. SUBSTANTIVE ANALYSIS

A. Part of the holistic assessment of refugee status

6. The 1951 Convention does not require or even suggest that the fear of being persecuted need always extend to the whole territory of the refugee's country of origin.[4] The concept of an internal flight or relocation alternative therefore refers to a specific area of the country where there is no

[1] For further details, see UNHCR, "Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", Geneva, April 2001, (hereafter UNHCR, "Interpreting Article 1"), para. 12.
[2] *Ibid*., paras. 35–37.
[3] (Emphasis added.) The 1984 *Cartagena Declaration* also specifically refers to Article I(2) of the OAU Refugee Convention.
[4] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, Geneva, re-edited 1992), (hereinafter "UNHCR, *Handbook*"), para. 91.

risk of a well-founded fear of persecution and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him/herself and live a normal life.[5] Consequently, if internal flight or relocation is to be considered in the context of refugee status determination, a particular area must be identified and the claimant provided with an adequate opportunity to respond.

7. In the context of the holistic assessment of a claim to refugee status, in which a well-founded fear of persecution for a Convention reason has been established in some localised part of the country of origin, the assessment of whether or not there is a relocation possibility requires two main sets of analyses, undertaken on the basis of answers to the following sets of questions:

I. The Relevance Analysis

a. *Is the area of relocation practically, safely, and legally accessible to the individual*? If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.

b. *Is the agent of persecution the State*? National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.

c. I*s the agent of persecution a non-State agent*? Where there is a risk that the non- State actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.

d. *Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation*? This would include the original or any new form of persecution or other serious harm in the area of relocation.

II. The Reasonableness Analysis

a. *Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship*? If not, it would not be reasonable to expect the person to move there.

Scope of assessment

8. The determination of whether the proposed internal flight or relocation area is an appropriate alternative in the particular case requires an assessment over time, taking into account not only the circumstances that gave rise to the persecution feared, and that prompted flight from the original area, but also whether the proposed area provides a meaningful alternative in the future. The forward-looking assessment is all the more important since, although rejection of status does not automatically determine the course of action to be followed, forcible return may be a consequence.

B. The relevance analysis

9. The questions outlined in paragraph 7 can be analysed further as follows:

Is the area of relocation practically, safely, and legally accessible to the individual?

10. An area is not an internal flight or relocation alternative if there are barriers to reaching the area which are not reasonably surmountable. For example, the claimant should not be required to encounter physical dangers en route to the area such as mine fields, factional fighting, shifting war fronts, banditry or other forms of harassment or exploitation.

[5] For issues concerning the burden of proof in establishing these issues see section III.A below.

11. If the refugee claimant would have to pass through the original area of persecution in order to access the proposed area, that area cannot be considered an internal flight or relocation alternative. Similarly, passage through airports may render access unsafe, especially in cases where the State is the persecutor or where the persecutor is a non- State group in control of the airport.

12. The proposed area must also be legally accessible, that is, the individual must have the legal right to travel there, to enter, and to remain. Uncertain legal status can create pressure to move to unsafe areas, or to the area of original persecution. This issue may require particular attention in the case of stateless persons or those without documentation.

Is the agent of persecution the State?

13. The need for an analysis of internal relocation only arises where the fear of being persecuted is limited to a specific part of the country, outside of which the feared harm cannot materialise. In practical terms, this normally excludes cases where the feared persecution emanates from or is condoned or tolerated by State agents, including the official party in one-party States, as these are presumed to exercise authority in all parts of the country.[6] Under such circumstances the person is threatened with persecution countrywide unless exceptionally it is clearly established that the risk of persecution stems from an authority of the State whose power is clearly limited to a specific geographical area or where the State itself only has control over certain parts of the country.[7]

14. Where the risk of being persecuted emanates from local or regional bodies, organs or administrations within a State, it will rarely be necessary to consider potential relocation, as it can generally be presumed that such local or regional bodies derive their authority from the State. The possibility of relocating internally may be relevant only if there is clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national government's failure to counteract the localised harm.

Is the agent of persecution a non-State agent?

15. Where the claimant fears persecution by a non-State agent of persecution, the main inquiries should include an assessment of the motivation of the persecutor, the ability of the persecutor to pursue the claimant in the proposed area, and the protection available to the claimant in that area from State authorities. As with questions involving State protection generally, the latter involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection. Evidence of the State's inability or unwillingness to protect the claimant in the original persecution area will be relevant. It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas. This may apply in particular to cases of gender-related persecution.

16. Not all sources of possible protection are tantamount to State protection. For example, if the area is under the control of an international organisation, refugee status should not be denied solely on the assumption that the threatened individual could be protected by that organisation. The facts of the individual case will be particularly important. The general rule is that it is inappropriate to equate the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis with national protection provided by States. Under international law, international organisations do not have the attributes of a State.

17. Similarly, it is inappropriate to find that the claimant will be protected by a local clan or militia in an area where they are not the recognised authority in that territory and/or where their control over

[6] See Summary Conclusions – Internal Protection/Relocation/Flight Alternative, Global Consultations on International Protection, San Remo Expert Roundtable, 6–8 September 2001 (hereinafter "Summary Conclusions – Internal Protection/Relocation/Flight Alternative"), para. 2; UNHCR, "Interpreting Article 1", paras. 12–13.
[7] See also paras. 16, 17 and 27 of these Guidelines.

the area may only be temporary. Protection must be effective and of a durable nature: It must be provided by an organised and stable authority exercising full control over the territory and population in question.

Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?

18. It is not sufficient simply to find that the original agent of persecution has not *yet* established a presence in the proposed area. Rather, there must be reason to believe that the reach of the agent of persecution is likely to remain localised and outside the designated place of internal relocation.

19. Claimants are not expected or required to suppress their political or religious views or other protected characteristics to avoid persecution in the internal flight or relocation area. The relocation alternative must be more than a "safe haven" away from the area of origin.

20. In addition, a person with an established fear of persecution for a 1951 Convention reason in one part of the country cannot be expected to relocate to another area of serious harm. If the claimant would be exposed to a new risk of serious harm, including a serious risk to life, safety, liberty or health, or one of serious discrimination,[8] an internal flight or relocation alternative does not arise, irrespective of whether or not there is a link to one of the Convention grounds.[9] The assessment of new risks would therefore also need to take into account serious harm generally covered under complementary forms of protection.[10]

21. The proposed area is also not an internal flight or relocation alternative if the conditions there are such that the claimant may be compelled to go back to the original area of persecution, or indeed to another part of the country where persecution or other forms of serious harm may be a possibility.

C. The reasonableness analysis

22. In addition to there not being a fear of persecution in the internal flight or relocation alternative, it must be reasonable in all the circumstances for the claimant to relocate there. This test of "reasonableness" has been adopted by many jurisdictions. It is also referred to as a test of "undue hardship" or "meaningful protection".

23. The "reasonableness test" is a useful legal tool which, while not specifically derived from the language of the 1951 Convention, has proved sufficiently flexible to address the issue of whether or not, in all the circumstances, the particular claimant could reasonably be expected to move to the proposed area to overcome his or her well-founded fear of being persecuted. It is not an analysis based on what a hypothetical "reasonable person" should be expected to do. The question is what is reasonable, both subjectively and objectively, given the individual claimant and the conditions in the proposed internal flight or relocation alternative.

Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?

24. In answering this question, it is necessary to assess the applicant's personal circumstances, the existence of past persecution, safety and security, respect for human rights, and possibility for economic survival.

[8] See UNHCR, *Handbook*, paras. 51–52.
[9] A more general right not to be returned to a country where there is a risk of torture or cruel or inhuman treatment is found, either explicitly or by interpretation, in international human rights instruments. The most prominent are Article 3 of the Convention against Torture 1984, Article 7 of the International Covenant on Civil and Political Rights 1966, and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.
[10] See UN docs. EC/50/SC/CRP.18, 9 June 2000 and EC/GC/01/18, 4 September 2001.

Personal circumstances

25. The personal circumstances of an individual should always be given due weight in assessing whether it would be unduly harsh and therefore unreasonable for the person to relocate in the proposed area. Of relevance in making this assessment are factors such as age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects. In particular, lack of ethnic or other cultural ties may result in isolation of the individual and even discrimination in communities where close ties of this kind are a dominant feature of daily life. Factors which may not on their own preclude relocation may do so when their cumulative effect is taken into account. Depending on individual circumstances, those factors capable of ensuring the material and psychological well-being of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others.

Past persecution

26. Psychological trauma arising out of past persecution may be relevant in determining whether it is reasonable to expect the claimant to relocate in the proposed area. The provision of psychological assessments attesting to the likelihood of further psychological trauma upon return would militate against finding that relocation to the area is a reasonable alternative. In some jurisdictions, the very fact that the individual suffered persecution in the past is sufficient in itself to obviate any need to address the internal relocation issue.

Safety and security

27. The claimant must be able to find safety and security and be free from danger and risk of injury. This must be durable, not illusory or unpredictable. In most cases, countries in the grip of armed conflict would not be safe for relocation, especially in light of shifting armed fronts which could suddenly bring insecurity to an area hitherto considered safe. In situations where the proposed internal flight or relocation alternative is under the control of an armed group and/or State-like entity, careful examination must be made of the durability of the situation there and the ability of the controlling entity to provide protection and stability.

Respect for human rights

28. Where respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic, the proposed area cannot be considered a reasonable alternative. This does not mean that the deprivation of any civil, political or socio-economic human right in the proposed area will disqualify it from being an internal flight or relocation alternative. Rather, it requires, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative.

Economic survival

29. The socio-economic conditions in the proposed area will be relevant in this part of the analysis. If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level.

30. If the person would be denied access to land, resources and protection in the proposed area because he or she does not belong to the dominant clan, tribe, ethnic, religious and/or cultural group, relocation there would not be reasonable. For example, in many parts of Africa, Asia and elsewhere, common ethnic, tribal, religious and/or cultural factors enable access to land, resources and protection. In such situations, it would not be reasonable to expect someone who does not belong to the dominant group, to take up residence there. A person should also not be required to relocate to areas, such as the slums of an urban area, where they would be required to live in conditions of severe hardship.

D. Relocation and internally displaced persons

31. The presence of internally displaced persons who are receiving international assistance in one part of the country is not in itself conclusive evidence that it is reasonable for the claimant to relocate there. For example, the standard and quality of life of the internally displaced are often insufficient to support a finding that living in the area would be a reasonable alternative to flight. Moreover, where internal displacement is a result of "ethnic cleansing" policies, denying refugee status on the basis of the internal flight or relocation concept could be interpreted as condoning the resulting situation on the ground and therefore raises additional concerns.

32. The reality is that many thousands of internally displaced persons do not enjoy basic rights and have no opportunity to exercise the right to seek asylum outside their country. Thus, although standards largely agreed by the international community now exist, their implementation is by no means assured in practice. Moreover, the *Guiding Principles on Internal Displacement* specifically affirm in Principle 2(2) that they are not to be interpreted as "restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law" and in particular, they are "without prejudice to the right to seek and enjoy asylum in other countries."[11]

III. PROCEDURAL ISSUES

A. Burden of proof

33. The use of the relocation concept should not lead to additional burdens on asylum- seekers. The usual rule must continue to apply, that is, the burden of proving an allegation rests on the one who asserts it. This is consistent with paragraph 196 of the *Handbook* which states that

> … while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his [or her] disposal to produce the necessary evidence in support of the application.

34. On this basis, the decision-maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case. If considered relevant, it is up to the party asserting this to identify the proposed area of relocation and provide evidence establishing that it is a reasonable alternative for the individual concerned.

35. Basic rules of procedural fairness require that the asylum-seeker be given clear and adequate notice that such a possibility is under consideration.[12] They also require that the person be given an opportunity to provide arguments why (a) the consideration of an alternative location is not relevant in the case, and (b) if deemed relevant, that the proposed area would be unreasonable.

[11] See also W. Kälin, *Guiding Principles on Internal Displacement: Annotations*, Studies in Transnational Legal Policy No. 32, 2000 (The American Society of International Law, The Brookings Institution, Project on Internal Displacement), pp. 8-10.
[12] See Summary Conclusions – Internal Protection/Relocation/Flight Alternative, para. 7.

B. Accelerated or admissibility procedures

36. Given the complex and substantive nature of the inquiry, the examination of an internal flight or relocation alternative is not appropriate in accelerated procedures, or in deciding on an individual's admissibility to a full status determination procedure.[13]

C. Country of origin information

37. While examination of the relevance and reasonableness of a potential internal relocation area always requires an assessment of the individual's own particular circumstances, well-documented, good quality and current information and research on conditions in the country of origin are important components for the purpose of such examination. The usefulness of such information may, however, be limited in cases where the situation in the country of origin is volatile and sudden changes may occur in areas hitherto considered safe. Such changes may not have been recorded by the time the claim is being heard.

IV. CONCLUSION

38. The concept of internal flight or relocation alternative is not explicitly referred to in the criteria set out in Article 1A(2) of the 1951 Convention. The question of whether the claimant has an internal flight or relocation alternative may, however, arise as part of the holistic determination of refugee status. It is relevant only in certain cases, particularly when the source of persecution emanates from a non-State actor. Even when relevant, its applicability will depend on a full consideration of all the circumstances of the case and the reasonableness of relocation to another area in the country of origin.

[13] See Summary Conclusions – Internal Protection/Relocation/Flight Alternative, para. 6; Executive Committee Conclusion No. 87 (L), 1999, para. j; and Note on International Protection, 1999, para. 26 (UN doc. A/AC.96/914, 7 July 1999).

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

Distr. GENERAL | HCR/GIP/03/05 | 4 September 2003 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 5:

Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992). These Guidelines summarise the *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (4 September 2003) which forms an integral part of UNHCR's position on this issue. They supersede *The Exclusion Clauses: Guidelines on their Application* (UNHCR, Geneva, 1 December 1996) and *Note on the Exclusion Clauses* (UNHCR, Geneva, 30 May 1997), and result, *inter alia*, from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in Lisbon, Portugal, in May 2001. An update of these Guidelines was also deemed necessary in light of contemporary developments in international law.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

I. INTRODUCTION

A. Background

1. Paragraph 7(d) of the 1950 UNHCR Statute, Article 1F of the 1951 Convention relating to the Status of Refugees (hereinafter "1951 Convention") and Article I(5) of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter "OAU Convention") all oblige States and UNHCR to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees. These provisions are commonly referred to as "the exclusion clauses". These Guidelines provide a summary of the key issues relating to these provisions – further guidance can be found in UNHCR's Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (hereinafter "the Background Note"), which forms an integral part of these Guidelines.

2. The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum, as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.

3. The exclusion clauses in the 1951 Convention are exhaustive. This should be kept in mind when interpreting Article I(5) of the OAU Convention which contains almost identical language. Article 1F of the 1951 Convention states that the provisions of that Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that:

> (a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; or
>
> (c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations.

B. Relationship with other provisions of the 1951 Convention

4. Article 1F of the 1951 Convention should be distinguished from **Article 1D** which applies to a specific category of persons receiving protection or assistance from organs and agencies of the United Nations other than UNHCR.[1] Article 1F should also be distinguished from **Article 1E** which deals with persons not in need (as opposed to undeserving) of international protection. Moreover the exclusion clauses are not to be confused with **Articles 32 and 33(2)** of the Convention which deal respectively with the expulsion of, and the withdrawal of protection from *refoulement* from, recognised refugees who pose a danger to the host State (for example, because of serious crimes they have committed there). Article 33(2) concerns the future risk that a recognised refugee may pose to the host State.

C. Temporal scope

5. Articles 1F(a) and 1F(c) are concerned with crimes whenever and wherever they are committed. By contrast, the scope of Article 1F(b) is explicitly limited to crimes committed outside the country of refuge prior to admission to that country as a refugee.

[1] See, UNHCR, "Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees", October 2002.

D. Cancellation or revocation on the basis of exclusion

6. Where facts which would have led to exclusion only come to light after the grant of refugee status, this would justify **cancellation** of refugee status on the grounds of exclusion. The reverse is that information casting doubt on the basis on which an individual has been excluded should lead to reconsideration of eligibility for refugee status. Where a refugee engages in conduct falling within Article 1F(a) or 1F(c), this would trigger the application of the exclusion clauses and the **revocation** of refugee status, provided all the criteria for the application of these clauses are met.

E. Responsibility for determination of exclusion

7. States parties to the 1951 Convention/1967 Protocol and/or OAU Convention and UNHCR need to consider whether the exclusion clauses apply in the context of the determination of refugee status. Paragraph 7(d) of UNHCR's Statute covers similar grounds to Article 1F of the 1951 Convention, although UNHCR officials should be guided by the language of Article 1F, as it represents the later and more specific formulation.

F. Consequences of exclusion

8. Although a State is precluded from granting refugee status pursuant to the 1951 Convention or the OAU Convention to an individual it has excluded, it is not otherwise obliged to take any particular course of action. The State concerned can choose to grant the excluded individual stay on other grounds, but obligations under international law may require that the person concerned be criminally prosecuted or extradited. A decision by UNHCR to exclude someone from refugee status means that that individual can no longer receive protection or assistance from the Office.

9. An excluded individual may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international instruments. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture. Other international and regional human rights instruments contain similar provisions.[2]

II. SUBSTANTIVE ANALYSIS

A. Article 1F(a): Crimes against peace, war crimes and crimes against humanity

10. Amongst the various international instruments which offer guidance on the scope of these international crimes are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the 1945 Charter of the International Military Tribunal (the London Charter), and most recently the 1998 Statute of the International Criminal Court which entered into force on 1 July 2002.

11. According to the London Charter a **crime against peace** involves the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". Given the nature of this crime, it can only be committed by those in a high position of authority representing a State or a State-like entity. In practice, this provision has rarely been invoked.

[2] For further details, see Annex A of the Background Note accompanying these Guidelines.

12. Certain breaches of international humanitarian law constitute **war crimes**.[3] Although such crimes can be committed in both international and non-international armed conflicts, the content of the crimes depends on the nature of the conflict. War crimes cover such acts as wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial.

13. The distinguishing feature of **crimes against humanity**,[4] which cover acts such as genocide, murder, rape and torture, is that they must be carried out as part of a widespread or systematic attack directed against the civilian population. An isolated act can, however, constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts. Since such crimes can take place in peacetime as well as armed conflict, this is the broadest category under Article 1F(a).

B. Article 1F(b): Serious non-political crimes

14. This category does not cover minor crimes nor prohibitions on the legitimate exercise of human rights. In determining whether a particular offence is sufficiently serious, international rather than local standards are relevant. The following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime. Thus, for example, murder, rape and armed robbery would undoubtedly qualify as serious offences, whereas petty theft would obviously not.

15. A serious crime should be considered **non-political** when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant.[5] The motivation, context, methods and proportionality of a crime to its objectives are important factors in evaluating its political nature. The fact that a particular crime is designated as non-political in an extradition treaty is of significance, but not conclusive in itself. Egregious acts of violence, such as acts those commonly considered to be of a "terrorist" nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective. Furthermore, for a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles.

16. Article 1F(b) also requires the crime to have been committed "outside the country of refuge prior to [the individual's] admission to that country as a refugee". Individuals who commit "serious non-political crimes" within the country of refuge are subject to that country's criminal law process and, in the case of particularly grave crimes, to Articles 32 and 33(2) of the 1951 Convention.

C. Article 1F(c): Acts contrary to the purposes and principles of the United Nations

17. Given the broad, general terms of the purposes and principles of the United Nations, the scope of this category is rather unclear and should therefore be read narrowly. Indeed, it is rarely applied and, in many cases, Article 1F(a) or 1F(b) are anyway likely to apply. Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category. Given that Articles 1 and 2 of the United Nations Charter essentially set out the fundamental principles States must uphold in their mutual relations, it would appear that in principle only persons who have been in positions of power in a State or State-like entity would appear capable of committing such acts. In cases involving a terrorist act, a correct application of Article 1F(c) involves an assessment as to the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security.

[3] For instruments defining war crimes, see Annex B of the Background Note.
[4] For instruments defining crimes against humanity, see Annex C of the Background Note.
[5] See para 152 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, re-edited 1992.

D. Individual responsibility

18. For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F. Specific considerations in relation to crimes against peace and acts against the purposes and principles of the UN have been discussed above. In general, individual responsibility flows from the person having committed, or made a substantial contribution to the commission of the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice.

19. The fact that a person was at some point a senior member of a repressive government or a member of an organisation involved in unlawful violence does not in itself entail individual liability for excludable acts. A presumption of responsibility may, however, arise where the individual has remained a member of a government clearly engaged in activities that fall within the scope of Article 1F. Moreover, the purposes, activities and methods of some groups are of a particularly violent nature, with the result that voluntary membership thereof may also raise a presumption of individual responsibility. Caution must be exercised when such a presumption of responsibility arises, to consider issues including the actual activities of the group, its organisational structure, the individual's position in it, and his or her ability to influence significantly its activities, as well as the possible fragmentation of the group. Moreover, such presumptions in the context of asylum proceedings are rebuttable.

20. As for ex-combatants, they should not necessarily be considered excludable, unless of course serious violations of international human rights law and international humanitarian law are reported and indicated in the individual case.

E. Grounds for rejecting individual responsibility

21. Criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. Where the **mental element** is not satisfied, for example, because of ignorance of a key fact, individual criminal responsibility is not established. In some cases, the individual may not have the mental capacity to be held responsible a crime, for example, because of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity.

22. Factors generally considered to constitute **defences** to criminal responsibility should be considered. For example, the defence of superior orders will only apply where the individual was legally obliged to obey the order, was unaware of its unlawfulness and the order itself was not manifestly unlawful. As for duress, this applies where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided. Action in self-defence or in defence of others or of property must be both reasonable and proportionate in relation to the threat.

23. Where **expiation** of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.

F. Proportionality considerations

24. The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention. The concept has evolved in particular in relation to Article 1F(b) and represents a fundamental principle of many fields of international law. As with any exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion. Such a proportionality analysis would, however, not normally be required in the case of crimes against peace, crimes against humanity, and acts falling under Article 1F(c), as the acts covered are so heinous. It remains relevant, however, to Article 1F(b) crimes and less serious war crimes under Article 1F(a).

G. Particular acts and special cases

25. Despite the lack of an internationally agreed definition of **terrorism**,[6] acts commonly considered to be terrorist in nature are likely to fall within the exclusion clauses even though Article 1F is not to be equated with a simple anti-terrorism provision. Consideration of the exclusion clauses is, however, often unnecessary as suspected terrorists may not be eligible for refugee status in the first place, their fear being of legitimate prosecution as opposed to persecution for Convention reasons.

26. Of all the exclusion clauses, Article 1F(b) may be particularly relevant as acts of terrorist violence are likely to be disproportionate to any avowed political objective. Each case will require individual consideration. The fact that an individual is designated on a national or international list of terrorist suspects (or associated with a designated terrorist organisation) should trigger consideration of the exclusion clauses but will not in itself generally constitute sufficient evidence to justify exclusion. Exclusion should not be based on membership of a particular organisation alone, although a presumption of individual responsibility may arise where the organisation is commonly known as notoriously violent and membership is voluntary. In such cases, it is necessary to examine the individual's role and position in the organisation, his or her own activities, as well as related issues as outlined in paragraph 19 above.

27. As acts of **hijacking** will almost certainly qualify as a "serious crime" under Article 1F(b), only the most compelling of circumstances can justify non-exclusion. Acts of **torture** are prohibited under international law. Depending on the context, they will generally lead to exclusion under Article 1F.

28. The exclusion clauses apply in principle to **minors**, but only if they have reached the age of criminal responsibility and possess the mental capacity to be held responsible for the crime in question. Given the vulnerability of children, great care should be exercised in considering exclusion with respect to a minor and defences such as duress should in particular be examined carefully. Where UNHCR conducts refugee status determination under its mandate, all such cases should be referred to Headquarters before a final decision is made.

29. Where the main applicant is excluded from refugee status, the dependants will need to establish their own grounds for refugee status. If the latter are recognised as refugees, the excluded individual is not able to rely on the right to family unity in order to secure protection or assistance as a refugee.

30. The exclusion clauses can also apply in situations of **mass influx**, although in practice the individual screening required may cause operational and practical difficulties. Nevertheless, until such screening can take place, all persons should receive protection and assistance, subject of course to the separation of armed elements from the civilian refugee population.

[6] For instruments pertaining to terrorism, see Annex D of the Background Note.

III. PROCEDURAL ISSUES

31. Given the grave consequences of exclusion, it is essential that rigorous procedural **safeguards** are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the **regular refugee status determination procedure** and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made. The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula. Exclusion may exceptionally be considered without particular reference to inclusion issues (i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue.

32. **Specialised exclusion units** within the institution responsible for refugee status determination could be set up to handle exclusion cases to ensure that they are dealt with in an expeditious manner. It may be prudent to defer decisions on exclusion until completion of any domestic criminal proceedings, as the latter may have significant implications for the asylum claim. In general, however, the refugee claim must be determined in a final decision before execution of any extradition order.

33. At all times the **confidentiality** of the asylum application should be respected. In exceptional circumstances, contact with the country of origin may be justified on national security grounds, but even then the existence of the asylum application should not be disclosed.

34. The burden of proof with regard to exclusion rests with the State (or UNHCR) and, as in all refugee status determination proceedings, the applicant should be given the benefit of the doubt. Where, however, the individual has been indicted by an international criminal tribunal, or where individual responsibility for actions which give rise to exclusion is presumed, as indicated in paragraph 19 of these Guidelines, the burden of proof is reversed, creating a rebuttable presumption of excludability.

35. In order to satisfy the **standard of proof** under Article 1F, clear and credible evidence is required. It is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met. Confessions and testimony of witnesses, for example, may suffice if they are reliable. Lack of cooperation by the applicant does not in itself establish guilt for the excludable act in the absence of clear and convincing evidence. Consideration of exclusion may, however, be irrelevant if non-cooperation means that the basics of an asylum claim cannot be established.

36. Exclusion should not be based on **sensitive evidence** that cannot be challenged by the individual concerned. Exceptionally, anonymous evidence (where the source is concealed) may be relied upon but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker's ability to challenge the substance of the evidence is not substantially prejudiced. Secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude. Where national security interests are at stake, these may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights.

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

Distr. GENERAL | HCR/GIP/04/06 | 28 April 2004 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 6:

Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992). They are informed, *inter alia*, by a roundtable organised by UNHCR and the Church World Service in Baltimore, Maryland, United States, in October 2002, as well as by an analysis of relevant State practice and international law.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

I. INTRODUCTION

1. Claims to refugee status based on religion can be among the most complex. Decision- makers have not always taken a consistent approach, especially when applying the term "religion" contained in the refugee definition of the 1951 Convention relating to the Status of Refugees and when determining what constitutes "persecution" in this context. Religion-based refugee claims may overlap with one or more of the other grounds in the refugee definition or, as can often happen, they may involve post-departure conversions, that is, *sur place* claims. While these Guidelines do not purport to offer a definitive definition of "religion", they provide decision-makers with guiding parameters to facilitate refugee status determination in such cases.

2. The right to freedom of thought, conscience and religion is one of the fundamental rights and freedoms in international human rights law. In determining religion-based claims, it is therefore useful, *inter alia*, to draw on Article 18 of the 1948 Universal Declaration of Human Rights (the "Universal Declaration") and Articles 18 and 27 of the 1966 International Covenant on Civil and Political Rights (the "International Covenant"). Also relevant are the General Comments issued by the Human Rights Committee,[1] the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, the 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities and the body of reports of the Special Rapporteur on Religious Intolerance.[2] These international human rights standards provide guidance in defining the term "religion" also in the context of international refugee law, against which action taken by States to restrict or prohibit certain practices can be examined.

II. SUBSTANTIVE ANALYSIS

A. Defining "religion"

3. The refugee definition contained in Article 1A(2) of the 1951 Convention states:

> A. 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.

4. The *travaux préparatoires* of the 1951 Convention show that religion-based persecution formed an integral and accepted part of the refugee definition throughout the drafting process. There was, however, no attempt to define the term as such.[3] No universally accepted definition of "religion" exists, but the instruments mentioned in paragraph 2 above certainly inform the interpretation of the term "religion" in the international refugee law context. Its use in the 1951 Convention can therefore be taken to encompass freedom of thought, conscience or belief.[4] As the Human Rights Committee notes, "religion" is "not limited … to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions".[5] It also broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief. The term is not, however, without limits and international human rights law foresees a number of legitimate boundaries on the exercise of religious freedom as outlined in greater detail in paragraphs 15–16 below.

[1] See, in particular, Human Rights Committee, General Comment No. 22, adopted 20 July 1993, UN doc. CCPR/C/21/Rev.1/ ADD.4, 27 September 1993.
[2] The latter can be found at http://www.unhchr.ch/huridocda/huridoca.nsf/FramePage/intolerance+En?OpenDocument. Relevant regional instruments include Article 9 of the 1950 European Convention on Human Rights; Article 12 of the 1969 American Convention on Human Rights; Article 8 of the 1981 African Charter on Human and Peoples' Rights.
[3] A key source in States' deliberations was the refugee definition set out in the 1946 Constitution of the International Refugee Organisation (IRO). This included those expressing valid objections to return because of a fear of persecution on grounds of "race, religion, nationality or political opinions". (A fifth ground, membership of a particular social group, was approved later in the negotiating process for the 1951 Convention.)
[4] See, also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Geneva, re-edited 1992 (hereafter "UNHCR, *Handbook*"), para. 71.
[5] Human Rights Committee, General Comment No. 22, above note 1, para. 2.

5. Claims based on "religion" may involve one or more of the following elements:

a. religion as belief (including non-belief);

b. religion as identity;

c. religion as a way of life.

6. "Belief", in this context, should be interpreted so as to include theistic, nontheistic and atheistic beliefs. Beliefs may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of humankind. Claimants may also be considered heretics, apostates, schismatic, pagans or superstitious, even by other adherents of their religious tradition and be persecuted for that reason.

7. "Identity" is less a matter of theological beliefs than membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry. A claimant may identify with, or have a sense of belonging to, or be identified by others as belonging to, a particular group or community. In many cases, persecutors are likely to target religious groups that are different from their own because they see that religious identity as part of a threat to their own identity or legitimacy.

8. For some individuals, "religion" is a vital aspect of their "way of life" and how they relate, either completely or partially, to the world. Their religion may manifest itself in such activities as the wearing of distinctive clothing or observance of particular religious practices, including observing religious holidays or dietary requirements. Such practices may seem trivial to non-adherents, but may be at the core of the religion for the adherent concerned.

9. Establishing sincerity of belief, identity and/or a certain way of life may not necessarily be relevant in every case.[6] It may not be necessary, for instance, for an individual (or a group) to declare that he or she belongs to a religion, is of a particular religious faith, or adheres to religious practices, where the persecutor imputes or attributes this religion, faith or practice to the individual or group. As is discussed further below in paragraph 31, it may also not be necessary for the claimant to know or understand anything about the religion, if he or she has been identified by others as belonging to that group and fears persecution as a result. An individual (or group) may be persecuted on the basis of religion, even if the individual or other members of the group adamantly deny that their belief, identity and/or way of life constitute a "religion".

10. Similarly, birth into a particular religious community, or a close correlation between race and/or ethnicity on the one hand and religion on the other could preclude the need to enquire into the adherence of an individual to a particular faith or the bona fides of a claim to membership of that community, if adherence to that religion is attributed to the individual.

B. Well-founded fear of persecution

a) General

11. The right to freedom of religion includes the freedom to manifest one's religion or belief, either individually or in community with others and in public or private in worship, observance, practice and teaching.[7] The only circumstances under which this freedom may be restricted are set out in Article 18(3) of the International Covenant, as described in paragraphs 15–16 below.

12. Persecution for reasons of religion may therefore take various forms. Depending on the particular circumstances of the case, including the effect on the individual concerned, examples could include prohibition of membership of a religious community, of worship in community with others in public

[6] For further analysis of credibility issues, see paras. 28–33 below.
[7] See Universal Declaration, Article 18 and International Covenant, Article 18(1).

or in private, of religious instruction, or serious measures of discrimination imposed on individuals because they practise their religion, belong to or are identified with a particular religious community, or have changed their faith.[8] Equally, in communities in which a dominant religion exists or where there is a close correlation between the State and religious institutions, discrimination on account of one's failure to adopt the dominant religion or to adhere to its practices, could amount to persecution in a particular case.[9] Persecution may be inter-religious (directed against adherents or communities of different faiths), intra-religious (within the same religion, but between different sects, or among members of the same sect), or a combination of both.[10] The claimant may belong to a religious minority or majority. Religion-based claims may also be made by individuals in marriages of mixed religions.

13. Applying the same standard as for other Convention grounds, religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution.[11] Indeed, the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions.[12]

14. Each claim requires examination on its merits on the basis of the individual's situation. Relevant areas of enquiry include the individual profile and personal experiences of the claimant, his or her religious belief, identity and/or way of life, how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution. In this context, the well-founded fear "need not necessarily be based on the applicant's own personal experience". What, for example, happened to the claimant's friends and relatives, other members of the same religious group, that is to say to other similarly situated individuals, "may well show that his [or her] fear that sooner or later he [or she] also will become a victim of persecution is well-founded".[13] Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. As the UNHCR Handbook notes, there may, however, be special circumstances where mere membership suffices, particularly when taking account of the overall political and religious situation in the country of origin, which may indicate a climate of genuine insecurity for the members of the religious community concerned.

b) Restrictions or limitations on the exercise of religious freedom

15. Article 18(3) of the International Covenant permits restrictions on the "freedom to manifest one's religion or beliefs" if these limits "are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". As the Human Rights Committee notes: "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner."[14] In assessing the legitimacy of the restriction or limitation at issue, it is therefore necessary to analyse carefully why and how it was imposed. Permissible restrictions or limitations could include measures to prevent criminal activities (for example, ritual killings), or harmful traditional practices and/or limitations on religious practices injurious to the best interests of the child, as judged by international law standards. Another justifiable, even necessary, restriction could involve the criminalisation of hate speech, including when committed in the name of religion. The

[8] UNHCR, *Handbook*, above note 4, para. 72.
[9] In this context, Article 27 of the International Covenant reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."
[10] Interim Report of the Special Rapporteur on Religious Intolerance, "Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief", UN doc. A/53/279, 24 August 1998, para. 129.
[11] See also, UNHCR, "Guidelines on International Protection: 'Membership of a particular social group' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", HCR/GIP/02/02, 7 May 2002, para. 6. Similarly, in internal flight or relocation cases, the claimant should not be expected or required to suppress his or her religious views to avoid persecution in the internal flight or relocation area. See UNHCR, "Guidelines on International Protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", HCR/GIP/03/04, 23 July 2003, paras. 19, 25.
[12] UNHCR, *Handbook*, above note 4, para. 73.
[13] UNHCR, *Handbook*, above note 4, para. 43.
[14] See Human Rights Committee, General Comment No. 22, above note 1, para. 8.

fact that a restriction on the exercise of a religious freedom finds the support of the majority of the population in the claimant's country of origin and/or is limited to the manifestation of the religion in public is irrelevant.

16. In determining whether restrictions or limitations rise to the level of persecution, the decision-maker must not only take into account international human rights standards, including lawful limitations on the exercise of religious freedom, but also evaluate the breadth of the restriction and the severity of any punishment for noncompliance. The importance or centrality of the practice within the religion and/or to the individual personally is also relevant. The decision-maker should proceed cautiously with such inquiries, taking into account the fact that what may seem trivial to an outsider may be central to the claimant's beliefs. Where the restricted practice is not important to the individual, but important to the religion, then it is unlikely to rise to the level of persecution without additional factors. By contrast, the restricted religious practice may not be so significant to the religion, but may be particularly important to the individual, and could therefore still constitute persecution on the basis of his or her conscience or belief.

c) Discrimination

17. Religion-based claims often involve discrimination.[15] Even though discrimination for reasons of religion is prohibited under international human rights law, all discrimination does not necessarily rise to the level required for recognition of refugee status. For the purposes of analysing an asylum claim, a distinction should be made between discrimination resulting merely in preferential treatment and discrimination amounting to persecution because, in aggregate or of itself, it seriously restricts the claimant's enjoyment of fundamental human rights. Examples of discrimination amounting to persecution would include, but are not limited to, discrimination with consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn a livelihood, or to access normally available educational institutions and/or health services. This may also be so where economic measures imposed "destroy the economic existence" of a particular religious group.[16]

18. The existence of discriminatory laws will not normally in itself constitute persecution, although they can be an important, even indicative, factor which therefore needs to be taken into account. An assessment of the implementation of such laws and their effect is in any case crucial to establishing persecution. Similarly, the existence of legislation on religious freedom does not of itself mean individuals are protected. In many cases, such legislation may not be implemented in practice or custom or tradition may, for instance, in practice override this.

19. Discrimination may also take the form of restrictions or limitations on religious belief or practice. Restrictions have, for instance, included penalties for converting to a different faith (apostasy) or for proselytising, or for celebrating religious festivals particular to the religion concerned. The compulsory registration of religious groups and the imposition of specific regulations governing them to restrict the exercise of freedom of religion or belief can also have a discriminatory aim or results. Such actions are legitimate only if they are "specified by law, objective, reasonable and transparent and, consequently, if they do not have the aim or the result of creating discrimination".[17]

d) Forced conversion

20. Forced conversion to a religion is a serious violation of the fundamental human right to freedom of thought, conscience and religion and would often satisfy the objective component of persecution. The claimant would still need to demonstrate a subjective fear that the conversion would be persecutory to him or her personally. Generally, this would be satisfied if the individual held convictions or faith or had a clear identity or way of life in relation to a different religion, or if he or she had chosen to be disassociated from any religious denomination or community. Where a claimant held no particular religious conviction (including one of atheism) nor a clear identification with

[15] See generally, UNHCR, *Handbook*, above note 4, paras. 54–55.
[16] UNHCR, *Handbook*, above note 4, paras. 54 and 63.
[17] Special Rapporteur on freedom of religion or belief, interim report annexed to Note by the Secretary-General, "Elimination of All Forms of Religious Intolerance", UN doc. A/58/296, 19 August 2003, paras. 134–35.

a particular religion or religious community before the conversion or threat of conversion, it would be necessary to assess the impact of such a conversion on the individual (for example, it may be an act without correlative personal effects).

e) Forced compliance or conformity with religious practices

21. Forced compliance with religious practices might, for example, take the form of mandated religious education that is incompatible with the religious convictions, identity or way of life of the child or the child's parents.[18] It might also involve an obligation to attend religious ceremonies or swear an oath of allegiance to a particular religious symbol. In determining whether such forced compliance constitutes persecution, the policies or acts with which the person or group is required to comply, the extent to which they are contrary to the person's belief, identity or way of life and the punishment for non-compliance should be examined. Such forced compliance could rise to the level of persecution if it becomes an intolerable interference with the individual's own religious belief, identity or way of life and/or if non-compliance would result in disproportionate punishment.

22. Forced compliance may also involve the imposition of a particular criminal or civil legal code purported to be based on a religious doctrine to which non-observers might object. Where such a code contains discriminatory substantive or procedural safeguards and especially where it imposes different levels of punishment upon adherents and non-adherents, it could well be regarded as persecutory. Where the law imposes disproportionate punishment for breaches of the law (for example, imprisonment for blasphemy or practising an alternative religion, or death for adultery), whether or not for adherents of the same religion, it would constitute persecution. Such cases are more common where there is limited or no separation between the State and the religion.

23. A specific religious code may be persecutory not just when enforced against non- observers, but also when applied to dissidents within or members of the same faith. The enforcement of anti-blasphemy laws, for example, can often be used to stifle political debate among co-religionists and could constitute persecution on religious and/or political grounds even when enforced against members of the same religion.

C. Special considerations

a) Gender

24. Particular attention should be paid to the impact of gender on religion-based refugee claims, as women and men may fear or suffer persecution for reasons of religion in different ways to each other. Clothing requirements, restrictions on movement, harmful traditional practices, or unequal or discriminatory treatment, including subjection to discriminatory laws and/or punishment, may all be relevant.[19] In some countries, young girls are pledged in the name of religion to perform traditional slave duties or to provide sexual services to the clergy or other men. They may also be forced into underage marriages, punished for honour crimes in the name of religion, or subjected to forced genital mutilation for religious reasons. Others are offered to deities and subsequently bought by individuals believing that they will be granted certain wishes. Women are still identified as "witches" in some communities and burned or stoned to death.[20] These practices may be culturally condoned in the claimant's community of origin but still amount to persecution. In addition, individuals may be persecuted because of their marriage or relationship to someone of a different religion than their own.

[18] This would be likely also to interfere with the undertaking of States to respect the liberty of parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions under Article 18(4) of the International Covenant.

[19] For more information, see 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", HCR/GIP/02/01, 7 May 2002, especially paras. 25–26.

[20] For description of these practices, see "Integration of the Human Rights of Women and the Gender Perspective Violence against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49, Cultural practices in the family that are violent towards women", E/CN.4/2002/83, 31 January 2002, available at http://www.unhchr.ch/huridocda/huridoca.nsf/0/42E7191FAE543562C1256BA7004E963C/$ File/G0210428.doc?OpenElement; "Droits Civils et Politiques et, Notamment: Intolérance Religieuse", Rapport soumis par M. Abdelfattah Amor, Rapporteur spécial, conformément àla résolution 2001/42 de la Commission des droits de l'homme, Additif: "Étude sur la liberté de religion ou de conviction et la condition de la femme au regard de la religion et des traditions", E/CN.4/2002/73/Add.2, 5 avril 2002, available (only in French) at http://www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/9fa99a4d3f9eade5c1256b9e00510d71?Open Document&Highlight=2,E%2FCN.4%2F2002%2F73%2FAdd.2.

When, due to the claimant's gender, State actors are unwilling or unable to protect the claimant from such treatment, it should not be mistaken as a private conflict, but should be considered as valid grounds for refugee status.

b) Conscientious objection

25. A number of religions or sects within particular religions have abstention from military service as a central tenet and a significant number of religion-based claimants seek protection on the basis of refusal to serve in the military. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably a criminal offence.[21]

26. Where military service is compulsory, refugee status may be established if the refusal to serve is based on genuine political, religious, or moral convictions, or valid reasons of conscience.[22] Such claims raise the distinction between prosecution and persecution. Prosecution and punishment pursuant to a law of general application is not generally considered to constitute persecution,[23] although there are some notable exceptions. In conscientious objector cases, a law purporting to be of general application may, depending on the circumstances, nonetheless be persecutory where, for instance, it impacts differently on particular groups, where it is applied or enforced in a discriminatory manner, where the punishment itself is excessive or disproportionately severe, or where the military service cannot reasonably be expected to be performed by the individual because of his or her genuine beliefs or religious convictions. Where alternatives to military service, such as community service, are imposed there would not usually be a basis for a claim. Having said this, some forms of community service may be so excessively burdensome as to constitute a form of punishment, or the community service might require the carrying out of acts which clearly also defy the claimant's religious beliefs. In addition, the claimant may be able to establish a claim to refugee status where the refusal to serve in the military is not occasioned by any harsh penalties, but the individual has a well-founded fear of serious harassment, discrimination or violence by other individuals (for example, soldiers, local authorities, or neighbours) for his or her refusal to serve.

III. PROCEDURAL ISSUES

a) General

27. The following are some general points of particular relevance to examining religion-based refuge claims:

a. Religious practices, traditions or beliefs can be complex and may vary from one branch or sect of a religion to another or from one country or region to another. For this reason, there is a need for reliable, accurate, up-to-date, and country- or region- specific as well as branch- or sect-specific information.

b. Refugee status determinations based on religion could also benefit from the assistance of independent experts with *particularised* knowledge of the country, region and context of the particular claim and/or the use of corroborating testimony from other adherents of the same faith.

c. Decision-makers need to be objective and not arrive at conclusions based solely upon their own experiences, even where they may belong to the same religion as the claimant. General assumptions about a particular religion or its adherents should be avoided.

d. In assessing religion-based claims, decision-makers need to appreciate the frequent interplay between religion and gender, race, ethnicity, cultural norms, identity, way of life and other factors.

[21] See generally, UNHCR, *Handbook*, above note 4, paras. 167–74.
[22] UNHCR, *Handbook*, above note 4, para. 170.
[23] UNHCR, *Handbook*, above note 4, para. 55–60.

e. In the selection of interviewers and interpreters, there should be sensitivity regarding any cultural, religious or gender aspects that could hinder open communication.[24]

f. Interviewers should also be aware of the potential for hostile biases toward the claimant by an interpreter, either because he or she shares the same religion or is not of the same religion, or of any potential fear of the same by the claimant, which could adversely affect his or her testimony. As with all refugee claims, it can be critical that interpreters are well-versed in the relevant terminology.

b) Credibility

28. Credibility is a central issue in religion-based refugee claims. While decision-makers will often find it helpful during research and preparation to list certain issues to cover during an interview, extensive examination or testing of the tenets or knowledge of the claimant's religion may not always be necessary or useful. In any case, knowledge tests need to take account of individual circumstances, particularly since knowledge of a religion may vary considerably depending on the individual's social, economic or educational background and/or his or her age or sex.

29. Experience has shown that it is useful to resort to a narrative form of questioning, including through open-ended questions allowing the claimant to explain the personal significance of the religion to him or her, the practices he or she has engaged in (or has avoided engaging in out of a fear of persecution), or any other factors relevant to the reasons for his or her fear of being persecuted. Information may be elicited about the individual's religious experiences, such as asking him or her to describe in detail how he or she adopted the religion, the place and manner of worship, or the rituals engaged in, the significance of the religion to the person, or the values he or she believes the religion espouses. For example, the individual may not be able to list the Ten Commandments or name the Twelve Imams, but may be able to indicate an understanding of the religion's basic tenets more generally. Eliciting information regarding the individual's religious identity or way of life will often be more appropriate and useful and may even be necessary. It should also be noted that a claimant's detailed knowledge of his or her religion does not necessarily correlate with sincerity of belief.

30. As indicated in paragraph 9 above, individuals may be persecuted on the basis of their religion even though they have little or no substantive knowledge of its tenets or practices. A lack of knowledge may be explained by further research into the particular practices of that religion in the area in question or by an understanding of the subjective and personal aspects of the claimant's case. For instance, the level of repression against a religious group in a society may severely restrict the ability of an individual to study or practise his or her religion. Even when the individual is able to receive religious education in a repressive environment, it may not be from qualified leaders. Women, in particular, are often denied access to religious education. Individuals in geographically remote communities may espouse adherence to a particular religion and face persecution as a result, yet have little knowledge of its formal practices. Over time, communities may adapt particular religious practices or faith to serve their own needs, or combine them with their more traditional practices and beliefs, especially where the religion has been introduced into a community with long-established traditions. For example, the claimant may not be able to distinguish between those practices which are Christian and those which are animist.

31. Less formal knowledge may also be required of someone who obtained a particular religion by birth and who has not widely practised it. No knowledge is required where a particular religious belief or adherence is imputed or attributed to a claimant.

32. Greater knowledge may be expected, however, of individuals asserting they are religious leaders or who have undergone substantial religious instruction. It is not necessary for such teaching or training to conform fully to objectively tested standards, as these may vary from region to region and country to country, but some clarification of their role and the significance of certain practices or rites to the religion would be relevant. Even claimants with a high level of education or schooling in their religion may not have knowledge of teachings and practices of a more complex, formal or obscure nature.

[24] See also, UNHCR, "Guidelines on Gender-Related Persecution", above note 19.

33. Subsequent and additional interviews may be required where certain statements or claims made by the claimant are incompatible with earlier statements or with general understandings of the religious practices of other members of that religion in the area or region in question. Claimants must be given an opportunity to explain any inconsistencies or discrepancies in their story.

c) Conversion post departure

34. Where individuals convert after their departure from the country of origin, this may have the effect of creating a *sur place* claim.[25] In such situations, particular credibility concerns tend to arise and a rigorous and in depth examination of the circumstances and genuineness of the conversion will be necessary. Issues which the decision-maker will need to assess include the nature of and connection between any religious convictions held in the country of origin and those now held, any disaffection with the religion held in the country of origin, for instance, because of its position on gender issues or sexual orientation, how the claimant came to know about the new religion in the country of asylum, his or her experience of this religion, his or her mental state and the existence of corroborating evidence regarding involvement in and membership of the new religion.

35. Both the specific circumstances in the country of asylum and the individual case may justify additional probing into particular claims. Where, for example, systematic and organised conversions are carried out by local religious groups in the country of asylum for the purposes of accessing resettlement options, and/or where "coaching" or "mentoring" of claimants is commonplace, testing of knowledge is of limited value. Rather, the interviewer needs to ask open questions and try to elicit the motivations for conversion and what effect the conversion has had on the claimant's life. The test remains, however, whether he or she would have a well-founded fear of persecution on a Convention ground if returned. Regard should therefore be had as to whether the conversion may come to the notice of the authorities of the person's country of origin and how this is likely to be viewed by those authorities.[26] Detailed country of origin information is required to determine whether a fear of persecution is objectively well-founded.

36. So-called "self-serving" activities do not create a well-founded fear of persecution on a Convention ground in the claimant's country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned. Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status or a complementary form of protection. In the event that the claim is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, international protection is required. Where the opportunistic nature of the action is clearly apparent, however, this could weigh heavily in the balance when considering potential durable solutions that may be available in such cases, as well as, for example, the type of residency status.

[25] Such a claim may also arise if a claimant marries someone of another religion in the country of asylum or educates his or her children in that other religion there and the country of origin would use this as the basis for persecution.
[26] See UNHCR, *Handbook*, above note 4, para. 96.

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

Distr. GENERAL | HCR/GIP/06/07 | 7 April 2006 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 7:

The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees* in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992). They should additionally be read in conjunction with UNHCR's Guidelines on International Protection on gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01) and on "membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/ GIP/02/02), both of 7 May 2002.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff carrying out refugee status determination in the field.

I. INTRODUCTION

1. Trafficking in persons, the primary objective of which is to gain profit through the exploitation of human beings, is prohibited by international law and criminalized in the national legislation of a growing number of States. Although the range of acts falling within the definition of trafficking varies among national jurisdictions, States have a responsibility to combat trafficking and to protect and assist victims of trafficking.

2. The issue of trafficking has attracted substantial attention in recent years, but it is not a modern phenomenon. Numerous legal instruments dating from the late nineteenth century onwards have sought to address various forms and manifestations of trafficking.[1] These instruments remain in force and are relevant to the contemporary understanding of trafficking and how best to combat it. The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the "Trafficking Protocol")[2] supplementing the 2000 United Nations Convention against Transnational Organized Crime (hereinafter the "Convention against Transnational Crime")[3] provides an international definition of trafficking. This represents a crucial step forward in efforts to combat trafficking and ensure full respect for the rights of individuals affected by trafficking.

3. Trafficking in the context of the sex trade is well documented and primarily affects women and children who are forced into prostitution and other forms of sexual exploitation.[4] Trafficking is not, however, limited to the sex trade or to women. It also includes, at a minimum, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[5] Depending on the circumstances, trafficking may constitute a crime against humanity and, in armed conflict, a war crime.[6] A common characteristic of all forms of trafficking is that victims are treated as merchandise, "owned" by their traffickers, with scant regard for their human rights and dignity.

4. In some respects, trafficking in persons resembles the smuggling of migrants, which is the subject of another Protocol to the Convention against Transnational Crime.[7] As with trafficking, the smuggling of migrants often takes place in dangerous and/or degrading conditions involving human rights abuses. It is nevertheless essentially a voluntary act entailing the payment of a fee to the smuggler to provide a specific service. The relationship between the migrant and the smuggler normally ends either with the arrival at the migrant's destination or with the individual being abandoned en route. Victims of trafficking are distinguished from migrants who have been smuggled by the protracted nature of the exploitation they endure, which includes serious and ongoing abuses of their human rights at the hands of their traffickers. Smuggling rings and trafficking rings are nevertheless often closely related, with both preying on the vulnerabilities of people seeking international protection or access to labour markets abroad. Irregular migrants relying on the services of smugglers whom they have willingly contracted may also end up as victims of trafficking, if the services they originally sought metamorphose into abusive and exploitative trafficking scenarios.

5. UNHCR's involvement with the issue of trafficking is essentially twofold. Firstly, the Office has a responsibility to ensure that refugees, asylum-seekers, internally displaced persons (IDPs), stateless persons and other persons of concern do not fall victim to trafficking. Secondly, the Office has a responsibility to ensure that individuals who have been trafficked and who fear being subjected to persecution upon a return to their country of origin, or individuals who fear being trafficked, whose claim to international protection falls within the refugee definition contained in the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (hereinafter "the 1951 Convention") are recognized as refugees and afforded the corresponding international protection.

---

[1] It has been estimated that between 1815 and 1957 some 300 international agreements were adopted to suppress slavery in its various forms, including for example the 1910 International Convention for the Suppression of the White Slave Traffic, the 1915 Declaration Relative to the Universal Abolition of the Slave Trade, the 1926 Slavery Convention, the 1949 Convention for the Suppression of the Traffick in Persons and of the Exploitation of the Prostitution of Others and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.
[2] Entered into force on 25 December 2003.
[3] Entered into force on 29 September 2003.
[4] Bearing in mind the prevalence of women and girls amongst the victims of trafficking, gender is a relevant factor in evaluating their claims for refugee status. See further, 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" (hereinafter "UNHCR Guidelines on Gender-Related Persecution"), HCR/GIP/02/01, 7 May 2002, para. 2.
[5] See Article 3(a) of the Trafficking Protocol cited in para. 8 below.
[6] See, for instance, Articles 7(1)(c), 7(1)(g), 7(2)(c) and 8(2)(xxii) of the 1998 Statute of the International Criminal Court, A/ CONF.183/9, which specifically refer to "enslavement", "sexual slavery" and "enforced prostitution" as crimes against humanity and war crimes.
[7] The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air (entered into force on 28 January 2004).

6. Not all victims or potential victims of trafficking fall within the scope of the refugee definition. To be recognized as a refugee, all elements of the refugee definition have to be satisfied. These Guidelines are intended to provide guidance on the application of Article 1A(2) of the 1951 Convention to victims or potential victims of trafficking. They also cover issues concerning victims of trafficking arising in the context of the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The protection of victims or potential victims of trafficking as set out in these Guidelines is additional to and distinct from the protection contemplated by Part II of the Trafficking Protocol.[8]

II. SUBSTANTIVE ANALYSIS

a) Definitional issues

7. The primary function of the Convention against Transnational Crime and its supplementary Protocols against Trafficking and Smuggling is crime control. They seek to define criminal activities and guide States as to how best to combat them. In doing so, they nevertheless provide helpful guidance on some aspects of victim protection and therefore constitute a useful starting point for any analysis of international protection needs arising as a result of trafficking.

8. Article 3 of the Trafficking Protocol reads:

> For the purposes of this Protocol:
>
> (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
>
> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
>
> (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;
>
> (d) 'Child' shall mean any person under eighteen years of age.

9. The Trafficking Protocol thus defines trafficking by three essential and interlinked sets of elements:

The act: recruitment, transportation, transfer, harbouring or receipt of persons;

The means: by threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, or of giving or receiving of payments or benefits to achieve the consent of a person having control over the victim;

The purpose: exploitation of the victim, including, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[9]

[8] Part II of the Trafficking Protocol concerns the protection of victims of trafficking. It covers areas such as ensuring the protection of privacy and identity of the victims; providing victims with information on relevant court and administrative proceedings, as well as assistance to enable them to present their views and concerns at appropriate stages of criminal proceedings against offenders; providing victims with support for physical, psychological and social recovery; permitting victims to remain in the territory temporarily or permanently; repatriating victims with due regard for their safety; and other measures.

[9] For the purposes of these Guidelines, the Trafficking Protocol definition is used as it represents the current international consensus on the meaning of trafficking. In order to understand the legal meaning of terms used within the Protocol definition fully, it is nevertheless necessary to refer further to other legal instruments, for example, a number of International Labour Organization Conventions, including the 1930 Convention No. 29 on Forced or Compulsory Labour, the 1957 Convention No. 105 on the Abolition of Forced Labour, the 1975 Convention No. 143 on Migrant Workers (Supplementary Provisions) and the 1999 Convention No. 182 on the Worst Forms of Child Labour. These are referred to in the first report of the Special Rapporteur on trafficking in persons, especially women and children, Ms Sigma Huda, E/CN.4/2005/71, 22 December 2004, para. 22. Her second report entitled "Integration of the Human Rights of Women and a Gender Perspective", E/CN.4/2006/62, 20 February 2006, goes into this issue in further detail in paras. 31–45. The Special Rapporteur was appointed in 2004 pursuant to a new mandate created by the 60th Session of the Commission on Human Rights (Resolution 2004/110).

10. An important aspect of this definition is an understanding of trafficking as a process comprising a number of interrelated actions rather than a single act at a given point in time. Once initial control is secured, victims are generally moved to a place where there is a market for their services, often where they lack language skills and other basic knowledge that would enable them to seek help. While these actions can all take place within one country's borders,[10] they can also take place across borders with the recruitment taking place in one country and the act of receiving the victim and the exploitation taking place in another. Whether or not an international border is crossed, the intention to exploit the individual concerned underpins the entire process.

11. Article 3 of the Trafficking Protocol states that where any of the means set forth in the definition are used, the consent of the victim to the intended exploitation is irrelevant.[11] Where the victim is a child,[12] the question of consent is all the more irrelevant as any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used.

12. Some victims or potential victims of trafficking may fall within the definition of a refugee contained in Article 1A(2) of the 1951 Convention and may therefore be entitled to international refugee protection. Such a possibility is not least implicit in the saving clause contained in Article 14 of the Trafficking Protocol, which states:

> 1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.[13]
>
> 2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

13. A claim for international protection presented by a victim or potential victim of trafficking can arise in a number of distinct sets of circumstances. The victim may have been trafficked abroad, may have escaped her or his traffickers and may seek the protection of the State where she or he now is. The victim may have been trafficked within national territory, may have escaped from her or his traffickers and have fled abroad in search of international protection. The individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection. In all these instances, the individual concerned must be found to have a "well- founded fear of persecution" linked to one or more of the Convention grounds in order to be recognized as a refugee.

b) Well-founded fear of persecution

14. What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case.[14] Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings and psychological make-up of the asylum applicant.

---

[10] The Council of Europe Convention on Action against Trafficking in Human Beings, opened for signature in May 2005, addresses the question of trafficking within national borders directly.

[11] Article 3(b) of the Trafficking Protocol. See also, the second report of the Special Rapporteur on trafficking in persons, cited above in footnote 9, paras. 37–43 on the "irrelevance of consent".

[12] Article 3(c) of the Trafficking Protocol follows the 1989 Convention on the Rights of the Child in defining a child as "any person under eighteen years of age".

[13] The Agenda for Protection, A/AC.96/965/Add.1, 2002, Goal 2, Objective 2, calls upon States to ensure that their asylum systems are open to receiving claims from individual victims of trafficking. This interpretation of the Article 14 saving clause as imposing an obligation on States to consider the international protection needs of victims of trafficking is strengthened by paragraph 377 of the Explanatory Report accompanying the Council of Europe Convention. This states in relation to Article 40 of that Convention:
The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of *non-refoulement*.
Additionally, the Office of the High Commissioner for Human Rights (OHCHR) "Recommended Principles and Guidelines on Human Rights and Human Trafficking" presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights, E/2002/68/Add. 1, 20 May 2002, available at http:www.ohchr.org/english/about/ publications/docs/trafficking.doc, address in Guideline 2.7 the importance of ensuring that procedures and processes are in place for the consideration of asylum claims from trafficked persons (as well as from smuggled asylum-seekers) and that the principle of *non-refoulement* is respected and upheld at all times.

[14] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, re-edited 1992, para. 51 (hereinafter the "UNHCR, *Handbook*").

15. In this regard, the evolution of international law in criminalizing trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking. Asylum claims lodged by victims of trafficking or potential victims of trafficking should thus be examined in detail to establish whether the harm feared as a result of the trafficking experience, or as a result of its anticipation, amounts to persecution in the individual case. Inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution.

16. In cases where the trafficking experience of the asylum applicant is determined to be a one-off past experience, which is not likely to be repeated, it may still be appropriate to recognize the individual concerned as a refugee if there are compelling reasons arising out of previous persecution, provided the other interrelated elements of the refugee definition are fulfilled. This would include situations where the persecution suffered during the trafficking experience, even if past, was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable. In other words, the impact on the individual of the previous persecution continues. The nature of the harm previously suffered will also impact on the opinions, feelings and psychological make-up of the asylum applicant and thus influence the assessment of whether any future harm or predicament feared would amount to persecution in the particular case.

17. Apart from the persecution experienced by individuals in the course of being trafficked, they may face reprisals and/or possible re-trafficking should they be returned to the territory from which they have fled or from which they have been trafficked.[15] For example, the victim's cooperation with the authorities in the country of asylum or the country of origin in investigations may give rise to a risk of harm from the traffickers upon return, particularly if the trafficking has been perpetrated by international trafficking networks. Reprisals at the hands of traffickers could amount to persecution depending on whether the acts feared involve serious human rights violations or other serious harm or intolerable predicament and on an evaluation of their impact on the individual concerned. Reprisals by traffickers could also be inflicted on the victim's family members, which could render a fear of persecution on the part of the victim well-founded, even if she or he has not been subjected directly to such reprisals. In view of the serious human rights violations often involved, as described in paragraph 15 above, re-trafficking would usually amount to persecution.

18. In addition, the victim may also fear ostracism, discrimination or punishment by the family and/or the local community or, in some instances, by the authorities upon return. Such treatment is particularly relevant in the case of those trafficked into prostitution. In the individual case, severe ostracism, discrimination or punishment may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process. Where the individual fears such treatment, her or his fear of persecution is distinct from, but no less valid than, the fear of persecution resulting from the continued exposure to the violence involved in trafficking scenarios. Even if the ostracism from, or punishment by, family or community members does not rise to the level of persecution, such rejection by, and isolation from, social support networks may in fact heighten the risk of being re-trafficked or of being exposed to retaliation, which could then give rise to a well-founded fear of persecution.

c) Women and children victims of trafficking

19. The forcible or deceptive recruitment of women and children for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecu-

[15] See, "Report of the Working Group on Contemporary Forms of Slavery on its twenty-ninth session", E/CN.4/Sub.2/2004/36, 20 July 2004, Section VII Recommendations adopted at the twenty-ninth session, p. 16, para. 29. This "[c]alls upon all States to ensure that the protection and support of the victims are at the centre of any anti-trafficking policy, and specifically to ensure that: (a) No victim of trafficking is removed from the host country if there is a reasonable likelihood that she will be re-trafficked or subjected to other forms of serious harm, irrespective of whether she decides to cooperate in a prosecution".

tion.[16] Trafficked women and children can be particularly susceptible to serious reprisals by traffickers after their escape and/or upon return, as well as to a real possibility of being re-trafficked or of being subjected to severe family or community ostracism and/or severe discrimination.

20. In certain settings, unaccompanied or separated children,[17] are especially vulnerable to trafficking.[18] Such children may be trafficked for the purposes of irregular adoption. This can occur with or without the knowledge and assent of the child's parents. Traffickers may also choose to target orphans. In assessing the international protection needs of children who have been trafficked, it is essential that the best interest principle be scrupulously applied.[19] All cases involving trafficked children require a careful examination of the possible involvement of family members or caregivers in the actions that set the trafficking in motion.

d) Agents of persecution

21. There is scope within the refugee definition to recognize both State and non-State agents of persecution. While persecution is often perpetrated by the authorities of a country, it can also be perpetrated by individuals if the persecutory acts are "knowingly tolerated by the authorities or if the authorities refuse, or prove unable to offer effective protection".[20] In most situations involving victims or potential victims of trafficking, the persecutory acts emanate from individuals, that is, traffickers or criminal enterprises or, in some situations, family or community members. Under these circumstances, it is also necessary to examine whether the authorities of the country of origin are able and willing to protect the victim or potential victim upon return.

22. Whether the authorities in the country of origin are able to protect victims or potential victims of trafficking will depend on whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking, as well as to protect and assist the victims and on whether these mechanisms are effectively implemented in practice.[21] Part II of the Trafficking Protocol requires States to take certain steps with regard to the protection of victims of trafficking, which can be of guidance when assessing the adequacy of protection and assistance provided. Measures relate not only to protecting the privacy and identity of victims of trafficking, but also to their physical, psychological and social recovery.[22] Article 8 of the Trafficking Protocol also requires State Parties, which are facilitating the return of their nationals or permanent residents who have been trafficked, to give due regard to the safety of the individuals concerned when accepting them back. The protection measures set out in Part II of the Trafficking Protocol are not exhaustive and should be read in light of other relevant binding and non-binding human rights instruments and guidelines.[23]

23. Many States have not adopted or implemented sufficiently stringent measures to criminalize and prevent trafficking or to meet the needs of victims. Where a State fails to take such reasonable steps

---

[16] See UNHCR Guidelines on Gender-Related Persecution, above footnote 4, para. 18. The Commission on Human Rights also recognized that such violence may constitute persecution for the purposes of the refugee definition, when it urged States "to mainstream a gender perspective into all policies and programmes, including national immigration and asylum policies, regulations and practices, as appropriate, in order to promote and protect the rights of all women and girls, including the consideration of steps to recognize gender-related persecution and violence when assessing grounds for granting refugee status and asylum". See Resolution 2005/41, Elimination of violence against women, 57th meeting, 19 April 2005, operational para. 22.

[17] As indicated in the *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, 2004, "separated children are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives", while unaccompanied children are "children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so".

[18] There are a number of international instruments which offer specific guidance with respect to the needs and rights of children. These should be given due consideration in assessing the claims of child victims. See, for example, the 1989 Convention on the Rights of the Child, the 2000 Optional Protocol to that Convention, on the sale of children, child prostitution and child pornography, the 1980 Hague Convention No. 28 on the Civil Aspects of International Child Abduction, the 2000 Trafficking Protocol and the 1999 ILO Convention No. 182 on the Prohibition of the Worst Forms of Child Labour. See also, generally, Committee on the Rights of the Child, "General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin", CRC/CG/2005/6, 1 Sept. 2005.

[19] See, *UNHCR Guidelines on Formal Determination of the Best Interests of the Child*, provisional release April 2006; UN Children's Fund (UNICEF), "Guidelines for Protection of the Rights of Child Victims of Trafficking", May 2003 and in the process of being updated.

[20] See, UNHCR, *Handbook*, above footnote 14, para. 65; UNHCR, "Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees" (hereinafter "Interpreting Article 1"), April 2001, para. 19; UNHCR Guidelines on Gender-related Persecution, above footnote 4, para. 19.

[21] See Part II of the Trafficking Protocol outlined in footnote 8 above.

[22] *Ibid*.

[23] See, United Nations High Commissioner for Human Rights, "Recommended Principles and Guidelines on Human Rights and Human Trafficking", above footnote 13, which states in Principle No. 2: "States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons". Numerous instruments of a binding and a non-binding nature highlight the obligation of States to uphold the human rights of victims of trafficking. See, for example, the Council of Europe Convention cited above at footnote 10, the 2002 South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the 2003 Organization for Security and Cooperation in Europe (OSCE) Action Plan to Combat Trafficking in Human Beings.

as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well-founded. The mere existence of a law prohibiting trafficking in persons will not of itself be sufficient to exclude the possibility of persecution. If the law exists but is not effectively implemented, or if administrative mechanisms are in place to provide protection and assistance to victims, but the individual concerned is unable to gain access to such mechanisms, the State may be deemed unable to extend protection to the victim, or potential victim, of trafficking.

24. There may also be situations where trafficking activities are *de facto* tolerated or condoned by the authorities or even actively facilitated by corrupt State officials. In these circumstances, the agent of persecution may well be the State itself, which becomes responsible, whether directly or as a result of inaction, for a failure to protect those within its jurisdiction. Whether this is so will depend on the role played by the officials concerned and on whether they are acting in their personal capacity outside the framework of governmental authority or on the basis of the position of authority they occupy within governmental structures supporting or condoning trafficking. In the latter case, the persecutory acts may be deemed to emanate from the State itself.

e) Place of persecution

25. In order to come within the scope of Article 1A(2) of the 1951 Convention, the applicant must be outside her or his country of origin and, owing to a well-founded fear of persecution, be unable or unwilling to avail her- or himself of the protection of that country. The requirement of being outside one's country does not, however, mean that the individual must have left on account of a well-founded fear of persecution.[24] Where this fear arises after she or he has left the country of origin, she or he would be a refugee *sur place*, providing the other elements in the refugee definition were fulfilled. Thus, while victims of trafficking may not have left their country owing to a well-founded fear of persecution, such a fear may arise after leaving their country of origin. In such cases, it is on this basis that the claim to refugee status should be assessed.

26. Whether the fear of persecution arises before leaving the country of origin or after, the location where the persecution takes place is a crucial aspect in correctly assessing asylum claims made by individuals who have been trafficked. The 1951 Convention requires that the refugee demonstrate a well-founded fear of persecution with regard to her or his country of nationality or habitual residence. Where someone has been trafficked within her or his own country, or fears being trafficked, and escapes to another in search of international protection, the link between the fear of persecution, the motivation for flight and the unwillingness to return is evident and any international protection needs fall to be determined in terms of the threat posed to the individual should she or he be obliged to return to the country of nationality or habitual residence. If no such well-founded fear is established in relation to the country of origin, then it would be appropriate for the State from which asylum has been requested to reject the claim to refugee status.

27. The circumstances in the applicant's country of origin or habitual residence are the main point of reference against which to determine the existence of a well-founded fear of persecution. Nevertheless, even where the exploitation experienced by a victim of trafficking occurs mainly outside the country of origin, this does not preclude the existence of a well-founded fear of persecution in the individual's own country. The trafficking of individuals across international borders gives rise to a complex situation which requires a broad analysis taking into account the various forms of harm that have occurred at different points along the trafficking route. The continuous and interconnected nature of the range of persecutory acts involved in the context of transnational trafficking should be given due consideration. Furthermore, trafficking involves a chain of actors, starting with those responsible for recruitment in the country of origin, through to those who organize and facilitate the transport, transfer and/or sale of victims, through to the final "purchaser". Each of these actors has a vested interest in the trafficking enterprise and could pose a real threat to the victim. Depending on the sophistication of the trafficking rings involved, applicants may thus have experienced and continue to fear harm in a number of locations, including in countries through

[24] See UNHCR, *Handbook*, above footnote 14, para. 94.

which they have transited, the State in which the asylum application is submitted and the country of origin. In such circumstances, the existence of a well-founded fear of persecution is to be evaluated in relation to the country of origin of the applicant.

28. A victim of trafficking who has been determined to be a refugee may additionally fear reprisals, punishment or re-trafficking in the country of asylum. If a refugee is at risk in her or his country of refuge or has particular needs, which cannot be met in the country of asylum, she or he may need to be considered for resettlement to a third country.[25]

f) The causal link ("for reasons of")

29. To qualify for refugee status, an individual's well-founded fear of persecution must be related to one or more of the Convention grounds, that is, it must be "for reasons of" race, religion, nationality, membership of a particular social group or political opinion. It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause. In many jurisdictions, the causal link ("for reasons of") must be explicitly established, while in other States, causation is not treated as a separate question for analysis but is subsumed within the holistic analysis of the refugee definition.[26] In relation to asylum claims involving trafficking, the difficult issue for a decision-maker is likely to be linking the well-founded fear of persecution to a Convention ground. Where the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.[27]

30. In cases where there is a risk of being persecuted at the hands of a non-State actor for reasons related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention-related. Alternatively, where a risk of persecution at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.

31. Trafficking in persons is a commercial enterprise, the prime motivation of which is likely to be profit rather than persecution on a Convention ground. In other words, victims are likely to be targeted above all because of their perceived or potential commercial value to the traffickers. This overriding economic motive does not, however, exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking. Scenarios in which trafficking can flourish frequently coincide with situations where potential victims may be vulnerable to trafficking precisely as a result of characteristics contained in the 1951 Convention refugee definition. For instance, States where there has been significant social upheaval and/or economic transition or which have been involved in armed conflict resulting in a breakdown in law and order are prone to increased poverty, deprivation and dislocation of the civilian population. Opportunities arise for organized crime to exploit the inability, or lack of will, of law enforcement agencies to maintain law and order, in particular the failure to ensure adequate security for specific or vulnerable groups.

32. Members of a certain race or ethnic group in a given country may be especially vulnerable to trafficking and/or less effectively protected by the authorities of the country of origin. Victims may be targeted on the basis of their ethnicity, nationality, religious or political views in a context where individuals with specific profiles are already more vulnerable to exploitation and abuse of varying forms. Individuals may also be targeted by reason of their belonging to a particular social group. As an example, among children or women generally in a particular society some subsets of children or women may be especially vulnerable to being trafficked and may constitute a social group within the terms of the refugee definition. Thus, even if an individual is not trafficked solely and exclusively for a Convention reason, one or more of these Convention grounds may have been relevant for the trafficker's selection of the particular victim.

[25] UNHCR, *Resettlement Handbook*, November 2004 edition, chapter 4.1.
[26] See UNHCR Guidelines on Gender-related Persecution, above footnote 4, para. 20.
[27] See UNHCR "Interpreting Article 1", above footnote 20, para. 25.

g) Convention grounds

33. The causal link may be established to any one single Convention ground or to a combination of these grounds. Although a successful claim to refugee status only needs to establish a causal link to one ground, a full analysis of trafficking cases may frequently reveal a number of inter-linked, cumulative grounds.

Race

34. For the purposes of the refugee definition, race has been defined as including "all kinds of ethnic groups that are referred to as 'races' in common usage".[28] In situations of armed conflict where there is a deliberate policy of exploitation or victimization of certain racial or ethnic groups, persecution may manifest itself by the trafficking of members of that group. This kind of targeting of victims may occur in conjunction with an economic motivation which above all seeks to obtain financial gain. In the absence of armed conflict, members of one racial group may still be particularly targeted for trafficking for varied ends, if the State is unable or unwilling to protect members of that group. Where trafficking serves the sex trade, women and girls may also be especially targeted as a result of market demands for a particular race (or nationality). As the Special Rapporteur on trafficking has noted, such demand "is often further grounded in social power disparities of race, nationality, caste and colour".[29]

Religion

35. Individuals may similarly be targeted by traffickers because they belong to a particular religious community, that is, they may be targeted because their faith or belief identifies them as a member of a vulnerable group in the particular circumstances, if, for instance, the authorities are known not to provide adequate protection to certain religious groups. Again the profit motive may be an overriding factor, but this does not obviate the relevance of religion as a factor in the profiling and selection of victims. Alternatively, trafficking may be the method chosen to persecute members of a particular faith.[30]

Nationality

36. Nationality has a wider meaning than citizenship. It can equally refer to membership of an ethnic or linguistic group and may overlap with the term "race".[31] Trafficking may be the method chosen to persecute members of a particular national group in a context where there is inter-ethnic conflict within a State and certain groups enjoy lesser guarantees of protection. Again, even where the primary motive of the trafficker is financial gain, someone's nationality may result in them being more vulnerable to trafficking.

Membership of a particular social group[32]

37. Victims and potential victims of trafficking may qualify as refugees where it can be demonstrated that they fear being persecuted for reasons of their membership of a particular social group. In establishing this ground it is not necessary that the members of a particular group know each other or associate with each other as a group. It is, however, necessary[33] that they either share a common characteristic other than their risk of being persecuted or are perceived as a group by society. The shared characteristic will often be one that is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one's human rights.[34] Persecutory action against a group may be relevant in heightening the visibility of the group without being its defining characteristic.[35] As with the other Convention grounds, the size of the purported social group is not a relevant

[28] UNHCR, *Handbook*, para. 68.
[29] See, Report of the Special Rapporteur, "Integration of the Human Rights of Women and a Gender Perspective", above footnote 9, paras. 48 and 66.
[30] See generally, UNHCR, "Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees", HCR/GIP/04/06, 28 April 2004
[31] UNHCR, *Handbook*, para. 74.
[32] See generally, UNHCR, "Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1A(2) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees", HCR/GIP/02/02, 7 May 2002.
[33] *Ibid*., para. 15.
[34] *Ibid*., para. 11.
[35] *Ibid*., para. 14.

criterion in determining whether a social group exists within the meaning of Article 1A(2).[36] While a claimant must still demonstrate a well-founded fear of being persecuted based on her or his membership of the particular social group, she or he need not demonstrate that all members of the group are at risk of persecution in order to establish the existence of the group.[37]

38. Women are an example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men. As such, they may constitute a particular social group.[38] Factors which may distinguish women as targets for traffickers are generally connected to their vulnerability in certain social settings; therefore certain social subsets of women may also constitute particular social groups. Men or children or certain social subsets of these groups may also be considered as particular social groups. Examples of social subsets of women or children could, depending on the context, be single women, widows, divorced women, illiterate women, separated or unaccompanied children, orphans or street children. The fact of belonging to such a particular social group may be one of the factors contributing to an individual's fear of being subjected to persecution, for example, to sexual exploitation, as a result of being, or fearing being, trafficked.

39. Former victims of trafficking may also be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked. A society may also, depending on the context, view persons who have been trafficked as a cognizable group within that society. Particular social groups can nevertheless not be defined exclusively by the persecution that members of the group suffer or by a common fear of persecution.[39] It should therefore be noted that it is the past trafficking experience that would constitute one of the elements defining the group in such cases, rather than the future persecution now feared in the form of ostracism, punishment, reprisals or re-trafficking. In such situations, the group would therefore not be defined solely by its fear of future persecution.

Political opinion

40. Individuals may be targeted for trafficking because they hold a certain political opinion or are perceived as doing so. Similar considerations apply for the other Convention grounds, that is, individuals may, depending on the circumstances, be targeted because of their actual or perceived political views which make them vulnerable and less likely to enjoy the effective protection of the State.

III. STATELESSNESS AND TRAFFICKING

41. The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness establish a legal framework setting out the rights of stateless persons, the obligations of States Parties to avoid actions that would result in statelessness and the steps to be taken to remedy situations of statelessness. The 1954 Convention applies to anyone who is "not considered as a national by any State under the operation of its law",[40] that is, it applies for the benefit of those who are denied citizenship under the laws of any State. The 1961 Convention generally requires States to avoid actions that would result in statelessness and explicitly forbids the deprivation of nationality if this would result in statelessness.[41] This constitutes a prohibition on actions that would cause statelessness, as well as an obligation to avoid situations where statelessness may arise by default or neglect. The only exception to this prohibition is when the nationality was acquired fraudulently.[42]

42. When seeking to assess and address the situation of someone who has been trafficked, it is important to recognize potential implications as regards statelessness. The mere fact of being a

[36] *Ibid*., para. 18.
[37] *Ibid*., para. 17.
[38] *Ibid*., para. 12. See also UNHCR Guidelines on Gender-related Persecution, above footnote 4, para. 30.
[39] See UNHCR Guidelines on Membership of a Particular Social Group, above footnote 32, para. 14.
[40] See Article 1(1) of the 1954 Convention.
[41] See Article 8(1) of the 1961 Convention.
[42] In addition to the 1954 and 1961 Statelessness Conventions, other international or regional instruments set out similar principles. See, for instance, the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1997 European Convention on Nationality, the 1969 American Convention on Human Rights and the 1990 African Charter on the Rights and Welfare of the Child.

victim of trafficking will not *per se* render someone stateless. Victims of trafficking continue to possess the citizenship they had when they fell under the control of their traffickers. If, however, these traffickers have confiscated their identity documents, as commonly happens as a way of establishing and exerting control over their victims, they may be unable to prove citizenship. This lack of documentation and temporary inability to establish identity is not necessarily unique to victims of trafficking. It should be, and in many cases is, easily overcome with the assistance of the authorities of the State of origin.[43]

43. Everyone has the right to return to their own country.[44] States should extend diplomatic protection to their nationals abroad. This includes facilitating their re-entry into the country, including in the case of victims of trafficking who find themselves abroad. If, however, the State withholds such assistance and fails to supply documentation to enable the individual to return, one practical consequence may be to render the individual effectively stateless.[45] Even if the individuals were not previously considered stateless by their State of nationality, they may find themselves effectively treated as such if they attempt to avail themselves of that State's protection.[46] UNHCR's statelessness mandate may mean it needs to take action to assist individuals in such circumstances.[47]

44. There may also be situations where stateless individuals are trafficked out of their country of habitual residence. The lack of documentation coupled with lack of citizenship may render them unable to secure return to their country of habitual residence. While this alone does not make someone a refugee, the individual concerned may be eligible for refugee status where the refusal of the country of habitual residence to allow re-entry is related to a Convention ground and the inability to return to the country leads to serious harm or a serious violation, or violations, of human rights amounting to persecution.

IV. PROCEDURAL ISSUES

45. Given the broad range of situations in which trafficking cases come to light and victims of trafficking can be identified, it is important that mechanisms be put in place at the national level to provide for the physical, psychological and social recovery of victims of trafficking. This includes the provision of housing, legal counselling and information, medical, psychological and material assistance, as well as employment, educational and training opportunities in a manner which takes into account the age, gender and special needs of victims of trafficking.[48] It is also necessary to ensure that victims of trafficking have access to fair and efficient asylum procedures as appropriate[49] and to proper legal counselling, if they are to be able to lodge an asylum claim effectively. In view of the complexities of asylum claims presented by victims or potential victims of trafficking, such claims normally require an examination on their merits in regular procedures.

46. In the reception of applicants who claim to have been victims of trafficking, and in interviewing such individuals, it is of utmost importance that a supportive environment be provided so that they can be reassured of the confidentiality of their claim. Providing interviewers of the same sex as the applicant can be particularly important in this respect. Interviewers should also take into consideration that victims who have escaped from their traffickers could be in fear of revealing the real extent of the persecution they have suffered. Some may be traumatized and in need of expert medical and/or psycho-social assistance, as well as expert counselling.

[43] In such circumstances, it is necessary to respect principles of confidentiality. These require amongst other things that any contact with the country of origin should not indicate either that the individual concerned has applied for asylum or that she or he has been trafficked.
[44] 1948 Universal Declaration of Human Rights, Article 13(2). See also, Article 12(4) of the International Covenant on Civil and Political Rights, which reads: "No one shall be arbitrarily deprived of the right to enter his own country."
[45] See, Executive Committee Conclusion No. 90 (LII), 2001, paragraph (s), in which the Executive Committee of UNHCR expresses its concern that many victims of trafficking are rendered effectively stateless due to an inability to establish their identity and nationality status.
[46] This is so, despite relevant State obligations contained in the 1961 Convention on the Reduction of Statelessness, in addition to Article 8 of the Trafficking Protocol.
[47] When the 1961 Convention on the Reduction of Statelessness came into force, the UN General Assembly designated UNHCR as the UN body entrusted to act on behalf of stateless persons. Since 1975, General Assembly Resolutions have further detailed UNHCR's responsibilities regarding the prevention of statelessness and the protection of stateless persons.
[48] See Article 6 in Part II of the Trafficking Protocol.
[49] See Agenda for Protection, Goal 2 Objective 2, and the OHCHR, "Recommended Principles and Guidelines on Human Rights and Human Trafficking", above footnote 13, Guideline 2.7, and the Council of Europe Convention, Explanatory Report, para. 377.

47. Such assistance should be provided to victims in an age and gender sensitive manner. Many instances of trafficking, in particular trafficking for the purposes of exploitation of the prostitution of others or other forms of sexual exploitation, are likely to have a disproportionately severe effect on women and children. Such individuals may rightly be considered as victims of gender-related persecution. They will have been subjected in many, if not most, cases to severe breaches of their basic human rights, including inhuman or degrading treatment, and in some instances, torture.

48. Women, in particular, may feel ashamed of what has happened to them or may suffer from trauma caused by sexual abuse and violence, as well as by the circumstances surrounding their escape from their traffickers. In such situations, the fear of their traffickers will be very real. Additionally, they may fear rejection and/or reprisals by their family and/or community which should be taken into account when considering their claims. Against this background and in order to ensure that claims by female victims of trafficking are properly considered in the refugee status determination process, a number of measures should be borne in mind. These have been set out in Part III of UNHCR's Guidelines on International Protection on gender-related persecution and are equally applicable in the context of trafficking-related claims.[50]

49. Children also require special attention in terms of their care, as well as of the assistance to be provided in the presentation of asylum claims. In this context, procedures for the rapid identification of child victims of trafficking need to be established, as do specialized programmes and policies to protect and support child victims, including through the appointment of a guardian, the provision of age-sensitive counselling and tracing efforts which bear in mind the need for confidentiality and a supportive environment. Additional information on the appropriate handling of claims by child victims of trafficking can be found in the UN Children Fund (UNICEF) "Guidelines for the Protection of the Rights of Child Victims of Trafficking",[51] in the "Recommended Principles and Guidelines on Human Rights and Human Trafficking" of the Office of the High Commissioner for Human Rights[52] and General Comment No. 6 of the of the Committee on the Rights of the Child.[53]

50. An additional and specific consideration relates to the importance of avoiding any linkage, whether overt or implied, between the evaluation of the merits of a claim to asylum and the willingness of a victim to give evidence in legal proceedings against her or his traffickers. Providing evidence to help identify and prosecute traffickers can raise specific protection concerns that need to be addressed through specially designed witness protection programmes. The fact that an individual has agreed to provide such evidence will nevertheless not necessarily make her or him a refugee, unless the repercussions feared upon a return to the country of origin rise to the level of persecution and can be linked to one or more of the Convention grounds. Conversely, the fact that a victim of trafficking refuses to provide evidence should not lead to any adverse conclusion with respect to her or his asylum claim.

[50] See UNHCR Guidelines on Gender-related Persecution, above footnote 4. Complementary information can be found in World Health Organization, London School of Hygiene and Tropical Medicine and Daphne Programme of the European Commission, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women*, 2003, available at http://www.who.int/gender/ documents/en/final%20recommendations%2023%20oct.pdf.
[51] See above footnote 19.
[52] See above footnote 13. Guideline 8 addresses special measures for the protection and support of child victims of trafficking.
[53] See above, footnote 18, especially paras. 64–78.

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

Distr. GENERAL | HCR/GIP/09/08 | 22 September 2009 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 8:

Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (re-edited, Geneva, January 1992).

These Guidelines 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.

I. INTRODUCTION

1. These Guidelines offer substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner. They highlight the specific rights and protection needs of children in asylum procedures. Although the definition of a refugee contained in Article 1(A)2 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereafter "1951 Convention" and "1967 Protocol") applies to all individuals regardless of their age, it has traditionally been interpreted in light of adult experiences. This has meant that many refugee claims made by children have been assessed incorrectly or overlooked altogether.[1]

2. The specific circumstances facing child asylum-seekers as individuals with independent claims to refugee status are not generally well understood. Children may be perceived as part of a family unit rather than as individuals with their own rights and interests. This is explained partly by the subordinate roles, positions and status children still hold in many societies worldwide. The accounts of children are more likely to be examined individually when the children are unaccompanied than when they are accompanied by their families. Even so, their unique experiences of persecution, due to factors such as their age, their level of maturity and development and their dependency on adults have not always been taken into account. Children may not be able to articulate their claims to refugee status in the same way as adults and, therefore, may require special assistance to do so.

3. Global awareness about violence, abuse and discrimination experienced by children is growing,[2] as is reflected in the development of international and regional human rights standards. While these developments have yet to be fully incorporated into refugee status determination processes, many national asylum authorities are increasingly acknowledging that children may have refugee claims in their own right. In *Conclusion on Children at Risk* (2007), UNHCR's Executive Committee underlines the need for children to be recognized as "active subjects of rights" consistent with international law. The Executive Committee also recognized that children may experience child-specific forms and manifestations of persecution.[3]

4. Adopting a child-sensitive interpretation of the 1951 Convention does not mean, of course, that child asylum-seekers are automatically entitled to refugee status. The child applicant must establish that s/he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. As with gender, age is relevant to the entire refugee definition.[4] As noted by the UN Committee on the Rights of the Child, the refugee definition:

> … must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status-determination procedures.[5]

Alongside age, factors such as rights specific to children, a child's stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status.[6]

---

[1] UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Geneva, 1997 (hereafter "UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*"), http://www.unhcr.org/refworld/docid/3ae6b3360. html, in particular Part 8.

[2] See, for instance, UN General Assembly, Rights of the Child: Note by the Secretary-General, A/61/299, 29 Aug. 2006 (hereafter "UN study on violence against children") http://www.unhcr.org/refworld/docid/453780fe0.html; UN Commission on the Status of Women, The elimination of all forms of discrimination and violence against the girl child, E/CN.6/2007/2, 12 Dec. 2006, http://www. unhcr.org/refworld/docid/46c5b30c0.html; UN General Assembly, Impact of armed conflict on children: Note by the Secretary- General (the "Machel Study"), A/51/306, 26 Aug. 1996, http://www.unhcr.org/refworld/docid/3b00f2d30.html, and the strategic review marking the 10 year anniversary of the Machel Study, UN General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/62/228, 13 Aug. 2007, http://www.unhcr.org/refworld/docid/47316f602.html.

[3] ExCom, *Conclusion on Children at Risk*, 5 Oct. 2007, No. 107 (LVIII) – 2007, (hereafter "ExCom, Conclusion No. 107"), http://www.unhcr.org/refworld/docid/471897232.html, para. (b)(x)(viii).

[4] UNHCR, *Guidelines on International Protection No. 1: 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*, 7 May 2002 (hereafter "UNHCR, Guidelines on Gender- Related Persecution"), http://www.unhcr.org/refworld/docid/3d36f1c64.html, paras. 2, 4.

[5] UN Committee on the Rights of the Child, *General Comment No. 6 (2005)-Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, Sep. 2005 (hereafter "CRC, *General Comment No. 6*"), http://www.unhcr.org/refworld/docid/42dd174b4.html, para. 74.

[6] UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*, *op cit*., page 10.

5. A child-sensitive application of the refugee definition would be consistent with the 1989 Convention on the Rights of the Child (hereafter "the CRC").[7] The Committee on the Rights of the Child has identified the following four Articles of the CRC as general principles for its implementation:[8] *Article 2*: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind;[9] *Article 3 (1)*: the best interests of the child as a primary consideration in all actions concerning children;[10] *Article 6*: the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child;[11] and *Article 12*: the child's right to express his/her views freely regarding "all matters affecting the child", and that those views be given due weight.[12] These principles inform both the substantive and the procedural aspects of the determination of a child's application for refugee status.

II. DEFINITIONAL ISSUES

6. These guidelines cover all child asylum-seekers, including accompanied, unaccompanied and separated children, who may have individual claims to refugee status. Each child has the right to make an independent refugee claim, regardless of whether s/he is accompanied or unaccompanied. "Separated children" are children separated from both their parents or from their previous legal or customary primary caregivers but not necessarily from other relatives. In contrast, "unaccompanied children" are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.[13]

7. For the purposes of these Guidelines, "children" are defined as all persons below the age of 18 years.[14] Every person under 18 years who is the principal asylum applicant is entitled to child-sensitive procedural safeguards. Lowering the age of childhood or applying restrictive age assessment approaches in order to treat children as adults in asylum procedures may result in violations of their rights under international human rights law. Being young and vulnerable may make a person especially susceptible to persecution. Thus, there may be exceptional cases for which these guidelines are relevant even if the applicant is 18 years of age or slightly older. This may be particularly the case where persecution has hindered the applicant's development and his/her psychological maturity remains comparable to that of a child.[15]

8. Even at a young age, a child may still be considered the principal asylum applicant.[16] The parent, caregiver or other person representing the child will have to assume a greater role in making sure

[7] With a near universal ratification, the CRC is the most widely ratified human rights treaty, available at http://www.unhcr.org/refworld/docid/3ae6b38f0.html. The rights contained therein apply to all children within the jurisdiction of the State. For a detailed analysis of the provisions of the CRC, see UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, fully revised third edition, Sep. 2007 (hereafter "UNICEF, *Implementation Handbook*"). It can be ordered at http://www.unicef.org/publications/index_43110.html.
[8] CRC, *General Comment No. 5 (2003): General Measures of Implementation for the Convention on the Rights of the Child* (Arts. 4, 42 and 44, Para. 6), CRC/GC/2003/5, 3 Oct. 2003 (hereafter "CRC, *General Comment No. 5*"), http://www.unhcr.org/refworld/docid/4538834f11.html, para. 12.
[9] CRC, *General Comment No. 6*, para. 18.
[10] *Ibid*., paras. 19–22. See also ExCom *Conclusion No. 107*, para. (b)(5), and, on how to conduct "best interests" assessments and determinations, UNHCR, *Guidelines on Determining the Best Interests of the Child*, Geneva, May 2008, http://www.unhcr.org/refworld/docid/48480c342.html.
[11] CRC, *General Comment No. 6*, paras. 23–24.
[12] *Ibid*., para. 25. See also CRC, *General Comment No. 12 (2009): The right of the child to be heard*, CRC/C/GC/12, 20 July 2009 (hereafter "CRC, *General Comment No. 12*"), http://www.unhcr.org/refworld/docid/4ae562c52.html.
[13] CRC, *General Comment No. 6*, paras. 7–8. See also, UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum*, *op cit*., p. 5, paras. 3.1-3.2. See also, UNHCR, UNICEF et al, *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, Geneva, 2004 (hereafter "*Inter-Agency Guiding Principles*"), http://www.unhcr.org/refworld/docid/4113abc14.html, p. 13.
[14] CRC, Art. 1 provides that "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." In addition, the EU 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, 19 May 2004, 2004/83/EC, http://www.unhcr.org/refworld/docid/4157e75e4.html, provides that "'unaccompanied minors' means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States", Art. 2 (i).
[15] The United Kingdom Immigration Appeals Tribunal (now the Asylum and Immigration Tribunal) has held that "[t]o adopt a rigidity however in this respect is in our view to fail to recognize that in many areas of the world even today exact ages and dates of birth are imprecise. It is better to err on the side of generosity"; *Sarjoy Jakitay v. Secretary of State for the Home Department*, Appeal No. 12658 (unreported), U.K. IAT, 15 Nov. 1995. See also, *Decision VA0-02635*, *VA0-02635*, Canada, Immigration and Refugee Board (hereafter "IRB"), 22 March 2001, http://www.unhcr.org/refworld/docid/4b18dec82.html.
[16] See, for instance, *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*, [2000] HCA 19, Australia, High Court, 13 April 2000, http://www.unhcr.org/refworld/docid/3ae6b6df4.html. In this case, which concerned a 3 ½ year-old boy, it was found that "under Australian law, the child was entitled to have his own rights determined as that law provides. He is not for all purposes subsumed to the identity and legal rights of his parents", para. 78.

that all relevant aspects of the child's claim are presented.[17] However, the right of children to express their views in all matters affecting them, including to be heard in all judicial and administrative proceedings, also needs to be taken into account.[18] A child claimant, where accompanied by parents, members of an extended family or of the community who by law or custom are responsible for the child, is entitled to appropriate direction and guidance from them in the exercise of his/her rights, in a manner consistent with the evolving capacities of the child.[19] Where the child is the principal asylum-seeker, his/her age and, by implication, level of maturity, psychological development, and ability to articulate certain views or opinions will be an important factor in a decision maker's assessment.

9. Where the parents or the caregiver seek asylum based on a fear of persecution for their child, the child normally will be the principal applicant even when accompanied by his/her parents. In such cases, just as a child can derive refugee status from the recognition of a parent as a refugee, a parent can, *mutatis mutandis*, be granted derivative status based on his/her child's refugee status.[20] In situations where both the parent(s) and the child have their own claims to refugee status, it is preferable that each claim be assessed separately. The introduction of many of the procedural and evidentiary measures enumerated below in Part IV will enhance the visibility of children who perhaps ought to be the principal applicants within their families. Where the child's experiences, nevertheless, are considered part of the parent's claim rather than independently, it is important to consider the claim also from the child's point of view.[21]

III. SUBSTANTIVE ANALYSIS

a) Well-founded fear of persecution

10. The term "persecution", though not expressly defined in the 1951 Convention, can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable situations as assessed with regard to the age, opinions, feelings and psychological make-up of the applicant.[22] Discrimination may amount to persecution in certain situations where the treatment feared or suffered leads to consequences of a substantially prejudicial nature for the child concerned.[23] The principle of the best interests of the child requires that the harm be assessed from the child's perspective. This may include an analysis as to how the child's rights or interests are, or will be, affected by the harm. Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child.[24]

11. Both objective and subjective factors are relevant to establish whether or not a child applicant has a well-founded fear of persecution.[25] An accurate assessment requires both an up-to-date analysis and knowledge of child-specific circumstances in the country of origin, including of existing child protection services. Dismissing a child's claim based on the assumption that perpetrators would not take a child's views seriously or consider them a real threat could be erroneous. It may be the case that a child is unable to express fear when this would be expected or, conversely, exaggerates the fear. In

[17] See also UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva, 1994, http://www.unhcr.org/refworld/docid/3ae6b3470.html, pp. 97–103.
[18] CRC, Art. 12(2); CRC, *General Comment No. 12*, paras. 32, 67, 123.
[19] CRC, Art. 5.
[20] UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009 (hereafter "UNHCR, *Guidance Note on FGM*"), http://www.unhcr.org/refworld/docid/4a0c28492.html, para. 11. See also UNHCR, ExCom Conclusion on the Protection of the Refugee's Family, No. 88 (L), 1999, http://www.unhcr.org/refworld/docid/3ae68c4340.html, para. (b)(iii).
[21] See, for instance, *EM (Lebanon) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, U.K. House of Lords, 22 Oct. 2008, http://www.unhcr.org/refworld/docid/490058699.html; *Refugee Appeal Nos. 76250 & 76251*, Nos. 76250 & 76251, New Zealand, Refugee Status Appeals Authority (hereafter "RSAA"), 1 Dec. 2008, http://www.unhcr.org/refworld/docid/494f64952.html.
[22] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, re-edited, Geneva, Jan. 1992 (hereafter "UNHCR, *Handbook*") http://www.unhcr. org/refworld/docid/3ae6b3314.html, paras. 51–52; UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, 7 Apr. 2006 (hereafter "UNHCR, *Guidelines on Victims of Trafficking*"), http://www.unhcr.org/refworld/ docid/443679fa4.html, para. 14.
[23] UNHCR, *Handbook*, paras. 54–55.
[24] See, for instance, United States Bureau of Citizenship and Immigration Services, *Guidelines For Children's Asylum Claims*, 10 Dec. 1998 (hereafter the "U.S. Guidelines for Children's Asylum Claims"), http://www.unhcr.org/refworld/docid/3f8ec0574. html, noting that "the harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution." See also, *Chen Shi Hai, op. cit*., where the Court found that "what may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child", para. 79.
[25] UNHCR, *Handbook*, paras. 40–43.

such circumstances, decision makers must make an objective assessment of the risk that the child would face, regardless of that child's fear.[26] This would require consideration of evidence from a wide array of sources, including child-specific country of origin information. When the parent or caregiver of a child has a well-founded fear of persecution for their child, it may be assumed that the child has such a fear, even if s/he does not express or feel that fear.[27]

12. Alongside age, other identity-based, economic and social characteristics of the child, such as family background, class, caste, health, education and income level, may increase the risk of harm, influence the type of persecutory conduct inflicted on the child and exacerbate the effect of the harm on the child. For example, children who are homeless, abandoned or otherwise without parental care may be at increased risk of sexual abuse and exploitation or of being recruited or used by an armed force/ group or criminal gang. Street children, in particular, may be rounded up and detained in degrading conditions or be subjected to other forms of violence, including murder for the purpose of "social cleansing".[28] Children with disabilities may be denied specialist or routine medical treatment or be ostracized by their family or community. Children in what may be viewed as unconventional family situations including, for instance, those born out of wedlock, in violation of coercive family policies,[29] or through rape, may face abuse and severe discrimination. Pregnant girls may be rejected by their families and subject to harassment, violence, forced prostitution or other demeaning work.[30]

Child-specific rights

13. A contemporary and child-sensitive understanding of persecution encompasses many types of human rights violations, including violations of child-specific rights. In determining the persecutory character of an act inflicted against a child, it is essential to analyse the standards of the CRC and other relevant international human rights instruments applicable to children.[31] Children are entitled to a range of child-specific rights set forth in the CRC which recognize their young age and dependency and are fundamental to their protection, development and survival. These rights include, but are not limited to, the following: the right not to be separated from parents (Article 9); protection from all forms of physical and mental violence, abuse, neglect, and exploitation (Article 19); protection from traditional practices prejudicial to the health of children (Article 24); a standard of living adequate for the child's development (Article 27); the right not to be detained or imprisoned unless as a measure of last resort (Article 37); and protection from under- age recruitment (Article 38). The CRC also recognizes the right of refugee children and children seeking refugee status to appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the CRC and in other international human rights or humanitarian instruments (Article 22).

14. Children's socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs. Deprivation of economic, social and cultural rights, thus, may be as relevant to the assessment of a child's claim as that of civil and political rights. It is important not to automatically attribute greater significance to certain violations than to others but to assess the overall impact of the harm on the individual child. The violation of one right often may expose the child to other abuses; for example, a denial of the right to education or an adequate standard of living may lead to a heightened risk of other forms

[26] See UNHCR, *Handbook*, paras. 217–219. See also *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629; F.C.J. 1049, Canada, Federal Court, 24 Oct. 1991, http://www.unhcr.org/refworld/docid/403e24e84.html. The Court concluded that "I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, s/he was incapable of experiencing fear the reasons for which clearly exist in objective terms.", at 5.

[27] See, for instance, *Canada (Minister of Citizenship and Immigration) v. Patel*, 2008 FC 747, [2009] 2 F.C.R. 196, Canada, Federal Court, 17 June 2008, http://www.unhcr.org/refworld/docid/4a6438952.html, at 32–33.

[28] "Social cleansing" refers to the process of removing an undesirable group from an area and may involve murder, disappearances, violence and other ill-treatment. See, UNICEF, *Implementation Handbook*, pp. 89, 91, 287. See also *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (hereafter "IACtHR"), Judgment of 19 Nov. 1999, http://www.unhcr.org/refworld/docid/4b17bc442.html, paras. 190–191. The Court found that there was a prevailing pattern of violence against street children in Guatemala. Relying on the CRC to interpret Art. 19 of the 1969 American Convention on Human Rights, "Pact of San Jose", Costa Rica (hereafter "ACHR"), http://www.unhcr.org/refworld/docid/3ae6b36510.html, the Court noted that the State had violated their physical, mental, and moral integrity as well as their right to life and also failed to take any measures to prevent them from living in misery, thereby denying them of the minimum conditions for a dignified life.

[29] See further, UNHCR, *Note on Refugee Claims Based on Coercive Family Planning Laws or Policies*, Aug. 2005, http://www. unhcr.org/refworld/docid/4301a9184.html.

[30] UNHCR, *Guidelines on Gender-Related Persecution, op cit*., para. 18.

[31] In the context of Africa, the African Charter on the Rights and Welfare of the Child should also be considered (hereafter "African Charter"), http://www.unhcr.org/refworld/docid/3ae6b38c18.html.

of harm, including violence and abuse.[32] Moreover, there may be political, racial, gender or religious aims or intentions against a particular group of children or their parents underlying discriminatory measures in the access and enjoyment of ESC rights. As noted by the UN Committee on Economic, Social and Cultural Rights:

> The lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance, children who may live in abject poverty and not lead healthy lives are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment levels for girls and major reductions in child marriages.[33]

Child-related manifestations of persecution

15. While children may face similar or identical forms of harm as adults, they may experience them differently. Actions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child. Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.[34] Particularly in claims where the harm suffered or feared is more severe than mere harassment but less severe than a threat to life or freedom, the individual circumstances of the child, including his/her age, may be important factors in deciding whether the harm amounts to persecution. To assess accurately the severity of the acts and their impact on a child, it is necessary to examine the details of each case and to adapt the threshold for persecution to that particular child.

16. In the case of a child applicant, psychological harm may be a particularly relevant factor to consider. Children are more likely to be distressed by hostile situations, to believe improbable threats, or to be emotionally affected by unfamiliar circumstances. Memories of traumatic events may linger in a child and put him/her at heightened risk of future harm.

17. Children are also more sensitive to acts that target close relatives. Harm inflicted against members of the child's family can support a well-founded fear in the child. For example, a child who has witnessed violence against, or experienced the disappearance or killing of a parent or other person on whom the child depends, may have a well- founded fear of persecution even if the act was not targeted directly against him/her.[35] Under certain circumstances, for example, the forced separation of a child from his/her parents, due to discriminatory custody laws or the detention of the child's parent(s) could amount to persecution.[36]

Child-specific forms of persecution

18. Children may also be subjected to specific forms of persecution that are influenced by their age, lack of maturity or vulnerability. The fact that the refugee claimant is a child may be a central factor in the harm inflicted or feared. This may be because the alleged persecution only applies to, or disproportionately affects, children or because specific child rights may be infringed. UNHCR's Executive Committee has recognized that child-specific forms of persecution may include under-age recruitment, child trafficking and female genital mutilation (hereafter "FGM").[37] Other examples include, but are not limited to, family and domestic violence, forced or underage marriage,[38] bonded or hazardous child labour, forced labour,[39]

[32] CRC, *General Comment No. 5*, *op cit*., paras. 6–7. See further below at v. Violations of economic, social and cultural rights.
[33] UN Committee on Economic, Social and Cultural Rights (hereafter "CESCR"), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, E/1992/23, 10 May 1999, http://www.unhcr.org/refworld/docid/4538838c0.html, para. 4.
[34] See further Save the Children and UNICEF, *The evolving capacities of the child*, 2005, http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf.
[35] See, for instance, *Cicek v. Turkey*, Application No. 67124/01, European Court of Human Rights (hereafter "ECtHR"), 18 Jan. 2005, http://www.unhcr.org/refworld/docid/42d3e7ea4.html, paras. 173–174; *Bazorkina v. Russia*, Application No. 69481/01, ECtHR, 27 July 2006, http://www.unhcr.org/refworld/docid/44cdf4ef4.html, paras. 140–141.
[36] See *EM (Lebanon) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, *op. cit*., *Refugee Appeal Nos. 76226 and 76227*, Nos. 76226 and 76227, New Zealand, RSAA, 12 Jan. 2009, http://www.unhcr.org/refworld/docid/49a6ac0e2. html, paras. 112–113.
[37] ExCom, *Conclusion No. 107*, para. (g)(viii).
[38] CRC, Art. 24(3); International Convenant on Civil and Political Rights (hereafter "ICCPR"), http://www.unhcr.org/refworld/ docid/3ae6b3aa0.html, Art. 23; International Covenant on Economic, Social and Cultural Rights, http://www.unhcr.org/refworld/ docid/3ae6b36c0.html, Art. 10; Convention on the Elimination of All Forms of Discrimination Against Women, http://www.unhcr.org/refworld/docid/3ae6b3970.html, Art. 16.
[39] CRC, Arts. 32–36; International Labour Organization, Worst Forms of Child Labour Convention, C182 (hereafter "ILO Convention on the Worst Forms of Child Labour"), http://www.unhcr.org/refworld/docid/3ddb6e0c4.html; Minimum Age Convention, C138, (hereafter "ILO Minimum Age Convention"), http://www.unhcr.org/refworld/docid/421216a34.html, Arts. 2 (3), 2(4).

forced prostitution and child pornography.[40] Such forms of persecution also encompass violations of survival and development rights as well as severe discrimination of children born outside strict family planning rules[41] and of stateless children as a result of loss of nationality and attendant rights. Some of the most common forms of child-specific persecution arising in the context of asylum claims are outlined in greater detail below.

i. Under-age recruitment

19. There is a growing consensus regarding the ban on the recruitment and use of children below 18 years in armed conflict.[42] International humanitarian law prohibits the recruitment and participation in the hostilities of children under the age of 15 years whether in international[43] or non-international armed conflict.[44] Article 38 of the CRC reiterates State Parties' obligations under international humanitarian law. The Rome Statute of the International Criminal Court classifies as war crimes the enlistment and use of children under the age of 15 years into the armed forces at a time of armed conflict.[45] The Special Court for Sierra Leone has concluded that the recruitment of children under the age of 15 years into the armed forces constitutes a crime under general international law.[46]

20. The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict provides that States parties shall take all feasible measures to ensure that members of their armed forces under the age of 18 years do not take part in hostilities, and ensure that persons under the age of 18 years are not compulsorily recruited into their armed forces.[47] The Optional Protocol contains an absolute prohibition against the recruitment or use, under any circumstances, of children who are less than 18 years old by armed groups that are distinct from the armed forces of a State.[48] It also amends Article 38 of the CRC by raising the minimum age of voluntary recruitment.[49] States also commit to use all feasible measures to prohibit and criminalize under-age recruitment and use of child soldiers by non-State armed groups.[50] The Committee on the Rights of the Child emphasizes that

> … under-age recruitment (including of girls for sexual services or forced marriage with the military) and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution, and should lead to the granting of refugee status where the well-founded fear of such recruitment or participation in hostilities is based on "reasons of race, religion, nationality, membership of a particular social group or political opinion" (article 1A (2),
>
> 1951 Refugee Convention).[51]

21. In UNHCR's view, forced recruitment and recruitment for direct participation in hostilities of a child below the age of 18 years into the armed forces of the State would amount to persecution. The same would apply in situations where a child is at risk of forced re-recruitment or would be punished for having evaded forced recruitment or deserted the State's armed forces. Similarly, the recruitment by a non-State armed group of any child below the age of 18 years would be considered persecution.

---

[40] CRC, Art. 34; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, http://www.unhcr.org/refworld/docid/3ae6b38bc.html.
[41] See, for instance, *Xue Yun Zhang v. Gonzales*, No. 01-71623, U.S. Court of Appeals for the 9th Circuit, 26 May 2005, http://www.unhcr.org/refworld/docid/4b17c7082.html; *Chen Shi Hai, op. cit*.
[42] See UNICEF, The Paris Principles and Guidelines on Children Associated With Armed Forces or Armed Groups, Feb. 2007 (hereafter "The Paris Principles"). While not binding, they reflect a strong trend for a complete ban on under-age recruitment. See also UN Security Council resolution 1612 (2005) (on children in armed conflict), 26 July 2005, S/RES/1612, http://www.unhcr.org/refworld/docid/43f308d6c.html, para. 1; 1539 on the protection of children affected by armed conflict, S/RES/1539, 22 Apr. 2004, http://www.unhcr.org/refworld/docid/411236fd4.html.
[43] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), http://www.unhcr.org/refworld/docid/3ae6b36b4.html, Art. 77(2).
[44] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), http://www.unhcr.org/refworld/docid/3ae6b37f40.html, Art. 4(3).
[45] UN General Assembly, *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998 (hereafter "ICC Statute"), http://www.unhcr.org/refworld/docid/3ae6b3a84.html, Art. 8 (2) (b) [xxvi] and (e)[vii].
[46] See *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, paras. 52–53; UN Security Council, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 Oct. 2000, S/2000/915, http://www.unhcr.org/refworld/docid/3ae6afbf4.html, para. 17, which recognized the customary character of the prohibition of child recruitment.
[47] The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, http:// www.unhcr.org/refworld/docid/47fdfb180.html, Arts. 1–2. There are currently 127 States Parties to the Optional Protocol. See also the African Charter, which establishes 18 years as the minimum age for all compulsory recruitment, Arts. 2 and 22.2, and the ILO Convention on the Worst Forms of Child Labour, which includes the forced recruitment of children under the age of 18, Arts. 2 and 3(a) in its definition of worst forms of child labor.
[48] Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, Art. 4.
[49] *Ibid*., Art. 3.
[50] *Ibid*., Art. 4.
[51] CRC, *General Comment, No. 6*, para. 59. See also para. 58.

22. Voluntary recruitment of children above the age of 16 years by States is permissible under the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.[52] However, the recruiting State authorities have to put in place safeguards to ensure that the recruitment is voluntary, that it is undertaken with the informed consent of the parents and that the children who are so recruited are requested to produce satisfactory proof of age prior to their recruitment. In such cases, it is important to assess whether the recruitment was genuinely voluntary, bearing in mind that children are particularly susceptible to abduction, manipulation and force and may be less likely to resist recruitment. They may enlist under duress, in self-defence, to avoid harm to their families, to seek protection against unwanted marriages or sexual abuse within their homes, or to access basic means of survival, such as food and shelter. The families of children may also encourage them to participate in armed conflict, despite the risks and dangers.

23. In addition, children may have a well-founded fear of persecution arising from the treatment they are subjected to, and/or conduct they are required to engage in, by the armed forces or armed group. Boys and girls associated with armed forces or armed groups may be required to serve as cooks, porters, messengers, spies as well as to take direct part in the hostilities. Girls, in particular, may be forced into sexual relations with members of the military.[53] It is also important to bear in mind that children who have been released from the armed forces or group and return to their countries and communities of origin may be in danger of harassment, re-recruitment or retribution, including imprisonment or extra-judicial execution.

ii. Child trafficking and labour

24. As recognized by several jurisdictions, trafficked children or children who fear being trafficked may have valid claims to refugee status.[54] UNHCR's Guidelines on Victims of Trafficking and Persons at Risk of Being Trafficked are equally applicable to an asylum claim submitted by a child. The particular impact of a trafficking experience on a child and the violations of child-specific rights that may be entailed also need to be taken into account.[55]

25. The trafficking of children occurs for a variety of reasons but all with the same overarching aim to gain profit through the exploitation of human beings.[56] In this context, it is important to bear in mind that any recruitment, transportation, transfer, harbouring or receipt of children for the purpose of exploitation is a form of trafficking regardless of the means used. Whether the child consented to the act or not is, therefore, irrelevant.[57]

26. The trafficking of a child is a serious violation of a range of fundamental rights and, therefore, constitutes persecution. These rights include the right to life, survival and development, the right to protection from all forms of violence, including sexual exploitation and abuse, and the right to protection from child labour and abduction, sale and trafficking, as specifically provided for by Article 35 of the CRC.[58]

27. The impact of reprisals by members of the trafficking network, social exclusion, ostracism and/or discrimination[59] against a child victim of trafficking who is returned to his/her home country needs to be assessed in a child-sensitive manner. For example, a girl who has been trafficked for sexual ex-

[52] Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, Art. 3. States Parties are required to raise in years the minimum age for the voluntary recruitment from the age set out in Art. 38, para. 3 of the CRC, hence, from 15 to 16 years.
[53] The Paris Principles define children associated with an armed force or group as follows: "A child associated with an armed force or armed group refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities." Art. 2.1.
[54] See, for instance, *Ogbeide v. Secretary of State for the Home Department*, No. HX/08391/2002, U.K. IAT, 10 May 2002 (unreported); *Li and Others v. Minister of Citizenship and Immigration*, IMM-932-00, Canada, Federal Court, 11 Dec. 2000, http:// www.unhcr.org/refworld/docid/4b18d3682.html.
[55] See UNHCR, *Guidelines on Victims of Trafficking*. See also UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, Oct. 2006, http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf, which make reference to refugee status for children who have been trafficked.
[56] These reasons include, but are not limited to, bonded child labour, debt repayment, sexual exploitation, recruitment by armed forces and groups, and irregular adoption. Girls, in particular, may be trafficked for the purpose of sexual exploitation or arranged marriage while boys may be particularly at risk of being trafficked for various forms of forced labour.
[57] For a definition of the scope of "trafficking", see the following international and regional instruments: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, 15 Nov. 2000, http://www.unhcr.org/refworld/docid/4720706c0.html, in particular Art. 3; Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 3 May 2005 http://www.unhcr.org/refworld/ docid/43fded544.html.
[58] For a detailed analysis of the human rights framework relating to the trafficking of children, see UNICEF, *Implementation Handbook, op cit*., in particular pp. 531–542.
[59] UNHCR, *Guidelines on Victims of Trafficking, op cit*., paras. 17–18.

ploitation may end up being rejected by her family and become a social outcast in her community if returned. A boy, who has been sent away by his parents in the hope and expectation that he will study, work abroad and send remittances back to his family likewise may become excluded from his family if they learn that he has been trafficked into forced labour. Such child victims of trafficking may have very limited possibilities of accessing and enjoying their human rights, including survival rights, if returned to their homes.

28. In asylum cases involving child victims of trafficking, decision makers will need to pay particular attention to indications of possible complicity of the child's parents, other family members or caregivers in arranging the trafficking or consenting to it. In such cases, the State's ability and willingness to protect the child must be assessed carefully. Children at risk of being (re-)trafficked or of serious reprisals should be considered as having a well- founded fear of persecution within the meaning of the refugee definition.

29. In addition to trafficking, other worst forms of labour, such as slavery, debt bondage and other forms of forced labour, as well as the use of children in prostitution, pornography and illicit activities (for example, the drug trade) are prohibited by international law.[60] Such practices represent serious human rights violations and, therefore, would be considered persecution, whether perpetrated independently or as part of a trafficking experience.

30. International law also proscribes labour likely to harm the health, safety or morals of a child, also known as "hazardous work".[61] In determining whether labour is hazardous, the following working conditions need to be considered: work that exposes children to physical or mental violence; work that takes place underground, under water, at dangerous heights or in confined spaces; work that involves dangerous equipment or manual handling of heavy loads; long working hours and unhealthy environments.[62] Labour performed by a child under the minimum age designated for the particular kind of work and deemed likely to inhibit the child's education and full development is also prohibited according to international standards.[63] Such forms of labour could amount to persecution, as assessed according to the particular child's experience, his/her age and other circumstances. Persecution, for example, may arise where a young child is compelled to perform harmful labour that jeopardizes his/her physical and/or mental health and development.

iii. Female genital mutilation

31. All forms of FGM[64] are considered harmful and violate a range of human rights,[65] as affirmed by international and national jurisprudence and legal doctrine. Many jurisdictions have recognized that FGM involves the infliction of grave harm amounting to persecution.[66] As the practice disproportionately affects the girl child,[67] it can be considered a child-specific form of persecution. For further information about FGM in the context of refugee status determination, see UNHCR Guidance Note on Refugee Claims relating to Female Genital Mutilation.[68]

iv. Domestic violence against children

32. All violence against children, including physical, psychological and sexual violence, while in the care of parents or others, is prohibited by the CRC.[69] Violence against children may be perpetrated

[60] ILO Convention on the Worst Forms of Child Labour, Art. 3 (a–c).
[61] *Ibid*., Art. 3(d).
[62] *Ibid*., Art. 3(d). Ibid., Art. 4 in conjunction with ILO Worst Forms of Child Labour Recommendation, 1999, R190, http://www.unhcr.org/refworld/docid/3ddb6ef34.html, at 3 and 4.
[63] ILO Minimum Age Convention, Art. 2.
[64] FGM comprises all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons. See further, OHCHR, UNAIDS et al., *Eliminating Female Genital Mutilation: An Interagency Statement*, Feb. 2008, http://www.unhcr.org/refworld/docid/47c6aa6e2.html.
[65] These include the right to life, to protection from torture, and cruel, inhuman or degrading treatment, to protection from physical and mental violence and the right to the highest attainable standard of health.
[66] See, for instance, *Mlle Diop Aminata*, 164078, Commission des Recours des Réfugiés (hereafter "CRR"), France, 17 July 1991, http://www.unhcr.org/refworld/docid/3ae6b7294.html; *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh*, Canada, IRB, 10 May 1994, http://www.unhcr.org/refworld/docid/3ae6b70618.html; *In re Fauziya Kasinga*, 3278, U.S. Board of Immigration Appeals (hereafter "BIA"), 13 June 1996, http://www.unhcr.org/refworld/docid/47bb00782.html.
[67] FGM is mostly carried out on girls up to 15 years of age, although older girls and women may also be subjected to the practice.
[68] UNHCR, *Guidance Note on FGM, op cit*.
[69] CRC, Arts. 19, 37.

in the private sphere by those who are related to them through blood, intimacy or law.[70] Although it frequently takes place in the name of discipline, it is important to bear in mind that parenting and caring for children, which often demand physical actions and interventions to protect the child, is quite distinct from the deliberate and punitive use of force to cause pain or humiliation.[71] Certain forms of violence, in particular against very young children, may cause permanent harm and even death, although perpetrators may not aim to cause such harm.[72] Violence in the home may have a particularly significant impact on children because they often have no alternative means of support.[73]

33. Some jurisdictions have recognized that certain acts of physical, sexual and mental forms of domestic violence may be considered persecution.[74] Examples of such acts include battering, sexual abuse in the household, incest, harmful traditional practices, crimes committed in the name of honour, early and forced marriages, rape and violence related to commercial sexual exploitation.[75] In some cases, mental violence may be as detrimental to the victim as physical harm and could amount to persecution. Such violence may include serious forms of humiliation, harassment, abuse, the effects of isolation and other practices that cause or may result in psychological harm.[76] Domestic violence may also come within the scope of torture and other cruel, inhuman and degrading treatment or punishment.[77] A minimum level of severity is required for it to constitute persecution. When assessing the level of severity of the harm, a number of factors such as the frequency, patterns, duration and impact on the particular child need to be taken into account. The child's age and dependency on the perpetrator as well as the long-term effects on the physical and psychological development and well-being of the child also need to be considered.

v. Violations of economic, social and cultural rights

34. The enjoyment of economic, social and cultural rights is central to the child's survival and development.[78] The UN Committee on the Rights of the Child has stated that

> … the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play.[79]

While the CRC and the 1966 Covenant on Economic, Social and Cultural Rights contemplate the progressive realization of economic, social and cultural rights, these instruments impose various obligations on States Parties which are of immediate effect.[80] These obligations include avoiding taking retrogressive measures, satisfying minimum core elements of each right and ensuring non-discrimination in the enjoyment of these rights.[81]

35. A violation of an economic, social or cultural right may amount to persecution where minimum core elements of that right are not realized. For instance, the denial of a street child's right to an adequate standard of living (including access to food, water and housing) could lead to an intolerable

[70] Declaration on the Elimination of Violence Against Women, http://www.unhcr.org/refworld/docid/3b00f25d2c.html, Art. 2(a).
[71] See CRC, *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, CRC/C/GC/8, 2 Mar. 2007 (hereafter "CRC, *General Comment No. 8*"), http://www.unhcr.org/refworld/docid/460bc7772.html, paras. 13–14, 26.
[72] UN study on violence against children, *op. cit*., para. 40.
[73] See further UNICEF, *Domestic Violence Against Women and Girls*, Innocenti Digest No. 6, 2000, http://www.unicef-irc.org/publications/pdf/digest6e.pdf.
[74] See UNHCR, *Handbook for the Protection of Women and Girls*, Feb. 2008, http://www.unhcr.org/refworld/docid/47cfc2962.html, pp. 142–144. See also, for instance, *Rosalba Aguirre-Cervantes a.k.a. Maria Esperanza Castillo v. Immigration and Naturalization Service*, U.S. Court of Appeals for the 9th Circuit, 21 Mar. 2001, http://www.unhcr.org/refworld/docid/3f37adc24.html.
[75] UN Commission on Human Rights, Human Rights Resolution 2005/41: Elimination of violence against women, E/CN.4/ RES/2005/41, 19 Apr. 2005, http://www.unhcr.org/refworld/docid/45377c59c.html, para. 5.
[76] CRC, *General Comment No. 8*, *op cit*., para. 11. See also UN study on violence against children, *op. cit*., para. 42; UNICEF, *Domestic Violence Against Women and Girls*, *op cit*., pp. 2–4.
[77] CRC, *General Comment No. 8*, *op cit*., para. 12; Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/7/3, 15 Jan. 2008, http://www.unhcr.org/refworld/docid/47c2c5452. html, paras. 45–49.
[78] CRC, Art. 6.2.
[79] CRC, *General Comment No. 7: Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev.1, 20 Sep. 2006 (hereafter "CRC, *General Comment No. 7*") http://www.unhcr.org/refworld/docid/460bc5a62.html, para. 10.
[80] See CESCR, *General Comment No. 3: The Nature of States Parties' Obligations* (Art. 2, Para. 1, of the Covenant), E/1991/23, 14 Dec. 1990, http://www.unhcr.org/refworld/docid/4538838e10.html, para. 1; CRC, *General Comment No. 5*, para. 6.
[81] See UN Commission on Human Rights, Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 Jan. 1987, E/CN.4/1987/17 at B.16, 21–22, http://www.unhcr.org/refworld/docid/48abd5790.html; International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 Jan. 1997, http://www.unhcr.org/refworld/docid/48abd5730.html, at II.9 and 11.

predicament which threatens the development and survival of that child. Similarly, a denial of medical treatment, particularly where the child concerned suffers from a life-threatening illness, may amount to persecution.[82] Persecution may also be established through an accumulation of a number of less serious violations.[83] This could, for instance, be the case where children with disabilities or stateless children lack access to birth registration and, as a result, are excluded from education, health care and other services.[84]

36. Measures of discrimination may amount to persecution when they lead to consequences of a substantially prejudicial nature for the child concerned.[85] Children who lack adult care and support, are orphaned, abandoned or rejected by their parents, and are escaping violence in their homes may be particularly affected by such forms of discrimination. While it is clear that not all discriminatory acts leading to the deprivation of economic, social and cultural rights necessarily equate to persecution, it is important to assess the consequences of such acts for each child concerned, now and in the future. For example, bearing in mind the fundamental importance of education and the significant impact a denial of this right may have for the future of a child, serious harm could arise if a child is denied access to education on a systematic basis.[86] Education for girls may not be tolerated by society,[87] or school attendance may become unbearable for the child due to harm experienced on racial or ethnic grounds.[88]

b) Agents of persecution

37. In child asylum claims, the agent of persecution is frequently a non-State actor. This may include militarized groups, criminal gangs, parents and other caregivers, community and religious leaders. In such situations, the assessment of the well-foundedness of the fear has to include considerations as to whether or not the State is unable or unwilling to protect the victim.[89] Whether or not the State or its agents have taken sufficient action to protect the child will need to be assessed on a case-by-case basis.

38. The assessment will depend not only on the existence of a legal system that criminalizes and provides sanctions for the persecutory conduct. It also depends on whether or not the authorities ensure that such incidents are effectively investigated and that those responsible are identified and appropriately punished.[90] Hence, the enactment of legislation prohibiting or denouncing a particular persecutory practice against children, in itself, is not sufficient evidence to reject a child's claim to refugee status.[91]

---

[82] See, for instance, *RRT Case No. N94/04178*, N94/04178, Australia, Refugee Review Tribunal (hereafter "RRT"), 10 June 1994, http://www.unhcr.org/refworld/docid/3ae6b6300.html.

[83] UNHCR, *Handbook*, *para. 53*. *See also Canada (Citizenship and Immigration) v. Oh*, 2009 FC 506, Canada, Federal Court, 22 May 2009, http://www.unhcr.org/refworld/docid/4a897a1c2.html, at 10.

[84] See *Case of the Yean and Bosico Children v. The Dominican Republic*, IACtHR, 8 Sep. 2005, http://www.unhcr.org/refworld/ docid/44e497d94.html. Two girls of Haitian origin were denied the right to nationality and education because, among other matters, they did not have a birth certificate; *Case of the "Juvenile Reeducation Institute" v. Paraguay*, IACtHR, 2 Sep. 2004, http://www. unhcr.org/refworld/docid/4b17bab62.html. The Court found that failure to provide severely marginalized groups with access to basic health-care services constitutes a violation of the right to life of the ACHR. See also, CRC, General Comment No. 7, para. 25; CRC, *General Comment No. 9 (2006): The Rights of children with disabilities*, CRC/C/GC/9, 27 Feb. 2007 (hereafter "CRC, *General Comment No. 9*"), http://www.unhcr.org/refworld/docid/461b93f72.html, paras. 35–36.

[85] UNHCR, *Handbook*, para. 54.

[86] See *RRT Case No. V95/03256*, [1995] RRTA 2263, Australia, RRT, 9 Oct. 1995, http://www.unhcr.org/refworld/docid/4b17c13a2. html, where the Tribunal found that "discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution." at 47.

[87] See *Ali v. Minister of Citizenship and Immigration*, IMM-3404-95, Canada, IRB, 23 Sep. 1996, http://www.unhcr.org/refworld/ docid/4b18e21b2.html, which concerned a 9 year-old girl from Afghanistan. The Court concluded that "Education is a basic human right and I direct the Board to find that she should be found to be a Convention refugee."

[88] Decisions in both Canada and Australia have accepted that bullying and harassment of school children may amount to persecution. See, for instance, *Decision VA1-02828, VA1-02826, VA1-02827 and VA1-02829, VA1-02828, VA1-02826, VA1-02827 and VA1-02829*, Canada, IRB, 27 Feb. 2003, http://www.unhcr.org/refworld/docid/4b18e03d2.html, para. 36; *RRT Case No. N03/46534*, [2003] RRTA 670, Australia, RRT, 17 July 2003, http://www.unhcr.org/refworld/docid/4b17bfd62.html.

[89] See CRC, Art. 3, which imposes a duty on States Parties to ensure the protection and care of children in respect of actions by both State and private actors; ACHR, Arts. 17 and 19; African Charter, Arts. 1(3), 81. See also UNHCR, *Handbook*, para. 65; UNHCR, *Guidelines on Gender-Related Persecution*, para. 19; *Advisory Opinion on Juridical Condition and Human Rights of the Child*, No. OC-17/02, IACtHR, 28 Aug. 2002, http://www.unhcr.org/refworld/docid/4268c57c4.html.

[90] See, for instance, *Velásquez Rodríguez Case*, Series C, No. 4, IACtHR, 29 July 1988, para. 174 http://www.unhcr.org/refworld/docid/40279a9e4.html; M.C. v. Bulgaria, Application No. 39272/98, ECtHR, 3 Dec. 2003, http://www.unhcr.org/refworld/ docid/47b19f492.html. See also UN Committee on the Elimination of Discrimination Against Women, General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), A/47/38, 1992, http://www.unhcr.org/refworld/docid/453882a422.html, para. 9; UN Commission on Human Rights, The due diligence standard as a tool for the elimination of violence against women: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk, E/CN.4/2006/61, 20 Jan. 2006, http://www.unhcr.org/refworld/docid/45377afb0.html.

[91] UNHCR, *Guidelines on Gender-Related Persecution*, para. 11.

39. The child's access to State protection also depends on the ability and willingness of the child's parents, other primary caregiver or guardian to exercise rights and obtain protection on behalf of the child. This may include filing a complaint with the police, administrative authorities or public service institutions. However, not all children will have an adult who can represent them as is the case, for example, where the child is unaccompanied or orphaned, or where a parent, other primary caregiver or guardian is the agent of persecution. It is important to remember that, due to their young age, children may not be able to approach law enforcement officials or articulate their fear or complaint in the same way as adults. Children may be more easily dismissed or not taken seriously by the officials concerned, and the officials themselves may lack the skills necessary to interview and listen to children.

c) The 1951 Convention grounds

40. As with adult claims to refugee status, it is necessary to establish whether or not the child's well-founded fear of persecution is linked to one or more of the five grounds listed in Article 1A(2) of the 1951 Convention. It is sufficient that the Convention ground be a factor relevant to the persecution, but it is not necessary that it be the sole, or even dominant, cause.

Race and nationality or ethnicity

41. Race and nationality or ethnicity is at the source of child asylum claims in many contexts. Policies that deny children of a particular race or ethnicity the right to a nationality or to be registered at birth,[92] or that deny children from particular ethnic groups their right to education or to health services would fall into this category. This Convention ground would apply similarly to policies that aim to remove children from their parents on the basis of particular racial, ethnic or indigenous backgrounds. Systematic targeting of girls belonging to ethnic minorities for rape, trafficking, or recruitment into armed forces or groups also may be analysed within this Convention ground.

Religion

42. As with an adult, the religious beliefs of a child or refusal to hold such beliefs may put him/her at risk of persecution. For a Convention ground to be established, it is not necessary that the child be an active practitioner. It is sufficient that the child simply be perceived as holding a certain religious belief or belonging to a sect or religious group, for example, because of the religious beliefs of his/her parents.[93]

43. Children have limited, if any, influence over which religion they belong to or observe, and belonging to a religion can be virtually as innate as one's ethnicity or race. In some countries, religion assigns particular roles or behaviour to children. As a consequence, if a child does not fulfil his/her assigned role or refuses to abide by the religious code and is punished as a consequence, s/he may have a well-founded fear of persecution on the basis of religion.

44. The reasons for persecution related to a child's refusal to adhere to prescribed gender roles may also be analysed under this ground. Girls, in particular, may be affected by persecution on the basis of religion. Adolescent girls may be required to perform traditional slave duties or to provide sexual services. They also may be required to undergo FGM or to be punished for honour crimes in the name of religion.[94] In other contexts, children – both boys and girls – may be specifically targeted to join armed groups or the armed forces of a State in pursuit of religious or related ideologies.

Political opinion

45. The application of the Convention ground of "political opinion" is not limited to adult claims. A claim based on political opinion presupposes that the applicant holds, or is assumed to hold, opin-

[92] Universal Declaration of Human Rights, http://www.unhcr.org/refworld/docid/3ae6b3712c.html, Art. 15; ICCPR, Arts 24(2) and (3); CRC, Art. 7.
[93] UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 Apr. 2004 (hereafter, "UNHCR, *Guidelines on Religion-Based Persecution*"), http://www.unhcr.org/refworld/docid/4090f9794.html.
[94] *Ibid*., para. 24.

ions not tolerated by the authorities or society and that are critical of generally accepted policies, traditions or methods. Whether or not a child is capable of holding a political opinion is a question of fact and is to be determined by assessing the child's level of maturity and development, level of education, and his/her ability to articulate those views. It is important to acknowledge that children can be politically active and hold particular political opinions independently of adults and for which they may fear being persecuted. Many national liberation or protest movements are driven by student activists, including schoolchildren. For example, children may be involved in distributing pamphlets, participating in demonstrations, acting as couriers or engaging in subversive activities.

46. In addition, the views or opinions of adults, such as the parents, may be imputed to their children by the authorities or by non-State actors.[95] This may be the case even if a child is unable to articulate the political views or activities of the parent, including where the parent deliberately withholds such information from the child to protect him/her. In such circumstances, these cases should be analysed not only according to the political opinion ground but also in terms of the ground pertaining to membership of a particular social group (in this case, the "family").

47. The grounds of (imputed) political opinion and religion may frequently overlap in child asylum claims. In certain societies, the role ascribed to women and girls may be attributable to the requirements of the State or official religion. The authorities or other agents of persecution may perceive the failure of a girl to conform to this role as a failure to practice or to hold certain religious beliefs. At the same time, failure to conform could be interpreted as holding an unacceptable political opinion that threatens fundamental power structures. This may be the case particularly in societies where there is little separation between religious and State institutions, laws and doctrines.[96]

Membership of a particular social group

48. Children's claims to refugee status most often have been analysed in the context of the Convention ground of "membership of a particular social group", although any of the Convention grounds may be applicable. As stated in UNHCR's Guidelines

> [a] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[97]

49. Although age, in strict terms, is neither innate nor permanent as it changes continuously, being a child is in effect an immutable characteristic at any given point in time. A child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution feared.[98] The fact that the child eventually will grow older is irrelevant to the identification of a particular social group, as this is based on the facts as presented in the asylum claim. Being a child is directly relevant to one's identity, both in the eyes of society and from the perspective of the individual child. Many government policies are age-driven or age-related, such as the age for military conscription, the age for sexual consent, the age of marriage, or the age for starting and leaving school. Children also share many general characteristics, such as innocence, relative immaturity, impressionability and evolving capacities. In most societies, children are set apart from adults as they are understood to require special attention or care, and they are referred to by a range of descriptors used to identify or label them, such as "young", "infant", "child", "boy", "girl" or "adolescent". The identification of

[95] See *Matter of Timnit Daniel and Simret Daniel*, A70 483 789 & A70 483 774, U.S. BIA, 31 Jan. 2002 (unpublished, non- precedent setting decision). The Court found that the notion "that the respondents were too young to have an actual political opinion is irrelevant; it is enough that the officials believed that they supported the EPLF."

[96] UNHCR, *Guidelines on Gender-Related Persecution, op. cit*. para. 26.

[97] UNHCR, *Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, http://www.unhcr.org/refworld/docid/3d36f23f4.html, para. 11.

[98] See *Matter of S-E-G-, et al*., 24 I&N Dec. 579 (BIA 2008), U.S. BIA, 30 July 2008, http://www.unhcr.org/refworld/ docid/4891da5b2.html, which noted that "we acknowledge that the mutability of age is not within one's control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable." (p. 583); *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department*, [2008] U.K. AIT 00005, 15 Mar. 2007, http:// www.unhcr.org/refworld/docid/47a04ac32.html, finding that the applicant, "although, assuming he survives, he will in due course cease to be a child, he is immutably a child at the time of assessment" at 6; *Decision V99-02929*, *V99-02929*, Canada, IRB, 21 Feb. 2000, http://www.unhcr.org/refworld/docid/4b18e5592.html, which found that "[t]he child's vulnerability arises as a result of his status as a minor. His vulnerability as a minor is an innate and unchangeable characteristic, notwithstanding the child will grow into an adult."

social groups also may be assisted by the fact that the children share a common socially-constructed experience, such as being abused, abandoned, impoverished or internally displaced.

50. A range of child groupings, thus, can be the basis of a claim to refugee status under the "membership of a particular social group" ground. Just as "women" have been recognized as a particular social group in several jurisdictions, "children" or a smaller subset of children may also constitute a particular social group.[99] Age and other characteristics may give rise to groups such as "abandoned children",[100] "children with disabilities", "orphans", or children born outside coercive family planning policies or of unauthorized marriages, also referred to as "black children".[101] The applicant's family may also constitute a relevant social group.[102]

51. The applicant's membership in a child-based social group does not necessarily cease to exist merely because his/her childhood ends. The consequences of having previously belonged to such a social group might not end even if the key factor of that identity (that is, the applicant's young age) is no longer applicable. For instance, a past shared experience may be a characteristic that is unchangeable and historic and may support the identification of groups such as "former child soldiers"[103] or "trafficked children" for the purposes of a fear of future persecution.[104]

52. Some of the more prominent social groupings include the following:

i. **Street children** may be considered a particular social group. Children living and/or working on the streets are among the most visible of all children, often identified by society as social outcasts. They share the common characteristics of their youth and having the street as their home and/or source of livelihood. Especially for children who have grown up in such situations, their way of life is fundamental to their identity and often difficult to change. Many of these children have embraced the term "street children" as it offers them a sense of identity and belonging while they may live and/ or work on the streets for a range of reasons. They also may share past experiences such as domestic violence, sexual abuse, and exploitation or being orphaned or abandoned.[105]

ii. **Children affected by HIV/AIDS**, including both those who are HIV-positive and those with an HIV-positive parent or other relative, may also be considered a particular social group. The fact of being HIV-positive exists independently of the persecution they may suffer as a consequence of their HIV status. Their status or that of their family may set them apart and, while manageable and/or treatable, their status is by and large unchangeable.[106]

iii. Where children are singled out as a target group for **recruitment or use by an armed force or group,** they may form a particular social group due to the innate and unchangeable nature of their age as well as the fact that they are perceived as a group by the society in which they live. As with adults, a child who evades the draft, deserts or otherwise refuses to become associated with an armed force may be perceived as holding a political opinion in which case the link to the Convention ground of political opinion may also be established.[107]

---

[99] In *In re Fauziya Kasinga, op. cit*., it was held that "young women" may constitute a particular social group.

[100] In *V97-03500*, Canada, Convention Refugee Determination Division, 31 May 1999, it was accepted that abandoned children in Mexico can be a particular social group. (A summary is available at http://www2.irb-cisr.gc.ca/en/decisions/reflex/index_e. htm?action=article.view&id=1749). See also RRT Case No. 0805331, [2009] RRTA 347, Australia, RRT, 30 April 2009, http://www. unhcr.org/refworld/docid/4a2681692.html, where the Tribunal held that the applicant's (a two-year old child) particular social group was "children of persecuted dissidents".

[101] This has been affirmed in several decisions in Australia. See, for instance, *Chen Shi Hai, op. cit*. and more recently in RRT Case No. 0901642, [2009] RRTA 502, Australia, RRT, 3 June 2009, http://www.unhcr.org/refworld/docid/4a76ddbf2.html.

[102] See *Aguirre-Cervantes, op. cit*., where the Court found that "[f]amily membership is clearly an immutable characteristic, fundamental to one's identity", and noted that "[t]he undisputed evidence demonstrates that Mr. Aguirre's goal was to dominate and persecute members of his immediate family."

[103] *In Lukwago v. Ashcroft, Attorney General*, 02-1812, U.S. Court of Appeals for the 3rd Circuit, 14 May 2003, http://www.unhcr. org/refworld/docid/47a7078c3.html, the Court found that "membership in the group of former child soldiers who have escaped LRA captivity fits precisely within the BIA's own recognition that a shared past experience may be enough to link members of a 'particular social group'."

[104] UNHCR, *Guidelines on Victims of Trafficking*, para. 39. See also, RRT Case No. N02/42226, [2003] RRTA 615, Australia, RRT, 30 June 2003, http://www.unhcr.org/refworld/docid/4b17c2b02.html, which concerned a young woman from Uzbekistan. The identified group was "Uzbekistani women forced into prostitution abroad who are perceived to have transgressed social mores."

[105] See, for instance, *Matter of B-F-O-*, A78 677 043, U.S. BIA, 6 Nov. 2001 (unpublished, non-precedent decision). The Court found that the applicant, who was an abandoned street child, had a well-founded fear of persecution based on membership in a particular social group. See also, *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department, op. cit*. The Tribunal found that the applicant's fear of harm as an orphan and street child "would be as a result of his membership in a part of a group sharing an immutable characteristic and constituting, for the purposes of the Refugee Convention, a particular social group", at 7.

[106] See further, CRC, *General Comment No. 3: HIV/AIDS and the Rights of the Child*, 17 Mar. 2003, http://www.unhcr.org/refworld/docid/4538834e15.html.

[107] UNHCR, *Handbook*, paras. 169–171; UNHCR, *Guidelines on Religion-Based Persecution*, paras. 25–26.

d) Internal "flight" or "relocation" alternative

53. An assessment of the issue of internal flight alternative contains two parts: the relevance of such an inquiry, and the reasonableness of any proposed area of internal relocation.[108] The child's best interests inform both the relevance and reasonableness assessments.

54. As in the case of adults, internal relocation is only **relevant** where the applicant can access practically, safely and legally the place of relocation.[109] In particular with regard to gender-based persecution, such as domestic violence and FGM which are typically perpetrated by private actors, the lack of effective State protection in one part of the country may be an indication that the State may also not be able or willing to protect the child in any other part of the country.[110] If the child were to relocate, for example, from a rural to an urban area, the protection risks in the place of relocation would also need to be examined carefully, taking into account the age and coping capacity of the child.

55. In cases where an internal flight or relocation alternative is deemed relevant, a proposed site of internal relocation that may be **reasonable** in the case of an adult may not be reasonable in the case of a child. The "reasonableness test" is one that is applicant-specific and, thus, not related to a hypothetical "reasonable person". Age and the best interests of the child are among the factors to be considered in assessing the viability of a proposed place of internal relocation.[111]

56. Where children are unaccompanied and, therefore, not returning to the country of origin with family members or other adult support, special attention needs to be paid as to whether or not such relocation is reasonable. Internal flight or relocation alternatives, for instance, would not be appropriate in cases where unaccompanied children have no known relatives living in the country of origin and willing to support or care for them and it is proposed that they relocate to live on their own without adequate State care and assistance. What is merely inconvenient for an adult might well constitute undue hardship for a child, particularly in the absence of any friend or relation.[112] Such relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment.[113]

57. If the only available relocation option is to place the child in institutional care, a proper assessment needs to be conducted of the care, health and educational facilities that would be provided and with regard to the long-term life prospects of adults who were institutionalized as children.[114] The treatment as well as social and cultural perceptions of orphans and other children in institutionalized care needs to be evaluated carefully as such children may be the subject of societal disapproval, prejudice or abuse, thus rendering the proposed site for relocation unreasonable in particular circumstances.

e) The application of exclusion clauses to children

58. The exclusion clauses contained in Article 1F of the 1951 Convention provide that certain acts are so grave that they render their perpetrators undeserving of international protection as refu-

[108] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, http://www. unhcr.org/refworld/docid/3f2791a44.html.
[109] *Ibid*., para. 7.
[110] *Ibid*., para. 15.
[111] *Ibid*., para. 25. See further factors in the CRC, *General Comment No. 6*, para. 84, on Return to Country of Origin. Although drafted with a different context in mind, these factors are equally relevant to an assessment of an internal flight/relocation alternative.
[112] See, for instance, *Elmi v. Minister of Citizenship and Immigration*, Canada, Federal Court, No. IMM-580-98, 12 Mar. 1999, http://www.unhcr.org/refworld/docid/4b17c5932.html.
[113] CRC, Arts. 3, 6 and 37. See also *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, ECtHR, 12 Oct. 2006, http://www.unhcr.org/refworld/docid/45d5cef72.html, which concerned the return (not internal relocation) of an unaccompanied five-year old girl. The Court was "struck by the failure to provide adequate preparation, supervision and safeguards for her deportation", noting further that such "conditions was bound to cause her extreme anxiety and demonstrated such a total lack of humanity towards someone of her age and in her situation as an unaccompanied minor as to amount to inhuman treatment [violation of article 3 of the European Convention on Human Rights]", paras. 66, 69.
[114] See CRC, *General Comment No. 6*, para. 85. See also *Inter-Agency Guiding Principles*, *op cit*., which notes that institutional care needs to be considered a last resort, as "residential institutions can rarely offer the developmental care and support a child requires and often cannot even provide a reasonable standard of protection", p. 46.

gees.[115] Since Article 1F is intended to protect the integrity of asylum, it needs to be applied "scrupulously". As with any exception to human rights guarantees, a restrictive interpretation of the exclusion clauses is required in view of the serious possible consequences of exclusion for the individual.[116] The exclusion clauses are exhaustively enumerated in Article 1F, and no reservations are permitted.[117]

59. In view of the particular circumstances and vulnerabilities of children, the application of the exclusion clauses to children always needs to be exercised with great caution. In the case of young children, the exclusion clauses may not apply at all. Where children are alleged to have committed crimes while their own rights were being violated (for instance while being associated with armed forces or armed groups), it is important to bear in mind that they may be victims of offences against international law and not just perpetrators.[118]

60. Although the exclusion clauses of Article 1F do not distinguish between adults and children, Article 1F can be applied to a child only if s/he has reached the age of criminal responsibility as established by international and/or national law at the time of the commission of the excludable act.[119] Thus, a child below such minimum age cannot be considered responsible for an excludable act.[120] Article 40 of the CRC requires States to establish a minimum age for criminal responsibility, but there is no universally recognized age limit.[121] In different jurisdictions, the minimum age ranges from 7 years to higher ages, such as 16 or 18 years, while the Statutes of the Special Court for Sierra Leone[122] and the International Criminal Court[123] set the cut-off age at 15 years and 18 years respectively.

61. In view of the disparities in establishing a minimum age for criminal responsibility by States and in different jurisdictions, the emotional, mental and intellectual maturity of any child over the relevant national age limit for criminal responsibility would need to be evaluated to determine whether s/he had the mental capacity to be held responsible for a crime within the scope of Article 1F. Such considerations are particularly important where the age limit is lower on the scale but is also relevant if there is no proof of age and it cannot be established that the child is at, or above, the age for criminal responsibility. The younger the child, the greater the presumption that the requisite mental capacity did not exist at the relevant time.

62. As with any exclusion analysis, a three-step analysis needs to be undertaken if there are indications that the child has been involved in conduct which may give rise to exclusion.[124] Such an analysis requires that: (i) the acts in question be assessed against the exclusion grounds, taking into account the nature of the acts as well as the context and all individual circumstances in which they occurred; (ii) it be established in each case that the child committed a crime which is covered by one of the sub-clauses of Article 1F, or that the child participated in the commission of such a crime in a manner

[115] UNHCR's interpretative legal guidance on the substantive and procedural standards for the application of Art. 1F is set out in UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 Sep. 2003, (hereafter: "UNHCR, *Guidelines on Exclusion*") http://www.unhcr. org/refworld/docid/3f5857684.html; UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sep. 2003, (hereafter "UNHCR, *Background Note on Exclusion*"), http://www. unhcr.org/refworld/docid/3f5857d24.html; UNHCR, *Statement on Article 1F of the 1951 Convention*, July 2009, (hereafter "UNHCR, Statement on Article 1F"), http://www.unhcr.org/refworld/docid/4a5de2992.html; and UNHCR, *Handbook*, paras. 140–163.

[116] UNHCR, *Guidelines on Exclusion*, para. 2; UNHCR *Background Note on Exclusion*, para. 4. UNHCR, *Handbook* para. 149. See also ExCom Conclusions No. 82 (XLVIII), *Safeguarding Asylum*, 17 Oct. 1997, http://www.unhcr.org/refworld/docid/3ae68c958. html, para. (v); No. 102 (LVI) 2005, *General Conclusion on International Protection*, 7 Oct. 2005, http://www.unhcr.org/refworld/ docid/43575ce3e.html, para. (i); No. 103 (LVI), *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, 7 Oct. 2005, http://www.unhcr.org/refworld/docid/43576e292.html, para. (d).

[117] UNHCR, *Guidelines on Exclusion*, para. 3; UNHCR, *Background Note on Exclusion*, para. 7.

[118] The Paris Principles state: "Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles," para. 3.6. It should also be noted that the prosecutor for the SCSL chose not to prosecute children between the ages of 15 and 18 years given that they themselves were victims of international crimes.

[119] UNHCR, *Guidelines on Exclusion*, para. 28.

[120] UNHCR, *Background Note on Exclusion*, para. 91. If the age of criminal responsibly is higher in the country of origin than in the host country, this should be taken into account in the child's favour.

[121] The Committee on the Rights of the Child urged States not to lower the minimum age to 12 years and noted that a higher age, such as 14 or 16 years, "contributes to a juvenile justice system which […] deals with children in conflict with the law without resorting to judicial proceedings"; see, CRC, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, CRC/C/GC/10, 25 Apr. 2007, http://www.unhcr.org/refworld/docid/4670fca12.html, para. 33. See also UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, 29 Nov. 1985, http://www. unhcr.org/refworld/docid/3b00f2203c.html, which provides that the "beginning of that age should not be fixed at a too low an age level bearing in mind the facts of emotional, mental and intellectual maturity", Art. 4.1.

[122] UN Security Council, Statute of the Special Court for Sierra Leone, 16 Jan. 2002, Art. 7.

[123] ICC Statute, Art. 26.

[124] For further information on exclusion concerning child soldiers, see UNHCR, *Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers*, 12 Sep. 2005 (hereafter "UNHCR, Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers"), http://www.unhcr.org/refworld/docid/440eda694.html.

which gives rise to criminal liability in accordance with internationally applicable standards; and (iii) it be determined, in cases where individual responsibility is established, whether the consequences of exclusion from refugee status are proportional to the seriousness of the act committed.[125]

63. It is important to undertake a thorough and individualized analysis of all circumstances in each case. In the case of a child, the exclusion analysis needs to take into account not only general exclusion principles but also the rules and principles that address the special status, rights and protection afforded to children under international and national law at all stages of the asylum procedure. In particular, those principles related to the best interest of the child, the mental capacity of children and their ability to understand and consent to acts that they are requested or ordered to undertake need to be considered. A rigorous application of legal and procedural standards of exclusion is also critical.[126]

64. Based on the above, the following considerations are of central importance in the application of the exclusion clauses to acts committed by children:

i. When determining individual responsibility for excludable acts, the issue of whether or not a child has the necessary **mental state** (or *mens rea*), that is, whether or not the child acted with the requisite intent and knowledge to be held individually responsible for an excludable act, is a central factor in the exclusion analysis. This assessment needs to consider elements such as the child's emotional, mental and intellectual development. It is important to determine whether the child was sufficiently mature to understand the nature and consequences of his/her conduct and, thus, to commit, or participate in, the commission of the crime. Grounds for the absence of the *mens rea* include, for example, severe mental disabilities, involuntary intoxication, or immaturity.

ii. If mental capacity is established, other grounds for **rejecting individual responsibility** need to be examined, notably whether the child acted under duress, coercion, or in defence of self or others. Such factors are of particular relevance when assessing claims made by former child soldiers. Additional factors to consider may include: the age at which the child became involved in the armed forces or group; the reasons for which s/he joined and left the armed forces or group; the length of time s/he was a member; the consequences of refusal to join the group; any forced use of drugs, alcohol or medication; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered.[127]

iii. Finally, if individual responsibility is established, it needs to be determined whether or not the consequences of exclusion from refugee status are proportional to the seriousness of the act committed.[128] This generally involves a weighing of the gravity of the offence against the degree of persecution feared upon return. If the applicant is likely to face severe persecution, the crime in question needs to be very serious in order to exclude him/her from refugee status. Issues for consideration include any mitigating or aggravating factors relevant to the case. When assessing a child's claim, even if the circumstances do not give rise to a defence, factors such as the age, maturity and vulnerability of the child are important considerations. In the case of child soldiers, such factors include ill-treatment by military personnel and circumstances during service. The consequences and treatment that the child may face upon return (i.e. serious human rights violations as a consequence of having escaped the armed forces or group) also need to be considered.

[125] UNHCR, *Statement on Article 1F*, p. 7.
[126] For a detailed analysis on procedural issues regarding exclusion, see UNHCR, *Guidelines on Exclusion*, paras. 31–36 and UNHCR, *Background Note on Exclusion*, paras. 98–113.
[127] Decisions in France have recognized that children who committed offences, which should in principle lead to the application of the exclusion clauses, may be exonerated if they were in particularly vulnerable situations. See, for instance, *459358, M.V.; Exclusion*, CRR, 28 Apr. 2005, http://www.unhcr.org/refworld/docid/43abf5cf4.html; *448119, M.C,* CRR, 28 Jan. 2005, http://www. unhcr.org/refworld/docid/4b17b5d92.html. See also, *MH (Syria) v. Secretary of State for the Home Department; DS (Afghanistan) v. Secretary of State for the Home Department*, [2009] EWCA Civ 226, Court of Appeal (U.K.), 24 Mar. 2009, http://www.unhcr. org/refworld/docid/49ca60ae2.html, para. 3. For detailed guidance on grounds rejecting individual responsibility, see, UNHCR *Guidelines on Exclusion*, paras. 21–24. UNHCR, *Background Note on Exclusion*, paras. 91–93. UNHCR, *Advisory Opinion on the Application of Exclusion Clauses to Child Soldiers, op cit*. pp. 10–12.
[128] For detailed guidance on proportionality see UNHCR, *Guidelines on Exclusion*, para. 24; UNHCR, *Background Note on Exclusion*, paras. 76–78.

IV. PROCEDURAL AND EVIDENTIARY ISSUES

65. Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims.[129] The general measures outlined below set out minimum standards for the treatment of children during the asylum procedure. They do not preclude the application of the detailed guidance provided, for example, in the Action for the Rights of Children Resources Pack,[130] the Inter-Agency Guiding Principles on Unaccompanied and Separated Children and in national guidelines.[131]

66. Claims made by child applicants, whether they are accompanied or not, should normally be processed on a priority basis, as they often will have special protection and assistance needs. Priority processing means reduced waiting periods at each stage of the asylum procedure, including as regards the issuance of a decision on the claim. However, before the start of the procedure, children require sufficient time in which to prepare for and reflect on rendering the account of their experiences. They will need time to build trusting relationships with their guardian and other professional staff and to feel safe and secure. Generally, where the claim of the child is directly related to the claims of accompanying family members or the child is applying for derivative status, it will not be necessary to prioritise the claim of the child unless other considerations suggest that priority processing is appropriate.[132]

67. There is no general rule prescribing in whose name a child's asylum claim ought to be made, especially where the child is particularly young or a claim is based on a parent's fear for their child's safety. This will depend on applicable national regulations. Sufficient flexibility is needed, nevertheless, to allow the name of the principal applicant to be amended during proceedings if, for instance, it emerges that the more appropriate principal applicant is the child rather than the child's parent. This flexibility ensures that administrative technicalities do not unnecessarily prolong the process.[133]

68. For unaccompanied and separated child applicants, efforts need to be made as soon as possible to initiate tracing and family reunification with parents or other family members. There will be exceptions, however, to these priorities where information becomes available suggesting that tracing or reunification could put the parents or other family members in danger, that the child has been subjected to abuse or neglect, and/ or where parents or family members may be implicated or have been involved in their persecution.[134]

69. An independent, qualified guardian needs to be appointed immediately, free of charge in the case of unaccompanied or separated children. Children who are the principal applicants in an asylum procedure are also entitled to a legal representative.[135] Such representatives should be properly trained and should support the child throughout the procedure.

70. The right of children to express their views and to participate in a meaningful way is also important in the context of asylum procedures.[136] A child's own account of his/her experience is often essential

[129] The relevant applicable age for children to benefit from the additional procedural safeguards elaborated in this section is the date the child seeks asylum and not the date a decision is reached. This is to be distinguished from the substantive assessment of their refugee claim in which the prospective nature of the inquiry requires that their age at the time of the decision may also be relevant.

[130] Action for the rights of children, *ARC Resource Pack, a capacity building tool for child protection in and after emergencies*, produced by Save the Children, UNHCR, UNICEF, OHCHR, International Rescue Committee and Terre des Hommes, 7 Dec. 2009, http://www.savethechildren.net/arc.

[131] See, for instance, U.K. Asylum Instruction, *Processing an Asylum Application from a Child*, 2 Nov. 2009, http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/ processingasylumapplication1.pdf?view=Binary; U.K. Border Agency Code of Practice for Keeping Children Safe from Harm, Dec. 2008, http://www.unhcr.org/refworld/docid/4948f8662.html; Finland, Directorate of Immigration, *Guidelines for Interviewing (Separated) Minors*, Mar. 2002, http://www.unhcr.org/refworld/docid/430ae8d72.html; U.S. *Guidelines For Children's Asylum Claims, op cit*.; Canada, IRB, *Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues*, 30 Sep. 1996, No. 3, http://www.unhcr.org/refworld/docid/3ae6b31d3b.html.

[132] UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 Nov. 2003, http://www.unhcr. org/refworld/docid/42d-66dd84.html, pages 3.25, 4.21–4.23.

[133] This is especially relevant in relation to claims, such as FGM or forced marriage, where parents flee with their child in fear for his/her life although the child may not fully comprehend the reason for flight.

[134] Family tracing and reunification have been addressed in a number of ExCom Conclusions, including most recently in ExCom, *Conclusion No. 107*, para. (h)(iii). See also UNHCR, *Guidelines on Determining the Best Interests of the Child, op cit*.; CRC, *General Comment No. 6*, para. 81.

[135] "Guardian" here refers to an independent person with specialized skills who looks after the child's best interests and general well-being. Procedures for the appointment of a guardian must not be less favourable than the existing national administrative or judicial procedures used for appointing guardians for children who are nationals in the country. "Legal representative" refers to a lawyer or other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with the authorities on legal matters. See ExCom, *Conclusion No. 107*, para. (g)(viii). For further details, see CRC, *General Comment No. 6*, paras. 33–38, 69. See also UNHCR, *Guidelines on Unaccompanied Children Seeking Asylum, op cit*., p. 2 and paras. 4.2, 5.7, 8.3, 8.5.

[136] CRC, Art. 12. The CRC does not set any lower age limit on children's right to express their views freely as it is clear that children can and do form views from a very early age.

for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information. Ensuring that the child has the opportunity to express these views and needs requires the development and integration of safe and child-appropriate procedures and environments that generate trust at all stages of the asylum process. It is important that children be provided with all necessary information in a language and manner they understand about the possible existing options and the consequences arising from them.[137] This includes information about their right to privacy and confidentiality enabling them to express their views without coercion, constraint or fear of retribution.[138]

71. Appropriate communication methods need to be selected for the different stages of the procedure, including the asylum interview, and need to take into account the age, gender, cultural background and maturity of the child as well as the circumstances of the flight and mode of arrival.[139] Useful, non-verbal communication methods for children might include playing, drawing, writing, role-playing, story-telling and singing. Children with disabilities require "whatever mode of communication they need to facilitate expressing their views".[140]

72. Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions, such as time or distance. Thus, what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child. It is, therefore, essential that examiners have the necessary training and skills to be able to evaluate accurately the reliability and significance of the child's account.[141] This may require involving experts in interviewing children outside a formal setting or observing children and communicating with them in an environment where they feel safe, for example, in a reception centre.

73. Although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied.[142] If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt.[143] Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.[144]

74. Just as country of origin information may be gender-biased to the extent that it is more likely to reflect male as opposed to female experiences, the experiences of children may also be ignored. In addition, children may have only limited knowledge of conditions in the country of origin or may be unable to explain the reasons for their persecution. For these reasons, asylum authorities need to make special efforts to gather relevant country of origin information and other supporting evidence.

75. Age assessments are conducted in cases when a child's age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual.[145] It is important that such assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity. The margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that,

[137] CRC, *General Comment No. 6*, para. 25; CRC, *General Comment No. 12*, paras. 123–124.
[138] CRC, Arts. 13, 17.
[139] Separated Children in Europe Programme, *SCEP Statement of Good Practice*, Third edition, 2004, http://www.unhcr.org/refworld/docid/415450694.html, para. 12.1.3.
[140] CRC, *General Comment No. 9*, para. 32.
[141] ExCom, *Conclusion No. 107*, para. (d).
[142] *Ibid*., para. (g)(viii), which recommends that States develop adapted evidentiary requirements.
[143] UNHCR, *Handbook*, paras. 196, 219.
[144] *Inter-Agency Guiding Principles, op. cit*., p. 61.
[145] ExCom, *Conclusion No. 107*, para. (g)(ix).

in case of uncertainty, the individual will be considered a child.[146] As age is not calculated in the same way universally or given the same degree of importance, caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child.

76. In normal circumstances, DNA testing will only be done when authorized by law and with the consent of the individuals to be tested, and all individuals will be provided with a full explanation of the reasons for such testing. In some cases, however, children may not be able to consent due to their age, immaturity, inability to understand what this entails or for other reasons. In such situations, their appointed guardian (in the absence of a family member) will grant or deny consent on their behalf taking into account the views of the child. DNA tests should be used only where other means for verification have proven insufficient. They may prove particularly beneficial in the case of children who are suspected of having been trafficked by individuals claiming to be parents, siblings or other relatives.[147]

77. Decisions need to be communicated to children in a language and in a manner they understand. Children need to be informed of the decision in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment. If the decision is negative, particular care will need to be taken in delivering the message to the child and explaining what next steps may be taken in order to avoid or reduce psychological stress or harm.

[146] *Ibid*., para. (g)(ix); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, op cit*., paras. 5.11, *6.*
[147] UNHCR, *Note on DNA Testing to Establish Family Relationships in the Refugee Context*, June 2008, http://www.unhcr.org/refworld/docid/48620c2d2.html.

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

Distr. GENERAL | HCR/GIP/12/09 | 23 October 2012 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 9:

Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (Reissued, Geneva, 2011). In particular, they should be read in conjunction with *UNHCR's Guidelines on International Protection No.1: 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* (May 2002); *UNHCR's Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (May 2002); and *UNHCR's Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (April 2004). They replace *UNHCR's Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity* (November 2008).

These Guidelines 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 under its mandate.

The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection* are available as a compilation at: http://www.unhcr.org/refworld/docid/4f33c8d92.html.

I. INTRODUCTION

1. In many parts of the world, individuals experience serious human rights abuses and other forms of persecution due to their actual or perceived sexual orientation and/or gender identity. While persecution of Lesbian, Gay, Bisexual, Transgender and Intersex (hereafter "LGBTI")[1] individuals and those perceived to be LGBTI is not a new phenomenon,[2] there is greater awareness in many countries of asylum that people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees under Article 1A(2) of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (hereafter the "1951 Convention").[3] Nevertheless, the application of the refugee definition remains inconsistent in this area.

2. It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world.[4] Many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty.[5] In these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution.

3. Intersecting factors that may contribute to and compound the effects of violence and discrimination include sex, age, nationality, ethnicity/race, social or economic status and HIV status. Due to these multiple layers of discrimination, LGBTI individuals are often highly marginalized in society and isolated from their communities and families. It is also not uncommon for some individuals to harbour feelings of shame and/or internalized homophobia. Because of these and other factors, they may be inhibited from informing asylum adjudicators that their real fear of persecution relates to their sexual orientation and/or gender identity.

4. The experiences of LGBTI persons vary greatly and are strongly influenced by their cultural, economic, family, political, religious and social environment. The applicant's background may impact the way he or she expresses his or her sexual orientation and/or gender identity, or may explain the reasons why he or she does not live openly as LGBTI. It is important that decisions on LGBTI refugee claims are not based on superficial understandings of the experiences of LGBTI persons, or on erroneous, culturally inappropriate or stereotypical assumptions. These Guidelines provide substantive and procedural guidance on the determination of refugee status of individuals on the basis of their sexual orientation and/or gender identity, with a view to ensuring a proper and harmonized interpretation of the refugee definition in the 1951 Convention.[6]

II. INTERNATIONAL HUMAN RIGHTS LAW

5. Article 1 of the Universal Declaration of Human Rights provides that "all human beings are born free and equal in dignity and rights", and Article 2 declares that "everyone is entitled to all the rights and freedoms

[1] For a discussion of terms, see below at III. Terminology. For the purpose of these Guidelines, "gender identity" also incorporates "intersex".
[2] The 1951 Convention relating to the Status of Refugees was drafted not least as a response to the persecution during World War II, during which intolerance and violence cost the lives of thousands of people with a LGBTI background. See, UNHCR, "Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity", November 2010, Expert Roundtable organized by UNHCR, Geneva, Switzerland, 30 September–1 October 2010 (hereafter "UNHCR, Summary Conclusions of Roundtable"), available at: http://www.unhcr.org/refworld/docid/4cff99a42.html, para. 3.
[3] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951; Protocol Relating to the Status of Refugees, 31 January 1967.
[4] See, UN Human Rights Council, "Report of the United Nations High Commissioner for Human Rights on Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity", 17 November 2011 (hereafter "OHCHR, Report on Sexual Orientation and Gender Identity"), available at: http://www.unhcr.org/refworld/docid/4ef092022.html. For an overview of jurisprudence and doctrine, see also International Commission of Jurists (hereafter "ICJ"), *Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 2010, fourth updated edition, available at: http://www.unhcr.org/refworld/docid/4c627bd82.html; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union*, October 2007, available at: http://www.unhcr.org/refworld/docid/4a54bbb5d.html; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System*, July 2007, available at: http://www.unhcr.org/refworld/docid/4ad5b83a2.html.
[5] See, International Lesbian, Gay, Bisexual, Trans and Intersex Association, "State-sponsored Homophobia, A World Survey of Laws Prohibiting Same-Sex Activity between Consenting Adults", May 2012, available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf.
[6] These Guidelines supplement the UNHCR "Guidelines on International Protection No. 1: 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", 7 May 2002 (hereafter "UNHCR, Guidelines on Gender-Related Persecution"), available at: http://www.unhcr.org/refworld/docid/3d36f1c64.html

set forth in this Declaration".[7] All people, including LGBTI individuals, are entitled to enjoy the protection provided for by international human rights law on the basis of equality and non-discrimination.[8]

6. Although the main international human rights treaties do not explicitly recognize a right to equality on the basis of sexual orientation and/or gender identity,[9] discrimination on these grounds has been held to be prohibited by international human rights law.[10] For example, the proscribed grounds of "sex" and "other status" contained in the non-discrimination clauses of the main international human rights instruments have been accepted as encompassing sexual orientation and gender identity.[11] As respect for fundamental rights as well as the principle of non-discrimination are core aspects of the 1951 Convention and international refugee law,[12] the refugee definition must be interpreted and applied with due regard to them, including the prohibition on discrimination on the basis of sexual orientation and gender identity.

7. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity were adopted in 2007 by a group of human rights experts and, although not binding, reflect well-established principles of international law.[13] They set out the human rights protection framework applicable in the context of sexual orientation and/or gender identity. Principle 23 outlines the right to seek and enjoy asylum from persecution related to sexual orientation and/or gender identity:

> Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

III. TERMINOLOGY

8. These Guidelines are intended to be inclusive of and relevant to the range of claims relating to sexual orientation and/or gender identity. The concepts of sexual orientation and gender identity are outlined in the Yogyakarta Principles and this terminology is also used for the purposes of these Guidelines. Sexual orientation refers to: "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender".[14] Gender identity refers to: "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms".[15]

9. Sexual orientation and gender identity are broad concepts which create space for self-identification. Research over several decades has demonstrated that sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or the opposite sex.[16] Gender identity and its expression also take many forms, with some individuals identifying neither as male nor female, or as both. Whether one's sexual orientation is determined

[7] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.
[8] OHCHR, Report on Sexual Orientation and Gender Identity, para. 5.
[9] However, some regional instruments expressly prohibit discrimination on grounds of sexual orientation. See, for example, Charter of Fundamental Rights of the European Union, Article 21, 18 December 2000, and Resolution of the Organization of American States, Human Rights, Sexual Orientation, and Gender Identity, AG/RES. 2721 (XLII-O/12), 4 June 2012.
[10] "[D]iscrimination' as used in the Covenant [on Civil and Political Rights] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.", UN Human Rights Committee, CCPR General Comment No. 18: Non-Discrimination, 10 November 1989, available at: http://www.unhcr.org/refworld/docid/453883fa8.html, para. 7.
[11] The UN Human Rights Committee held in 1994 in the landmark decision *Toonen v. Australia* that the International Covenant on Civil and Political Rights (adopted by the UN General Assembly on 16 December 1966, hereafter "ICCPR") prohibits discrimination on the grounds of sexual orientation, see CCPR/C/50/D/488/1992, 4 April 1994, (hereafter *"Toonen v. Australia"*) available at: http://www.unhcr.org/refworld/docid/48298b8d2.html. This has subsequently been affirmed by several other UN human rights treaty bodies, including also recognition that gender identity is among the prohibited grounds of discrimination. See further, OHCHR, Report on Sexual Orientation and Gender Identity, para. 7.
[12] 1951 Convention, Preambular para. 1, Article 3.
[13] ICJ, Yogyakarta Principles - Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, (hereafter "Yogyakarta Principles"), March 2007, available at: http://www.unhcr.org/refworld/docid/48244e602.html.
[14] Yogyakarta Principles, Preamble.
[15] Ibid.
[16] American Psychological Association, "Sexual Orientation and Homosexuality" (hereafter "APA, Sexual Orientation and Homosexuality"), available at: http://www.apa.org/helpcenter/sexual-orientation.aspx.

by, *inter alia*, genetic, hormonal, developmental, social, and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation.[17] While for most people sexual orientation or gender identity are determined at an early age, for others they may continue to evolve across a person's lifetime. Different people realize at different points in their lives that they are LGBTI and their sexual and gender expressions may vary with age, and other social and cultural determinants.[18]

10. Refugee claims based on sexual orientation and/or gender identity often emanate from members of specific sub-groups, that is, lesbian, gay, bisexual, transgender, intersex and queer[19] individuals (usually abbreviated as "LGBT", "LGBTI" or "LGBTIQ"[20]). The experiences of members of these various groups will often be distinct from one another; and, as noted above at paragraph 4, *between* members. It is, therefore, essential that decision makers understand both the context of each refugee claim, as well as individual narratives that do not easily map onto common experiences or labels.[21]

Lesbian

A *lesbian* is a woman whose enduring physical, romantic and/or emotional attraction is to other women. Lesbians often suffer multiple discrimination due to their gender, their often inferior social and/or economic status, coupled with their sexual orientation. Lesbians are commonly subjected to harm by non-State actors, including acts such as "corrective" rape, retaliatory violence by former partners or husbands, forced marriage, and crimes committed in the name of "honour" by family members. Some lesbian refugee applicants have not had any experiences of past persecution; for example, if they have had few or no lesbian relationships. Lesbians may have had heterosexual relationships, often, but not necessarily, because of social pressures to marry and bear children. They may only later in life enter into a lesbian relationship or identify as lesbian. As in all refugee claims, it is important to ensure that the assessment of her fear of persecution is future-looking and that decisions are not based on stereotypical notions of lesbians.

Gay men

Gay is often used to describe a man whose enduring physical, romantic and/or emotional attraction is to other men, although gay can also be used to describe both gay men and women (lesbians). Gay men numerically dominate sexual orientation and gender identity refugee claims, yet their claims should not be taken as a "template" for other cases on sexual orientation and/or gender identity. Gay men are often more visible than other LGBTI groups in public life in many societies and can become the focus of negative political campaigns. It is important, however, to avoid assumptions that all gay men are public about their sexuality or that all gay men are effeminate. Having defied masculine privilege by adopting roles and characteristics viewed as "feminine", gay men may be viewed as "traitors", whether they are effeminate or not. They could be at particular risk of abuse in prisons, the military[22] and other traditionally male dominated environments and job sites. Some gay men may also have had heterosexual relationships because of societal pressures, including to marry and/or have children.

Bisexual

Bisexual describes an individual who is physically, romantically and/or emotionally attracted to both men and women. The term bisexuality tends to be interpreted and applied inconsistently, often with a too narrow understanding. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes. Bisexuality is a unique identity, which requires an examination in its own right. In some countries persecution may be directed expressly at gay or lesbian conduct, but nevertheless encompass acts of individuals who identify as bisexual. Bisexuals often describe their sexual orientation as "fluid" or "flexible" (see further below at paragraph 47).

[17] There is no consensus among scientists about the exact reasons that an individual develops a particular sexual orientation. See, APA, Sexual Orientation and Homosexuality.
[18] *Application No. 76175*, New Zealand Appeals Authority, 30 April 2008, available at: http://www.unhcr.org/refworld/docid/482422f62.html, para. 92.
[19] *Queer* is traditionally a pejorative term, however, it has been appropriated by some LGBT people to describe themselves.
[20] UNHCR has opted to refer to "LGBTI" individuals, which is intended to be inclusive of a wide range of individuals who fear persecution for reasons of their sexual orientation and/or gender identity. See further, UNHCR, *Working with Lesbian, Gay, Bisexual, Transgender & Intersex Persons in Forced Displacement*, 2011, available at: http://www.unhcr.org/refworld/docid/4e6073972.html. For further information on terminology, see, for example, Gay & Lesbian Alliance Against Defamation, "Media Reference Guide: A Resource for Journalists", updated May 2010, available at: http://www.glaad.org/reference.
[21] Considerations relating to each group are also integrated elsewhere in these Guidelines.
[22] See, for example, *RRT Case No. 060931294*, [2006] RRTA 229, Australia, RRTA, 21 December 2006, available at: http://www.unhcr.org/refworld/docid/47a707ebd.html; *MS (Risk – Homosexuality – Military Service) Macedonia v. SSHD*, CG [2002] UKIAT 03308, UK Immigration and Asylum Tribunal, 30 July 2002, available at: http://www.unhcr.org/refworld/docid/46836aba0.html, which found that the "atrocious prison conditions" in the particular country would breach the appellant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 3. Lesbians may also be at risk in these environments. See, *Smith v. Minister of Citizenship and Immigration*, 2009 FC 1194, Canada, Federal Court, 20 November 2009, available at: http://www.unhcr.org/refworld/docid/4b3c7b8c2.html.

Transgender

Transgender describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth.[23] Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual.[24] Transgender individuals dress or act in ways that are often different from what is generally expected by society on the basis of their sex assigned at birth. Also, they may not appear or act in these ways at all times. For example, individuals may choose to express their chosen gender only at certain times in environments where they feel safe. Not fitting within accepted binary perceptions of being male and female, they may be perceived as threatening social norms and values. This non-conformity exposes them to risk of harm. Transgender individuals are often highly marginalized and their claims may reveal experiences of severe physical, psychological and/or sexual violence. When their self-identification and physical appearance do not match the legal sex on official documentation and identity documents, transgender people are at particular risk.[25] The transition to alter one's birth sex is not a one-step process and may involve a range of personal, legal and medical adjustments. Not all transgender individuals choose medical treatment or other steps to help their outward appearance match their internal identity. It is therefore important for decision makers to avoid overemphasis on sex-reassignment surgery.

Intersex

The term *intersex* or "disorders of sex development" (DSD)[26] refers to a condition in which an individual is born with reproductive or sexual anatomy and/or chromosome patterns that do not seem to fit typical biological notions of being male or female. These conditions may be apparent at birth, may appear at puberty, or may be discovered only during a medical examination. Individuals with these conditions were previously referred to as "hermaphrodites", however this term is considered outdated and should not be used unless the applicant uses it.[27] An intersex person may identify as male or female, while their sexual orientation may be lesbian, gay, bisexual, or heterosexual.[28] Intersex persons may be subjected to persecution in ways that relate to their atypical anatomy. They may face discrimination and abuse for having a physical disability or medical condition, or for non-conformity with expected bodily appearances of females and males. Some intersex children are not registered at birth by the authorities, which can result in a range of associated risks and denial of their human rights. In some countries, being intersex can be seen as something evil or part of witchcraft and can result in a whole family being targeted for abuse.[29] Similar to transgender individuals, they may risk being harmed during the transition to their chosen gender because, for example, their identification papers do not indicate their chosen gender. People who self-identify as intersex may be viewed by others as transgender, as there may simply be no understanding of the intersex condition in a given culture.

11. Not all applicants will self-identify with the LGBTI terminology and constructs as presented above or may be unaware of these labels. Some may only be able to draw upon (derogatory) terms used by the persecutor. Decision makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognize a valid claim. For example, bisexuals are often categorized in the adjudication of refugee claims as either gay, lesbian or heterosexual, intersex individuals may not identify as LGBTI at all (they may not see their condition as part of their identity, for example) and men who have sex with men do not always identify as gay. It is also important to be clear about the distinction between sexual orientation and gender identity. They are separate concepts and, as explained above at paragraph8, they present different aspects of the identity of each person.

[23] The term may include, but is not limited to, transsexuals (an older term which originated in the medical and psychological communities), cross-dressers and other gender-variant people. See further, APA, "Answers to Your Questions about Transgender People, Gender Identity and Gender Expression", available at: http://www.apa.org/topics/sexuality/transgender.aspx.

[24] See also, *RRT Case No. 0903346*, [2010] RRTA 41, Australia, Refugee Review Tribunal, 5 February 2010, (hereafter "*RRT Case No. 0903346")* available at: http://www.unhcr.org/refworld/docid/4b8e783f2.html, which concerned a transgender applicant who feared persecution because of her gender identity.

[25] The European Court of Human Rights has established that authorities must legally recognize the altered gender. See, *Goodwin v. United Kingdom*, Application no. 28957/95, European Court of Human Rights, 11 July 2002, available at: http://www.unhcr.org/refworld/docid/4dad9f762.html, finding a violation of the applicant's right to privacy, noting that "the stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality.", para. 77, and that "Under Article 8 of the Convention in particular, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings", para. 90. See also Council of Europe Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, recognizing that "Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way.", at 21.

[26] Note that some individuals (and/or their medical records) will just use the name of their particular condition, such as congenital adrenal hyperplasia or androgen insensitivity syndrome, rather than using the term intersex or DSD.

[27] US Citizenship and Immigration Services, "Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims", 27 December 2011 (hereafter "USCIS, Guidance for Adjudicating LGBTI Claims"), available at: http://www.unhcr.org/refworld/docid/4f269cd72.html, p. 13.

[28] See further, Advocates for Informed Choice website: http://aiclegal.org/faq/#whatisintersex.

[29] Jill Schnoebelen, *Witchcraft Allegations, Refugee Protection and Human Rights: A Review of the Evidence*, UNHCR, New Issues in Refugee Research, Research Paper No. 169, January 2009, available at: http://www.unhcr.org/4981ca712.pdf.

IV. SUBSTANTIVE ANALYSIS

A. Background

12. A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that.[30] As affirmed by the position adopted in a number of jurisdictions, sexual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal.[31] While one's sexual orientation and/or gender identity may be revealed by sexual conduct or a sexual act, or by external appearance or dress, it may also be evidenced by a range of other factors, including how the applicant lives in society, or how he or she expresses (or wishes to express) his or her identity.[32]

13. An applicant's sexual orientation and/or gender identity can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation and/or gender identity, which does not, or is seen not to, conform to prevailing political, cultural or social norms. The intersection of gender, sexual orientation and gender identity is an integral part in the assessment of claims raising questions of sexual orientation and/or gender identity. Harm as a result of not conforming to expected gender roles is often a central element in these claims. UNHCR's Guidelines on Gender-Related Persecution recognize that:

> Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory 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.[33]

14. The impact of gender is relevant to refugee claims made by both LGBTI men and women.[34] Decision makers need to be attentive to differences in their experiences based on sex/gender. For example, heterosexual or male gay norms or country information may not apply to the experiences of lesbians whose position may, in a given context, be similar to that of other women in her society. Full account needs to be taken of diverse and evolving identities and their expression, the actual circumstances of the individual, and the cultural, legal, political and social context.[35]

15. Societal disapproval of varied sexual identities or their expression is usually more than the simple disapproval of sexual practices. It is often underlined by a reaction to non-compliance with expected cultural, gender and/or social norms and values. The societal norms of who men and women are and how they are supposed to behave are commonly based on hetero-normative standards. Both men and women may be subject to violent acts to make them conform to society's gender roles and/or to intimidate others by setting "an example". Such harm can be "sexualized" as a means of further degrading, objectifying or punishing the victim for his/her sexual orientation and/or gender identity, but can also take other forms.[36]

---

[30] UNHCR, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department – Case for the First Intervener (United Nations High Commissioner for Refugees)*, 19 April 2010, (hereafter "UNHCR, *HJ and HT*"), available at: http://www.unhcr.org/refworld/docid/4bd1abbc2.html, para. 1. For a comparison with other Convention grounds, see para. 29 of the submission. See also, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UK, [2010] UKSC 31, Supreme Court, 7 July 2010 (hereafter *"HJ and HT"*), available at: http://www.unhcr.org/refworld/docid/4c3456752.html.

[31] See, for example, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada, Supreme Court, 30 June 1993 (hereafter "*Canada v. Ward*"), available at: http://www.unhcr.org/refworld/docid/3ae6b673c.html; *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, US, 225 F.3d 1084, A72-994-275, (9th Cir. 2000), 24 August 2000, available at: http://www.unhcr.org/refworld/docid/3ba9c1119.html, later affirmed by *Morales v. Gonzales*, US, 478 F.3d 972, No. 05-70672, (9th Cir. 2007), 3 January 2007, available at: http://www.unhcr.org/refworld/docid/4829b1452.html; *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia, High Court, 9 December 2003 (hereafter *"S395/2002"*), available at: http://www.unhcr.org/refworld/docid/3fd9eca84.html; *Refugee Appeal No. 74665*, New Zealand, Refugee Status Appeals Authority, 7 July 2004 (hereafter *"Refugee Appeal No. 74665"*), available at: http://www.unhcr.org/refworld/docid/42234ca54.html; *HJ and HT*, above footnote 30, paras. 11, 14, 78.

[32] Yogyakarta Principles, Principle 3, affirms that each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. See further, *S395/2002*, para. 81; *Matter of Toboso-Alfonso*, US Board of Immigration Appeals, 12 March 1990, (hereafter "*Matter of Toboso-Alfonso*"), available at: http://www.unhcr.org/refworld/docid/3ae6b6b84.html; *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, US, No. 02-72651, (9th Cir. 2005), 7 March 2005 (hereafter "*Karouni*") available at: http://www.unhcr.org/refworld/docid/4721b5c32.html, at III[6]; *Lawrence, et al. v. Texas*, US Supreme Court, 26 June 2003, available at: http://www.unhcr.org/refworld/docid/3f21381d4.html, which found that "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring", p. 6.

[33] UNHCR, Guidelines on Gender-Related Persecution, para. 16.

[34] UNHCR, Guidelines on Gender-Related Persecution, para. 3.

[35] UNHCR, Summary Conclusions of Roundtable, para. 5.

[36] UNHCR, Summary Conclusions of Roundtable, paras. 6, 16.

B. Well-founded fear of being persecuted

16. The term "persecution", though not expressly defined in the 1951 Convention, can be considered to involve serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.[37]

17. Discrimination is a common element in the experiences of many LGBTI individuals. As in other refugee claims, discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned.[38] Assessing whether the cumulative effect of such discrimination rises to the level of persecution is to be made by reference to reliable, relevant and up-to-date country of origin information.[39]

18. Not all LGBTI applicants may have experienced persecution in the past (see further below at paragraphs 30-33 on concealment as persecution and at paragraph 57 on *sur place* claims). Past persecution is not a prerequisite to refugee status and in fact, the well-foundedness of the fear of persecution is to be based on the assessment of the predicament that the applicant would have to face if returned to the country of origin.[40] The applicant does not need to show that the authorities knew about his or her sexual orientation and/or gender identity before he or she left the country of origin.[41]

19. Behaviour and activities may relate to a person's orientation or identity in complex ways. It may be expressed or revealed in many subtle or obvious ways, through appearance, speech, behaviour, dress and mannerisms; or not revealed at all in these ways. While a certain activity expressing or revealing a person's sexual orientation and/or gender identity may sometimes be considered trivial, what is at issue is the consequences that would follow such behaviour. In other words, an activity associated with sexual orientation may merely reveal or expose the stigmatized identity, it does not cause or form the basis of the persecution. In UNHCR's view, the distinction between forms of expression that relate to a "core area" of sexual orientation and those that do not, is therefore irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution.[42]

Persecution

20. Threats of serious abuse and violence are common in LGBTI claims. Physical, psychological and sexual violence, including rape,[43] would generally meet the threshold level required to establish persecution. Rape in particular has been recognized as a form of torture, leaving "deep psychological scars on the victim".[44] Rape has been identified as being used for such purposes as "intimida-

---

[37] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3 (hereafter "UNHCR, *Handbook*"), paras. 51–53.

[38] *Ibid*, paras. 54–55.

[39] *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 98, Canada, Federal Court, 21 January 2005 (hereafter "*Molnar v. Canada*") available at: http://www.unhcr.org/refworld/docid/4fe81df72.html.

[40] See, for example, *Bromfield v. Mukasey*, US, 543 F.3d 1071, 1076-77 (9th Cir. 2008), 15 September 2008, available at: http://www.unhcr.org/refworld/docid/498b08a12.html, *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, available at: http://www.unhcr.org/refworld/docid/4f8410a52.html, para. 91.

[41] UNHCR, *Handbook*, para. 83.

[42] *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11)*, C-71/11 and C-99/11, CJEU, 5 September 2012, available at: http://www.unhcr.org/refworld/docid/505ace862.html, para. 62; *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, UK Supreme Court, 25 July 2012, available at: http://www.unhcr.org/refworld/docid/500fdacb2.html, paras. 75–76 (Lord Kerr); *UNHCR Statement on Religious Persecution and the Interpretation of Article 9(1) of the EU Qualification Directive* and UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) – Case for the Intervener*, 25 May 2012, Case No. 2011/0011, available at: http://www.unhcr.org/refworld/docid/4fc369022.html, para. 12(9).

[43] International criminal tribunals in their jurisprudence have broadened the scope of crimes of sexual violence that can be prosecuted as rape to include oral sex and vaginal or anal penetration through the use of objects or any part of the perpetrator's body. See, for instance, *Prosecutor v. Anto Furundzija (Trial Judgment)*, IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), 10 December 1998, available at: http://www.unhcr.org/refworld/docid/40276a8a4.html, para. 185; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, ICTY, 12 June 2002, available at: http://www.unhcr.org/refworld/docid/3debaafe4.html, para. 128. See also, International Criminal Court, Elements of Crimes, 2011, available at: http://www.unhcr.org/refworld/docid/4ff5dd7d2.html, Articles 7 (1) (g)-1 and 8(2)(b)(xxii)-1. For refugee-related jurisprudence, see *Ayala v. US Attorney General*, US, No. 09-12113, (11th Cir. 2010), 7 May 2010 (hereafter "*Ayala v. US Attorney General*"), available at: http://www.unhcr.org/refworld/docid/4c6c04942.html, which found that oral rape constituted persecution.

[44] *Aydin v. Turkey*, 57/1996/676/866, Council of Europe, European Court of Human Rights, 25 September 1997, available at: http://www.unhcr.org/refworld/docid/3ae6b7228.html, para. 83. See also, *HS (Homosexuals: Minors, Risk on Return) Iran v. Secretary of State for the Home Department* [2005] UKAIT 00120, UK Asylum and Immigration Tribunal (AIT), 4 August 2005, available at http://www.unhcr.org/refworld/docid/47fdfafe0.html, recognizing as torture the sexual assault the applicant had been subjected to while in detention, paras. 57, 134; *Arrêt n° 36 527*, Belgium: Conseil du Contentieux des Etrangers, 22 December 2009, available at: http://www.unhcr.org/refworld/docid/4dad94692.html, referring to torture and serious violations of the appellant's physical integrity while in prison as constituting persecution.

tion, degradation, humiliation, discrimination, punishment, control or destruction of the person. Like torture, rape is a violation of personal dignity."[45]

21. Many societies, for example, continue to view homosexuality, bisexuality, and/or transgender behaviour or persons, as variously reflecting a disease, a mental illness or moral failing, and they may thus deploy various measures to try to change or alter someone's sexual orientation and/or gender identity. Efforts to change an individual's sexual orientation or gender identity by force or coercion may constitute torture, or inhuman or degrading treatment, and implicate other serious human rights violations, including the rights to liberty and security of person. Examples at the extreme end and which on their face reach the threshold of persecution include forced institutionalization, forced sex-reassignment surgery, forced electroshock therapy and forced drug injection or hormonal therapy.[46] Non-consensual medical and scientific experimentation is also explicitly identified as a form of torture or inhuman or degrading treatment under the International Covenant on Civil and Political Rights.[47] Some intersex individuals may be forced to undergo surgery aimed at "normalcy" and, where it will be applied without their consent, this is likely to amount to persecution. It is also important to distinguish in these cases between surgery necessary to preserve life or health and surgery for cosmetic purposes or social conformity. The assessment needs to focus on whether the surgery or treatment was voluntary and took place with the informed consent of the individual.[48]

22. Detention, including in psychological or medical institutions, on the sole basis of sexual orientation and/or gender identity is considered in breach of the international prohibition against the arbitrary deprivation of liberty and would normally constitute persecution.[49] Moreover, as noted by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, there is usually a strict hierarchy in detention facilities and those at the bottom of this hierarchy, such as LGBTI detainees, suffer multiple discrimination. Male-to-female transgender prisoners are at particular risk of physical and sexual abuse if placed within the general male prison population.[50] Administrative segregation, or solitary confinement, solely because a person is LGBTI can also result in severe psychological harm.[51]

23. Social norms and values, including so-called family "honour", are usually closely intertwined in the refugee claims of LGBTI individuals. While "mere" disapproval from family or community will not amount to persecution, it may be an important factor in the overall context of the claim. Where family or community disapproval, for example, manifests itself in threats of serious physical violence or even murder by family members or the wider community, committed in the name of "honour", it would clearly be classed as persecution.[52] Other forms of persecution include forced or underage marriage,

[45] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda, 2 September 1998, available at: http://www.unhcr.org/refworld/docid/40278fbb4.html, para. 687.

[46] Yogyakarta Principles, Principle 18: "Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed". See also, *Alla Konstantinova Pitcherskaia v. Immigration and Naturalization Service*, US, 95-70887, (9th Cir. 1997), 24 June 1997 (hereafter "*Pitcherskaia v. INS*"), available at: http://www.unhcr.org/refworld/docid/4152e0fb26.html.

[47] *ICCPR, Article 7, "... In particular, no one shall be subjected without his free consent to medical or scientific experimentation". As affirmed, for example, by the UN Committee Against Torture and the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, this includes subjecting men suspected of homosexual conduct to non-consensual anal examinations to prove their homosexuality. See further, OHCHR, Report on Sexual Orientation and Gender Identity, para. 37.*

[48] See, UN Committee on the Elimination of Discrimination against Women (CEDAW), *Communication No. 4/2004*, 29 August 2006, CEDAW/C/36/D/4/2004, available at: http://www.unhcr.org/refworld/docid/4fdb288e2.html, which considered non-consensual sterilization as a violation of women's rights to informed consent and dignity, para. 11.3. In respect of surgery at birth, the best interests of the child is a primary consideration, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her (Convention on the Rights of the Child (CRC), Article 3). If sex re-assignment or reconstructive surgery is contemplated only later in childhood, "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child" (CRC, Article 12(1)).

[49] See, UN Working Group on Arbitrary Detention, Opinions No. 22/2006 on Cameroon and No. 42/2008 on Egypt; A/HRC/16/47, annex, para. 8(e). See also, UNHCR, "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention", 2012, (hereafter "UNHCR, Guidelines on Detention"), available at: http://www.unhcr.org/refworld/docid/503489533b8.html.

[50] OHCHR, Report on Sexual Orientation and Gender Identity, para. 34.

[51] As noted in the UNHCR Guidelines on Detention, "solitary confinement is not an appropriate way to manage or ensure the protection of such individuals", para. 65.

[52] UN Human Rights Committee and the Inter-American Commission on Human Rights have concluded that the inaction of State vis-à-vis death threats constitutes a violation of the right to life. See also, *RRT Case No. 0902671*, [2009] RRTA 1053, Australia, Refugee Review Tribunal, 19 November 2009, available at: http://www.unhcr.org/refworld/docid/4b57016f2.html, which found that the "applicant's chance of facing serious harm, possibly death by honour killing, if he returned to [the country of origin] now or in the reasonably foreseeable future is real and amounts to serious harm...in that it is deliberate or intentional and involves persecution for a Convention reason". See also, *Muckette v. Minister of Citizenship and Immigration*, 2008 FC 1388, Canada, Federal Court, 17 December 2008, available at: http://www.unhcr.org/refworld/docid/4989a27e2.html. The case was remanded for reconsideration as the lower instance had "failed to address whether the death threats had a degree of reality to them and in effect dismissed them because no one had attempted to kill the Applicant."

forced pregnancy and/or marital rape (on rape, see above at paragraph 20). In the context of sexual orientation and/or gender identity cases, such forms of persecution are often used as a means of denial or "correcting" non-conformity. Lesbians, bisexual women and transgender persons are at particular risk of such harms owing to pervasive gender inequalities that restrict autonomy in decision-making about sexuality, reproduction and family life.[53]

24. LGBTI individuals may also be unable to enjoy fully their human rights in matters of private and family law, including inheritance, custody, visitation rights for children and pension rights.[54] Their rights to freedom of expression, association and assembly may be restricted.[55] They may also be denied a range of economic and social rights, including in relation to housing, education,[56] and health care.[57] Young LGBTI individuals may be prevented from going to school, subjected to harassment and bullying and/or expelled. Community ostracism can have a damaging impact on the mental health of those targeted, especially if such ostracism has lasted for an extended period of time and where it occurs with impunity or disregard. The cumulative effect of such restrictions on the exercise of human rights may constitute persecution in a given case.

25. LGBTI individuals may also experience discrimination in access to and maintenance of employment.[58] Their sexual orientation and/or gender identity may be exposed in the workplace with resulting harassment, demotion or dismissal. For transgender individuals in particular, deprivation of employment, often combined with lack of housing and family support, may frequently force them into sex work, subjecting them to a variety of physical dangers and health risks. While being dismissed from a job generally is not considered persecution, even if discriminatory or unfair, if an individual can demonstrate that his or her LGBTI identity would make it highly improbable to enjoy any kind of gainful employment in the country of origin, this may constitute persecution.[59]

Laws criminalizing same-sex relations

26. Many lesbian, gay or bisexual applicants come from countries of origin in which consensual same-sex relations are criminalized. It is well established that such criminal laws are discriminatory and violate international human rights norms.[60] Where persons are at risk of persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident.[61]

27. Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection.

---

[53] OHCHR, Report on Sexual Orientation and Gender Identity, para. 66.
[54] *Ibid*, paras. 68–70.
[55] *Ibid*, paras. 62–65.
[56] *Ibid*, paras. 58–61.
[57] *Ibid*, paras. 54–57.
[58] *Ibid*, paras. 51–53.
[59] USCIS, Guidance for Adjudicating LGBTI Claims, p. 23. See also, *Kadri v. Mukasey*, US, Nos. 06-2599 & 07-1754, (1st Cir. 2008), 30 September 2008, available at: http://www.unhcr.org/refworld/docid/498b0a212.html. The case was remanded for consideration of the standard for economic persecution, referring to *In re T-Z-*, 24 I & N. Dec. 163 (US Board of Immigration Appeals, 2007), which had found that "'[nonphysical] harm or suffering . . . such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life may rise to persecution".
[60] See, for example, *Toonen v. Australia*, above footnote 11, which found that the sodomy law of the territory concerned violated the rights to privacy and equality before the law.
[61] European Union, European Parliament, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), (hereafter "EU Qualification Directive"), Article 9; COC and Vrije Universiteit Amsterdam, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011 (hereafter "Fleeing Homophobia Report") available at: http://www.unhcr.org/refworld/docid/4ebba7852.html, pp. 22–24. See also *Arrêt n° 50 966*, Belgium, Conseil du Contentieux des Etrangers, 9 November 2010, available at: http://www.unhcr.org/refworld/docid/4dad967f2.html, concerning a lesbian, found that a prison term for homosexual conduct of 1–5 years and fines from 100 000 à 1 500 000 francs CFA and the fact that society was homophobic were sufficient grounds to constitute persecution in the circumstances of the case, para. 5.7.1. Similarly in *Arrêt n° 50 967*, Belgium, Conseil du Contentieux des Etrangers, 9 November 2010, available at: http://www.unhcr.org/refworld/docid/4dad97d92.html, concerning a gay man.

28. Assessing the "well-founded fear of being persecuted" in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. The legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant needs to be examined.[62] The "fear" element refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where the country of origin information does not establish whether or not, or the extent, that the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted.

29. Even where consensual same-sex relations are not criminalized by specific provisions, laws of general application, for example, public morality or public order laws (loitering, for example) may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution.[63]

Concealment of sexual orientation and/or gender identity

30. LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret. Many will not have lived openly as LGBTI in their country of origin and some may not have had any intimate relationships. Many suppress their sexual orientation and/or gender identity to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval, or family exclusion.

31. That an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.[64] LGBTI people are as much entitled to freedom of expression and association as others.[65]

32. With this general principle in mind, the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion.[66] It is also important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children, for example). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.[67]

---

[62] UNHCR, *Handbook*, para. 45.

[63] *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, available at: http://www.unhcr.org/refworld/docid/4f8410a52.html, paras. 89, 96; *RRT Case No. 071862642*, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008, available at: http://www.unhcr.org/refworld/docid/4811a7192.html.

[64] For example, *HJ and HT*, above footnote 30; UNHCR, *HJ and HT*, above footnote 30, paras. 26–33; *S395/2002*, above footnote 31; *Refugee Appeal No. 74665*, above footnote 31; *Karouni*, above footnote 32; *KHO:2012:1*, Finland, Supreme Administrative Court, 13 January 2012, available at: http://www.unhcr.org/refworld/docid/4f3cdf7e2.html. See also, UNHCR, "Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees", 7 May 2002, HCR/GIP/02/02 (hereafter "UNHCR, Guidelines on Social Group"), available at: http://www.unhcr.org/refworld/docid/3d36f23f4.html, paras. 6, 12; UNHCR, "Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees", 28 April 2004, HCR/GIP/04/06, (hereafter "UNHCR, Guidelines on Religion"), para. 13; UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, 2011/0011, available at: http://www.unhcr.org/refworld/docid/4fc369022.html, para. 9.

[65] As noted by the UK Supreme Court in *HJ and HT*, above footnote 30: "The underlying rationale of the Convention is … that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them", para. 53.

[66] *S395/2002*, above footnote 31, paras. 56–58.

[67] *SW (lesbians - HJ and HT applied) Jamaica v. Secretary of State for the Home Department*, UK, CG [2011] UKUT 00251(IAC), Upper Tribunal (Immigration and Asylum Chamber), 24 June 2011, available at: http://www.unhcr.org/refworld/docid/4e0c3fae2.html.

33. Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals[68] and could in particular cases lead to an intolerable predicament amounting to persecution.[69] Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term.

Agents of Persecution

34. There is scope within the refugee definition to recognize persecution emanating from both State and non-State actors. State persecution may be perpetrated, for example, through the criminalization of consensual same-sex conduct and the enforcement of associated laws, or as a result of harm inflicted by officials of the State or those under the control of the State, such as the police or the military. Individual acts of "rogue" officers may still be considered as State persecution, especially where the officer is a member of the police and other agencies that purport to protect people.[70]

35. In situations where the threat of harm is from non-State actors, persecution is established where the State is unable or unwilling to provide protection against such harm. Non-State actors, including family members, neighbours, or the broader community, may be either directly or indirectly involved in persecutory acts, including intimidation, harassment, domestic violence, or other forms of physical, psychological or sexual violence. In some countries, armed or violent groups, such as paramilitary and rebel groups, as well as criminal gangs and vigilantes, may target LGBTI individuals specifically.[71]

36. In scenarios involving non-State agents of persecution, State protection from the claimed fear has to be available and effective.[72] State protection would normally neither be considered available nor effective, for instance, where the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence against LGBTI individuals with due diligence.[73] Depending on the situation in the country of origin, laws criminalizing same-sex relations are normally a sign that protection of LGB individuals is not available. Where the country of origin maintains such laws, it would be unreasonable to expect that the applicant first seek State protection against harm based on what is, in the view of the law, a criminal act. In such situations, it should be presumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant.[74] As in other types of claims, a claimant does not need to show that he or she approached the authorities for protection before flight. Rather he or she has to establish that the protection was not or unlikely to be available or effective upon return.

37. Where the legal and socio-economic situation of LGBTI people is improving in the country of origin, the availability and effectiveness of State protection needs to be carefully assessed based on reliable and up-to-date country of origin information. The reforms need to be more than merely transitional. Where laws criminalizing same-sex conduct have been repealed or other positive measures have been taken, such reforms may not impact in the immediate or foreseeable future as to how society generally regards people with differing sexual orientation and/or gender iden-

[68] Discrimination of LGBTI individuals has been associated with mental health problems. Studies have shown that internalized negative attitudes towards non-heterosexuality in LGB individuals was related to difficulties with self-esteem, depression, psychosocial and psychological distress, physical health, intimacy, social support, relationship quality, and career development. See further, APA, "Practice Guidelines for LGB Clients, Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients" (hereafter "APA, Practice Guidelines for LGB Clients"), available at: http://www.apa.org/pi/lgbt/resources/guidelines.aspx?item=3.

[69] *Pathmakanthan v. Holder*, US, 612 F.3d 618, 623 (7th Cir. 2010), available at: http://www.unhcr.org/refworld/docid/4d249efa2.html.

[70] See *Ayala v. US Attorney General*, above footnote 42. The treatment by a group of police officers (robbery and sexual assault) constituted persecution and was deemed to be on account of the applicant's sexual orientation.

[71] *P.S., a/k/a S.J.P., v. Holder, Attorney General*, US, No. 09-3291, Agency No. A99-473-409, (3rd Cir. 2010), 22 June 2010, available at: http://www.unhcr.org/refworld/docid/4fbf263f2.html, concerned a gay man who was targeted by a non-State armed group. See also, *RRT Case No. N98/22948*, [2000] RRTA 1055, Australia, Refugee Review Tribunal, 2 November 2000, available at: http://www.unhcr.org/refworld/docid/4b7a97fd2.html, which found that the applicant was at risk of persecution at the hands of vigilante groups. The identification of poor gay men as "disposables" put them at risk of "social clean up" operations.

[72] UNHCR, *Handbook*, paras. 97–101; UN Human Rights Committee, General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, available at: http://www.unhcr.org/refworld/docid/478b26ae2.html, paras. 8, 15–16; CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, CEDAW/C/2010/47/GC.2, available at: http://www.unhcr.org/refworld/docid/4d467ea72.html, para. 36.

[73] See, for example, UK Home Office, "Sexual Orientation Issues in the Asylum Claim", 6 October 2011, available at: http://www.unhcr.org/refworld/docid/4eb8f0982.html, p. 6.

[74] UNHCR, Summary Conclusions of Roundtable, para. 8.

tity.[75] The existence of certain elements, such as anti-discrimination laws or presence of LGBTI organizations and events, do not necessarily undermine the well-foundedness of the applicant's fear.[76] Societal attitudes may not be in line with the law and prejudice may be entrenched, with a continued risk where the authorities fail to enforce protective laws.[77] A *de facto*, not merely *de jure*, change is required and an analysis of the circumstances of each particular case is essential.

C. The causal link ("for reasons of")

38. As with other types of refugee claims, the well-founded fear of persecution must be "for reasons of" one or more of the five grounds contained in the refugee definition in Article 1A(2) of the 1951 Convention. The Convention ground should be a contributing factor to the well-founded fear of persecution, though it need not be the sole, or even dominant, cause.

39. Perpetrators may rationalize the violence they inflict on LGBTI individuals by reference to the intention of "correcting", "curing" or "treating" the person.[78] The intent or motive of the persecutor can be a relevant factor to establishing the "causal link" but it is not a prerequisite.[79] There is no need for the persecutor to have a punitive intent to establish the causal link.[80] The focus is on the reasons for the applicant's feared predicament within the overall context of the case, and how he or she would experience the harm rather than on the mind-set of the perpetrator. Nonetheless, where it can be shown that the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.[81] Where the persecutor is a non-State actor, the causal link may be established either where the non-State actor is likely to harm the LGBTI person for a Convention reason or the State is not likely to protect him or her for a Convention reason.[82]

D. Convention grounds

40. The five Convention grounds, that is, race, religion, nationality, membership of a particular social group and political opinion, are not mutually exclusive and may overlap. More than one Convention ground may be relevant in a given case. Refugee claims based on sexual orientation and/or gender identity are most commonly recognized under the "membership of a particular social group" ground. Other grounds may though also be relevant depending on the political, religious and cultural context of the claim. For example, LGBTI activists and human rights defenders (or perceived activists/defenders) may have either or both claims based on political opinion or religion if, for example, their advocacy is seen as going against prevailing political or religious views and/or practices.

41. Individuals may be subject to persecution due to their actual or perceived sexual orientation or gender identity. The opinion, belief or membership may be attributed to the applicant by the State or the non-State agent of persecution, even if they are not in fact LGBTI, and based on this perception they may be persecuted as a consequence. For example, women and men who do not fit stereotyped appearances and roles may be perceived as LGBTI. It is not required that they actually be LGBTI.[83]

---

[75] *RRT Case No. 0905785*, [2010] RRTA 150, Australia, Refugee Review Tribunal, 7 March 2010, available at: http://www.unhcr.org/refworld/docid/4c220be62.html, found that the decriminalization of homosexual acts in the particular country was unlikely to have an immediate impact on how people viewed homosexuality, para. 88.

[76] USCIS, Guidance for Adjudicating LGBTI Claims, p. 25. See also *Guerrero v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 860, Canada, Federal Court, 8 July 2011, available at: http://www.unhcr.org/refworld/docid/4fa952572.html, which noted that the presence of many non-governmental organizations that fight against discrimination based on sexual orientation is in itself a telling factor in considering the country conditions.

[77] See, *Judgment No. 616907*, *K*, France, Cour nationale du droit d'asile, 6 April 2009, summary available at *Contentieux des réfugiés: Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile – Année 2009*, 26 October 2010, available at: http://www.unhcr.org/refworld/docid/4dad9db02.html, pp. 61–62, which recognized as a refugee a gay man from a particular territory based on the fact that even though a 2004 law banned all discrimination on the basis of sexual orientation those showing their homosexuality in public were regularly subject to harassment and discrimination without being able to avail themselves of the protection of the authorities.

[78] Yogyakarta Principles, Principle 18.

[79] UNHCR, *Handbook*, para. 66.

[80] *Pitcherskaia v. INS*, above footnote 45, found that the requirement on the applicant to prove the punitive intent of the perpetrator was unwarranted.

[81] UNHCR, "Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", April 2001, available at: http://www.unhcr.org/refworld/docid/3b20a3914.html, para. 19.

[82] UNHCR, Guidelines on Social Group, para. 23.

[83] UNHCR, Guidelines on Gender-Related Persecution, para. 32; UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, available at; http://www.unhcr.org/refworld/docid/4551c0d04.html, para. 5. See also, *Kwasi Amanfi v. John Ashcroft*, *Attorney General*, US, Nos. 01-4477 and 02-1541, (3rd Cir. 2003), 16 May 2003, available at: http://www.unhcr.org/refworld/docid/47fdfb2c1a.html, which concerned an applicant who claimed persecution on account of imputed homosexuality.

Transgender individuals often experience harm based on imputed sexual orientation. Partners of transgender individuals may be perceived as gay or lesbian or simply as not conforming to accepted gender roles and behaviour or associating themselves with transgender individuals.

Religion

38. Where an individual is viewed as not conforming to the teachings of a particular religion on account of his or her sexual orientation or gender identity, and is subjected to serious harm or punishment as a consequence, he or she may have a well-founded fear of persecution for reasons of religion.[84] The teachings of the world's major religions on sexual orientation and/or gender identity differ and some have also changed over time or in particular contexts, ranging from outright condemnation, including viewing homosexuality as an "abomination", "sin", "disorder" or apostasy, to complete acceptance of diverse sexual orientation and/or gender identity. Non-LGBTI persons may also be subject to persecution for reasons of religion, for example, where they are (wrongly) perceived as LGBTI or where they support or are seen to support them or their rights.

43. Negative attitudes held by religious groups and communities towards LGBTI individuals can be given expression in a range of ways, from discouraging same-sex activity, or transgender behaviour or expression of identity, among adherents to active opposition, including protests, beatings, naming/shaming and "excommunication", or even execution. The religion and political opinion grounds may overlap where religious and State institutions are not clearly separated.[85] Religious organizations may impute opposition to their teachings or governance by LGBTI individuals, whether or not this is the case. LGBTI applicants may continue to profess adherence to a faith in which they have been subject to harm or a threat of harm.

Membership of a Particular Social Group

44. The 1951 Convention includes no specific list of particular social groups. Rather, "the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[86] UNHCR defines 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.[87]

45. The two approaches – "protected characteristics" and "social perception" - to identifying "particular social groups" reflected in this definition are *alternative*, not cumulative tests. The "protected characteristics" approach examines whether a group is united *either* by an innate or immutable characteristic *or* by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception" approach, on the other hand, examines whether a particular social group shares a common characteristic which makes it cognizable or sets the group's members apart from society at large.

46. Whether applying the "protected characteristics" or "social perception" approach, there is broad acknowledgment that under a correct application of either of these approaches, lesbians,[88] gay men,[89] bisexuals[90] and transgender persons[91] are members of "particular social groups" within

[84] UNHCR, Guidelines on Gender-Related Persecution, para. 25. See by analogy, *In Re S-A*, Interim Decision No. 3433, US Board of Immigration Appeals, 27 June 2000, available at: http://www.unhcr.org/refworld/docid/3ae6b6f224.html.
[85] UNHCR, Guidelines on Gender-Related Persecution, para. 26.
[86] UNHCR, Guidelines on Social Group, para. 3.
[87] UNHCR, Guidelines on Social Group, para. 11. Emphasis added.
[88] See, for example, *Pitcherskaia v. INS*, above footnote 45; *Decisions VA0-01624 and VA0-01625 (In Camera)*, Canada, Immigration and Refugee Board, 14 May 2001, available at: http://www.unhcr.org/refworld/docid/48246f092.html; *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, UK House of Lords (Judicial Committee), 25 March 1999, available at: http://www.unhcr.org/refworld/docid/3dec8abe4.html, pp. 8–10.
[89] See, for example. *Matter of Toboso-Alfonso*, above footnote 32; *Refugee Appeal No. 1312/93, Re GJ*, New Zealand, Refugee Status Appeals Authority, 30 August 1995, available at: http://www.unhcr.org/refworld/docid/3ae6b6938.html.
[90] See, for example, *VRAW v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] FCA 1133, Australia, Federal Court, 3 September 2004, available at: http://www.unhcr.org/refworld/docid/4dada05c2.html; *Decision T98-04159*, Immigration and Refugee Board of Canada, 13 March 2000, available at: http://www.unhcr.org/refworld/docid/4dada1672.html.
[91] See, for example, *RRT Case No. 0903346*, above footnote 24; *CE, SSR, 23 juin 1997, 171858, Ourbih*, 171858, France, Conseil d'Etat, 23 June 1997, available at: http://www.unhcr.org/refworld/docid/3ae6b67c14.html.

the meaning of the refugee definition.[92] Relatively fewer claims have been made by intersex applicants, but they would also on their face qualify under either approach.

47. Sexual orientation and/or gender identity are considered as innate and immutable characteristics or as characteristics so fundamental to human dignity that the person should not be compelled to forsake them. Where the identity of the applicant is still evolving, they may describe their sexual orientation and/or gender identity as fluid or they may express confusion or uncertainty about their sexuality and/or identity. In both situations, these characteristics are in any event to be considered as fundamental to their evolving identity and rightly within the social group ground.

48. There is no requirement that members of the social group associate with one another, or that they are socially visible, for the purposes of the refugee definition. "Social perception" does not mean to suggest a sense of community or group identification as might exist for members of an organization or association. Thus, members of a social group may not be recognizable even to each other.[93]

49. Decision makers should avoid reliance on stereotypes or assumptions, including visible markers, or a lack thereof. This can be misleading in establishing an applicant's membership of a particular social group. Not all LGBTI individuals look or behave according to stereotypical notions. In addition, although an attribute or characteristic expressed visibly may reinforce a finding that an applicant belongs to an LGBTI social group, it is not a pre-condition for recognition of the group.[94] In fact, a group of individuals may seek to avoid manifesting their characteristics in society precisely to avoid persecution (see above paragraphs30-33).[95] The "social perception" approach requires neither that the common attribute be literally visible to the naked eye nor that the attribute be easily identifiable by the general public.[96] It is furthermore not necessary that particular members of the group or their common characteristics be publicly known in a society. The determination rests simply on whether a group is "cognizable" or "set apart from society" in a more general, abstract sense.

Political Opinion

50. The term political opinion should be broadly interpreted to incorporate any opinion on any matter in which the machinery of State, society, or policy may be engaged.[97] It may include an opinion as to gender roles expected in the family or as regards education, work or other aspects of life.[98] The expression of diverse sexual orientation and gender identity can be considered political in certain circumstances, particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values. Anti-LGBTI statements could be part of a State's official rhetoric, for example, denying the existence of homosexuality in the country or claiming that gay men and lesbians are not considered part of the national identity.

E. INTERNAL FLIGHT OR RELOCATION ALTERNATIVE

51. The concept of an internal flight or relocation alternative (IFA) refers to whether it is possible for an individual to be relocated to a specific area of the country where the risk of feared persecution would not be well-founded and where, given the particular circumstances of the case, the individual could reasonably be expected to establish him or herself and live a normal life.[99] Protection would

[92] Sexual orientation and/or gender identity has been explicitly included in the refugee definition in some regional and domestic legislation. For instance, the European Union has adopted a definition of particular social group, recognizing that "depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation", EU Qualification Directive, Article 10.
[93] UNHCR, Guidelines on Social Group, paras. 15–16.
[94] *Judgment No. 634565/08015025*, C, France, Cour nationale du droit d'asile, 7 July 2009, summary available at Contentieux des réfugiés: Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile - Année 2009, 26 October 2010, available at: http://www.unhcr.org/refworld/docid/4dad9db02.html, pp. 58–59, recognizing as a refugee a gay man who had neither claimed nor manifested his homosexuality openly.
[95] UNHCR, *HJ and HT*, above footnote 30, para. 26.
[96] See, for example, UNHCR, *Valdiviezo-Galdamez v. Holder, Attorney General. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 14 April 2009, available at: http://www.unhcr.org/refworld/docid/49ef25102.html; *Gatimi et al. v. Holder, Attorney General*, No. 08-3197, United States Court of Appeals for the Seventh Circuit, 20 August 2009, available at: http://www.unhcr.org/refworld/docid/4aba40332.html.
[97] *Canada v. Ward*, above footnote 31.
[98] UNHCR, Guidelines on Gender-Related Persecution, para. 32.
[99] See UNHCR, "Guidelines on International Protection No. 4: 'Internal Flight or Relocation Alternative' Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees", 23 July 2003, HCR/GIP/03/04 (hereafter "UNHCR, Guidelines on Internal Flight Alternative"), para. 6.

need to be available in a genuine and meaningful way. United Nations agencies, non-governmental organizations, civil society and other non-State actors are not a substitute for State protection.

52. Within the context of the holistic assessment of a claim for refugee status, the assessment of whether or not there is an IFA requires two main analyses: (i) the relevance analysis[100] and (ii) the reasonableness analysis.[101] In considering the relevance and reasonableness of a proposed site of internal flight or relocation, gender considerations must be taken into account.

53. In respect of the relevance analysis, if the country in question criminalizes same-sex relations and enforces the relevant legislation, it will normally be assumed that such laws are applicable in the entire territory. Where the fear of persecution is related to these laws, a consideration of IFA would not be relevant. Laws which do not allow a transgender or intersex individual to access and receive appropriate medical treatment if sought, or to change the gender markers on his or her documents, would also normally be applicable nationwide and should be taken into account when considering the proposed place of relocation.

54. Furthermore, intolerance towards LGBTI individuals tends to exist countrywide in many situations, and therefore an internal flight alternative will often not be available. Relocation is not a relevant alternative if it were to expose the applicant to the original or any new forms of persecution. IFA should not be relied upon where relocation involves (re-)concealment of one's sexual orientation and/or gender identity to be safe (see paragraphs 30-33).[102]

55. Some countries have seen social and political progress which is sometimes localized in urban areas and these locations may in certain circumstances constitute a relocation alternative. In this context, it is important to recall that the decision maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case, including identifying the proposed place of relocation and collecting country of origin information about it (see further below at paragraph 66).[103]

56. In determining whether internal flight is reasonable, the decision maker needs to assess whether return to the proposed place of relocation would cause undue hardship, including by examining the applicant's personal circumstances;[104] the existence of past persecution; safety and security; respect for human rights; and possibility for economic survival.[105] The applicant needs to be able to access a minimum level of political, civil and socio-economic rights. Women may have lesser economic opportunities than men, or may be unable to live separately from male family members, and this should be evaluated in the overall context of the case.[106]

F. SUR PLACE CLAIMS

57. A *sur place* claim arises after arrival in the country of asylum, either as a result of the applicant's activities in the country of asylum or as a consequence of events, which have occurred or are occurring in the applicant's country of origin since their departure.[107] *Sur place* claims may also arise due to changes in the personal identity or gender expression of the applicant after his or her arrival in the country of asylum. It should be noted that some LGBTI applicants may not have identified themselves as LGBTI before the arrival to the country of asylum or may have consciously decided not to act on their sexual orientation or gender identity in their country of origin. Their fear of

[100] The elements to be examined under this analysis are the following: Is the area of relocation practically, safely and legally accessible to the individual? Is the agent of persecution a State or non-State agent? Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?
[101] The criterion to be examined under this analysis is: Can the claimant lead a relatively normal life without facing undue hardship?
[102] See, for example, *Okoli v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 332, Canada, Federal Court, 31 March 2009, available at: http://www.unhcr.org/refworld/docid/4a5b4bfa2.html, which found that the concealment of an immutable characteristic, that is, the applicant's sexual orientation, was an "impermissible requirement" for the assessment of internal flight alternative, paras. 36–37, 39; *HJ and HT*, above footnote 30. para. 21.
[103] UNHCR, Guidelines on Internal Flight Alternative, paras. 33–34.
[104] *Boer-Sedano v. Gonzales*, US, 418 F.3d 1082, (9th Cir. 2005), 12 August 2005, available at: http://www.unhcr.org/refworld/docid/4821a2ba2.html, found that the applicant's [HIV-positive] health status would make relocation unreasonable.
[105] UNHCR, Guidelines on Internal Flight Alternative, paras. 22–30.
[106] UNHCR, Guidelines on Gender-related Persecution.
[107] UNHCR, *Handbook*, paras. 94, 96.

persecution may thus arise or find expression whilst they are in the country of asylum, giving rise to a refugee claim *sur place*. Many such claims arise where an LGBTI individual engages in political activism or media work or their sexual orientation is exposed by someone else.

V. PROCEDURAL ISSUES

General

58. LGBTI individuals require a supportive environment throughout the refugee status determination procedure, including pre-screening so that they can present their claims fully and without fear. A safe environment is equally important during consultations with legal representatives.

59. Discrimination, hatred and violence in all its forms can impact detrimentally on the applicant's capacity to present a claim. Some may be deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared.[108] Adverse judgements should not generally be drawn from someone not having declared their sexual orientation or gender identity at the screening phase or in the early stages of the interview. Due to their often complex nature, claims based on sexual orientation and/or gender identity are generally unsuited to accelerated processing or the application of "safe country of origin" concepts.[109]

60. In order to ensure that refugee claims relating to sexual orientation and/or gender identity are properly considered during the refugee status determination process, the following measures should be borne in mind:

i. An open and reassuring environment is often crucial to establishing trust between the interviewer and applicant and will assist the disclosure of personal and sensitive information. At the beginning of the interview, the interviewer needs to assure the applicant that all aspects of his or her claim will be treated in confidence.[110] Interpreters are also bound by confidentiality.

ii. Interviewers and decision makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation or gender identity.[111] There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.

iii. The interviewer and the interpreter must avoid expressing, whether verbally or through body language, any judgement about the applicant's sexual orientation, gender identity, sexual behaviour or relationship pattern. Interviewers and interpreters who are uncomfortable with diversity of sexual orientation and gender identity may inadvertently display distancing or demeaning body language. Self-awareness and specialized training (see iv.) are therefore critical aspects to a fair status determination.

iv. Specialized training on the particular aspects of LGBTI refugee claims for decision makers, interviewers, interpreters, advocates and legal representatives is crucial.

[108] Some LGBTI applicants may, for instance, change their claims during the process by initially stating that their sexual orientation is imputed to them or making a claim on a ground unrelated to their sexual orientation or gender identity, to eventually expressing that they are LGBTI.
[109] UNHCR, "Statement on the right to an effective remedy in relation to accelerated asylum procedures", 21 May 2010, available at: http://www.unhcr.org/refworld/docid/4bf67fa12.html, paras. 11–12.
[110] UNHCR, Guidelines on Gender-Related Persecution, paras. 35, 36.iv.
[111] This issue has been addressed by a number of US Courts: *Shahinaj v. Gonzales*, 481 F.3d 1027, (8th Cir. 2007), 2 April 2007, available at: http://www.unhcr.org/refworld/docid/4821bd462.html; *Razkane v. Holder, Attorney General*, No. 08-9519, (10th Cir. 2009), 21 April 2009, available at: http://www.unhcr.org/refworld/docid/4a5c97042.html; *Todorovic v. US Attorney General*, No. 09-11652, (11th Cir. 2010), 27 September 2010, available at: http://www.unhcr.org/refworld/docid/4cd968902.html.

v. The use of vocabulary that is non-offensive and shows positive disposition towards diversity of sexual orientation and gender identity, particularly in the applicant's own language, is essential.[112] Use of inappropriate terminology can hinder applicants from presenting the actual nature of their fear. The use of offensive terms may be part of the persecution, for example, in acts of bullying or harassment. Even seemingly neutral or scientific terms can have the same effect as pejorative terms. For instance, although widely used, "homosexual" is also considered a derogatory term in some countries.

vi. Specific requests made by applicants in relation to the gender of interviewers or interpreters should be considered favourably. This may assist the applicant to testify as openly as possible about sensitive issues. If the interpreter is from the same country, religion or cultural background, this may heighten the applicant's sense of shame and hinder him or her from fully presenting all the relevant aspects of the claim.

vii. Questioning about incidents of sexual violence needs to be conducted with the same sensitivity as in the case of any other sexual assault victims, whether victims are male or female.[113] Respect for the human dignity of the asylum-seeker should be a guiding principle at all times.[114]

viii. For claims based on sexual orientation and/or gender identity by women, additional safeguards are presented in UNHCR's Guidelines on Gender-Related Persecution.[115] Women asylum-seekers should, for instance, be interviewed separately, without the presence of male family members in order to ensure they have an opportunity to present their case.

ix. Specific procedural safeguards apply in the case of child applicants, including processing on a priority basis and the appointment of a qualified guardian as well as a legal representative.[116]

61. Where an individual seeks asylum in a country where same-sex relations are criminalized, these laws can impede his or her access to asylum procedures or deter the person from mentioning his or her sexual orientation or gender identity within status determination interviews. In such situations, it may be necessary for UNHCR to become directly involved in the case, including by conducting refugee status determination under its mandate.[117]

Credibility and Establishing the Applicant's Sexual Orientation and/or Gender Identity

62. Ascertaining the applicant's LGBTI background is essentially an issue of credibility. The assessment of credibility in such cases needs to be undertaken in an individualized and sensitive way. Exploring elements around the applicant's personal perceptions, feelings and experiences of difference, stigma and shame are usually more likely to help the decision maker ascertain the applicant's sexual orientation or gender identity, rather than a focus on sexual practices.[118]

63. Both open-ended and specific questions that are crafted in a non-judgemental manner may allow the applicant to explain his or her claim in a non-confrontational way. Developing a list of questions in preparation of the interview may be helpful, however, it is important to bear in mind that there is no magic formula of questions to ask and no set of "right" answers in response. Useful areas of questioning may include the following:

[112] For suggested appropriate terminology, see above at paras. 9–12.
[113] UNHCR, Guidelines on Gender-Related Persecution, para. 36 viii, xi.
[114] UNHCR, "Summary Report, Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity", 10 September 2011 (hereafter "UNHCR, Summary Report of Informal Meeting of Experts"), available at: http://www.unhcr.org/refworld/docid/4fa910f92.html, para. 34.
[115] UNHCR, Guidelines on Gender-Related Persecution paras. 35–37.
[116] UNHCR, "Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", 22 December 2009, HCR/GIP/09/08, available at: http://www.unhcr.org/refworld/docid/4b2f4f6d2.html, paras. 65–77.
[117] It is generally only where States have not yet acceded to the international refugee instruments, or if they have acceded but have not yet established national procedures, or these procedures are not fully functioning that UNHCR may be called upon to undertake individual refugee status determination and recognize refugees under its mandate. This function, therefore, can be exercised either in a State which is, or a State which is not, a signatory to the international refugee instruments. In these situations, UNHCR conducts refugee status determination for protection purposes (in order to protect refugees from *refoulement* and detention, for example) and/or to facilitate a durable solution. See, for example, UNHCR, *MM (Iran) v. Secretary of State for the Home Department - Written Submission on Behalf of the United Nations High Commissioner for Refugees*, 3 August 2010, C5/2009/2479, available at: http://www.unhcr.org/refworld/docid/4c6aa7db2.html, para. 11.
[118] UNHCR, Summary Report of Informal Meeting of Experts, para. 32.

i. Self-identification: Self-identification as a LGBTI person should be taken as an indication of the applicant's sexual orientation and/or gender identity. The social and cultural background of the applicant may affect how the person self-identifies. Some LGB individuals, for example, may harbour deep shame and/or internalized homophobia, leading them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles. Applicants from highly intolerant countries may, for instance, not readily identify as LGBTI. This alone should not rule out that the applicant could have a claim based on sexual orientation or gender identity where other indicators are present.

ii. Childhood: In some cases, before LGBTI individuals come to understand their own identity fully, they may feel "different" as children. When relevant, probing this experience of "difference" can be helpful to establishing the applicant's identity. The core attractions that form the basis for adult sexual orientation may emerge between middle childhood and early adolescence,[119] while some may not experience same-sex attraction until later in life. Likewise, persons may not be aware of their full gender identity until adolescence, early adulthood or later in life, as gender codes in many societies may be less prescriptive or strict during childhood than in (early) adulthood.

iii. Self-Realization: The expression "coming out" can mean both an LGBTI person's coming to terms with his or her own LGBTI identity and/or the individual communicating his or her identity to others. Questions about both of these "coming out" or self-realization processes may be a useful way to get the applicant talking about his or her identity, including in the country of origin as well as in the country of asylum. Some people know that they are LGBTI for a long time before, for example, they actually pursue relationships with other people, and/or they express their identity openly. Some, for example, may engage in sexual activity (with same-sex and/or other-sex partners) before assigning a clear label to their sexual orientation. Prejudice and discrimination may make it difficult for people to come to terms with their sexual orientation and/or gender identity and it can, therefore, be a slow process.[120]

iv. Gender identity: The fact that a transgender applicant has not undergone any medical treatment or other steps to help his or her outward appearance match the preferred identity should not be taken as evidence that the person is not transgender. Some transgender people identify with their chosen identity without medical treatment as part of their transition, while others do not have access to such treatment. It may be appropriate to ask questions about any steps that a transgender applicant has taken in his or her transition.

v. Non-conformity: LGBTI applicants may have grown up in cultures where their sexuality and/or gender identity is shameful or taboo. As a result, they may struggle with their sexual orientation or gender identity at some point in their lives. This may move them away from, or place them in opposition to their families, friends, communities and society in general. Experiences of disapproval and of "being different" or the "other" may result in feelings of shame, stigmatization or isolation.

vi. Family Relationships: Applicants may or may not have disclosed their sexual orientation and/or gender identity to close family members. Such disclosures may be fraught with difficulty and can lead to violent and abusive reactions by family members. As noted above, an applicant may be married, or divorced and/or have children. These factors by themselves do not mean that the applicant is not LGBTI. Should concerns of the credibility of an applicant who is married arise, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, the portion of the testimony should be found credible.[121]

vii. Romantic and Sexual Relationships: The applicant's relationships with and attraction to partners, or their hope to have future relationships, will usually be part of their narrative of LGBTI individuals. Not everyone, however, especially young LGBTI people, will have had romantic or sexual relationships. The fact that an applicant has not had any relationship(s) in the country of origin does not

[119] APA, Sexual Orientation and Homosexuality.
[120] APA, Sexual Orientation and Homosexuality.
[121] USCIS, Guidance for Adjudicating LGBTI Claims, pp. 39–40.

necessarily mean that he or she is not LGBTI. It may rather be an indication that he or she has been seeking to avoid harm. Presuming that the applicant has been involved in a same-sex relationship, decision makers need to be sensitive with regard to questioning about past and current relationships since it involves personal information which the applicant may be reluctant to discuss in an interview setting. Detailed questions about the applicant's sex life should be avoided. It is not an effective method of ascertaining the well-foundedness of the applicant's fear of persecution on account of his or her sexual orientation and/or gender identity. Interviewers and decision makers need to bear in mind that sexual orientation and gender identity are about a person's identity, whether or not that identity is manifested through sexual acts.

viii. Community Relationship: Questions about the applicant's knowledge of LGBTI contacts, groups and activities in the country of origin and asylum may be useful. It is important to note, however, that applicants who were not open about their sexual orientation or gender identity in the country of origin may not have information about LGBTI venues or culture. For example, ignorance of commonly known meeting places and activities for LGBTI groups is not necessarily indicative of the applicant's lack of credibility. Lack of engagement with other members of the LGBTI community in the country of asylum or failure to join LGBTI groups there may be explained by economic factors, geographic location, language and/or cultural barriers, lack of such opportunities, personal choices or a fear of exposure.[122]

ix. Religion: Where the applicant's personal identity is connected with his/her faith, religion and/or belief, this may be helpful to examine as an additional narrative about their sexual orientation or gender identity. The influence of religion in the lives of LGBTI persons can be complex, dynamic, and a source of ambivalence.[123]

Evidentiary Matters

64. The applicant's own testimony is the primary and often the only source of evidence, especially where persecution is at the hands of family members or the community. Where there is a lack of country of origin information, the decision maker will have to rely on the applicant's statements alone. Normally, an interview should suffice to bring the applicant's story to light.[124] Applicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts. It would also be inappropriate to expect a couple to be physically demonstrative at an interview as a way to establish their sexual orientation.

65. Medical "testing" of the applicant's sexual orientation is an infringement of basic human rights and must not be used.[125] On the other hand, medical evidence of transition-related surgery, hormonal treatment or biological characteristics (in the case of intersex individuals) may corroborate their personal narrative.

66. Relevant and specific country of origin information on the situation and treatment of LGBTI individuals is often lacking. This should not automatically lead to the conclusion that the applicant's claim is unfounded or that there is no persecution of LGBTI individuals in that country.[126] The extent to which international organizations and other groups are able to monitor and document abuses against LGBTI individuals remain limited in many countries. Increased activism has often been met with attacks on human rights defenders, which impede their ability to document violations. Stigma attached to issues surrounding sexual orientation and/or gender identity also contributes to incidents going unreported. Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people. It is critical to avoid automatically drawing conclusions based on information about one group or another; however, it may serve as an indication of the applicant's situation in certain circumstances.

[122] *Essa v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1493, Canada, Federal Court, 20 December 2011, available at: http://www.unhcr.org/refworld/docid/4f901c392.html, paras. 30–31, found that the Board's insistence on the applicant going to or have knowledge about gay venues in the country of asylum in order to be gay was not reasonable.
[123] APA, Practice Guidelines for LGB Clients.
[124] UNHCR, *Handbook*, paras. 196, 203–204.
[125] See further, "UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation", April 2011, available at: http://www.unhcr.org/refworld/docid/4daeb07b2.html.
[126] See, for example, *Molnar v. Canada*, above footnote 39.

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

Distr. GENERAL HCR/GIP/13/10/Corr. 1. 12 November 2014 Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 10:

Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees

UNHCR issues these *Guidelines* pursuant to its mandate, as contained in the Office's Statute, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (reissued 2011) and, in particular, are to be read together with UNHCR's *Guidelines on International Protection No. 6: Religion-Based Refugee Claims* and *Guidelines on International Protection No. 8: Child Asylum Claims*. They replace *UNHCR's Position on Certain Types of Draft Evasion* (1991).

The *Guidelines*, the result of broad consultations, provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out mandate refugee status determination.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* and *the Guidelines on International Protection* are available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html.

I. INTRODUCTION

1. The situation of "deserters and persons avoiding military service" is explicitly addressed in *UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ["*UNHCR Handbook*"].[1] Since the publication of the *UNHCR Handbook* there have been considerable developments both in the practice of States and in the restrictions placed on military service by international law. Given these developments, as well as divergences in jurisprudence, UNHCR issues these *Guidelines* with the aim to facilitate a consistent and principled application of the refugee definition in Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees in such cases. These *Guidelines* examine the position of individuals who seek international protection to avoid recruitment by, and service in, State armed forces, as well as forced recruitment by non-State armed groups.

2. These Guidelines address the definition of key terms [Part II], followed by an overview of international legal developments relating to military service [Part III]. Part IV examines the refugee determination criteria as they apply to claims involving military service. Part V considers procedural and evidentiary issues. The *Guidelines* focus on the interpretation of the "inclusion" components of the refugee definition. Exclusion considerations are not addressed, although they may be at issue in such cases, and will need to be properly assessed.[2]Further, issues around maintaining the civilian and humanitarian character of asylum, while often relevant to such claims, are not dealt with in these Guidelines.[3]

II. TERMINOLOGY

3. For the purpose of these *Guidelines*, these terms are defined as follows:

Alternative service refers to service in the public interest performed instead of compulsory military service in the State armed forces by individuals who have a conscientious objection to military service ["conscientious objectors"]. Alternative service may take the form of civilian service outside the armed forces or a non-combatant role in the military.[4] Civilian service can involve, for example, working in State-run health institutions, or voluntary work with charitable organisations either at home or abroad. Non-combatant service in the military would include positions such as cooks or administrative clerks.

Conscientious objection to military service refers to an objection to such service which "derives from principles and reasons of conscience, including profound convictions, arising from religious, moral, ethical, humanitarian or similar motives."[5] Such an objection is not confined to **absolute conscientious objectors** [pacifists], that is, those who object to all use of armed force or participation in all wars. It also encompasses those who believe that "the use of force is justified in some circumstances but not in others, and that therefore it is necessary to object in those other cases" [**partial** or **selective objection** to military service].[6] A conscientious objection may develop over time, and thus volunteers may at some stage also raise claims based on conscientious objection, whether absolute or partial.

Desertion involves abandoning one's duty or post without permission, or resisting the call up for military duties.[7] Depending on national laws, even someone of draft age who has completed his

[1] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee*, (reissued, Geneva, 2011), ("*UNHCR Handbook*"), available at: http://www.unhcr.org/refworld/pdfid/4f33c8d92.pdf, paras. 167-174.
2 Reference is made instead to UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, ("*UNHCR Exclusion Guidelines*"), available at: http://www.unhcr.org/refworld/docid/3f5857684.html.
[3] See, Executive Committee ("ExCom") Conclusion No. 94 (LII), 2002, on the civilian and humanitarian character of asylum, para. (c)(vii).
[4] See, further, for example, UN Human Rights Council, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, A/HRC/23/22, 3 June 2013, available at: http://www.refworld.org/docid/51b5c73c4.html.
[5] See, UN Commission on Human Rights, Resolution 1998/77, "*Conscientious Objection to Military Service*", E/CN.4/RES/1998/77, 22 April 1998, available at: http://www.refworld.org/docid/3b00f0be10.html. The Commission was replaced by the UN Human Rights Council in 2006.
[6] See, UN *Conscientious Objection to Military Service*, E/CN.4/Sub.2/1983/30/Rev.1, 1985 (the "*Eide and Mubanga-Chipoya report*"), available at: http://www.refworld.org/pdfid/5107cd132.pdf, para. 21. See also, paras. 128-135 regarding persecution in the context of conscientious objection to conflicts which violate basic rules of human conduct.
[7] See, European Court of Human Rights, *Feti Demirtaş c. Turquie*, Application no. 5260/07, 17 January 2012, available at: http://www.unhcr.org/refworld/docid/4ff5996d2.html.

or her national service and has been demobilized, but is still regarded as being subject to national service, may be regarded as a deserter under certain circumstances. Desertion can occur in relation to the police force, gendarmerie or equivalent security services, and is also the term used to apply to deserters from non-State armed groups. Desertion may be for reasons of conscience or for other reasons.

Draft evasion occurs when a person does not register for, or does not respond to, a call up or recruitment for compulsory military service. The evasive action may be as a result of the evader fleeing abroad, or may involve, inter alia, returning call up papers to the military authorities. In the latter case, the person may sometimes be described as a draft resister rather than a draft evader, although draft evader is used to cover both scenarios in these *Guidelines*. Draft evasion may also be pre-emptive in the sense that action may be taken in anticipation of the actual demand to register or report for duty. Draft evasion only arises where there is mandatory enrolment in military service ["the draft"]. Draft evasion may be for reasons of conscience or for other reasons.

Forced recruitment is the term used in these *Guidelines* to refer to the coerced, compulsory or involuntary recruitment into either a State's armed forces or a non-State armed group.

Military service primarily refers to service in a State's armed forces. This may occur in peacetime or during a period of armed conflict, and may be on a voluntary or compulsory basis. Compulsory military service by the State is also known as **conscription** or "**the draft**". Where an individual volunteers to join the State military, it is called **enlistment.**

Reservists are individuals who serve in the reserve forces of the State's armed forces. They are not considered to be on active duty, but are required to be available to respond to any call up in an emergency.

4. Where alternatives to compulsory military service are not available, an individual's conscientious objection may be expressed through draft evasion or desertion. However, draft evasion or desertion is not synonymous with conscientious objection as other motivations, such as fear of military service or the conditions of such service may be involved. Conscientious objection, draft evasion and desertion may all take place in peacetime as well as during armed conflict. Moreover, whilst conscientious objection and evasion/desertion tend to arise in relation to conscription, they can also take place where the original decision to join the armed forces was voluntary or the obligation to undertake compulsory military service was initially accepted.[8]

III. INTERNATIONAL LAW ON MILITARY SERVICE

A. The Right of States to Require Military Service

5. States have a right of self-defence under both the UN Charter and customary international law.[9] States are entitled to require citizens to perform military service for military purposes;[10] and this does not in itself violate an individual's rights.[11] This is recognized explicitly in human rights provisions concerned with forced labour, such as Article 8 of the 1966 International Covenant on Civil

[8] See, for example, UN Commission on Human Rights, Resolution 1998/77, preambular para. see note 5 above.
[9] Article 51, UN Charter. See also, International Court of Justice, *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, 27 June 1986, available at: http://www.refworld.org/docid/4023a44d2.html, paras. 187-201.
[10] This does not cover conscription of non-nationals in occupied territories in the context of international armed conflict: see Article 51 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), which states that an "Occupying Power may not compel protected persons to serve in its armed or auxiliary forces." "Protected persons" refers in this context to civilians in the occupied territory who are not nationals of the Occupying Power.
[11] The UN Human Rights Committee ("HRC") has noted this in relation to a complaint of discrimination (Article 26 of the 1966 International Covenant on Civil and Political Rights ("ICCPR")). See, *M.J.G. (name deleted) v. Netherlands*, CCPR/C/32/D/267/1987, 24 March 1988, available at: http://www.unhcr.org/refworld/pdfid/50b8eca22.pdf para. 3.2; see, similarly, the earlier case of *R.T.Z. (name deleted) v. Netherlands*, CCPR/C/31/D/245/1987, 5 November 1987, available at: http://www.unhcr.org/refworld/pdfid/50b8ed122.pdf. That human rights law, in particular the ICCPR, applies to members of the military as well as to civilians was explicitly stated by the HRC in *Vuolanne v. Finland*, CCPR/C/35/D/265/1987, 2 May 1989, available at: http://www.unhcr.org/refworld/pdfid/50b8ee372.pdf.

and Political Rights ["ICCPR"].[12]States may also impose penalties on persons who desert or avoid military service where their desertion or avoidance is not based on valid reasons of conscience, provided such penalties and the associated procedures comply with international standards.[13]

6. The State's right to compel citizens to undertake military service is not subject to other requirements in international human rights law, as well as international humanitarian and international criminal law[see Parts III.B. and III.C. below]. In general, for military recruitment and service to be justified it needs to fulfil certain criteria: prescribed by law, implemented in a way that is not arbitrary or discriminatory, the functions and discipline of the recruits must be based on military needs and plans, and be challengeable in a court of law.[14]

7. The position of non-State armed groups is different from that of States, in that only States can require military conscription. International law does not entitle non-State armed groups, whether or not they may be the *de facto* authority over a particular part of the territory, to recruit on a compulsory or forced basis.

B. The Right to Conscientious Objection against Compulsory Military Service

8. The right to conscientious objection to State military service is a derivative right, based on an interpretation of the right to freedom of thought, conscience and religion contained in Article 18 of the Universal Declaration of Human Rights and Article 18 of the ICCPR. International jurisprudence on this right is evolving. The UN Human Rights Committee's [HRC] case law has shifted from characterizing the right as derived from the right "to manifest" one's religion or belief and thus subject to certain restrictions in Article 18(3),[15] to viewing it as one that "inheres in the right" to freedom of thought, conscience and religion in Article 18(1) itself.[16] This is a significant shift, and has been subject to individual concurring opinions.[17] According to the HRC, the right therefore "entitles the individual to an exemption from compulsory military service if this cannot be reconciled with the individual's religion or beliefs. The right must not be impaired by coercion."[18] The HRC has further clarified that "a State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights."[19] Even in its earlier jurisprudence, where the HRC based its decisions on the right to *manifest* one's religion or belief [found in Article 18(3) read together with 18(1) ICCPR], the State had to demonstrate why such a restriction was "necessary", given that many other countries manage to reconcile the interests of the individual with the interests of the State through the provision of alternative service.[20]

[12] Article 8(3)(c)(ii) ICCPR exempts from the prohibition on forced or compulsory labour (found in Article 8(3)(a)), "Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors." In addition, Article 2(2)(a) of the 1930 International Labour Organization ("ILO") Convention No. 29: Forced Labour Convention exempts from its prohibition on forced or compulsory labour (Article 1(1)), "any work or service exacted in virtue of compulsory military service laws for work of a purely military character." The reference to "military service laws" indicates that for the exemption to be valid, it must be set out in law. See also, the decisions of the HRC in *Venier and Nicholas v. France*, CCPR/C/69/D/690/1996, 1 August 2000, available at: http://www.unhcr.org/refworld/pdfid/50b8ec0c2.pdf and *Foin v. France*, CCPR/C/67/D/666/1995, 9 November 1999, where the HRC stated that under Article 8 of the ICCPR States may require service of a military character, available at: http://www.unhcr.org/refworld/docid/4a3a3aebf.html, para. 10.3.

[13] On procedures, in the European Court of Human Rights, see *Savda c. Turquie*, Application No. 42730/05,12 June 2012, available at: http://www.refworld.org/docid/4fe9a9bb2.html, see also, *Feti Demirtaş c. Turquie*, see note 7 above.

[14] Inter-American Commission on Human Rights ("IACHR"), "Fourth report on the situation of human rights in Guatemala", OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V. See also, IACHR, *Piché Cuca v. Guatemala*, Report No. 36/93, case 10.975, decision on merits, 6 October 1993, indicating that the conscription process must be challengeable in a court of law, available at: http://www.refworld.org/docid/5020dd282.html.

[15] Article 18(3) ICCPR provides certain limitations on the right to manifest one's religion or belief, namely "prescribed by law and (…) necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." For further analysis, see UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004, *("UNHCR Guidelines on Religion-Based Claims")*, available at: http://www.unhcr.org/refworld/docid/4090f9794.html, para. 15. Moreover, unlike other rights in the Covenant, restrictions on the grounds of national security are not permitted at all. As noted by the HRC, "… such restrictions must not impair the very essence of the right in question." See HRC, *Yoon and Choi v. Republic of Korea*, CCPR/C/88/D/1321-1322/2004, 23 January 2007, available at: http://www.unhcr.org/refworld/docid/48abd57dd.html, para. 8.3, and *Eu-min Jung* and *Others v. Republic of Korea*, CCPR/C/98/D/1593-1603/2007, 30 April 2010, available at: http://www.unhcr.org/refworld/pdfid/4c19e0322.pdf, para. 7.4.

[16] See, HCR, *Min-Kyu Jeong at al v. Republic of Korea*, CCPR/C/101/D/1642-1741/2007, 27 April 2011, available at: http://www.unhcr.org/refworld/docid/4ff59b332.html paras. 7.3 - 7.4; *Atasoy and Sarkut v. Turkey*, CCPR/C/104/D/1853-1854/2008, 19 June 2012, available at: http://www.unhcr.org/refworld/docid/4ff5b14c2.html, paras.10.4 - 10.5; and *Jong-nam Kim et al v. Republic of Korea*, CCPR/C/106/D/1786/2008, 1 February 2013, available at: http://www.refworld.org/docid/532a9f1a4.html, paras. 7.4 – 7.5.

[17] See, Individual opinion of Committee member Mr. Gerarld L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O'Flaherty and Mr. Walter Kaelin (concurring), *Atasoy and Sarkut v. Turkey*, *ibid.*

[18] *Min-Kyu Jeong at al v. Republic of Korea*, para.7.3; *Atasoy and Sarkut v. Turkey*, para. 10.4. and *Jong-nam Kim et al v. Republic of Korea*, para. 7.4, see note 16 above.

[19] *Ibid.*

[20] See, *Yoon and Choi v. Republic of Korea*, para. 8.4, and *Eu-min Jung and Others v. Republic of Korea*, para. 7.4, see both note 15 above.

9. Thus a conscientious objector's rights under Article 18 ICCPR will be respected where he or she is (i) exempted from the obligation to undertake military service or (ii) appropriate alternative service is available. In assessing the appropriateness of alternative service, it is generally considered that it needs to be compatible with the reasons for the conscientious objection; of a non-combatant or civilian character; in the public interest; and not punitive.[21] For example, civilian service under civilian administration would be necessary in the cases of individuals who object outright to any association with the military.[22] However, where the objection is specifically to the personal carrying of arms the option of non-combatant service in the military may be appropriate. Many States avoid the difficulty of having to evaluate the sincerity of a claim to conscientious objection by allowing the person a free choice between military and alternative service.[23] In some States recognition of conscientious objection has been granted only to certain religious groups. However, as noted above, this would not be consistent with the scope of the right to freedom of thought, conscience and religion, nor with the prohibition on discrimination.[24]

10. The right to conscientious objection is also reaffirmed in regional instruments, either explicitly or by interpretation,[25] as well as in various international standard setting documents.[26]

11. The right to conscientious objection applies to absolute, partial, or selective objectors [see II.];[27] volunteers as well as conscripts before and after joining the armed forces; during peace time and during armed conflict.[28] It includes objection to military service based on moral, ethical, humanitarian or similar motives.[29]

[21] UN Commission on Human Rights resolution 1998/77, para. 4, see note 5 above. See also, note 18 above.
[22] See,, *Min-Kyu Jeong at al v. Republic of Korea*, para.7.3; *Atasoy and Sarkut v. Turkey*, para. 10.4; and *Jong-nam Kim et al v. Republic of Korea,* para. 7.4, note 16 above.
[23] For a general overview of State practice, see, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, see note 4 above. See also, War Resisters' International, *World Survey of Conscription and Conscientious Objection to Military Service*, available at: http://www.wri-irg.org/co/rtba/index.html. With respect to European countries see also the judgment of the European Court of Human Rights in *Bayatyan v. Armenia*, Application No. 23459/03, 7 July 2011, available at: http://www.unhcr.org/refworld/docid/4e254eff2.html, para. 110.
[24] See, for example, HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993, available at: http://www.unhcr.org/refworld/pdfid/453883fb22.pdf, stating that "…there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs…", para. 11. With regard to State practice recognizing conscientious objection even when it originates from views outside of those of certain formal religions, see, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, para. 12, see note 4 above. See also, *Brinkhof v. Netherlands*, CCPR/C/48/D/402/1990, 29 July 1993, available at: http://www.unhcr.org/refworld/docid/4a3a3ae913.html.
[25] The right to conscientious objection is explicitly recognized in two regional treaties: 2000 Charter of Fundamental Rights of the European Union, Article 10(2); 2005 Ibero-American Convention on Young People's Rights, Article 12(3). The right is also derived from the right to freedom of thought, conscience and religion in regional human rights treaties, and has been recognized as such by the European Court of Human Rights (see *Bayatyan v. Armenia*, para. 110, note 28 above followed by *Feti Demirtaş c. Turquie*, note 7 above; *Savda c. Turquie*, see note 13 above; and *Tarhan c. Turquie*, Application No. 9078/06, 17 July 2012, available at: http://www.refworld.org/docid/51262a732.html)) and by the IACHR (see *Cristián Daniel Sahli Vera et al. v. Chile*, Case 12.219, Report no. 43/05, 10 March 2005, available at: http://www.unhcr.org/refworld/pdfid/4ff59edc2.pdf; see also the friendly settlement in *Alfredo Diaz Bustos v. Bolivia*, Case 14/04, Report no. 97/05, 27 October 2005, available at: http://www.unhcr.org/refworld/pdfid/4ff59fbc2.pdf, para. 19). See also IACHR, Annual Report, 1997, Chapter VII: Recommendation 10, available at: http://www.unhcr.org/refworld/docid/50b8bd162.html; Council of Europe Parliamentary Assembly, Recommendation 1518 (2001) on the exercise of the right of conscientious objection to military service in Council of Europe Member States, 23 May 2001, available at: http://www.unhcr.org/refworld/docid/5107cf8f2.html; Council of Europe Committee of Ministers, Recommendation No. R (87) 8, 9 April 1987, available at: http://www.unhcr.org/refworld/docid/5069778e2.html; and Council of Europe Committee of Ministers, Recommendation CM/Rec (2010) 4 on human rights of members of the armed forces, 24 February 2010, available at: http://www.unhcr.org/refworld/docid/506979172.html.
[26] See, UN General Assembly resolution, 33/165, 1978 on Status of persons refusing service in military or police forces used to enforce apartheid, available at: http://www.refworld.org/docid/3b00f1ae28.html. See HRC, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, at para. 11, see note 24 above, as well as the HRC's Concluding Observations on Ukraine, CCPR/CO/73/UKR, 12 November 2001, available at: http://www.unhcr.org/refworld/docid/3cbbeb1c4.html para. 20, and those on Kyrgyzstan, CCPR/CO/69/KGZ, 24 July 2000, available at: http://www.unhcr.org/refworld/docid/507572ef2.html, para. 18. The former UN Commission on Human Rights also affirmed that a right to conscientious objection derives from the right to freedom of thought, conscience and religion (UN Commission on Human Rights Resolution, *Conscientious objection to military service*, E/CN.4/RES/1989/59, 8 March 1989, available at: http://www.unhcr.org/refworld/docid/3b00f0b24.html, reinforced and developed in resolutions E/CN.4/RES/1993/84, 10 March 1993, available at: http://www.unhcr.org/refworld/docid/3b00f1228c.html; E/CN.4/RES/1995/83, 8 March 1995, available at: http://www.unhcr.org/refworld/docid/3b00f0d220.html; E/CN.4/RES/1998/77, see note 5 above, E/CN.4/RES/2000/34, 20 April 2000, available at: http://www.unhcr.org/refworld/docid/3b00efa128.html; E/CN.4/RES/2002/45, 23 April 2002, available at: http://www.unhcr.org/refworld/docid/5107c76c2.html; and E/CN.4/RES/2004/35, 19 April 2004, available at: http://www.unhcr.org/refworld/docid/415be85e4.html). Its successor, the UN Human Rights Council, has endorsed this position in its 2012 resolution on conscientious objection (A/HRC/RES/20/2, 16 July 2012, available at: http://www.unhcr.org/refworld/docid/501661d12.html) and latest in its 2013 resolution (A/HRC/24/L.23, 23 September 2013, available at: http://www.refworld.org/docid/526e3e114.html).
[27] Although the HRC has not discussed partial or selective conscientious objection either in *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, see note 29 above or in its recent decisions on individual complaints, a number of countries do make provision for selective or partial conscientious objectors. See, for example, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, para 47, see note 4 above.
[28] See, Part II on Terminology.
[29] See also *Savda c. Turquie*, para. 96, note 13 above.

C. Prohibition on Underage Recruitment and Participation in Hostilities

12. Explicit safeguards exist to prevent the exposure of children to military service.[30] All recruitment [both compulsory and voluntary] in State armed forces and the participation in hostilities[31] of those under 15 years of age is prohibited under international treaty law.[32] Such recruitment amounts to a war crime.[33] Whether conducted by governments or by non-State armed groups, compulsory recruitment of persons under 18 years of age is also prohibited pursuant to the 2000 Optional Protocol to the 1989 Convention on the Rights of the Child ["CRC"] on the involvement of children in armed conflict ["Optional Protocol to the CRC"].[34] A similar restriction is found in the 1999 International Labour Organization Convention on Worst Forms of Child Labour.[35] The 2000 Optional Protocol to the CRC requires States to "take all feasible measures" to prevent children under the age of 18 taking a "direct part in hostilities" whether as members of its armed forces or other armed groups and prohibits outright any voluntary recruitment of children under 18 years into non-State armed groups.[36] Whilst voluntary enlistment of children of 16 years and above is permitted for State armed forces, the State is obliged to put in place safeguards to ensure, *inter alia*, that any such recruitment is genuinely voluntary.[37] Despite the different age limits set by international law, it is UNHCR's view that forced recruitment and/or direct participation in hostilities of a child below the age of 18 years in the armed forces of the State or by a non-State armed group would amount to persecution.[38] Regional instruments also contain prohibitions on the recruitment and direct participation of children in hostilities.[39]

IV. SUBSTANTIVE ANALYSIS

A. Well-founded Fear of Being Persecuted

13. What amounts to a well-founded fear of being persecuted depends on the particular circumstances of the case, including the applicant's background, profile and experiences considered in light of up-to-date country of origin information.[40] It is important to take into account the personal experiences of the applicant, as well as the experiences of others similarly situated, since these may well show that there is a reasonable likelihood that the harm feared by the applicant will materialize sooner or later.[41] The first-tier question to ask is: *What would be the predicament [consequence(s)] for the applicant if returned?* The second-tier question is: *Does that predicament [or consequence(s)] meet the threshold of persecution?* The standard of proof to determine the risk is reasonable likelihood.[42]

---

[30] See, in this regard, UN Security Council, *Resolution 1882 (2009) on children and armed conflict*, S/RES/1882 (2009), 4 August 2009, available at: http://www.unhcr.org/refworld/docid/4a7bdb432.html.

[31] Technically, international humanitarian law distinguishes between non-international armed conflict and international armed conflict in this respect. In non-international armed conflict (Article 4(3)(c), Additional Protocol II to the 1949 Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflict ("Additional Protocol II")) the prohibition relates to use in hostilities. In international armed conflict (Article 77(2), Additional Protocol I to the 1949 Geneva Conventions, relating to the Protection of International Armed Conflict ("Additional Protocol I")), it is limited to taking direct part in hostilities. The Convention on the Rights of the Child ("CRC") adopts the narrower "direct part in hostilities" standard, see Article 38(2), CRC.

[32] Article 77(2), Additional Protocol I; Article 4(3)(c), Additional Protocol II; Article 38(2) CRC.

[33] See, Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the 1998 Statute of the International Criminal Court ("ICC Statute") which lists as war crimes "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." See also International Criminal Court ("ICC"), *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, available at: http://www.unhcr.org/refworld/docid/4f69a2db2.html; Special Court for Sierra Leone ("SCSL"), *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment)*, Case No. SCSL-04-15-T, 2 March 2009, available at: http://www.unhcr.org/refworld/docid/49b102762.html, at para. 184 (finding that the prohibition on such recruitment is customary international law). Further discussion of what constitutes the war crime of underage recruitment can be found in the SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, 18 May 2012, available at: http://www.unhcr.org/refworld/docid/50589aa92.html.

[34] Articles 2 and 4, 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

[35] Article 3(a), 1999 ILO Convention No. 182 on Worst Forms of Child Labour.

[36] Articles 1 and 4, 2000 Optional Protocol to CRC.

[37] Article 3, 2000 Optional Protocol to CRC. See also, *UNHCR Guidelines on International Protection No. 8 Child Asylum Claims under Articles 1A(2) and 1(F) of the 1951 Convention and /or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009, *("UNHCR Guidelines on Child Asylum Claims")*, available at: http://www.unhcr.org/refworld/docid/4b2f4f6d2.html, para. 22.

[38] *UNHCR Guidelines on Child Asylum Claims*, para. 21.

[39] See, Article 22(2), 1990 African Charter on the Rights and Welfare of the Child, and Article 12(3), 2005 Ibero-American Convention on Young People's Rights.

[40] *UNHCR Handbook*, paras. 51-53, see note 1 above.

[41] *UNHCR Handbook*, paras. 42-43, see note 1 above, and *UNHCR Guidelines on Religion-Based Claims*, para. 14, see note 15 above.

[42] See, UNHCR, *Note on the Burden and Standard of Proof*, 16 December 1998, *("Note on the Burden and Standard of Proof")*, available at: http://www.refworld.org/docid/3ae6b3338.html, para. 10; UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001, *("UNHCR Interpreting Article 1")*, available at: http://www.unhcr.org/refworld/docid/3b20a3914.html, paras. 16-17.

14. Persecution will be established if the individual is at risk of a threat to life or freedom,[43] other serious human rights violations, or other serious harm.[44] By way of example, disproportionate or arbitrary punishment for refusing to undertake State military service or engage in acts contrary to international law – such as excessive prison terms or corporal punishment – would be a form of persecution. Other human rights at stake in such claims include non-discrimination and the right to a fair trial right, as well as the prohibitions against torture or inhuman treatment, forced labour and enslavement/servitude.[45]

15. In assessing the risk of persecution, it is important to take into account not only the direct consequences of one's refusal to perform military service [for example, prosecution and punishment], but also any negative indirect consequences. Such indirect consequences may derive from non-military and non-State actors, for example, physical violence, severe discrimination and/or harassment by the community. Other forms of punitive retribution for draft evasion or desertion may also be evident in other situations, such as suspension of rights to own land, enrol in school or university, or access social services.[46] These types of harm may amount to persecution if they are sufficiently serious in and of themselves, or if they would cumulatively result in serious restrictions on the applicant's enjoyment of fundamental human rights, making their life intolerable.

16. Claims relating to military service may arise in various situations. This section outlines five common types of claims, albeit with some overlap.

(i) Objection to State Military Service for Reasons of Conscience [absolute or partial conscientious objectors]

17. In assessing what kinds of treatment would amount to persecution in cases where the applicant is a conscientious objector [see V. A. below on issues relating to credibility and genuineness of the applicant's conviction(s)], the key issue is whether the national law on military service adequately provides for conscientious objectors, by either: (i) exempting them from military service, or (ii) providing appropriate alternative service. As mentioned in Part III above, States can legitimately require that citizens perform military or alternative service. However, where this is done in a manner that is inconsistent with international law standards, conscription may amount to persecution.

18. In countries where neither exemption nor alternative service is possible, a careful examination of the consequences for the applicant will be needed. For example, where the individual would be forced to undertake military service or participate in hostilities against their conscience, *or* risk being subjected to prosecution and disproportionate or arbitrary punishment for refusing to do so, persecution would arise. Moreover, the threat of such prosecution and punishment, which puts pressure on conscientious objectors to change their conviction, in violation of their right to freedom of thought, conscience or belief, would also meet the threshold of persecution.[47]

19. The persecution threshold would not be met in countries that do not make provision for alternative service, but where the only consequence is a theoretical risk of military service because in practice conscription is not enforced or can be avoided through the payment of an administrative fee.[48] Similarly, where a draft evader is exempted from military service, or where a deserter is offered an honourable discharge, the issue of persecution would not arise, unless other factors are present.

---

[43] Article 33(1), 1951 Convention.
[44] See, *UNHCR Handbook*, para. 51-53, see note 1 above. See also, UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, HCR/GIP/06/07, 7 April 2006, available at: http://www.unhcr.org/refworld/docid/443679fa4.html, para. 14, and UNHCR Handbook, paras. 54-55, see note 1 above.
[45] See, for example, IACHR, "Fourth report on the situation of human rights in Guatemala", OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V.
[46] Concerning the denial of enrolment into school or university see for example, UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, April 2009, available at: http://www.refworld.org/docid/49de06122.html, page 13; regarding suspension of land ownership and denial of access to public services see for example, UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, 20 April 2011, HCR/EG/ERT/11/01, available at: http://www.refworld.org/docid/4dafe0ec2.html, pages 10 and 25 respectively.
[47] See, UN Commission on Human Rights, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, E/CN.4/2001/14, 20 December 2000, recommendation No. 2, available at: http://www.refworld.org/docid/3b00f54d18.html, paras. 91-94.
[48] Excessive administrative fees designed to deter genuine conscientious objectors from opting for alternative service or which are considered punitive would be considered discriminatory and may on a cumulative basis meet the threshold of persecution.

20. Where alternative service is available, but punitive in nature and implementation, because of the type of service involved or its disproportionate duration, the issue of persecution may nonetheless be at issue. A disparity in the length of alternative service will not, in itself, be sufficient to meet the threshold of persecution. If, for example, the duration of alternative service is based on objective and reasonable criteria, such as the nature of the specific service concerned, or the need for special training in order to accomplish that service, persecution would not arise.[49] However, where alternative service is merely theoretical, for instance, because the relevant legislative provision has never been implemented; the procedure for requesting alternative service is arbitrary and/or unregulated; or the procedure is open to some but not all, further inquiries need to be undertaken. In cases where the applicant has not availed him or herself of the existing procedures it would be important to understand their reasons for not doing so. If found that the reasons relate to a well-founded fear of being persecuted for publicly expressing his or her convictions, this would need to be factored into the overall analysis.

(ii) Objection to Military Service in Conflict Contrary to the Basic Rules of Human Conduct

21. Refugee claims relating to military service may also be expressed as an objection to (i) a particular armed conflict or (ii) the means and methods of warfare [the conduct of a party to a conflict]. The first objection refers to the unlawful use of force [*jus ad bellum*], while the second refers to the means and methods of warfare as regulated by international humanitarian law [*jus in bello*], as well as international human rights and international criminal law.[50] Collectively such objections relate to being forced to participate in conflict activities that are considered by the applicant to be contrary to the basic rules of human conduct.[51] Such objections may be expressed as an objection on the basis of one's conscience, and as such can be dealt with as a case of "conscientious objection" [see (i) above]; however, this will not always be the case. Individuals may, for example, object to participating in military activities because they consider this is required to conform to their military code of conduct, or they may refuse to engage in activities which constitute violations of international humanitarian, criminal or human rights law.

22. Recognizing the right to object on such grounds and to be granted refugee status is consistent with the rationale underlying the exclusion clauses in the 1951 Convention. Articles 1F(a) and 1F(c) exclude from protection individuals in respect of whom there are serious reasons for considering that they have committed crimes against peace, war crimes or crimes against humanity or are guilty of acts contrary to the purposes and principles of the United Nations, and who are therefore considered undeserving of international protection as refugees. The obligation on individuals under international humanitarian law and international criminal law to refrain from certain acts during armed conflict would find reflection in international refugee law in the case of individuals who are at risk of being punished for exercising the restraint expected of them under international law [see paragraph 14]. In this regard, it is important to note the absence of a defence of superior orders which are manifestly unlawful.[52]

Objection to Participating in an Unlawful Armed Conflict

23. Where an armed conflict is considered to be unlawful as a matter of international law [in violation of *jus ad bellum*], it is not necessary that the applicant be at risk of incurring individual criminal responsibility if he or she were to participate in the conflict in question, rather the applicant would need to establish that his or her objection is genuine, and that because of his or her objection, there is a risk of persecution. Individual responsibility for a crime of aggression only arises under international law for

[49] See the HRC's approach in *Foin v. France*, see note 12 above. See similarly, Richard *Maille v. France*, CCPR/C/69/D/689/1996, 31 July 2000, available at: http://www.unhcr.org/refworld/docid/3f588efd3.html, and *Venier and Nicholas v. France*, see note 12 above.

[50] *Jus ad bellum* refers to the constraints under international law on the use of force, whereas *jus in bello* governs the conduct of the parties to an armed conflict. Traditionally, the latter refers to international humanitarian law but relevant standards are also found in applicable provisions of international human rights law and international criminal law.

[51] See, *UNHCR Handbook*, paras. 170-171, note 1 above. With regard to para. 171: "Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could, in light of all other requirements of the definition, in itself be regarded as persecution." See also, at a regional level, Council of the European Union, "*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*", OJ/L 304/12, 30 Sept. 2004, available at: http://www.unhcr.org/refworld/docid/4157e75e4.html. Article 9(2)(e) which includes as a form of persecution: "[p]rosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)."

[52] See, for example, Article 33, ICC Statute, see note 33 above.

persons who were in a position of authority in the State in question.[53] Soldiers who enlisted prior to or during the conflict in question may also object as their knowledge of or views concerning the illegality of the use of force evolve.

24. In determining the legality of the conflict in question condemnation by the international community is strong evidence, but not essential for finding that the use of force is in violation of international law. Such pronouncements are not always made, even where objectively an act of aggression has taken place. Thus, a determination of illegality with regard to the use of force needs to be made through the application of the governing rules under international law. The relevant norms are the obligation on States to refrain from the threat or use of force against other States; the right of individual or collective self-defence; and the authorization of the use of force in line with the UN Security Council's powers to maintain peace and security.[54]

25. If the conflict is objectively assessed not to be an unlawful armed conflict under international law, the refugee claim will ordinarily fail unless other factors are present. Likewise, where the legality of the armed conflict is not yet settled under international law, the application may be assessed pursuant to (i) above as a conscientious objector case.

Objection to the Means and Methods of Warfare [*Conduct of the Parties*]

26. Where the applicant's objection is to the methods and means employed in an armed conflict [that is, the conduct of the one or more of the parties to the conflict], it is necessary to make an assessment of the reasonable likelihood of the individual being forced to participate in acts that violate standards prescribed by international law. The relevant standards can be found in international humanitarian law [*jus in bello*], international criminal law, as well as international human rights law, as applicable.

27. War crimes and crimes against humanity are serious violations which entail individual responsibility directly under international law [treaty or custom]. Developments in the understanding of the elements of such crimes must be taken into account in determining what kinds of conduct or methods of warfare constitute such crimes.[55] Moreover, when assessing the kinds of acts an individual may be forced to commit in an armed conflict, other violations of international humanitarian law may also be relevant on a cumulative basis. The relevance of international human rights law in international or non-international armed conflict situations is also important to bear in mind.

28. Determining whether there is a reasonable likelihood that the individual would be forced to commit acts or to bear responsibility for such acts which violate the basic rules of human conduct will normally depend on an evaluation of the overall conduct of the conflict in question. Thus, the extent to which breaches of the basic rules of human conduct occur in the conflict will be relevant. However, it is the risk of being compelled to become involved in the act(s), rather than the conflict alone that is at issue, so the individual circumstances of the applicant must thus be examined, bearing in mind the role in which he or she will be engaged.

29. If the applicant is likely to be deployed in a role that excludes exposure to the risk of participating in the act(s) in question – for example, a non-combatant position such as a cook, or logistical or technical support roles only – then a claim of persecution is unlikely to arise without additional factors. Additional factors might include the link between the applicant's logistical or technical support role and the foreseeability of [or contribution to] the commission of crimes in violation of international humanitarian or international criminal law. Further, the applicant's reasons for object-

[53] See, for example, International Criminal Court, *Elements of Crimes*, ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 8 bis, available at: http://www.unhcr.org/refworld/pdfid/4ff5dd7d2.pdf.
[54] See respectively, Articles 2(4), 51 and 42 UN Charter. See also, UN General Assembly, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, 9 December 1981, A/RES/36/103, available at: http://www.refworld.org/docid/3b00f478f.html.
[55] For an overview, see UNHCR's *Background Note on Exclusion*, 4 September 2003, available at: http://www.unhcr.org/refworld/docid/3f5857d24.html, paras. 30-32. Examples of war crimes in the context of an international armed conflict are wilful killing of civilians, soldiers hors de combat or prisoners of war; torture; killing or wounding treacherously individuals belonging to the hostile army; intentionally directing attacks against the civilian population; rape; recruitment of children under the age of fifteen years into the armed forces or using them to participate actively in hostilities; and use of poisonous weapons. In a non-international armed conflict, war crimes include intentionally directing attacks against civilians; killing or wounding treacherously a combatant adversary; rape; recruitment of children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

ing – regardless of the foreseeability or remoteness of the commission of crimes linked to his or her activities – may be sufficient to qualify him or her as a conscientious objector [see (i) above].

30. By contrast, where there is a reasonable likelihood that an individual may not be able to avoid deployment in a combatant role that will expose him or her to the risk of committing illegal acts, his or her fear of being persecuted would be considered well-founded [see paragraph 14]. In some cases the conflict in question may be one that is not generally characterized by violations of international law. However, the individual in question may be a member of a unit whose particular duties mean that it is specifically, or more likely, to be implicated in violations of basic rules of human conduct. In such circumstances there may be a reasonable likelihood that the individual concerned will be forced to commit, for example, war crimes or crimes against humanity. Where options are available to be discharged, reassigned [including to alternative service] or to have an effective remedy against superiors or the military which will be fairly examined and without retribution, the issue of persecution will not arise, unless other factors are present.[56]

(iii) Conditions of State Military Service

31. In cases involving conditions within the State armed forces, a person is clearly not a refugee if his or her only reason for desertion or draft evasion is a simple dislike of State military service or a fear of combat. However, where the conditions of State military service are so harsh as to amount to persecution the need for international protection would arise.[57] This would be the case, for instance, where the terms or conditions of military service amount to torture or other cruel or inhuman treatment,[58] violate the right to security[59] and integrity of person,[60] or involve forced or compulsory labour,[61] or forms of slavery or servitude [including sexual slavery].[62]

32. Such cases may in particular involve discrimination on the grounds of ethnicity, or gender. Where the ill-treatment feared is carried out within the State armed forces by military personnel, it is necessary to assess whether such practices are systemic and/or in practice authorized, tolerated or condoned by the military hierarchy. An assessment has to be made regarding the availability of redress against such ill-treatment.

33. Under international law the prohibition of "forced or compulsory labour"[63] does not encompass military or alternative service. Nevertheless, where it can be established that compulsory military service is being used to force conscripts to execute public works, and these works are not of a "purely military character" or not exacted in the case of an emergency, and do not constitute a necessity for national defence or a normal civic obligation, such work constitutes forced labour.[64] According to the International Labour Organization, the condition of a "purely military character" is aimed specifically

[56] See, for example, *Analytical report on conscientious objection to military service: Report of the United Nations High Commissioner for Human Rights*, see note 4 above, concerning the practice in some States of allowing enlisted soldiers to move to a different non-combatant unit if they develop a conscientious objection to a particular conflict or bearing arms altogether, paras. 26-27. Such an option may not be available though for an individual whose objection to a particular conflict is not based on conscientious objection.

[57] See, for example, Lord Justice Laws in obiter dictum "I should emphasise that it is plain (indeed uncontentious) that there are circumstances in which a conscientious objector may rightly claim that punishment for draft evasion would amount to persecution: where the military service to which he is called involves acts, with which he may be associated, which are contrary to basic rules of human conduct; where the conditions of military service are themselves so harsh as to amount to persecution on the facts; where the punishment in question is disproportionately harsh or severe. I am here addressing the case where none of these additional factors is present" in *Yasin Sepet, Erdem Bulbul v. Secretary of State for the Home Department*, C/2777; C/2000/2794, United Kingdom: Court of Appeal (England and Wales), 11 May 2001, available at: http://www.unhcr.org/refworld/docid/3ffbcb024.html, para. 61. See UN Working Group on Arbitrary Detention, Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add.1, 19 November 2004, available at: http://www.unhcr.org/refworld/pdfid/470b77b10.pdf. Similarly, HRC, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (Article 14), 23 August 2007, available at: http://www.unhcr.org/refworld/docid/478b2b2f2.html, stating that, "Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience", para. 55; see also UN Commission on Human Rights, Resolution 98/77, para. 5, see note 5 above. Subsequent to the HRC's ruling on Article 18 and a right to conscientious objection in *Yoon and Choi v. Republic of Korea*, see note 15 above, the UN Working Group on Arbitrary Detention has stated that the imprisonment of a conscientious objector for refusing to take up military service constitutes arbitrary detention as it is a violation of the rights guaranteed in Article 18 ICCPR as well as Article 9 ICCPR: Opinion No. 16/2008 (Turkey), A/HRC/10/21/Add.1, 4 February 2009, available at: http://www.unhcr.org/refworld/pdfid/5062b12e2.pdf. See also the European Court of Human Rights that held that the cumulative effect of repeated prosecution and punishment of conscientious objectors for desertion was their "civil death" amounting to degrading treatment in violation of Article 3 of the ECHR. See *Ülke v. Turkey*, Application No. 39437/98, 24 January 2006, available at: http://www.unhcr.org/refworld/docid/4964bd752.html as well as *Savda c. Turquie*, note 13 above and *Tarhan c. Turquie*, note 21 above, and *Feti Demirtaş c. Turquie*, see note 7 above.

[58] See, Article 7 ICCPR.

[59] See, Article 9 ICCPR.

[60] See for an interpretation, Articles 7, 9 and 17 ICCPR.

[61] See, Article 8(3) ICCPR and Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105).

[62] See, Article 8(1) ICCPR and Article 6 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").

[63] See, Article 8 ICCPR.

[64] 1930 ILO Convention No. 29 concerning Forced or Compulsory Labour. See also, IACHR, "Fourth report on the situation of human rights in Guatemala", OEA/Ser.L/V/II.83, Doc. 16 rev., 1 June 1993, chap. V.

at preventing the call up of conscripts for public works.[65] In situations of emergency, which would endanger the existence of the State or well-being of the whole or part of the population, conscripts may nevertheless be called upon to undertake non-military work. The duration and extent of compulsory service, as well as the purposes for which it is used, need to be confined to what is strictly required in the given situation.[66] Using a conscript to gain profit through his or her exploitation [e.g. slavery, sexual slavery, practices similar to slavery, and servitude] is prohibited by international law and criminalized in the national legislation of a growing number of States.

34. As with other refugee claims outlined above (i) - (ii), if the applicant has the possibility of discharge, reassignment [including appropriate alternative service] and/or an effective remedy, without retribution, the issue of persecution will not arise, unless other factors are present.

(iv) Forced Recruitment and/or Conditions of Service in Non-State Armed Groups

35. As far as forced recruitment in non-State armed groups is concerned, it is recalled that non-State armed groups are not entitled to recruit by coercion or by force.[67] A person who seeks international protection abroad because of feared forced recruitment, or re-recruitment, by non-State armed groups, may be eligible for refugee status provided the other elements of the refugee definition are established; in particular that the State is unable or unwilling to protect the person against such recruitment [see paragraphs 42-44 and 60-61 below]. Likewise, forced recruitment by non-State groups to carry out non-military works could amount to, *inter alia*, forced labour, servitude and/or enslavement and constitute persecution.[68]

36. Where the applicant would be subjected to conditions of service that constitute serious violations of international humanitarian or international criminal law,[69] serious human rights violations or other serious harm, persecution would arise.[70]

(v) Unlawful Child Recruitment

37. Special protection concerns arise where children are at risk of forced recruitment and service.[71] The same is true for children who may have "volunteered" for military activities with the State's armed forces or non-State armed groups. A child's vulnerability and immaturity make him or her particularly susceptible to coerced recruitment and obedience to the State's armed forces or a non-State armed group; this must be taken into account.

38. As outlined at III.C. above, there are important restrictions on the recruitment and participation in hostilities of children under international human rights law and international humanitarian law, whether related to an international or a non-international armed conflict, and relating to both State armed forces and non-State armed groups.[72] Children need to be protected from such violations; as such, a child evading forced recruitment or prosecution and/or punishment or other forms of serious retaliation for desertion would have a well-founded fear of persecution.

39. There may be cases where children "volunteer" under pressure, or are sent to fight by their parents or communities. Such cases can similarly give rise to refugee status. The key question is the likelihood of risk that the child will be recruited and/or forced to fight, and this needs to be assessed on the basis of up-to-date country of origin information, taking into account the child's

[65] It has its corollary in Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105), which prohibits the use of forced or compulsory labour "as a method of mobilizing and using labour for purposes of economic development."
[66] ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), CEACR: Individual Direct Request concerning Forced Labour Convention, 1930 (No. 29) Eritrea (ratification: 2000), 2010.
[67] See, para 7 above.
[68] See, Article 8(3) ICCPR, Article 1(b) of the Abolition of Forced Labour Convention (No. 105), 1957; Article 8(1) ICCPR; and Article 6 CEDAW.
[69] See, Article 3 common to the four Geneva Conventions of 1949; Article 8, Rome Statute of the ICC (last amended 2010), 17 July 1998, available at: http://www.refworld.org/docid/3ae6b3a84.html.
[70] For example, torture or other cruel, inhuman or degrading treatment or punishment (see Article 7, ICCPR), violations of the right to security (see Article 9 ICCPR) and integrity of person (see for an interpretation Article 7, 9 and 17 ICCPR), forced or compulsory labour (see Article 8(3) ICCPR and Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105)) or forms of slavery (including sexual slavery, see Article 8(1) and Article 6 CEDAW).
[71] *UNHCR Guidelines on Child Asylum Claims*, see note 37 above.
[72] See generally, UN Committee on the Rights of the Child, CRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, ("CRC General Comment No.6"), CRC/GC/2005/6, 1 September 2005, available at: http://www.unhcr.org/refworld/docid/42dd174b4.html, para. 59.

profile and past experiences, as well as the experiences of similarly situated children. Importantly, in refugee claims concerning violations of the restrictions on the recruitment and participation of children in hostilities, there is no additional requirement to consider the issue of conscientious objection.

40. Persecution may also arise from the nature of the treatment the child would be subjected to whilst in the military or armed group. In this respect, it is important to note that in addition to taking an active part in hostilities, children are also used as spies, messengers, porters, servants, slaves [including sex slaves], and/or to lay or clear landmines. Regardless of the function held by the child, they may be exposed to serious or multiple forms of harm, including being put in a position to witness heinous crimes.[73]

41. Persecution may also arise where there is a risk of ill-treatment on return to the country of origin, for example, because of the child's history of being involved with State armed forces or non-State armed groups, whether as a soldier/combatant/fighter or in another role. They may be considered as an "enemy" by respectively the State or the non-State armed group and as a result be at risk of retaliation, including physical attacks, or being ostracized by the community to such an extent that their life is intolerable. In all such cases, special consideration needs to be given to the particular vulnerabilities and best interest of child applicants.[74]

Agents of Persecution

42. There is scope within the refugee definition to recognize both State and non-State agents of persecution. In countries undergoing civil war, generalized violence, situations of insurgency, or State fragmentation, the threat of forced recruitment often emanates from non-State armed groups. This may result from the State's loss of control over parts of its territory. Alternatively, the State may empower, direct, control or tolerate the activities of non-State armed groups [for example, paramilitary units or private security groups]. The congruity of interests between the State and a non-State armed group involved in forced recruitment may not always be clear. Other non-State actors may also be the perpetrators of persecution in forms other than forced recruitment, for example, through violence and discrimination by family members and neighbours against former child soldiers perceived as having aided the enemy.

43. In all cases involving harm by non-State armed groups and other non-State actors, it is necessary to review the extent to which the State is able and/or willing to provide protection against such harms.

44. Where the refugee claim is based on the risk of being forced to commit acts that violate basic rules of human conduct, it is necessary to examine the extent to which such violations are taking place, as well as the ability and/or willingness of the authorities, in particular the military authorities, to prevent future violations. Isolated breaches of *jus in bello* which are effectively investigated and dealt with by the military authorities will indicate the existence of available and effective State protection. State responses of this nature would involve action being taken against those responsible and measures being put in place to prevent repetition.

45. With respect to ill-treatment by other soldiers, such as serious bullying or hazing, it is necessary to determine whether such acts are condoned by the military authorities and whether effective methods of redress are available through the military system or elsewhere in the State structure.

Amnesties

46. When a conflict ends, a State may offer amnesties to persons who evaded military service, in particular to conscientious objectors. Such initiatives may guarantee immunity from prosecution or offer official recognition of conscientious objector status, thereby removing the risk of harm associated with such prosecution or punishment. Nevertheless, the impact of an amnesty on an individual's fear of persecution requires careful assessment. Amnesties may not cover all deserters and draft evaders. Moreover, it is necessary to examine whether the protection is effective in practice; whether the individual may still face recruitment into the armed forces; whether he or she may be subjected

[73] See, note 70 above; see also *UNHCR Guidelines on Child Asylum Claims,* para. 23, see note 37 above.
[74] *UNHCR Guidelines on Child Asylum Claims,* paras. 4 and 5, see note 37 above, and the CRC General Comment No.6, see note 72 above.

to other forms of persecution apart from any criminal liability quashed by the amnesty; and/or whether the person is at risk of being targeted by non-State actors – including community groups for being considered a traitor, for example – irrespective of the legislation adopted by the State. In particular, individuals who have witnessed the commission of war crimes or other serious acts, and have deserted as a result, may be able to establish a well-founded fear of persecution under certain circumstances if, for instance, they were required to act as witnesses in criminal proceedings upon return which would expose them to serious harm.

B. The Convention Grounds

47. As with all claims to refugee status, the well-founded fear of persecution needs to be related to one or more of the grounds specified in the refugee definition in Article 1A (2) of the 1951 Convention; that is, it must be "for reasons of" race, religion, nationality, membership of a particular social group or political opinion. The Convention ground needs only to be a contributing factor to the well-founded fear of persecution; it need not be shown to be the dominant or even the sole cause. Further, one or more of the Convention grounds may be relevant; they are not mutually exclusive and may overlap.

48. The intent or motive of the persecutor can be a relevant factor in establishing the causal link between the fear of persecution and a Convention ground but it is not decisive, not least because it is often difficult to establish.[75] There is no need for the persecutor to have a punitive intent to establish the causal link; the focus is rather on the reasons for the applicant's predicament and how he or she is likely to experience the harm. Even where an individual is treated in the same way as a majority of the population this does not preclude persecution being for reasons of a Convention ground. Similarly, if the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link. Where the persecutor is a non-State armed actor, the causal link is established either where the persecutor harms the applicant for a Convention-related reason, *or* the State does not protect him or her for a Convention-related reason.[76]

Religion

49. The religion ground is not limited to belief systems ["theistic, non-theistic and atheistic"],[77] but covers also notions of identity, or way of life.[78] It dovetails with Article 18 ICCPR and includes broader considerations of thought and conscience, including moral, ethical, humanitarian or similar views. The religion ground is thus particularly relevant in cases of conscientious objection, including those expressed through draft evasion or desertion, as explained at III.B. With respect to claims by conscientious objectors, the *UNHCR Handbook* states that:

> Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.[79]

50. The religion ground may also be relevant in cases based on military service other than in situations of conscientious objection. Recruits may be subject to detention, ill treatment [such as physical beatings or severe psychological pressure] and serious discrimination on account of their religious beliefs, identity or practices. They may also be pressured to renounce their beliefs and convert.

Political Opinion

51. The political opinion ground is broader than affiliation with a particular political movement or ideology; it concerns "any opinion on any matter in which the machinery of the State, government,

---

[75] *UNHCR Handbook*, para. 66, see note 1 above.
[76] See, *UNHCR, Guidelines on International Protection No.2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, *HCR/GIP/02/02, 7 May 2002, ("UNHCR Guidelines on Social Group")*, available at: http://www.unhcr.org/refworld/docid/3d36f23f4.html, para. 23.
[77] *UNHCR Guidelines on Religion-Based Claims*, para. 6, see note 15 above.
[78] *Ibid*, paras. 4 and 8.
[79] *UNHCR Handbook*, para. 172, see note 1 above.

society, or policy may be engaged."[80] Moreover, it covers both the holding of an actual political opinion and its expression, political neutrality as well as cases where a political opinion is imputed to the applicant even if he or she does not hold that view.[81] The latter can arise in cases where the State, or a non-State armed group, attributes to the individual a particular political view.

52. Cases involving objection to military service may be decided on the basis that there is a nexus with the political opinion ground in the 1951 Convention. Depending on the facts, an objection to military service - especially objections based on a view that the conflict violates basic rules of human conduct [see IV. A. (ii) above] – may be viewed through the prism of actual or imputed political opinion. In relation to the latter, the authorities may interpret the individual's opposition to participating in a conflict or in act(s) as a manifestation of political disagreement with its policies. The act of desertion or evasion may in itself be, or be perceived to be, an expression of political views.

53. The political opinion ground may be relevant in other circumstances. For instance, a refugee claim by a soldier who becomes aware of and objects to criminal activity being conducted or tolerated by military personnel in the context of a conflict, such as the illicit sale of weapons, extortion of civilians or trafficking of drugs or in persons, and who fears persecution as a result of his or her opposition to such activities, may be considered under the political opinion ground. Whether or not the soldier is a whistle-blower, attempts to flee military service may be perceived by the authorities as evidence of political opposition. Objection to recruitment by non-State armed groups may also be an expression of political opinion.

54. Political opinion may also be the applicable ground in relation to family members of a conscientious objector, draft evader or deserter who is identified by the State or non-State armed group as having an allegiance to a particular political cause. In such cases, persecution may be linked to imputed political opinion, on the basis that the family member is assumed to hold similar views as those ascribed to the conscientious objector, draft evader or deserter. The relevant ground in such cases may also be "family" as a social group [see below paragraph 58].

Race or Nationality

55. Race and nationality, in the sense of ethnicity, are often factors in cases connected with military service. The well-founded fear of persecution may be directly based on the applicant's race, for example where conscripts from a particular racial group face harsher conditions than other recruits, or are the only ones actually subject to the draft. Similarly, children may face forced recruitment because they belong to a targeted ethnic group. Cases based on the conditions of military service arising to persecution may also relate to discrimination on the basis of race and/or ethnicity, and could invoke this ground.

Membership of a Particular Social Group

56. The 1951 Convention does not include a specific list of particular social groups. Rather, "the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."[82] UNHCR defines a "particular social group" as:

> A particular social group involves 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.[83]

[80] UNHCR, *Guidelines on International Protection No. 1: Guidelines on 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*, HCR/GIP/02/01, 7 May 2002, ("*UNHCR Guidelines on Gender-Related Persecution*"), available at: http://www.unhcr.org/refworld/docid/3d36f1c64.html, para. 32, as adapted from G. Goodwin-Gill, The Refugee in International Law, Clarendon Press 1983, 1st ed., page 31, and latest 3rd ed., Oxford University Press 2007 with J. McAdam, page 87, as also cited in Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, available at: http://www.refworld.org/docid/3ae6b673c.html.

[81] See UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, available at: http://www.unhcr.org/refworld/docid/4fc369022.html, para. 8.

[82] *UNHCR Guidelines on Social Group*, para. 3, see note 81 above.

[83] *Ibid*, para. 11.

57. The two approaches – "protected characteristics" and "social perception" – to identifying "particular social groups" reflected in this definition are alternative, not cumulative, tests. The "protected characteristics" approach examines whether a group is connected either by an immutable characteristic, or by a characteristic that is 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]."[84] The "social perception" approach considers whether a particular social group shares a common characteristic which makes it cognizable or sets the group's members apart from society at large. The latter approach does not require that the common characteristic be easily identifiable by the general public, or visible to the naked eye. An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group.[85] Moreover, irrespective of which approach is adopted, a particular social group can arise even where this covers a large number of people.[86] Nevertheless, everyone falling within a particular social group is not necessarily a refugee; a well-founded fear of persecution because of membership of that group is required.

58. Under either of these approaches, "conscientious objectors" are a particular social group given that they share a belief which is fundamental to their identity and that they may also be perceived as a particular group by society. Individuals with common past experience, such as child soldiers, may also constitute a particular social group. This may also be the case for draft evaders or deserters, as both types of applicants share a common characteristic which is unchangeable; a history of avoiding or having evaded military service. In some societies deserters may be perceived as a particular social group given the general attitude towards military service as a mark of loyalty to the country and/or due to the differential treatment of such persons [for example, discrimination in access to employment in the public sector] leading them to be set apart or distinguished as a group. The same may be true for draft evaders. Conscripts may form a social group characterized by their youth, forced insertion into the military corps or their inferior status due to lack of experience and low rank.

59. Women are a particular social group, defined by innate and immutable characteristics and frequently treated differently from men.[87] This may be the relevant ground in claims concerning sexual violence against female soldiers or women or girls forced to act as sex slaves; although this does not preclude the application of other grounds. Girls are a sub-set of this social group. Children are also a particular social group, and this will be a relevant ground in cases concerning fear of forced underage recruitment.[88]

C. Internal Flight or Relocation Alternative

60. Where the feared persecution emanates from, or is condoned, or tolerated by the State and/or State agents, an internal flight or relocation alternative will generally not be available, as the State actors will be presumed to have control and reach throughout the country. In the case of conscientious objectors to State military service, where the State does not provide for exemption or alternative service, and where the fear of persecution is related to these laws and/or practices and their enforcement, a consideration of an internal flight or relocation alternative [IFA] would not be *relevant* as it can be assumed that the objector would face persecution across the country.[89]

61. Determining whether an IFA is available in cases where the risk of persecution emanates from non-State armed groups, it is necessary to evaluate the ability and/or willingness of the State to protect the applicant from the harm feared. The evaluation needs to take into account whether the State protection is effective and of a durable nature, provided by an organized and

[84] *Ibid*, para. 6.
[85] *Ibid*, para. 17.
[86] *Ibid*, paras. 18-19.
[87] *UNHCR Gender-Related Persecution Guidelines*, para. 30, see note 80 above.
[88] *UNHCR Guidelines on Child Asylum Claims*, para. 48 et seq., see note 37 above.
[89] *UNHCR Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A (2) of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, ("*UNHCR Internal Flight Guidelines*"), available at: http://www.refworld.org/docid/3f2791a44.html.

stable authority exercising full control over the territory and population in question. In the particular context of non-international armed conflict, special consideration would need to be given to the applicant's profile, and whether he or she was recruited into and/or participated in activities of a non-State armed group considered to be in opposition to the government, and any likely reprisals from the government. It would often be unreasonable to expect former non-State recruits to relocate into government-controlled territory in a situation of an ongoing conflict, especially if the conflict has religious or ethnic dimensions.

V. PROCEDURAL AND EVIDENTIARY ISSUES

A. Establishing the Relevant Facts

62. The credibility assessment refers to the process of determining whether, in light of all the information available to the decision maker, the statements of the applicant relating to material elements of the claim can, on balance, be accepted as having been truthfully given for the purpose of determining refugee status eligibility. Where, notwithstanding, an applicant's genuine efforts to provide evidence pertaining to the material facts, there remains some doubt regarding some of the facts alleged by him or her, the benefit of doubt should be given to the applicant in relation to the assertions for which evidentiary proof is lacking once the decision maker is satisfied with the general credibility of the claim.[90]

63. In claims related to military service, reliable and relevant country of origin information, including the extent to which exemption from military service or alternative service are available, the manner in which conscription is enforced, and the treatment of individuals or groups within the military forces of the country of origin, can assist in the evaluation of the truthfulness of the applicant's account and the determination of the forms of treatment and their likelihood he or she may face if returned.[91]

64. Establishing the genuineness and/or the personal significance of an applicant's beliefs, thoughts and/or ethics plays a key role in claims to refugee status based on objection to military service, in particular conscientious objection [see IV. A. (i)-(ii)].[92] The applicant needs to be given the opportunity during the individual interview to explain the personal significance of the reasons behind his or her objection, as well as how these reasons impact on his or her ability to undertake military service. Eliciting information regarding the nature of the reasons espoused, the circumstances in which the applicant has come to adopt them, the manner in which such beliefs conflict with undertaking military service, as well as the importance of the reasons to the applicant's religious or moral/ethical code are appropriate and assist in determining the credibility of the applicant's statements.

65. Where the objection to military service is derived from a formal religion, it may be relevant to elicit information about the individual's religious experiences, such as asking him or her to describe how they adopted the religion, the place and manner of worship, or the rituals engaged in, the significance of the religion to the person, or the values he or she believes the religion espouses, in particular, in relation to the bearing of arms. That said, extensive examination or testing of the tenets or knowledge of the individual's religion may not always be necessary or useful, particularly as such knowledge will vary considerably depending on his or her personal circumstances. A claimant's detailed knowledge of his or her religion does not necessarily correlate with sincerity of belief and vice-versa.

66. Cases involving mistaken beliefs as to a particular religion's views on the bearing of arms occur from time to time. Where mistaken beliefs are at issue, it would need to be established that the applicant, despite the mistaken beliefs, still faces a well-founded fear of persecution for one or more of the Convention grounds.[93]

[90] *UNHCR Handbook*, para. 204, see note 1 above.
[91] *UNHCR Handbook*, paras. 196 and 203-204, see note 1 above, and *UNHCR Interpreting Article 1*, para. 10, see note 42 above. Note the *World Survey of Conscription and Conscientious Objection to Military Service*, which provides a country-by-country analysis, see note 28 above.
[92] For a general discussion of credibility issues in claims based on freedom of thought, conscience and religion see *UNHCR Guidelines on Religion-based Claims*, paras. 28-29, see note 15 above.
[93] *Ibid*, para. 30.

67. If the claimant is mistaken about the nature of a particular conflict, such as whether the conflict abides by international law, this does not automatically undermine the credibility of the alleged reasons for objecting to military service. The credibility assessment in such situations needs to be conducted in light of the applicant's explanations regarding why involvement in the conflict would be inconsistent with his or her religious or moral beliefs, and the reality of the situation on the ground. Nonetheless, while they may be credible in their objection, where such an objection is based on a false premise, the risk of persecution would not arise unless they face other persecutory consequences for having deserted or evaded military service and a nexus to one of the Convention grounds is established.

68. For those objectors whose reasons for their objection is a matter of thought or conscience [rather than religion], they will not be able to refer to the practices of a religious community or teachings of a religious institution in order to substantiate their assertion. They should, however, be able to articulate the moral or ethical basis for their convictions. This may be based on social or community beliefs or practices, parental beliefs or on philosophical or human rights convictions. Past behaviour and experiences may shed light on their views.

69. In cases involving individuals who volunteered for military service or responded to a call up, and who subsequently desert, it is important to recognize that religious or other beliefs may develop or change over time, as may the circumstances of the military service in question. Thus, adverse judgements as to the credibility of the applicant should not generally be drawn based only on the fact that he or she initially joined the military service voluntarily; the full circumstances surrounding the individual's espoused beliefs and situation need to be carefully examined.

B. Claims by Children

70. Given their young age, dependency and relative immaturity, special procedural and evidentiary safeguards are required for claims to refugee status by children.[94] In particular, children who spent time as soldiers/combatants/fighters or in a support role to armed groups may be suffering from severe trauma and be intimidated by authority figures. This can affect their ability to present a clearly understandable account of their experiences. Thus, appropriate interviewing techniques are essential during the refugee status determination procedure, as well as the creation of a non-threatening interview environment.

71. In cases concerning children, a greater burden of proof will fall on the decision makers than in other claims to refugee status, especially if the child is unaccompanied.[95] Given their immaturity, children cannot be expected to provide adult-like accounts of their experiences. If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his or her claim, a decision must be made on the basis of all known circumstances.

72. Age assessments may be particularly important in claims to refugee status based on military service where the age of the applicant is in doubt. This is the case not just with claims regarding conscription but also where a child considers him or herself to have "volunteered", given the limits on voluntary service set by international law [see III.B. above]. Age assessments, which may be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual, are to be conducted in a safe, child- and gender-sensitive manner with due respect for human dignity.[96] Where the assessment is inconclusive, the applicant must be considered a child. Prior to the assessment, an independent guardian should be appointed to advise the child on the purpose and process of the assessment procedure, which needs to be explained clearly in a language that the child understands. DNA testing should, in normal circumstances, only be done if permitted by law and with the informed consent of the relevant individuals.

[94] For a full discussion of the minimum safeguards required see *UNHCR Guidelines on Child Asylum Claims*, paras. 65-77, see note 37 above. See also ExCom, *Conclusion on Children at Risk*, No. 107 (LVIII), 5 October 2007, available at: http://www.unhcr.org/refworld/docid/471897232.html, para. g(viii). Whether a claimant is a child for the purposes of such safeguards will depend on the age at the date the claim to refugee status is made.
[95] *UNHCR Guidelines on Child Asylum Claims*, para. 73, see note 37 above.
[96] See further, *UNHCR Guidelines on Child Asylum Claims*, paras. 75-76, see note 37 above.

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

Distr. GENERAL | HCR/GIP/15/11 | 24 June 2015 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 11:

Prima Facie Recognition of Refugee Status

UNHCR issues these Guidelines pursuant to its mandate, as contained in the Office's Statute, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued, Geneva, 2011) and the other Guidelines on International Protection.

These Guidelines, having benefited from broad consultation, are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers, as well as UNHCR staff carrying out refugee status determination under its mandate and/or advising governments on the application of a prima facie approach.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the Guidelines on International Protection are available at: http://www.unhcr.org/refworld/docid/4f33c8d92.html.

Calls for public consultation on future guidelines will be posted at: http://www.unhcr.org/544f59896.html.

I. INTRODUCTION

1. A prima facie approach means the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum-seekers, their country of former habitual residence.[1] A prima facie approach acknowledges that those fleeing these circumstances are at risk of harm that brings them within the applicable refugee definition.[2]

2. Although a prima facie approach may be applied within individual refugee status determination procedures (see Part III. D in these Guidelines), it is more often used in group situations, for example where individual status determination is impractical, impossible or unnecessary in large-scale situations. A prima facie approach may also be applied to other examples of group departure, for example, where the refugee character of a group of similarly situated persons is apparent.

3. Recognizing refugee status on a prima facie basis has been a common practice of both States and UNHCR for over 60 years. Despite its common use and the fact that the majority of the world's refugees are recognized on a prima facie basis,[3] there has been limited articulation of uniform standards to guide the practice. These Guidelines explain the legal basis as well as some procedural and evidentiary aspects of applying a prima facie approach. They outline standards of general application by States and by UNHCR, albeit some of those (e.g. legal decrees) are employable only by States. The Guidelines focus on group determination primarily, albeit they touch on how a prima facie approach may be applied in individual procedures at Part III. D.

A. Definition and description

4. In general, "prima facie" means "at first appearance",[4] or "on the face of it."[5] UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* describes group determination on a prima facie basis as follows:

> [s]ituations have [...] arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called "group determination" of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.[6]

5. Refugee status may be recognized on a prima facie basis pursuant to any of the applicable refugee definitions, including:

- Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (hereinafter "1951 Convention");[7]

- one of the definitions in the regional refugee instruments;[8]

[1] UNHCR, "Protection of Refugees in Mass Influx Situations: Overall Protection Framework", 19 February 2001, EC/GC/01/4, available at: http://www.unhcr.org/3ae68f3c24.html, para. 6.
[2] Ivor C. Jackson, "The Refugee Concept in Group Situations" (Martinus Nijhoff, 1999), p. 3.
[3] UNHCR data indicates that in 2012, 1,121,952 refugees were recognized on a group basis and 239,864 were recognized individually. All refugees recognized on a group basis were recognized pursuant to a prima facie approach.
[4] Derived from Latin. "A case in which there is evidence which will suffice to support the allegation made in it, and which will stand unless there is evidence to rebut the allegation": *Osborn's Concise Law Dictionary* (10th edition, Thomson Sweet & Maxwell, 2005).
[5] The Oxford English Dictionary (1st edition 1933, reprinted 1978, online version, available at: http://www.oed.com/view/Entry/151264?redirectedFrom=prima+facie#eid).
[6] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, reissued December 2011, HCR/1P/4/ENG/REV.3 (hereafter "UNHCR, *Handbook*"), para. 44.
[7] Prima facie recognition may also apply to Palestinian refugees pursuant to Article 1D of the 1951 Convention, in circumstances where the protection or assistance of UNRWA has ceased.
[8] See, e.g., the extended regional refugee definitions in: Organization of African Unity (African Union), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969 (hereafter "OAU Convention"), Art. I(2); Cartagena Declaration on Refugees, adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 (hereafter "Cartagena Declaration"), Conclusion III(3).

- UNHCR's Statute and refugee mandate as further developed under the authority of the United Nations General Assembly.[9]

The regional refugee definitions were designed to respond, in part, to large-scale arrivals of people fleeing from objective circumstances in their countries of origin, such as conflict, occupation, massive human rights violations, generalised violence or events seriously disturbing public order, and are thus particularly suited to forms of group recognition. While commonly associated with the refugee definition under the 1969 Organization of African Unity (African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter "OAU Convention"),[10] adopting a prima facie approach is not unique to Africa. Whichever instrument is applied, the assessment is based on the readily apparent, objective circumstances in the country of origin or former habitual residence relevant to the applicable refugee definition (II. A).

6. A prima facie approach operates only to recognize refugee status. Decisions to reject require an individual assessment.

B. Refugee status and applicable rights

7. Each refugee recognized on a prima facie basis benefits from refugee status in the country where such recognition is made, and enjoys the rights contained in the applicable convention/instrument. Prima facie recognition of refugee status is not to be confused with an interim or provisional status, pending subsequent confirmation. Rather, once refugee status has been determined on a prima facie basis, it remains valid in that country unless the conditions for cessation[11] are met, or their status is otherwise cancelled[12] or revoked.[13]

8. Refugees recognized on a prima facie basis should be informed accordingly and issued with documentation certifying their status.[14]

C. Settings for use and situations where a prima facie approach is appropriate

9. A prima facie approach is particularly suited to situations of large-scale arrivals of refugees. Large-scale situations are characterised by the arrival across an international border of persons in need of international protection in such numbers and at such a rate as to render individual determination of their claims impracticable.[15]

10. A prima facie approach may also be appropriate in relation to groups of similarly situated individuals whose arrival is not on a large-scale, but who share a readily apparent common risk of harm. The characteristics shared by the similarly situated individuals may be, for example, their ethnicity, place of former habitual residence, religion, gender, political background or age, or a combination thereof, which exposes them to risk.

---

[9] UNHCR, "Note on the Mandate of the High Commissioner for Refugees and his Office", October 2013, p. 3, which summarizes UNHCR's mandate for refugees as covering "all persons outside their country of origin for reasons of feared persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and who, as a result, require international protection."

[10] OAU Convention, Art. 1.

[11] See UNHCR, "The Cessation Clauses: Guidelines on their Application", 26 April 1999, available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3c06138c4, para. 2, and UNHCR, "Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C (5) and (6)", 10 February 2003, HCR/GIP/03/03, available at: http://www.refworld.org/docid/3e50de6b4.html (hereafter "UNHCR, Cessation Guidelines"), para. 1.

[12] See UNHCR, "Note on the Cancellation of Refugee Status", 22 November 2004, available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain?-docid=41a5dfd94 (hereafter "UNHCR, Note on Cancellation"), para. 1(i).

[13] See UNHCR, "Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees", 4 September 2003, HCR/GIP/03/05, available at: http://www.unhcr.org/3f7d48514.html (hereafter "UNHCR, Article 1F Exclusion Guidelines"), para. 6.

[14] Executive Committee, (hereafter "ExCom") Conclusion No. 8 (XXVIII), 12 October 1977 on the Determination of Refugee Status, available at: http://www.unhcr.org/3ae68c6e4.html, para (v).

[15] UNHCR, "Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees", 7 February 2006, available at: http://www.refworld.org/docid/43f48c0b4.html (hereafter "UNHCR, Mass Influx Exclusion Guidelines"), para. 1. "Large-scale movements" or "large-scale arrivals" are the preferred terms for these Guidelines, although it is noted that other terms are used in other Guidelines, such as "mass influx". There is no scientific number of persons for a situation to qualify as a "large-scale movement" or "large-scale arrival." Rather such a designation is at the discretion of the State of arrival, factoring in such matters as the capacity for registration, processing as well as assistance to respond, also related to the speed and daily or monthly rates of arrivals.

11. A prima facie approach may be employed in urban, rural as well as camp or out-of-camp settings.

12. A prima facie approach may not be appropriate in all of the aforementioned situations, taking into account security, legal or operational factors. Alternative protection responses may be more suited to the situation at hand, such as screening or other procedures (e.g. temporary protection) and, in some circumstances, individual status determination.[16]

II. SUBSTANTIVE ANALYSIS

A. Readily apparent, objective circumstances

13. Prima facie recognition is based on readily apparent, objective circumstances in the country of origin or former habitual residence assessed against the refugee definition being applied to that situation.

14. In determining the appropriate instrument pursuant to which to recognize refugee status on a prima facie basis, the 1951 Convention criteria should generally be considered first as the universal and primary legal instrument for refugees, unless there are good reasons for doing otherwise.[17]

15. In respect of the 1951 Convention definition, where there is evidence of persecution against an entire group on account of a 1951 Convention ground, refugee status should be recognized pursuant to the 1951 Convention. An individualized assessment of the element of fear would normally be rendered unnecessary in such circumstances, as being on its face self-evident from the event or situation which precipitated the flight.

16. As for the regional refugee definitions, persons may be alternatively or additionally recognized under the extended refugee definitions in the OAU Convention or the Cartagena Declaration.[18] In such instances, States regularly agree on the "refugee-producing" character of certain situations and apply a prima facie approach.

17. Country information will play an important role in identifying the readily apparent circumstances that underlie a decision to recognize refugee status on a prima facie basis.[19] Such information should be relevant, current and from reliable sources. At the same time, the complexity of events in the country of origin or former habitual residence may result, at least initially, in scant or conflicting information. Because of its international protection mandate, including its supervisory responsibility,[20] field presence and operational activities, UNHCR is often uniquely placed to obtain first-hand information on the causes and motivations of flight. UNHCR has a long established practice of recommending to governments the application of a prima facie approach to given situations. Where information is uncertain or the situation is fluid, other protection responses (such as temporary protection, see II. E. below) may be appropriate in these early stages before activating a prima facie approach

[16] Any alternative protection response is without prejudice to and should not undermine the protection regime established by the 1951 Convention or other legal instruments to which the State is a party. See II. E on temporary protection or stay arrangements.
[17] See UNHCR, "Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa", 20 December 2012, para. 6, available at: http://www.refworld.org/docid/50d32e5e2.html. In the Summary Conclusions, it was noted that some States have adopted different practices: some States have adopted the recommended sequential approach in which an assessment on the basis of the criteria of the 1951 Convention refugee definition precedes the application of one of the extended definitions; other States have adopted a "nature of flight" approach, in which the prevailing situation in the country of origin (for example, an armed conflict) would lead to an initial application of an extended definition, rather than the 1951 Convention refugee definition; and other situations have called for a pragmatic approach, in which an extended definition is applied for reasons of efficiency and ease (para. 31).
[18] See para. 5 of these Guidelines.
[19] See, generally, UNHCR, "Country of Origin Information: Towards Enhanced International Cooperation", February 2004, available at: http://www.refworld.org/docid/403b2522a.html, para 14.
[20] See UNHCR, "Note on the Mandate".

B. Evidence to the contrary

18. A prima facie approach, once in place, applies to all persons belonging to the beneficiary class, *unless* there is evidence to the contrary in the individual case. Evidence to the contrary is information related to an individual that suggests that he or she should not be considered as a refugee – either because he or she is not a member of the designated group or, although being a member, should not be determined to be a refugee for other reasons (e.g. exclusion).

19. Examples of evidence to the contrary include, but are not limited to information, that the applicant:

i. is not from the designated country of origin or former habitual residence or does not possess the shared characteristic underlying the designated group's constitution;

ii. did not flee during the designated time period;

iii. left for other, non-protection reasons unrelated to the situation/event in question and has no *sur place* claim;

iv. has/had taken up residence in the country of asylum and is recognized by the competent authorities as having the rights and obligations attached to the possession of nationality of that country (Article 1E, 1951 Convention);[21]

v. may fall within the exclusion clauses in Article 1F of the 1951 Convention or of the relevant regional instruments.[22]

20. For reasons of legal certainty, any evidence to the contrary ought to be recorded and assessed as soon as possible after arrival. Such information may come to light, for example, during registration (see III. B. below). Where contrary evidence comes to light during registration, various case management strategies may need to be instituted (see III. B. below). As noted above at paragraph 6, a prima facie approach operates only to recognize refugee status. Decisions to reject require an individual assessment.

21. Contrary evidence that already existed at the time of recognition may only emerge after the recognition of refugee status, in which case cancellation procedures would be initiated.[23]

C. Dealing with combatants or armed elements

22. Owing to the civilian and humanitarian character of asylum, combatants and other armed elements are not eligible for international protection, until it has been established that they have genuinely and permanently renounced military or armed activities.[24] In the context of large-scale movements as a result of armed conflict, combatants and other armed elements should be identified early and separated from the civilian population through a careful screening mechanism.[25] Even if they have genuinely and permanently renounced their military or armed activities and thus become eligible to apply for refugee status, a full individual examination of their refugee claim is generally required (in particular because of the possible involvement in excludable acts).[26]

[21] UNHCR, "Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees", March 2009, available at: http://www.refworld.org/pdfid/49c3a3d12.pdf.
[22] UNHCR, "Article 1F Exclusion Guidelines".
[23] See UNHCR, "Note on Cancellation".
[24] ExCom, "Civilian and Humanitarian Character of Asylum", 8 October 2002, Conclusion No. 94 (LIII), available at: http://www.unhcr.org/3dafdd7c4.html, para. (c)(vii) (hereafter "ExCom Conclusion No. 94").
[25] Ibid. para. (c)(iii).
[26] UNHCR, "Article 1F Exclusion Guidelines", para. 15; restated in UNHCR, "Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum" September 2006, available at: http://www.refworld.org/docid/452b9bca2.html, p. 33 (hereafter "UNHCR, Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum").

23. Special procedures would need to be in place for children who formerly took part in armed activities.[27]

24. Civilian family members of combatants can benefit from refugee status on a prima facie basis unless there is evidence to the contrary in the individual case.[28]

D. Sur place claims

25. Persons who departed their country of origin or former habitual residence prior to the situation/event giving rise to a prima facie approach may also benefit from a declaration of refugee status on a prima facie basis.[29] Should he or she have taken up residence in the country of asylum and be recognized by the competent authorities as having the rights and obligations attached to the possession of nationality of that country, Article 1E of the 1951 Convention may apply (see para. 19).

E. Relationship with temporary protection or stay arrangements

26. Refugee status on a prima facie basis is to be distinguished from forms of temporary protection or stay arrangements. Such arrangements have a long history as an emergency response to large-scale movements of persons in need of international protection, providing protection from *refoulement* and appropriate treatment in accordance with international human rights standards.[30] They are not intended to substitute for existing protection mechanisms (such as prima facie recognition), and are more commonly applied in non-States parties or as regional approaches to particular crises in regions with few States parties to the relevant international and regional refugee instruments.[31]

27. In certain scenarios, it may be appropriate to apply a temporary protection or stay arrangement, as a prelude to a prima facie approach or at its end, even in States parties to the relevant instruments. In fluid or transitional contexts, such as at the beginning of a crisis where the exact cause and character of the movement is uncertain and hence a decision on prima facie recognition cannot be taken immediately, or at the end of a crisis, when the motivation for ongoing departures may need further assessment, a temporary protection or stay arrangement could be the appropriate response.[32]

F. Cessation

28. While Articles 1C(1)-(4) apply based on an individual's own actions, the "ceased circumstances" clauses in Article 1C(5)-(6) of the 1951 Convention ("general cessation") are widely activated by States to apply to refugees recognized on a prima facie basis.[33] In respect of the latter, while all recognized refugees who fall within the terms of a declaration of general cessation lose their refugee status automatically once the cessation declaration comes into effect, they must be given the possibility prior to the effective date to apply for an exemption from cessation ("exemption procedures"). Even though the general circumstances may have ceased to exist, a certain number of refugees may continue to have a well-founded fear of persecution either in relation to past or new circumstances, or have compelling reasons arising out of past persecution justifying their continued need for international protection.[34]

---

[27] UNHCR, "Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum", Part 2J; UNHCR, "Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", 22 December 2009, HCR/GIP/09/08 , available at: http://www.refworld.org/docid/4b2f4f6d2.html para. 51; UNHCR, "Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees", 3 December 2013, HCR/GIP/13/10/Corr. 1, available at: http://www.refworld.org/docid/529ee33b4.html, paras. 12, 37–41.

[28] ExCom Conclusion No. 94, para. (c)(vi).

[29] UNHCR, *Handbook*, paras. 94–96.

[30] UNHCR, "Guidelines on Temporary Protection or Stay Arrangements", February 2014, available at: http://www.refworld.org/docid/52fba2404.html (hereafter "UNHCR, Guidelines on Temporary Protection or Stay Arrangements"). The Guidelines identify four situations in which temporary protection or stay arrangements may be appropriate, at para. 9: (i) large-scale arrivals of asylum-seekers or other similar humanitarian crises; (ii) complex or mixed cross-border population movements, including boat arrivals and rescue-at-sea scenarios; (iii) fluid or transitional contexts; or (iv) other exceptional and temporary conditions in the country of origin necessitating international protection and which prevent return in safety and dignity.

[31] UNHCR, "Guidelines on Temporary Protection or Stay Arrangements", paras. 3 and 8.

[32] Ibid., para. 9(iii).

[33] UNHCR, "Cessation Guidelines", para 23.

[34] UNHCR, "Guidelines on Exemption Procedures in respect of Cessation Declarations", December 2011, available at: http://www.refworld.org/docid/4eef5c3a2.html.

III. EVIDENTIARY AND PROCEDURAL ASPECTS

29. The decision to adopt a prima facie approach rests on an assessment, by the relevant authority in the country of asylum or, acting under its mandate, by UNHCR, that the readily apparent, objective circumstances in the country of origin or former habitual residence causing persons to leave (or stay outside their country) satisfies the applicable refugee definition. It is standard practice to consult with UNHCR at the activation and ending of a prima facie approach and to strive for regional coherence.

A. Formal decision regulated by law

30. The decision to adopt a prima facie approach is to be made in accordance with the national legal framework. Different States have adopted various ways to recognize refugee status on this basis, the most common being by decision of the executive, such as the relevant government ministry or by presidential or cabinet decision. It is also possible that such a decision is taken by the parliament or the administrative authority responsible for refugee affairs in the country of asylum carrying out regular refugee status determination. In each case, the entity needs to have the legal authority to do so. The decision may take the form of a published declaration, decree or order (for the purposes of these Guidelines, hereinafter "Decision").[35]

31. The Decision would generally specify the following:

i. the applicable domestic law that provides the authority for declaring a prima facie approach;

ii. the title of the 1951 Convention or regional instrument pursuant to which refugee status is recognized, along with the rights and duties accompanying this status;

iii. a description of the events/circumstances in the country of origin or former habitual residence underlying the Decision, or the characteristics of the class of beneficiaries to whom the approach applies;

iv. periodic review and modalities of termination.

32. Sample Decisions covering the two distinct situations described in paragraphs 9–10 are attached as Annexes A and B to these Guidelines.

33. In accordance with its mandate, UNHCR has the authority to declare persons to be refugees, based on a prima facie determination. States are required to cooperate with UNHCR in the exercise of its functions to provide international protection and to find solutions, together with Governments and other relevant actors, for refugees.[36]

B. Identification and registration

34. Registration procedures are key to the application of a prima facie approach and are the principal way in which individuals are identified within group-based processing.[37] Registration procedures aim both to ensure persons are appropriately identified so as to benefit from the prima facie approach as well as to channel those for whom further individualised inquiries may be required.

[35] Executive authorities have, at times, decided to recognize refugees on a prima facie basis without issuing a formal Decision and instead have informed UNHCR of such Decision by way of a letter. While UNHCR welcomes being formally notified of the Decision to recognize refugee status on a prima facie basis, this should be in addition to the more formal procedures described in the text at paras. 30–31.

[36] UNHCR, "Note on the Mandate", pp. 3–4. See 1951 Convention, Art. 35; 1967 Protocol, Art. II, as well as Cartagena Declaration, Conclusion II(2); OAU Convention, Art. VIII(1); and Treaty on the Functioning of the European Union, 13 December.
2007, OJ C 115/47 of 9.05.2008, Art. 78 (1) per general reference to 1951 Convention; Declaration 17 of the Treaty of Amsterdam, Declaration on Article 73k of the Treaty establishing the European Community, OJ C 340/134 of 10.11.1997; EU Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 of 13.12.2005, Art. 21.

[37] See UNHCR ExCom, "Registration of Refugees and Asylum-Seekers", 5 October 2001, Conclusion No. 91 (LII), available at: http://www.unhcr.org/3bd3e1d44.html, para. (a).

While noting that the type and extent of data collected will vary depending on the situation,[38] the aim of registration as part of applying a prima facie approach would be to capture sufficient information on the individual and members of his/her family to determine their membership in the beneficiary class. Appropriate questions to identify any contrary evidence, including potentially excludable individuals, should also be included during the registration process.[39] Registration should ordinarily occur as soon as possible after arrival.[40]

35. Where there are indications of evidence to the contrary, persons need to be referred to a more enhanced registration process to gather more information. Where questions remain, the individual needs to be referred to regular refugee status determination procedures to assess adequately issues such as credibility and/or exclusion. In the event that regular status determination procedures are not operational, an assessment of the contrary evidence may need to be delayed, while making sure that the information is clearly recorded within the registration system. This will have the benefit of facilitating a review of eligibility for refugee status or possible cancellation at a later stage, when individual processing becomes feasible and/or operational.[41] In the meantime, such persons should benefit from an alternative form of stay.

C. Decision to end the prima facie approach and to revert to regular individual status determination

36. A prima facie approach remains appropriate as long as the readily apparent circumstances prevailing in the country of origin or former habitual residence continue to justify a group-based approach to refugee status. The decision to adopt a prima facie approach, therefore, needs to be kept under periodic review, such that the on-going use of the practice is deliberative. Likewise, through registration, the profile of individuals and their reasons for flight can be monitored on a continual basis.

37. When circumstances change, careful consideration of ending the prima facie approach needs to be undertaken. Such reviews are guided by the situation in the country of origin, while recognizing the need for consistency and stability in refugee status approaches.[42]

38. As with the decision to recognize refugee status on a prima facie basis, the decision to end this approach rests with the relevant authority in the country of asylum. The decision to end the prima facie approach is to be communicated in the same manner (that is, via declaration, decree or order) as the initial decision to implement the prima facie approach, stating the end date. It should be made clear in such a decision, as well as through public communication and outreach, that the ending of the prima facie approach does not affect the refugee status of those who have already been recognized under this approach (their status would cease only in accordance with Article 1C of the 1951 Convention, see II. F). Equally, such a decision does not affect the right of asylum-seekers to apply for asylum through individual procedures. The ending of a prima facie approach signals that the asylum system is back to normal, with refugee claims being assessed through individual refugee status determination procedures.

39. A sample of a decision to end the prima facie approach is contained in Annex C.

D. Prima facie approach within individual procedures

40. Although these Guidelines have focused on the group application of a prima facie approach, a number of States apply prima facie approaches within individual procedures. In the context of indi-

[38] UNHCR, "Handbook for Registration", September 2003, available at: http://www.refworld.org/docid/3f967dc14.html, p. 21, 30, 32, 41 and 53 (hereafter "UNHCR, Handbook for Registration"): Registration is a systematic method of identifying, recording, verifying, updating and managing the information on persons with the aim of protecting, documenting and assisting them (if and when necessary). Registration is also a starting and fundamental step for the search of durable solutions.
[39] See UNHCR, "Mass Influx Exclusion Guidelines", paras. 51–53. See II. B of these Guidelines.
[40] UNHCR, "Handbook for Registration", p. 7.
[41] See UNHCR, "Mass Influx Exclusion Guidelines", paras. 54–55.
[42] UNHCR ExCom Conclusion on the Extraterritorial Effect of Refugee Status, No. 12 (XXIX), 17 October 1978, available at: http://www.refworld.org/docid/3ae68c4447.html, para (b).

vidual procedures, a prima facie approach may also be part of simplified or accelerated processes based on the manifestly founded nature of a class of claims or on a presumption of inclusion.[43] Adopting a prima facie approach in individual procedures operates to provide an "evidentiary benefit"[44] to the applicant in the form of accepting certain objective facts. Refugee status would be provided to those who can establish that they belong to the pre-established "beneficiary class", unless there is evidence to the contrary.

41. Adopting a prima facie approach in individual procedures has many advantages, not least those of fairness and efficiency. In terms of fairness, it allows like cases to be treated alike as far as decision-makers are required to accept certain objective facts relating to the risks present in the country of origin or former habitual residence. In terms of efficiency, such an approach would generally reduce the time needed to hear cases because individuals are required to establish only that he or she (i) is a national of the country of origin or, in the case of stateless asylum-seekers, a former habitual resident, (ii) belongs to the identified group, and/or (iii) the specified time period of the event/situation in question.[45]

[43] It may also be known as "expedited positive" processing, or similar nomenclature.
[44] This evidentiary benefit was referred to as an "evidentiary shortcut" by J.-F. Durieux, "The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination" (2008) 25(2) *Refuge* 151.
[45] UNHCR, "Note on Burden and Standard of Proof in Refugee Claims", 16 December 1998, available at: http://www.refworld.org/docid/3ae6b3338.html, para. 8.

Annex A: Model Decision to adopt a prima facie approach for a large-scale arrival

Declaration of prima facie recognition

IN EXERCISE of the powers conferred by [*domestic law*], the [*relevant authority*] declares as follows:

1. Taking effect as at [*insert date*], any person who fled from [*country of origin*] arriving in [*country of asylum*] on or after [*date*] due to [*circumstances/event*] is recognized as a refugee, pursuant to a prima facie basis.

2. Any person who arrived in [*country of asylum*] from [*country of origin or, in case of stateless asylum-seekers, country of former habitual residence*] prior to [*date*] and is unable or unwilling to return to [*country of origin or former habitual residence*] due to [*circumstances/event*] will also benefit from prima facie recognition as a refugee (recognition *sur place*).

3. Any such persons recognized as refugees pursuant to [*Article 1A(2) of the 1951 Convention/1967 Protocol and/or regional refugee definition*] and [*relevant national law*] shall enjoy the rights and benefits as refugees pursuant to [*the 1951 Convention/regional refugee instrument, as applicable*], and have duties to conform to national laws and regulations.

4. This decision to recognize refugees pursuant to a prima facie approach will be kept under periodic review and remains valid until, after due consideration of country of origin information and consultation with UNHCR, it is terminated by [*formal decision by relevant authority*].

[signature]

[stamp]

[date]

Annex B: Model Decision to adopt a prima facie approach for groups of similarly situated persons

Declaration on prima facie recognition for [description of the group]

IN EXERCISE of the powers conferred by [*domestic law*], the [*relevant authority*] declares as follows:

1. Taking effect as at [*insert date*], the following persons shall be recognized as refugees on a prima facie basis:

- [*insert description of the group*]

2. Any such persons recognized as refugees pursuant to [*Article 1A(2) of the 1951 Convention/1967 Protocol and/or regional refugee definition*] and [*relevant national law*] shall enjoy the rights and benefits as refugees pursuant to [*the 1951 Convention/regional refugee instrument, as applicable*], and have duties to conform to national laws and regulations.

3. Any decision to recognize refugees on a prima facie basis will be kept under periodic review and will remain valid until, after due consideration of country information and consultation with UNHCR, it is terminated by [*formal decision by relevant authority*].

[signature]

[stamp]

[date]

Annex C: Model decision to terminate a prima facie approach

Decision to end the prima facie recognition for [description]

IN EXERCISE of the powers conferred by [*domestic law*], the [*relevant authority*] declares as follows:

1. Decision *[insert decision number and date]* made by [*relevant authority*] to recognize refugees on a prima facie basis from [*name country of origin/circumstance/event*] is, after due consideration of the current situation in the country of origin and following consultation with UNHCR, terminated in accordance with [*applicable national law*], effective [*insert date*].

2. Nothing in this decision to terminate a prima facie approach removes the right of asylum-seekers to apply for asylum or other forms of international protection within the regular status determination procedures.

3. This decision does not in any way affect the refugee status of those who have been recognized under this approach [*date and number of decision declaring prima facie recognition*]. They continue to be recognized as refugees until their status is ceased in accordance with Article 1C of the 1951 Convention.

[signature]

[stamp]

[date]

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

Distr. GENERAL | HCR/GIP/16/12 | 02 December 2016 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 12:

Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions

UNHCR issues these Guidelines on International Protection pursuant to its mandate, as contained in, inter alia, the *Statute of the Office of the United Nations High Commissioner for Refugees*, namely paragraph 8(a), in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees*, Article II of its *1967 Protocol*, Article VIII(1) of the *1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, and Commitment II(e) of the *1984 Cartagena Declaration on Refugees*.

These Guidelines clarify paragraph 164 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* and otherwise complement the Handbook. They are to be read in conjunction with UNHCR's other Guidelines on International Protection.

These Guidelines, having benefited from broad consultations, 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.

UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* and the *Guidelines on International Protection* are available at: http://www.refworld.org/docid/4f33c8d92.html.

Calls for public consultation on future Guidelines on International Protection will be posted online at: http://www.unhcr.org/544f59896.html.

TABLE OF CONTENTS

I. INTRODUCTION

A. Scope and terminology

1. Situations of armed conflict and violence are today the major causes of refugee movements. The majority of these situations engender political, religious, ethnic, social, or gender persecution. The 1951 Convention relating to the Status of Refugees[1] and/or its 1967 Protocol[2] (1951 Convention) is directly applicable to civilians displaced by situations of armed conflict and violence.

2. The purpose of these Guidelines is to provide substantive and procedural guidance for assessing claims for refugee status involving situations of armed conflict and violence, and to promote consistency in the application of the 1951 Convention and regional refugee definitions.[3]

3. These Guidelines provide guidance in relation to the inclusion aspects of the refugee definitions in:

- Article 1A(2) of the 1951 Convention and its 1967 Protocol (Part II of these Guidelines),
- Article I(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[4] (1969 OAU Convention) (Part III of these Guidelines), and
- Conclusion III(3) of the 1984 Cartagena Declaration on Refugees (Cartagena Declaration) (Part IV of these Guidelines).[5]

The inclusion of the regional refugee definitions in these Guidelines concern their application to claims for refugee status related to situations of armed conflict and violence and is without prejudice to the application of these definitions to other situations.

4. These Guidelines do not address exclusion[6] or cessation,[7] issues related to the civilian and humanitarian character of asylum,[8] or claims related to military service,[9] for which other guidance is available. These Guidelines also do not deal with prima facie recognition of refugee status, which is covered by Guidelines on International Protection No. 11.[10] However, they do deal with the relationship between the 1951 Convention refugee definition and the regional refugee definitions, including which approaches can be used in applying the various definitions (paragraphs 86 to 88 of these Guidelines). The Guidelines focus on refugee status and do not address specifically subsidiary or complementary forms of international protection.[11]

5. For the purpose of these Guidelines, the phrase "situations of armed conflict and violence" refers to situations that are marked by a material level or spread of violence that affects the civilian popula-

[1] *Convention Relating to the Status of Refugees* (28 July 1951) 189 UNTS 137 (1951 Convention), http://www.refworld.org/docid/3be01b964.html.
[2] *Protocol Relating to the Status of Refugees* (31 January 1967) 606 UNTS 267 (1967 Protocol), http://www.refworld.org/docid/3ae6b3ae4.html.
[3] For further information on the background to and reasons for developing these Guidelines, UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, ("UNHCR Cape Town Summary Conclusions"), http://www.refworld.org/docid/50d32e5e2.html.
[4] *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45 (1969 OAU Convention),http://www.refworld.org/docid/3ae6b36018.html.
[5] *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, (Cartagena Declaration), http://www.refworld.org/docid/3ae6b36ec.html. The 1984 Cartagena Declaration is not a treaty within the meaning of Article 1(a) of the *1969 Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331.
[6] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, http://www.refworld.org/docid/3f5857684.html. See also, UNHCR, *Guidelines on the Application in Mass Influx Situations of the Exclusion Clauses of Article 1F of the 1951 Convention relating to the Status of Refugees*, 7 February 2006, http://www.refworld.org/docid/43f48c0b4.html.
[7] UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, http://www.refworld.org/docid/3e50de6b4.html.
[8] EXCOM Conclusion No. 94 (LIII), 2002, para. (c)(viii). UNHCR, *Operational Guidelines on Maintaining the Civilian and Humanitarian Character of Asylum*, September 2006, http://www.refworld.org/docid/452b9bca2.html.
[9] UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 3 December 2013, HCR/GIP/13/10/Corr. 1, ("UNHCR Military Service Guidelines"), http://www.refworld.org/docid/529ee33b4.html.
[10] UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, 24 June 2015, HCR/GIP/15/11, ("UNHCR Prima Facie Recognition Guidelines"), http://www.refworld.org/docid/555c335a4.html.
[11] Paragraph 9 of these Guidelines contains a reference to the relationship between the 1951 Convention and subsidiary protection status under European Union (EU) law.

tion. Such situations may involve violence between state and non-state actors, including organized gangs,[12] and violence between different groups in society. Further, such situations may include violence between two or more states, between states and non-state armed groups, or between various non-state armed groups. Any particular classification of an armed group, for example as criminal or political, is not necessary or determinative for the purpose of refugee status determination. Further, while in some circumstances situations of armed conflict and violence referred to in these Guidelines may be categorized as an international (IAC)[13] or a non-international (NIAC)[14] armed conflict within the meaning of international humanitarian law (IHL), such categorization is not required for the purpose of refugee status determination.[15] Many situations of armed conflict and violence are not designated as an armed conflict for IHL purposes, yet the means employed and their consequences may be just as violent or harmful. Other labels – such as a situation of generalized[16] or indiscriminate[17] violence – have also been used by decision-makers to describe situations of armed conflict and violence. Regardless of such characterizations, the method of assessing the claim to refugee status is the same – a full and inclusive application of the refugee definition to the situation at hand is required, as is set out in these Guidelines.

B. The relationship between the 1951 Convention/1967 Protocol refugee definition and the regional definitions, and EU subsidiary protection

6. Regional refugee instruments, such as the 1969 OAU Convention and the Cartagena Declaration, complement the 1951 Convention/1967 Protocol, which remain the universal and primary legal protection instruments for refugees.[18] Each regional instrument incorporates the 1951 Convention definition of a refugee and also elaborates so-called broader refugee criteria (referred to as "regional definitions"). A principal purpose of both the 1969 OAU Convention and the Cartagena Declaration is to provide refugee protection in specific humanitarian situations, including large-scale arrivals of people fleeing specific situations or circumstances in their country of origin.[19]

7. Certain factual scenarios may suggest the relevance and applicability of both the 1951 Convention definition and one of the regional definitions to an individual claim for refugee status and raise questions concerning which definition to apply (see paragraphs 86 to 88 of these Guidelines). In other situations, an individual may be a refugee under one of the regional definitions but not under the 1951 Convention definition, including where no causal link can be established between her or his fear of being persecuted and a Convention ground. In such circumstances, the regional definitions expand the range of individuals eligible to benefit from refugee status.

8. While the two regional definitions differ slightly in wording, the types of situations or circumstances they refer to and are intended to cover can be largely assimilated. Further, although the re-

[12] UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010 ("UNHCR Gangs Guidance Note"), http://www.refworld.org/docid/4bb21fa02.html.

[13] Common Article 2(1) of the 1949 Geneva Conventions, including the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, http://www.refworld.org/docid/3ae6b36d2.html and Article 1(4) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, ("Protocol I to the Geneva Conventions"), http://www.refworld.org/docid/3ae6b36b4.html. See also, International Committee of the Red Cross (ICRC), *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, March 2008, pp 1 to 3, http://www.refworld.org/docid/47e24eda2.html and International Committee of the Red Cross (ICRC), *International humanitarian law and the challenges of contemporary armed conflicts*, October 2016, 32IC/15/11, http://www.refworld.org/docid/58047a764.html.

[14] Common Article 3 of the 1949 Geneva Conventions, including the Fourth Geneva Convention, note 13 above, and Article 1 of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, ("Protocol II to the Geneva Conventions"), http://www.refworld.org/docid/3ae6b37f40.html. See also, International Committee of the Red Cross (ICRC) 2008, note 13 above, pp 3 to 5 and International Committee of the Red Cross (ICRC) 2016, note 13 above.

[15] By analogy, this is the position taken by the Court of Justice of the European Union (CJEU) with regard to the meaning of internal armed conflict in the EU Qualification Directive, in *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, C-285/12, European Union: Court of Justice of the European Union, 30 January 2014, para. 23, http://www.refworld.org/docid/52ea51f54.html. The CJEU considered that 'while [IHL] is designed, inter alia, to provide protection for civilian populations in a conflict zone by restricting the effects of wars on persons and property, it does not … provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties'.

[16] See paragraph 71 to 73 of these Guidelines.

[17] In the European Union, in the context of international protection, the term 'indiscriminate violence' is used in Article 15c of the EU Qualification Directive (recast). According to the CJEU indiscriminate violence 'implies that it may extend to people irrespective of their personal circumstances', in *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: Court of Justice of the European Union, 17 February 2009, para. 34, http://www.refworld.org/docid/499aaee52.html.

[18] EXCOM Conclusion No. 87 (L) 1999, para. (f) and EXCOM Conclusion No. 89 (LI) 2000. See also, 1969 OAU Convention, note 4 above, ninth preambular paragraph, referring to the 1951 Convention and the 1967 Protocol as the basic and universal instrument for the protection of refugees.

[19] UNHCR Prima Facie Recognition Guidelines, note 10 above, para. 5.

gional definitions are detailed, neither of the regional instruments was intended to provide an all-encompassing definition for every situation in which persons are compelled to leave their countries of origin and cross an international border. As far as rights are concerned, the 1951 Convention and the regional instruments each recognize a person as a refugee and provide for 1951 Convention rights to be applied.[20] Therefore, in most cases, the particular definition pursuant to which the person is recognized as a refugee will not be of material consequence. For the purposes of legal certainty, however, a proper interpretation of each definition is necessary, with a sequential approach to adjudication being recommended (see paragraphs 86 to 88 of these Guidelines). Decision-makers also need to bear in mind that the regional protection systems are intended to be implemented in a manner that complements and strengthens the 1951 Convention regime.[21]

EU subsidiary protection

9. The EU Qualification Directive (recast) provides for subsidiary protection that is complementary to refugee protection envisaged by the 1951 Convention/1967 Protocol.[22] It applies to those who do not qualify as refugees but face a real risk of suffering serious harm, inter alia, when there is a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.[23] Certain factual situations may give rise to an overlap between the criteria for refugee protection in accordance with the 1951 Convention and subsidiary protection. Because of the primacy of refugee protection and the limitation that subsidiary protection only applies to persons who do not qualify as refugees, claims related to situations of armed conflict and violence must first be assessed in accordance with the criteria for refugee protection. Only when the applicant does not qualify for refugee status, should the claim be assessed in accordance with the criteria for subsidiary protection.[24]

II. SUBSTANTIVE ANALYSIS OF ARTICLE 1A(2) OF THE 1951 CONVENTION

10. In accordance with the ordinary meaning to be given to the terms and in light of the context as well as the object and purpose of the 1951 Convention,[25] Article 1A(2) applies to persons fleeing situations of armed conflict and violence. In fact, the 1951 Convention definition of a refugee makes no distinction between refugees fleeing peacetime or "wartime" persecution. The analysis required under Article 1A(2) focusses on a well-founded fear of being persecuted for one or more of the Convention grounds. The phrase, 'persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol', contained in paragraph 164 of the UNHCR Handbook needs to be understood as limited to situations where there is no causal link between a person's well-founded fear of being persecuted and a 1951 Convention ground.

[20] The 1969 OAU Convention accepts the rights in the 1951 Convention as applicable to refugees recognized under the 1969 OAU Convention, see 1969 OAU Convention, note 4 above, tenth preambular paragraph and Article VIII(2). See also, M Sharpe, "The 1969 African Refugee Convention: Innovations, Misconceptions, And Omissions", *McGill Law Journal* (2012) 58, p 126 to 145. The Cartagena Declaration also accepts the rights in the 1951 Convention as applicable to refugees recognized in accordance with Conclusion III(3) and also expressly calls upon countries in the region to apply the 1969 American Convention on Human Rights for the treatment of refugees and for countries to acknowledge that reunification of families constitutes a fundamental principle, see Cartagena Declaration, note 5 above, Conclusion III(1), III(8) and III(13).

[21] EXCOM Conclusion No. 89 (LI), 2000 and EXCOM Conclusion No. 103 (LVI), 2005, including para. (b).

[22] European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337; December 2011, pp 9-26, preamble, recital 33, http://www.refworld.org/docid/4f197df02.html ("EU Qualification Directive (recast)"). The CJEU acknowledged the two distinct systems of protection in *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: Court of Justice of the European Union, 2 March 2010, para. 78, http://www.refworld.org/docid/4b8e6ea22.html. See also, EXCOM Conclusion No. 103 (LVI), 2005, paras. (b), (i) and (k).

[23] EU Qualification Directive (recast), note 22 above, Article 2(f), according to which a "person eligible for subsidiary protection" means 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) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'. Serious harm as defined in Article 15 of the EU Qualification Directive (recast) consists of: '(a) the 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.'

[24] *H. N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-604/12, European Union: Court of Justice of the European Union, 8 May 2014, para. 35, http://www.refworld.org/docid/5375e84f4.html. It would be at variance with the Common European Asylum System, the Treaty of the European Union and the 1951 Convention when subsidiary protection criteria would be applied first, because, for example, of the comparatively or perceived easier task of establishing the existence of violence and conflict through generally-available country of origin information than a well-founded fear of being persecuted for one or more Convention grounds.

[25] EXCOM Conclusion No. 103 (LVI), 2005, para. (c).

A. A well-founded fear of being persecuted

11. Threats to life or freedom and other serious human rights violations can constitute persecution for the purposes of the 1951 Convention refugee definition.[26] In addition, lesser forms of harm may cumulatively constitute persecution.[27] Discrimination will amount to persecution where the effect leads to a situation that is intolerable or substantially prejudicial to the person concerned.[28] Likewise, conduct amounting to serious violations of IHL can constitute persecution (see paragraphs 14 and 15 of these Guidelines).[29] What amounts to persecution will also depend on the circumstances of the individual, including the age, gender, opinions, health, feelings and psychological make-up of the applicant.[30]

12. The standards mentioned in paragraph 11 above should be applied no differently in the context of persons fleeing situations of armed conflict and violence. No higher level of severity or seriousness of the harm is required for the harm to amount to persecution in situations of armed conflict and violence compared to other situations, nor is it relevant or appropriate to assess whether applicants would be treated any worse than what may ordinarily be "expected" in situations of armed conflict and violence. The overall context of a situation of armed conflict and violence can compound the effect of harms on a person, giving rise in certain circumstances to harm that amounts to persecution. Protracted situations of armed conflict and violence, for example, can have serious deleterious effects on the physical and psychological health of applicants or their personal development, which would need to be evaluated, taking into account their character, background, position in society, age, gender, and other factors.[31]

13. Situations of armed conflict and violence frequently involve exposure to serious human rights violations or other serious harm amounting to persecution. Such persecution could include, but is not limited to, situations of genocide[32] and ethnic cleansing;[33] torture and other forms of inhuman or degrading treatment;[34] rape and other forms of sexual violence;[35] forced recruitment, including of children;[36] arbitrary arrest and detention; hostage taking and enforced or arbitrary disappearances; and a wide range of other forms of serious harm resulting from circumstances mentioned, for example, in paragraphs 18 and 19 of these Guidelines.

Relevance of international humanitarian and criminal law

14. Many of the aforementioned human rights violations and other serious harm may also constitute war crimes when committed in the context of and associated with an armed conflict within the meaning of IHL, and/or, crimes against humanity when part of a widespread or systematic attack against a civilian population.[37] Deportations and forcible transfer or displacement, sometimes in the form of ethnic cleansing or genocide, can also amount to war crimes when committed in the context of and associated with an armed conflict within the meaning of IHL, and, crimes against humanity when part of a widespread or systematic attack against a civilian population.[38]

---

[26] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 51, http://www.refworld.org/docid/4f33c8d92.html ("UNHCR Handbook").
[27] *Ibid*., para. 53.
[28] *Ibid*., para. 54.
[29] UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Summary Conclusions*, July 2011, paras. 13-21, ("UNHCR Arusha Summary Conclusions"), http://www.refworld.org/docid/4e1729d52.html.
30 UNHCR Handbook, note 26 above, paras. 52 and 55.
[31] *Ibid*., para. 43. UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para. 10, http://www.refworld.org/docid/4b2f4f6d2.html.
[32] *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948) 78 UNTS 277, http://www.refworld.org/docid/3ae6b3ac0.html. Article 6, *Rome Statute of the International Criminal Court* (1 July 2002) 2187 UNTS 3, ("Rome Statute ICC"), http://www.refworld.org/docid/3ae6b3a84.html.
[33] Ethnic cleansing is defined as 'a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas', UN Security Council, *Report of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992)*, 27 May 1994, s/1994/674, http://www.refworld.org/docid/582060704.html.
[34] See, inter alia, Article 7, *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171, (ICCPR), http://www.refworld.org/docid/3ae6b3aa0.html and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984) 1465 UNTS 85, http://www.refworld.org/docid/3ae6b3a94.html.
[35] See paragraphs 26 and 27 of these Guidelines.
[36] UNHCR Military Service Guidelines, note 9 above, paras. 35 and 37 to 41 ("unlawful child recruitment").
[37] Rome Statute ICC, note 32 above, Articles 7 and 8.
[38] UNHCR Arusha Summary Conclusions, note 29 above, paras. 9 and 10. Please note that in the context of an international armed conflict within the meaning of IHL, evacuations may take place for security or imperative military reasons in accordance with Article 49 of *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, http://www.refworld.org/docid/3ae6b3694.html. In the context of a non-international armed conflict, see Article 17 of Protocol II to the Geneva Conventions, note 14 above.

15. For the purposes of determining refugee status, the existence of violations of IHL can be informative but not determinative of whether conduct amounts to persecution within the meaning of the 1951 Convention. An applicant cannot be expected to establish that there has been the commission of either an IHL violation or an international crime in order for a decision-maker to reach a finding that a particular kind of harm constitutes persecution.[39] Nor are the criteria for the crime against humanity of persecution, as defined in international criminal law,[40] applicable to refugee status determination. International criminal courts and tribunals are primarily concerned with harm committed in the past for the purposes of criminal prosecution; their mandate does not cover the broader humanitarian purpose of providing international protection to civilians. Relying on IHL or international criminal law in their strictest sense to determine refugee status could undermine the international protection objectives of the 1951 Convention, and leave outside its protection persons who face serious threats to their life or freedom.[41] Moreover, even if certain conduct is not prohibited under IHL or international criminal law, it does not change the fact that for international refugee law purposes, such conduct may constitute persecution.[42]

Relevance of derogations under international human rights law

16. States parties to relevant human rights treaties may derogate from a limited number of human rights in times of public emergency threatening the life of the nation.[43] Where a lawful state of emergency exists, non-securement of derogable rights may not necessarily constitute persecution if the adopted measures are strictly required by the exigencies of the situation.[44] However, to determine a claim to refugee status by an applicant who has fled such a situation, the overall circumstances of the case need to be assessed. A state of emergency may be unlawful or involve measures that are not strictly required by the exigencies of the situation or involve measures affecting non-derogable rights.

Individual and group-based risks

17. In situations of armed conflict and violence, an applicant may be at risk of being singled out or targeted for persecution. Equally, in such situations, entire groups or populations may be at risk of persecution, leaving each member of the group at risk.[45] The fact that many or all members of particular communities are at risk does not undermine the validity of any particular individual's claim.[46] The test is whether an individual's fear of being persecuted is well-founded. At times, the impact of a situation of armed conflict and violence on an entire community, or on civilians more generally, strengthens rather than weakens the well-founded nature of the fear of being persecuted of a particular individual.[47]

---

[39] For example, the requirements of discriminatory intent and that the crime be part of a widespread or systematic attack against a civilian population in international criminal law are not required by international refugee law, see UNHCR Arusha Summary Conclusions, note 29 above, para. 15.
[40] Rome Statute ICC, note 32 above, Article 7(1)(h).
[41] UNHCR Arusha Summary Conclusions, note 29 above, para. 15.
[42] Such conduct may, for example, amount to serious human rights violations. International human rights law does not cease to apply during situations of armed conflict, save in part through the effect of provisions for derogation of the kind to be found, for example, in Article 4 ICCPR, note 34 above. See, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para. 15, http://www.refworld.org/docid/4b2913d62.html; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, para. 106, http://www.refworld.org/docid/414ad9a719.html; and UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 11, http://www.refworld.org/docid/478b26ae2.html. See also, *AF (Syria)*, [2012] NZIPT 800388, New Zealand: Immigration and Protection Tribunal, 20 December 2012, paras. 45 to 49, http://www.refworld.org/docid/54c127434.html.
[43] ICCPR, note 34 above, Article 4. Also, UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, ("HRC General Comment 29"), http://www.refworld.org/docid/453883fd1f.html, states may only derogate against specifically identified rights, and can only do so to the extent strictly required by the exigencies of the situation, must be consistent with other obligations under international law and may not be based on or result in discrimination. The measures adopted must be proportionate and of temporary duration, and the relevant human rights body needs to be notified of the derogation. At the regional level, derogation clauses are provided for in Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 15, (ECHR), http://www.refworld.org/docid/3ae6b3b04.html and the Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 27, (American Convention on Human Rights), http://www.refworld.org/docid/3ae6b36510.html.
[44] *MS (Coptic Christians) Egypt CG v Secretary of State for the Home Department*, [2013] UKUT 00611 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 3 December 2013, para. 120, http://www.refworld.org/docid/52a5b86e4.html.
[45] The risk of harm as a result of exceptionally high levels of violence to the general population was addressed by the European Court of Human Rights in, inter alia, *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011, http://www.refworld.org/docid/4e09d29d2.html and *L.M. and Others v. Russia*, Applications nos. 40081/14, 40088/14 and 40127/14, Council of Europe: European Court of Human Rights, 15 October 2015, http://www.refworld.org/docid/561f770f4.html.
[46] UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 20, http://www.refworld.org/docid/3b20a3914.html.
[47] According to the European Court of Human Rights: 'in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion', see: *F.G. v. Sweden*, Application no. 43611/11, Council of Europe: European Court of Human Rights, 23 March 2016, para. 126, http://www.refworld.org/docid/56fd485a4.html.

18. In situations of armed conflict and violence, whole communities may be affected by, and be at risk from, aerial bombardments, the use of cluster munitions, barrel bombs or chemical weapons, artillery or sniper fire, improvised explosive devices, landmines, car bombs or suicide bombers, or siege tactics, for example. The systematic denial of food and medical supplies, the cutting of water supplies and electricity, the destruction of property or the militarization or closure of hospitals and schools may also constitute serious human rights or IHL violations that affect whole communities.[48] Exposure to such actions can amount to persecution within the meaning of Article 1A(2) of the 1951 Convention, either independently or cumulatively.

19. Both the direct and indirect consequences of situations of armed conflict and violence may also constitute persecution, including long-term consequences of these situations, such as demolition of vital infrastructure, insecurity and abject poverty. More specifically, situations of armed conflict and violence may seriously affect the rule of law as well as state and societal structures and support systems. Situations of armed conflict and violence may lead to a full or partial collapse of government institutions and services, political institutions and the police and justice system. Vital services such as water, electricity and sanitation may be disrupted. Increased crime levels; looting and corruption; food insecurity, malnourishment or famine; constraints on access to education and health care; serious economic decline, destruction of livelihoods and poverty may also ensue. These consequences of situations of armed conflict and violence may be sufficiently serious, either independently or cumulatively, to constitute persecution and create a well-founded fear of being persecuted. This is also relevant where the risk of persecution emanates from non-state actors (see paragraphs 28 to 30 of these Guidelines).

20. Other factors to take into account include propaganda that may create or contribute to an oppressive atmosphere of intolerance vis-à-vis one or more groups, and promote or lead to a risk of persecution.[49]

Degree of risk

21. A person's fear of persecution is well-founded if it can be established, to a reasonable degree, that her or his continued stay in the country of origin has become, or would become, intolerable.[50] This does not require a probability calculus,[51] based, for example, on the number of people killed, injured or displaced, but requires an analysis of both quantitative and qualitative information assessed against the applicant's circumstances (see paragraphs 89 to 92 of these Guidelines on establishing the facts).

No differential risk

22. As mentioned in paragraph 17 of these Guidelines, a person may have a well-founded fear of persecution that is shared by many others, and of a similar or same degree.[52] An applicant fleeing a situation of armed conflict and violence is not required to establish a risk of harm over and above that of others similarly situated (sometimes called a "differential test").[53] No higher level of risk is

[48] Relevant criteria to assess the intensity of a conflict were formulated by the United Kingdom, Asylum and Immigration Tribunal / Immigration Appellate Authority, in: *AM & AM (Armed Conflict: Risk Categories) Somalia v. Secretary of State for the Home Department*, [2008] UKAIT 00091, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 27 January 2009, http://www.refworld.org/docid/4934f7542.html and repeated by the European Court of Human Rights in *Sufi and Elmi v. United Kingdom*, note 45 above, para. 241 and *L.M. and Others v. Russia*, note 45 above, para. 121.

[49] For example, in Rwanda in 1994, Tutsi women were portrayed in Hutu controlled media outlets as 'seductive agents of the enemy', thereby 'articulat[ing] a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them', see *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Judgement and Sentence)*, ICTR-99-52-T, International Criminal Tribunal for Rwanda (ICTR), 3 December 2003, para. 1079, http://www.refworld.org/docid/404468bc2.html.

[50] UNHCR Handbook, note 26 above, para. 42.

[51] *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, http://www.refworld.org/docid/3ae6b68d10.html, in dismissing a calculus Stevens J. considered: 'The High Commissioner's analysis of the United Nations' standard is consistent with our own examination of the origins of the Protocol's definition, as well as the conclusions of many scholars who have studied the matter. There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening.'

[52] *Surajnarain and Others v. Minister of Citizenship and Immigration*, 2008 FC 1165, Canada: Federal Court, 16 October 2008, para. 17, http://www.refworld.org/docid/497f3bdc2.html.

[53] *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55, Australia: High Court, 26 October 2000, http://www.refworld.org/docid/3deb737f7.html, paras. 66 and 70. The 'differential test' test was considered by Lord Lloyd of Berwick in *R v. Secretary of State for the Home Department, Ex parte Adan*, CO/872/98, United Kingdom: House of Lords (Judicial Committee), 2 April 1998, http://www.refworld.org/docid/3ae6b6c914.html. See also *AM & AM (Armed Conflict: Risk Categories) Somalia v. Secretary of State for the Home Department*, note 48 above, para. 72.

required to establish a well-founded fear of persecution in situations of armed conflict and violence compared to other situations.

23. Further, some courts have referred to a "differential risk" in order to emphasize the requirement for a causal link between the risk (i.e. well-founded fear of persecution) and the reasons for persecution (i.e. one or more Convention grounds). However, such phrasing can lead to conflation of the risk element with the causal link requirement – addressed in paragraphs 32 and 33 of these Guidelines – and is not in keeping with a proper application of the 1951 Convention definition of a refugee.[54]

Forward-looking assessment of risk

24. The 1951 Convention protects those who – at the time of the decision – are at risk of persecution in their country of origin, regardless of whether they have already suffered persecution. A decision on whether a person has a well-founded fear of being persecuted requires a forward-looking assessment of all relevant facts of the case (see paragraphs 89 to 92 of these Guidelines). Absent a relevant change of circumstances, persons having suffered persecution in the past would be assumed to be at continued risk of persecution.[55]

25. When assessing the risk, it is important to take into account the fluctuating character of many contemporary situations of armed conflict and violence. Changing levels of violence or control over territories and populations are common in situations of armed conflict and violence. For example, even if the level of violence at the time of decision-making is relatively low, over time the situation of armed conflict and violence may change, increasing the degree of risk establishing a well-founded fear. There may be reasons for the lower level of violence at a particular moment in time, such as when the parties are regrouping or re-strategizing, or a temporary ceasefire has been agreed. Similarly, even if violence has not yet broken out in a particular part of the country, it may be foreseeable that the violence will spread there, taking into account the overall context and history of the situation of armed conflict and violence, the trajectory and mapping of the violence, the power dynamics at play and other conditions in the applicant's country of origin. The effects of past violence may also still rise to the level of persecution, despite a temporary suspension of hostilities, and need to be assessed carefully. In addition, the implementation of peace and demobilization agreements may lead to new armed actors filling vacuums of power, or to the consolidation of groups composed of former members who have not disarmed and reintegrated into society. This also requires a detailed analysis that constantly evolves in response to local developments in the country of origin.

Sexual and gender-related persecution

26. Sexual and gender-based violence, including rape, human trafficking, sexual slavery and conjugal slavery/forced marriage, are common forms of persecution in many situations of armed conflict and violence.[56] Sexual and gender-based violence may be used as an unlawful and criminal tactic, strategy or policy during situations of armed conflict and violence, in order to overwhelm and weaken the adversary directly or indirectly, by victimizing women and girls and/or men and boys.[57] Irrespective of the motivation of the individual perpetrator, sexual and gender-based violence may form part of a deliberate military or political strategy to debase, humiliate, terrorize or destroy civilian populations

[54] *Refugee Appeal No. 71462/99, Tamil and a Citizen of the Democratic Socialist Republic of Sri Lanka v. Refugee Status Branch of the New Zealand Immigration Service*, 71462/99, New Zealand: Refugee Status Appeals Authority, 27 September 1999, http://www.refworld.org/docid/3ae6b73cc.html.
[55] UNHCR Handbook, note 26 above, para. 45.
[56] UNHCR, *Guidelines on International Protection No. 1: 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*, 7 May 2002, HCR/GIP/02/01, para. 9, ("UNHCR Gender-Persecution Guidelines"), http://www.refworld.org/docid/3d36f1c64.html. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, para. 20, ("UNHCR Sexual-Orientation and/or Gender Identity Guidelines"), http://www.refworld.org/docid/50348afc2.html. Rape, for example, was considered a serious human rights violation constituting persecution in: *SS (Adan – Sexual Violence – UNHCR Letter) Burundi v. Secretary of State for the Home Department*, CG [2004] UKIAT 00290, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 29 October 2004, para. 16, http://www.refworld.org/docid/46836b180.html. UN Secretary-General (UNSG), *Sexual violence in conflict: report of the Secretary-General*, 14 March 2013, A/67/792-S/2013/149, ("UNSG Report sexual violence in conflict"), http://www.refworld.org/docid/5167bd0f4.html.
[57] See, for example, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment)*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009, para. 1347, http://www.refworld.org/docid/49b102762.html. *In re B (FC) (Appellant) (2002). Regina v. Special Adjudicator, Ex parte Hoxha (FC)*, [2005] UKHL 19, United Kingdom: House of Lords (Judicial Committee), 10 March 2005, para. 30, http://www.refworld.org/docid/423ec7784.html. Security Council, *Security Council resolution 2106 (2013) [on sexual violence in armed conflict]*, 24 June 2013, S/RES/2106 (2013), para. 1, http://www.refworld.org/docid/51d6b5e64.html.

in pursuit of broader goals, or rooted in gender-related and other forms of discrimination, thus linking it to one or more of the Convention grounds.[58]

27. For many victims of sexual and gender-based violence, torture and other acts of bodily harm and psychological trauma, the harm may continue long after the initial violent act was committed and the situation of armed conflict and violence has ended. They may be at risk of repeated harm[59] and/or the psychological consequences of their experiences may themselves amount to persecution,[60] in particular when people have suffered from particular egregious harm that makes return to the country of origin intolerable even if there is no future risk of further harm.[61]

Agents of persecution

28. In a situation of armed conflict and violence, persecution may emanate from state or non-state actors, and from one or more sides involved in the situation of armed conflict and violence.[62] Refugee status can be warranted in the case of persons at risk of harm from actors on both or all sides of these situations. Agents of persecution may include the state's armed forces, its law enforcement agents or security forces or other state organs or groups, and individuals for whom the state is responsible or whose conduct can be attributed to the state.[63] The state may empower, direct, control, support or tolerate the activities of so-called non-state actors, such that their actions can in some instances be attributable to the state.[64] Agents of persecution also include non-state actors such as paramilitary groups, militias, insurgents, bandits, pirates, criminal gangs or organizations,[65] terrorist organizations, private military or security companies, or other groups or individuals engaging in situations of armed conflict and violence. An analysis of these actors should take into account that their character may shift from one of these categories to another or defy categorization altogether. Non-state actors may also include neighbours, family members and other individuals.

29. In many situations of armed conflict and violence, the division between state and non-state actors is not always clear, especially as power shifts, situations overlap and alliances change, or where non-state actors penetrate or corrupt state institutions and/or law enforcement agencies or the state's armed forces.[66] The uncertainty during an attempted, ongoing or successful *coup d'état*, for example, can also blur such distinctions. However, it is not crucial to determine precisely from whom the feared harm may emanate; as long as a threat is established, it will be sufficient for determining a well-founded fear of persecution.

30. In cases involving non-state actors or unidentified actors, it is necessary to review the extent to which the state is able and/or willing to provide protection against persecution.[67] The particularities of the situation of armed conflict and violence will be relevant, since the state may be prevented from extending protection to affected populations, for example in cases where it has lost control over its territory and population or where such control is fluid or uncertain. In such situations, the state may also be unwilling to extend protection.

---

[58] UNHCR Cape Town Summary Conclusions, note 3 above, paras. 25 and 26. UNSG Report sexual violence in conflict, note 56 above, para. 5.
[59] *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009), United States Board of Immigration Appeals, 4 June 2009, http://www.refworld.org/docid/4a293b4a2.html. *Bah v. Y-, Diallo v. Department of Homeland Security, Diallo v. Department of Homeland Security*, 529 F.3d 99, 103 (2d Cir. 2008), United States Court of Appeals for the Second Circuit, 11 June 2008, http://www.refworld.org/docid/48d8a32c2.html.
[60] *In re B (FC) (Appellant) (2002). Regina v. Special Adjudicator, Ex parte Hoxha (FC)*, note 57 above, para. 36, in which Baroness Hale of Richmond considered: '[t]o suffer the insult and indignity of being regarded by one's own community as 'dirty like contaminated' because one has suffered the gross ill-treatment of a particularly brutal and dehumanising rape … is the sort of cumulative denial of human dignity which … is quite capable of amounting to persecution.'
[61] *In re Y-T-L-*, 23 I&N Dec. 601 (BIA 2003), United States Board of Immigration Appeals, 22 May 2003, p 607, http://www.refworld.org/docid/40449fa94.html. *Khadija Mohammed v. Alberto R. Gonzales, Attorney General; Khadija Ahmed Mohamed v. Alberto R. Gonzales, Attorney General*, A79-257-632; 03-72265; 03-70803, United States Court of Appeals for the Ninth Circuit, 10 March 2005, pp 3085 to 3086, http://www.refworld.org/docid/423811c04.html. UNHCR, *UNHCR intervention before the House of Lords in the case of Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, 14 June 2006, para. 24(2), http://www.refworld.org/docid/45631a0f4.html.
[62] UNHCR Handbook, note 26 above, para. 65.
[63] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001 Vol.II (Part Two), http://www.refworld.org/docid/3ddb8f804.html. See also: UNGA Res. 56/83, 12 December 2001; UNGA Res. 59/35, 2 December 2004; and UNGA Res. 71/133, 13 December 2016. In accordance with Article 10 of the aforementioned Articles, the conduct of an insurrectional movement or other movement shall be considered an act of state under international law, when the movement becomes the new government or when it succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration.
[64] *Ibid*., Articles 8 and 9. UNHCR Military Service Guidelines, note 9 above, para. 42.
[65] UNHCR Gangs Guidance Note, note 12 above, para. 4.
[66] See, for example, UNHCR, *Country of Origin Series: Guatemala: Background Paper*, October 2013, RBA/COI/GUA/13/01, p. 11, http://www.refworld.org/docid/53832fe84.html.
[67] UNHCR Military Service Guidelines, note 9 above, para. 43.

Refugees sur place

31. A well-founded fear of persecution may arise after an applicant has left her or his country of origin, owing to circumstances arising in the country of origin during the applicant's absence, and/or as a result of her or his own actions after s/he has left the country of origin, making the applicant a refugee *sur place*.[68] In the context of claims for refugee status related to situations of armed conflict and violence, a person may become a refugee *sur place* owing, for example, to the outbreak of a situation of armed conflict and violence, the intensification of a pre-existing but latent situation of armed conflict and violence in her or his country of origin,[69] or because she or he has expressed objections or taken a stance against the situation of armed conflict and violence.

B. 'For reasons of' one or more Convention grounds

'For reasons of' (causal link)

32. The intent or motive of the persecutor can be a relevant factor in establishing the causal link between the fear of persecution and a 1951 Convention ground. However, the intent or motive of the persecutor is not necessary or decisive, not least because it is often difficult to establish,[70] in particular in situations of armed conflict and violence. A causal link may also be established by the strategies, tactics or means and methods of warfare of the persecutor, by the inability or unwillingness of the state to provide protection, or by the effect(s) of the situation of armed conflict and violence. The question to guide decision-makers is: do the reasons for the person's feared predicament, within the overall context of the country, relate to a Convention ground?[71]

33. Situations of armed conflict and violence may be rooted in, motivated or driven by, and/or conducted along lines of race, ethnicity, religion, politics, gender or social group divides, or may impact people based on these factors. In fact, what may appear to be indiscriminate conduct (i.e. conduct whereby the persecutor is not seeking to target particular individuals),[72] may in reality be aimed at whole communities or areas whose inhabitants are actual or perceived supporters of one of the sides in the situation of armed conflict and violence. Rarely are modern-day situations of armed conflict and violence characterised by violence that is not in one way or another aimed at particular populations, or which does not have a disproportionate effect on a particular population, establishing a causal link with one or more of the Convention grounds. Who belongs to or is considered or perceived to be affiliated with, a particular side in a situation of armed conflict and violence, is often interpreted broadly by actors during such situations – and may include a range of people, including family members of fighters as well as all those who belong to the same religious or ethnic groups or reside in particular neighbourhoods, villages or towns. A Convention ground is regularly imputed to groups of people based on their family, community, geographic or other links.[73]

Convention grounds

34. The reasons for fearing persecution may be multiple. One or more Convention grounds may be relevant. The grounds are not mutually exclusive and frequently overlap.[74] A Convention ground need only be a contributing factor; it need not be the dominant or the sole cause of the fear of persecution.

35. Situations of armed conflict and violence are regularly rooted in, or driven by, a variety of motives, or have consequences that affect various groups. Situations of armed conflict and violence regularly

[68] UNHCR Handbook, note 26 above, para. 94 to 96.
[69] For example, Mozambicans finding themselves in South Africa between 1980 and 1985 could be considered as refugees *sur place*, see *South Africa: Passport Control Instruction No. 20 of 1994 – Guidelines for Refugees Status Determination of Mozambicans in South Africa*, 1994, para. 5 [of the Guidelines] http://www.refworld.org/docid/3ae6b5082c.html.
[70] UNHCR Handbook, note 26 above, para. 66. UNHCR Military Service Guidelines, note 9 above, para. 48.
[71] *Refugee Appeal No. 72635/01*, 72635/01, New Zealand: Refugee Status Appeals Authority, 6 September 2002, para. 168, http://www.refworld.org/docid/402a6ae14.html. J C Hathaway and M Foster, *The Law of Refugee Status* (Cambridge University Press, 2014), p. 376 to 379.
[72] *Elgafaji v. Staatssecretaris van Justitie*, note 17 above, para. 34.
[73] UNHCR, *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV*, November 2015, para. 17, http://www.refworld.org/docid/5641ef894.html. *Arrest nr. 122 129, 122 129, Belgium: Conseil du Contentieux des Etrangers*, 4 April 2014, (in Dutch; cover sheet in English available), http://www.refworld.org/docid/582068524.html.
[74] UNHCR Handbook, note 26 above, para. 67.

involve a mix of ethnic, religious, societal and political dimensions, with the parties involved operating along ethnic, religious or social lines and pursuing – or perceived to be pursuing – political and/or religious goals.

36. Even where the motives and drivers behind violent or otherwise harmful conduct resulting from, or prevalent in, situations of armed conflict and violence may, at first sight, appear to be criminal or profit-driven, they are regularly interconnected with Convention grounds.[75] For instance, armed groups may set up criminal enterprises to finance an ethnic, religious or political conflict, or the violence of gangs or other armed groups, including for example drug cartels, which is primarily profit-driven, may also have the aim of consolidating or expanding the group's powerbase in society, potentially characterizing the violence as politically motivated.[76] The targeting of individuals, as well as whole areas and populations, often has ethnic, religious and/or political purposes or links.

37. Expressing objections or taking a neutral or indifferent stance to the strategies, tactics or conduct of parties in situations of armed conflict and violence, or refusing to join, support, financially contribute to, take sides or otherwise conform to the norms and customs of the parties involved in the situation may – in the eyes of the persecutor – be considered critical of the political goals of the persecutor, or as deviating from the persecutor's religious or societal norms or practices.[77] Such objections, stances or behaviours may indicate or create the perception in the eyes of the persecutor that the person holds a political opinion or religious (or non-)belief, having an affiliation with or belonging to an ethnic or social group.

38. Persons pursuing certain trades, professions or occupations may be at risk for reasons of, for example, their real or perceived political opinion or religious (or non-)belief.[78] Their activities, role or status within society that follows from, or is associated with, their trade, profession or occupation, may be regarded as a real or perceived opinion on a matter in which the machinery of state, government, society or policy may be engaged,[79] in particular, in a country in conflict. For instance, journalists and other media professionals, and human rights and rule of law defenders, may report factually or critically on the conduct of certain actors, medical professionals treating opposition fighters may be seen as supporting the opposition, humanitarian workers continuing with their humanitarian work may be perceived as assisting the "enemy",[80] and religious leaders may side, or be seen to be siding, with one of the parties.

39. Claims involving gender-related persecution may be analysed under any of the Convention grounds, i.e. in relation to real or perceived political opinion, ethnicity[81] and/or religion or social group (gender).[82]

[75] *Refugee Appeal No. 76289*, No. 76289, New Zealand: Refugee Status Appeals Authority, 8 May 2009, para. 43, http://www.refworld.org/docid/4a2e2a5e2.html. *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, 00/TH/02257, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 24 November 2000, paras. 43, 44, 50, 51 and 73(XI), http://www.refworld.org/docid/40487df64.html. *Osorio v. Immigration and Naturalization Service*, 18 F.3d 1017: 1994 U.S. App. LEXIS 4170, United States Court of Appeals for the Second Circuit, 7 March 1994, http://www.refworld.org/docid/3ae6b70e7.html.

[76] See, for example, *NS (Social Group – Women – Forced Marriage) Afghanistan v. Secretary of State for the Home Department*, CG [2004] UKIAT 00328, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 30 December 2004, para. 69, http://www.refworld.org/docid/42c928984.html; and *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, note 75 above, para. 40.

[77] *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, para. 42, http://www.refworld.org/docid/500fdacb2.html. UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, 2011/0011, para. 10, http://www.refworld.org/docid/4fc369022.html. *Souad Noune v Secretary of State for the Home Department*, C 2000/2669, United Kingdom: Court of Appeal (England and Wales), 6 December 2000, Schiemann LJ, paras. 8(5) and 28(5), http://www.refworld.org/docid/558bcbad4.html.

[78] M Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, August 2012, UNHCR PPLA/2012/02, chapter 5.7.3, http://www.refworld.org/docid/4f7d94722.html. *Emilia Del Socorro Gutierrez Gomez v. Secretary of State for the Home Department*, note 75 above, para. 46.

[79] G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), p. 87. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, http://www.refworld.org/docid/3ae6b673c.html.

[80] UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, 31 May 2012, HCR/EG/IRQ/12/03, page 20 and 31, http://www.refworld.org/docid/4fc77d522.html.

[81] Real or perceived ethnicity is covered by the Convention grounds race and/or nationality, see, for example, UNHCR Handbook, note 26 above, paras. 68 and 74 and UNHCR Gender-Persecution Guidelines, note 56 above, paras. 24 (race) and 27 (nationality).

[82] UNHCR Gender-Persecution Guidelines, note 56 above, paras. 25 (religion), 28 to 31 (membership of a particular social group), and 32 to 34 (political opinion). UNHCR Sexual Orientation and/or Gender Identity Guidelines, note 56 above, paras. 42 and 43 (religion), 44 to 49 (membership of a particular social group), and 50 (political opinion).

C. Internal flight or relocation alternative

40. The relevance of an internal flight or relocation alternative in situations of armed conflict and violence needs to be carefully assessed. Situations of armed conflict and violence are often characterized by widespread fighting, are frequently fluid, with changing frontlines and/or escalations in violence, and often involve a variety of state and non-state actors, who may not be easily identifiable, operating in diverse geographical areas. Further, such situations often seriously affect state and societal structures and support systems (see paragraph 19 of these Guidelines) creating hardships for the civilian population. The humanitarian situation of civilian populations living in areas affected by situations of armed conflict and violence is often dire, including as a result of blocking supply routes and restrictions on humanitarian aid and freedom of movement. Considering these factors, in many situations of armed conflict and violence, it may neither be relevant nor reasonable to apply an internal flight or relocation alternative.

41. Only when the situation of armed conflict and violence and its impact is geographically limited and confined to a specific part of the country would it be relevant to assess whether an internal flight or relocation alternative exists.[83] In such situations, a careful examination needs to be made of the practical, legal and safe accessibility of the identified alternative area, in particular for the person concerned, and the ability of the state or other entity to provide protection that is effective. Protection must be provided by an organized and stable authority exercising full control over the territory and population in question.[84] It would be inappropriate to equate the exercise of a certain administrative authority and control over territory by international organisations or non-state actors, with national protection provided by a state.[85] Such control is often transitional or temporary and without the range of functions required of a state, including the ability to readmit nationals to the territory or to exercise other basic functions of government. Specifically, non-state entities and bodies do not have the attributes of a state. Their ability to enforce the law is limited. Further, in determining whether the internal flight or relocation alternative is reasonable, a careful assessment needs to be made of the ability of the person to live in safety and security without undue hardship, and for her or his human rights to be ensured. In addition, and in particular, the likely spread of the situation of armed conflict and violence into new areas needs to be taken into account (see paragraphs 25 and 40 of these Guidelines).[86] It is not reasonable to expect someone to relocate to a zone of active armed conflict and violence.

42. The presence of internally displaced persons, including those who are receiving international assistance, in one part of the country, is not necessarily evidence of the reasonableness of a proposed internal flight or relocation alternative in that part of the country.[87] Internally displaced persons often do not enjoy basic rights[88] and may face economic destitution or existence below an adequate level of subsistence, which would be evidence of the unreasonableness of the proposed internal flight or relocation alternative.[89] It is also necessary to consider the capacity of local authorities to provide protection against harm, as well as whether human rights, particularly non-derogable rights, are respected.[90] Further, in some situations, internal displacement may be the result of ethnic cleansing policies, or similar, in violation of the prohibitions on forcible transfer and arbitrary displacement under IHL in the context of an armed conflict. In such circumstances, an internal flight or relocation alternative should not be presumed to exist.[91]

43. Equally, "protected zones"[92] or "safe zones"[93] and other similar areas should not necessarily be considered a relevant or reasonable internal flight or relocation alternative. Under IHL, protected

[83] UNHCR Handbook, note 26 above, para. 91. For UNHCR guidance on a proper assessment of an internal flight or relocation alternative, see UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, ("UNHCR IFA Guidelines"), http://www.refworld.org/docid/3f2791a44.html.
[84] UNHCR IFA Guidelines, note 83 above, para. 17.
[85] *Ibid*., paras. 16 and 17.
[86] *Ibid*., paras. 17 and 27 to 30.
[87] *Ibid*., para. 31.
[88] *Ibid*., para. 32.
[89] *Ibid*., para. 29. See also, *Sufi and Elmi v. United Kingdom*, note 45 above, para. 291.
[90] UNHCR IFA Guidelines, note 83 above, para. 28.
[91] *Ibid*., para. 31.
[92] The term "protected zones" is the overarching term used by the International Committee of the Red Cross (ICRC) for all relevant zones stipulated in the 1949 Geneva Conventions and Additional Protocol I, and see Rules 35 to 37 of customary IHL, in: J –M Henkaerts and L Doswald-Beck (eds.), *Customary International Law, Volume I: Rules* (Cambridge University Press, 2005), pp. 119-126. The legal bases for establishing protected zones in the context of an armed conflict within the meaning of IHL can be found in Article 23 of the First Geneva Convention, note 38 above, Article 14 (hospital and safety zones and localities) and 15 (neutralized zones) of the Fourth Geneva Convention, note 13 above, and Article 59 (non-defended localities) and 60 (demilitarized zones) of Protocol I to the Geneva Convention, note 13 above.
[93] In a number of instances, the United Nations Security Council has called upon the creation of "safe zones", see, for example, UNSC Res. 787 (1992), 16 November 1992; UNSC Res. 819 (1993), 16 April 1993; UNSC Res. 824 (1993), 6 May 1993; UNSC Res. 918 (1994), 17 May 1994; and UNSC Res. 929 (1994), 22 June 1994.

zones agreed upon by the concerned belligerents are set up as measures to protect the civilian population and other categories of protected persons (for example, the wounded and sick, including wounded and sick combatants/fighters) from the effects of armed conflict. Similarly, "safe zones" and other similar areas established on the basis of United Nations Security Council resolutions, seek to prevent certain areas and persons from falling into enemy hands, even if their establishment and implementation differs from the "protected zones" within the meaning of IHL. Despite the overall objective of these zones and areas, the safety of the people living in such zones and areas may be compromised, as a result of sieges, or attacks against the zone or area and the population therein.

III. SUBSTANTIVE ANALYSIS OF ARTICLE I(2) OF THE 1969 OAU CONVENTION

44. Article I(1) of the 1969 OAU Convention replicates the 1951 Convention refugee definition contained in Article 1A(2) of the 1951 Convention, as amended by the 1967 Protocol,[94] while Article I(2) offers refugee protection to:

> 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

Preliminary considerations to guide interpretation

45. In applying the 1969 OAU Convention definition, the primacy of the 1951 Convention needs to be borne in mind, given its status as the 'basic and universal instrument' for the protection of refugees.[95] Following the adoption of the 1967 Protocol, which made the 1951 Convention the global instrument for the protection of refugees, the 1969 OAU Convention sought in large part to address the specific challenges facing African countries in responding to refugee crises on the continent.

46. The 1969 OAU Convention is a widely ratified, legally binding instrument,[96] which is protection- and humanitarian-oriented[97] and reflects trans-African solidarity.[98] It specifically reaffirms the importance of the institution of asylum,[99] the principle of *non-refoulement*[100] and non-discrimination,[101] the duties of refugees,[102] and the search for durable solutions, including respect for the voluntary character of repatriation.[103] Cooperation with the African Union and UNHCR is also emphasized,[104] and it calls on all OAU (now African Union) Member States to accede to the 1951 Convention.[105]

---

[94] Contrary to Article 1A(2) of the 1951 Convention, Article I(1) of the 1969 OAU Convention does not include the temporal limitation of having a well-founded fear as a result of 'events occurring before 1 January 1951'; a limitation later removed with the adoption of the 1967 Protocol, Article I(2).
[95] 1969 OAU Convention, note 4 above, ninth preambular paragraph.
[96] To date, the 1969 OAU Convention has been ratified by 46 of the African Union's (AU) 54 Member States. Djibouti, Eritrea, Madagascar, Mauritius, Namibia, Sao Tomé & Principe and Somalia have signed but not ratified or acceded to the 1969 OAU Convention. Only the Saharawi Arab Democratic Republic (SADR) has neither signed nor ratified or acceded to the 1969 OAU Convention. Morocco is a party to the 1969 OAU Convention, but not a Member State of the African Union.
[97] 1969 OAU Convention, note 4 above, second preambular paragraph.
[98] *Ibid*., eighth preambular paragraph.
[99] *Ibid*., Article II. A right to seek and obtain asylum is recognized in Article 12(3) of the African Charter on Human and Peoples' Rights, Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), http://www.refworld.org/docid/3ae6b3630.html.
[100] 1969 OAU Convention, note 4 above, Article II(3).
[101] *Ibid*., Article IV.
[102] *Ibid*., Article III.
[103] *Ibid*., Article II(5), referring to a right to reside, to be granted temporary residence, and resettlement. The right to voluntary repatriation is regulated by Article V of the 1969 OAU Convention.
[104] *Ibid*., eleventh preambular paragraph and Articles VII and VIII.
[105] To date, of the African Union's 54 Member States only the Comoros, Eritrea, Libya, Mauritius and South Sudan have neither signed nor ratified the 1951 Convention or its 1967 Protocol. Madagascar is a party to the 1951 Convention but not to the 1967 Protocol. Madagascar and the Republic of Congo continue to recognise the 1951 Convention's geographical limitation. Finally, Cabo Verde is party to the 1967 Protocol but not the 1951 Convention.

Scope of the 1969 OAU Convention definition

47. In accordance with the ordinary meaning of the terms, the 1969 OAU Convention definition applies to all persons within the jurisdiction of a State Party and is not limited to persons whose country of origin or nationality is in Africa.

48. Article I(2) of the 1969 OAU Convention is the first refugee definition of its kind to steer away from persecutory conduct towards more generalized or so-called "objectively" identifiable situations. The 1969 OAU definition acknowledges that the compulsion for persons to leave their country may occur not only as a result of the conduct by state or non-state actors in the refugee's country of origin, but also as a result of that government's loss of authority or control due to external aggression, occupation, foreign domination or events seriously disturbing public order.[106] The 1969 OAU definition focuses on situations that compel people to leave their countries in search of safety and sanctuary.

B. Elements of the 1969 OAU Convention definition

49. Article I(2) of the 1969 OAU Convention protects as refugees persons who (i) are outside their country of origin,[107] (ii) having been compelled to leave their place of habitual residence, (iii) because one or more of the situations listed in the definition exists in their country of origin or nationality. These elements of the 1969 OAU Convention definition are explained below and need to be considered as part of a holistic assessment of a claim for refugee status.

Compelled to leave one's place of habitual residence

50. By including the language of "compulsion" in the definition, Article I(2) of the 1969 OAU Convention emphasizes the seriousness of the situation. The verb "to compel" is understood to mean 'to urge irresistibly, to constrain, oblige, force'.[108] Reference to one's 'place of habitual residence' must be understood as part of the compulsion to leave and seek refuge outside one's country of origin or nationality, i.e. the situation must have an impact on the person's place of habitual residence. The 'place of habitual residence' element has no other or separate legal effect. Thus, when the situation in question is sufficiently serious that it is objectively reasonable for a person to leave her or his place of habitual residence and seek refuge in another country, she or he needs to be protected.[109]

51. Article I(2) of the 1969 OAU Convention does not require a personalized or discriminatory threat or risk of harm.[110] Whole groups of persons or an entire population may be affected by the situation and be compelled to leave their places of habitual residence owing to the situation in question. As Article I(2) emphasizes the assessment of the seriousness of the situation in question more than motives for flight or the risk of harm, decision-makers should assess whether flight from the country of origin or nationality is objectively reasonable.

Refugees sur place

52. *Sur place* claims are accepted under the 1969 OAU Convention consistent with the interpretation of the 1951 Convention (see paragraph 31 of these Guidelines).

---

[106] J.C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991), 17.

[107] The phrase 'country of origin or nationality' refers to the person's country of nationality, or in the case of stateless persons, the reference to 'country of origin' can be assimilated with 'country of former habitual residence' in Article 1A(2) of the 1951 Convention. To benefit from the 1969 OAU Convention, an applicant needs to be outside her or his country of origin or nationality.

[108] 'compel, *v*', *The Oxford English Dictionary* 2nd edition, OED online, 2015, Oxford University Press.

[109] *Radjabu v. The Chairperson of the Standing Committee for Refugee Affairs*, 8830/2010, South Africa: High Court, 4 September 2014, para. 6, http://www.refworld.org/docid/540874f94.html. The criterion of 'objectively reasonable to leave' speaks to the ordinary meaning of the word 'compulsion'. According to the Court, compulsion rather than volition is the predominant factor, whereby determining whether a person qualifies for refugee status under the regional definition requires an assessment of the existence of objectively ascertainable circumstances in the person's country of origin corresponding with any of those stipulated in the definition and whether their effect on the person concerned has been such as to force him or her to leave the place where s/he ordinarily resided.

[110] Article I(2) of the 1969 OAU Convention is not ignorant of a risk of harm as is evident from the phrase 'is compelled to leave' in the definition read in conjunction with the principle of *non-refoulement* laid down in Article II(3) of the 1969 OAU Convention, protecting people from being returned to a territory where their life, physical integrity or liberty would be threatened. However, a threat or risk of harm is not a necessary requirement to be granted protection under the regional definition.

Situations compelling flight

53. The situations mentioned in Article I(2) of the 1969 OAU Convention are to be given their ordinary meaning in their context and in light of their (protection-oriented) object and purpose.[111] They should also, wherever possible, be interpreted in such a way that they remain relevant and applicable to situations that were not foreseeable when the 1969 OAU Convention was drafted.

54. The situation may be the result of 'external aggression', i.e. aggression through the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.[112] These situations may include armed conflicts fuelled by outside involvement or that have spilled over from neighbouring states, including because of the presence of (members of) the armed forces of another state or incursions by foreign armed groups.

55. Situations of armed conflict and violence may also accompany, or be the result of, 'occupation', i.e. a situation whereby the territory is actually placed under the authority or effective control of a hostile foreign state's armed forces.[113] This may also be the case for other situations not classified as 'occupation' within the meaning of IHL, where armed group(s) from either within or outside the country exercise control over territory.[114] Situations of armed conflict and violence could also accompany, or be the result of, 'foreign domination', i.e. the political, economic or cultural control of a state by (agents of) one or more other states, association of states, or state-governed international organizations.[115]

56. The phrase 'events seriously disturbing public order' should be construed, in line with the 1969 OAU Convention's humanitarian object and purpose, to include events that impact the maintenance of public order (*ordre public*) based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are put in danger.[116] The threshold of "serious" refers to public disorder events likely to disrupt the normal functioning of the institutions of the state and affect internal and external security and stability of the state and society. Such events may be categorized as an IAC or NIAC within the meaning of IHL, but may also include events not categorized as an armed conflict within the meaning of IHL, involving violence by or between different groups in society or between the state and non-state actors.[117] The ground of 'events seriously disturbing public order' appears to be the primary element of Article I(2) of the 1969 OAU Convention under which refugee status is determined.[118]

57. A serious disturbance of public order may either be prompted by one-off acts or incidents, or a series of acts or incidents of a systematic or cumulative nature, in response to which the state is either unwilling or unable to provide protection. According to the ordinary meaning of the definition's terms, 'events seriously disturbing public order' may take place in either part or the whole of the country. Situations that have prompted the government to declare a state of emergency may be an important, albeit unnecessary indicator of the ground, although each situation should be assessed individually.[119]

[111] EXCOM Conclusion No. 103 (LVI), 2005, para. (c).
[112] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 2(4) and Chapter VII, ("UN Charter"), http://www.refworld.org/docid/3ae6b3930.html. Article 1 of the UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314, http://www.refworld.org/docid/3b00f1c57c.html, and Article 3, which includes a non-exhaustive list of acts that qualify as an act of aggression. See also, Article *8bis* of the Rome Statute ICC, note 32 above.
[113] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Article 42, http://www.refworld.org/docid/4374cae64.html. See also, *Chiragov and Others v. Armenia*, Application no. 13216/05, Council of Europe: European Court of Human Rights, 16 June 2015, para. 96, http://www.refworld.org/docid/5582d29d4.html.
[114] African Commission on Human and Peoples' Rights, *Statement by the African Commission on the Present Human Rights Situation in Mali*, 18 January 2013, http://www.refworld.org/docid/5108d96a2.html.
[115] Banjul Charter, note 97 above, Article 20(3): 'All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.'
[116] UNHCR, *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)*, 6 April 1992, EC/1992/SCP/CRP.6, http://www.refworld.org/docid/3ae68cd214.html.
[117] See paragraph 5 of these Guidelines. See also, Article 1(2) Protocol II to the Geneva Conventions, note 14 above.
[118] M Sharpe, 'The 1969 OAU Refugee Convention in the Context of Individual Refugee Status Determination', in V Türk, A Edwards and C Wouters (eds.), *In Flight from Conflict and Violence. UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press and UNHCR, forthcoming 2017), 133.
[119] ICCPR, note 34 above, Article 4. Also, HRC General Comment 29, note 43 above.

58. 'Events seriously disturbing public order' also include situations of generalized violence, i.e. violence that is widespread, affecting large groups of persons or entire populations, serious and/or massive human rights violations, or events characterized by the loss of government control and its inability or unwillingness to protect its population - including situations characterized by repressive and coercive social controls by non-state actors, often pursued through intimidation, harassment and violence.

59. Factual indicators of events seriously disturbing public order include: a declared state of emergency; violations of IHL including war crimes;[120] acts of terrorism; a significant number of people killed, injured or displaced; the closure of schools; a lack of food, medical services and supplies, and other vital services such as water, electricity and sanitation; a change in, or collapse of, government institutions and services, political systems or the police and justice system; the imposition of parallel or informal justice and administrative systems; and/or non-state actors controlling state territory.

C. Internal flight or relocation alternative

60. The consideration of internal relocation is not generally relevant to the determination of refugee status under Article I(2) of the 1969 OAU Convention.[121] Article I(2) covers both situations that affect either 'part' or 'the whole' of the refugee's territory.[122] As the focus of Article I(2) is on situations that seriously disrupt state and societal structures, people cannot be required to relocate to other parts of the country, even if the situation in these parts may be less disrupted. The only exception would be where the situation is indisputably confined to a particular part of the country or to a particular region or city, and where the state is able and willing to protect its citizens in other areas. Consideration of the likely spread of the situation and the accompanying violence and disorder into other areas would need to be carefully assessed, with a forward-looking perspective.

IV. SUBSTANTIVE ANALYSIS OF CONCLUSION III(3) OF THE 1984 CARTAGENA DECLARATION

A. Preliminary considerations to guide interpretation

61. The Cartagena Declaration on Refugees is a regional protection instrument, adopted in 1984 by a group of experts from several Central and South American countries.[123] It resulted from a colloquium on International Protection for Refugees and Displaced Persons in Central America, Mexico and Panama held in Cartagena de Indias, Colombia. Its adoption represented a humanitarian and pragmatic response to the movements of people from conflict and other situations characterized by indiscriminate threats to life, security or freedom. The Cartagena Declaration reaffirms the peaceful, non-political and exclusively humanitarian nature of asylum and the principle of *non-refoulement*; the importance of searching actively for durable solutions; and the necessity of co-ordination and harmonization of universal and regional systems and national efforts.[124]

62. Conclusion III(3) of the Cartagena Declaration recommends to include among refugees:

> 'persons who have fled their country because their lives, security 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.'[125]

[120] Rome Statute ICC, note 32 above, Article 8.
[121] UNHCR IFA Guidelines, note 83 above, para. 5.
[122] *Recueil des décisions (No 2 - 2008)*, Benin: Comité d'éligibilité au statut de réfugié, 2008, p. 97, http://www.refworld.org/docid/563cede14.html. See also, A. Edwards, 'Refugee Status Determination in Africa' (2006) 14 *Afr J Intl Comp L* 227.
[123] Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela.
[124] See, respectively, Conclusion III(4) on the right to asylum; Conclusion III(5) on the principle of *non-refoulement*; Conclusion III(11) on integration and Conclusion III(12) on voluntary repatriation; and Conclusions III(14) to (17) on co-operation, coordination and harmonization.
[125] The original Spanish text of Conclusion III(3) of the Cartagena Declaration refers to '*seguridad*', which is properly translated into English as 'security' rather than 'safety', which is the word used in the Cartagena Declaration, note 5 above.

63. The Cartagena refugee definition has attained a particular standing in the region, not least through its incorporation into national laws and its application in practice.[126] The authority of the Cartagena refugee definition has been reaffirmed by the Inter-American Court of Human Rights (IACrtHR),[127] the San José Declaration on Refugees and Displaced Persons (1994),[128] the Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America (2004),[129] the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas (2011)[130] and the Brazil Declaration and Plan of Action (2014).[131]

64. As a protection instrument, the Cartagena Declaration has at its foundation the commitment to ensure the treatment provided by the 1951 Convention to all refugees.[132] It drew inspiration from the 1969 OAU Convention, as well as the doctrine of the Inter-American Commission on Human Rights (IACHR).[133] Its interpretation is to be informed by international and regional law, especially the norms and standards of the 1948 American Declaration of the Rights and Duties of Man,[134] the 1969 American Convention on Human Rights,[135] and the evolving case law of the Inter-American human rights bodies.

65. Furthermore, as a humanitarian- and protection-oriented instrument, the Cartagena Declaration calls for an inclusive, evolving and flexible interpretation of the refugee definition.[136] Where the ordinary meaning is not clear, the text should be given a purposive or teleological interpretation.

Scope of the Cartagena refugee definition

66. The Cartagena refugee definition provides international protection to people fleeing the threats resulting from "objectively" identifiable circumstances which have seriously disturbed public order. The circumstances referred to in the Cartagena refugee definition are characterized by the indiscriminate, unpredictable or collective nature of the threats they present to the lif(v)e(s), security or freedom of a person or group of persons, or even to populations at large. The focus of the Cartagena refugee definition is on the exposure of people to the threats inherent in the circumstances referred to.

67. As the Cartagena refugee definition focuses on indiscriminate threats, decision-makers are advised to adopt a consistent approach to persons fleeing similar circumstances in the same country. This contributes towards addressing protection gaps in the region, and to ensuring more consistent outcomes between cases.

B. Elements of the Cartagena refugee definition

68. The Cartagena refugee definition protects as refugees persons who (i) are outside their country,[137] (ii) because their life, security or freedom has been threatened, (iii) as a result of

[126] To date, the Cartagena refugee definition has been incorporated into the national laws of 14 countries: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay. In addition, the Constitutional Court of Ecuador has ordered the regional definition to be reinstated in the national legal framework in September 2014: *Sentencia No 002-14-SIN-CC*, Ecuador: Corte Constitucional, 14 August 2014, http://www.refworld.org/docid/578f56084.html.

[127] *Advisory Opinion OC-21/14 of August 19, 2014 requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay: Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, Inter-American Court of Human Rights (IACrtHR), 19 August 2014, paras. 76, 77, 79 and 249, http://www.refworld.org/docid/54206c744.html.

[128] *San José Declaration on Refugees and Displaced Persons*, 7 December 1994, http://www.refworld.org/docid/4a54bc3fd.html.

[129] *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America*, 16 November 2004, http://www.refworld.org/docid/424bf6914.html.

[130] *Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas*, 11 November 2010, http://www.refworld.org/docid/4cdd44582.html.

[131] *Brazil Declaration and Plan of Action*, 3 December 2014, http://www.refworld.org/docid/5487065b4.html.

[132] Cartagena Declaration, note 5 above, Conclusion III(8). See also Recommendation E of the Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, http://www.refworld.org/docid/40a8a7394.html.

[133] See the text of Cartagena Declaration, note 5 above, Conclusion III(3).

[134] Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948, http://www.refworld.org/docid/3ae6b3710.html.

[135] Cartagena Declaration, note 5 above, Conclusion III(8) and (10) make explicit reference to the 1969 American Convention on Human Rights, note 43 above.

[136] EXCOM Conclusion No. 103 (LVI), 2005, para. (c).

[137] For the purposes of the Cartagena definition, reference to 'their country', in the phrase 'persons who have fled their country', is to be interpreted in line with the 1951 Convention as a person's country of nationality, or, in the case of stateless persons, the country of former habitual residence.

circumstances referred to in the definition existing in their country. The particular elements of the Cartagena refugee definition are explained below. These elements need to be considered as part of a holistic assessment.

Refugees sur place

69. *Sur place* claims are accepted under the Cartagena refugee definition consistent with the interpretation of the 1951 Convention (see paragraph 31 of these Guidelines).

Circumstances compelling flight

70. These circumstances referred to in the Cartagena refugee definition include, but are not limited to, generalized violence, foreign aggression, internal conflicts, and massive violation of human rights. Further, other circumstances which have seriously disturbed public order in the country may also result in threats to persons' lives, security or freedom forcing them to flee their country. Guided by the protection purpose of the Cartagena Declaration, the circumstances referred to in the Cartagena refugee definition are to be given their ordinary meaning, wherever possible, and interpreted in an evolutionary way so that they remain relevant to situations not foreseeable when the Cartagena Declaration was drafted.

71. 'Generalized violence' is not a term of art, nor does it have a strict or closed meaning. Adopting a case-by-case approach, the term encompasses situations characterized by violence that is indiscriminate and/or sufficiently widespread to the point of affecting large groups of persons or entire populations. Drawing on international human rights law to determine whether a situation of generalized violence prevails, it would be appropriate to identify factual indicators relating to the number and type of security incidents, as well as the overall level of violence in the country of origin and its effect on civilian populations.[138] Situations of generalized violence include situations involving mass and/or serious violations of human rights or IHL. Generalized violence is established via the intensity or geographic spread of the violence, or through a combination of these.

72. Since 'generalized violence' is not a term found in IHL, it cannot be limited to situations of armed conflict within the meaning of IHL, although it can include these situations if the conditions for applicability of IHL are met. See also paragraph 5 of these Guidelines in relation to the limited relevance of categorizing a situation as an armed conflict under IHL in determining who is a refugee.

73. Situations of generalized violence encompass violence carried out by state or non-state actors. It is the situation on the ground, and the risks that the violence presents, that is at issue.

74. 'Foreign aggression' is understood to be the same as the terms 'aggression', 'war of aggression' and 'act of aggression' as defined under international law, as well as the term 'external aggression' included in the 1969 OAU Convention (see paragraph 54 of these Guidelines).[139] Consistent with the object and purpose of the Cartagena Declaration, foreign aggression can be equated to the crime leading to an IAC within the meaning of IHL,[140] as well as relating to situations not categorized as such under IHL. These situations may include conflicts fuelled by outside involvement or those that have spilled

[138] The IACrtHR has considered a situation of generalized and indiscriminate violence in El Salvador in the early 1980s to exist, referring to systematic violence indiscriminately affecting a large number of people over a prolonged period of time. See *The Massacres of El Mozote and nearby places v. El Salvador*, Inter-American Court of Human Rights (IACrtHR), 25 October 2012, paras. 70 and 193, http://www.refworld.org/docid/564ecfee4.html.The Inter-American Commission on Human Rights (IACHR) has referred to similar indicators when describing situations of "widespread violence". These include the following: a) the number of violent incidents as well as the number of victims of those incidents is very high; b) the prevailing violence inflicts heavy suffering among the population; c) violence manifests itself in most egregious forms, such as massacres, torture, mutilation, cruel, inhuman and degrading treatments, summary executions, kidnappings, disappearances of persons and gross breaches to IHL; d) the perpetration of acts of violence is often aimed at causing terror and, eventually, creating a situation such that individuals are left with no option other than flee the area affected; e) violence can emanate from state and non-state agents, and when it emanates from the first, or from others acting at the instigation or with the acquiescence of the state's authorities, the authors enjoy impunity; f) where violence emanates from non-state agents, authorities are unable to effectively control them; and g) the level and extent of violence is such that the normal functioning of society is seriously impaired. See, for example, Inter-American Commission on Human Rights (IACHR), *Report on the Situation of Human Rights in Jamaica*, 10 August 2012, OEA/Ser.L/V/II.144, pp. 5 and 27, http://www.refworld.org/docid/51ff65004.html.

[139] See supra note 112 and *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986, http://www.refworld.org/docid/4023a44d2.html.

[140] See, Common Article 2(1) of the 1949 Geneva Conventions, note 13 above, which is applicable to IAC and refers to 'cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting States', and see also Article 1(4) of Protocol I to the Geneva Conventions, note 13 above, which makes further reference to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.

over from neighbouring states, including because of the presence of (members of) the armed forces of another state or incursions by foreign armed groups.

75. 'Internal conflicts' in the Cartagena refugee definition includes NIACs within the meaning of IHL.[141] However, keeping in mind the protection purpose of the Cartagena Declaration, the term 'internal conflicts' extends to internal armed conflicts that are not classified as NIACs within the meaning of IHL. IHL is considered to be informative, though not determinative of whether an internal conflict exists. Similarly, the qualifications made by the parties involved or affected by it are also considered to be informative rather than determinative (see paragraph 5 of these Guidelines).[142] For the purpose of the Cartagena refugee definition, situations that fall below the threshold of a NIAC within the meaning of IHL may be better captured under the ground of 'generalized violence' or 'massive violation of human rights'.

76. To determine whether a situation of 'massive violation of human rights' prevails, reference to the jurisprudence of the IACrtHR is particularly relevant. The term 'massive' refers to the scale or magnitude of the violation, irrespective of the duration, and as such, the violation may be the result of a single event.[143] Where the effects of human rights violations go beyond the actual/direct victims to affect large segments of the population, or even the society as a whole, the situation may also be classified as 'massive violation of human rights'. The elements of planning and organization on the part of the perpetrator – whether a state or non-state actor – can also indicate a situation of 'massive violation of human rights', although they are not a requirement. In the case of non-state actors committing human rights abuses, a situation of 'massive violation of human rights' may exist when the state is either unable or unwilling to protect their citizens by failing to prevent, investigate, prosecute or sanction these violations.[144] In this context, displacement may be an indicator of 'massive violation of human rights' or lead to serious human rights violations. The Cartagena refugee definition makes no distinction between the types of rights that are threatened.

77. The existence of judgments or provisional measures by the IACrtHR[145] or precautionary measures by the IACHR[146] related to a given situation would be strong evidence that a situation of massive violation of human rights exists. The statements of human rights bodies or courts may also provide relevant indicators. However, such judgments or measures are not required to qualify a situation as one of 'massive violation of human rights'. This is a factual assessment, to be undertaken by the relevant asylum adjudication body, relying on relevant information and evidence, including the applicant's own testimony.

78. Of all the circumstances referred to in the Cartagena refugee definition, 'other circumstances which have seriously disturbed public order' is the least frequently applied by national adjudication bodies when determining refugee claims under the Cartagena refugee definition.[147] The notion of 'public order', while not having a universally accepted definition, can be interpreted in the context of the Cartagena refugee definition as referring to the peace, internal and external security as well

[141] See, Common Article 3 of the 1949 Geneva Conventions, note 38 above, Article 1 of Protocol II to the Geneva Convention, note 14 above, and *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995, para. 70, http://www.refworld.org/docid/47fdfb520.html.

[142] For example, while an UN Security Council designation of a situation as a NIAC within the meaning of IHL would be sufficient for the purposes of the Cartagena refugee definition, such a qualification cannot be a requirement. See also, UNHCR Arusha Summary Conclusion, note 29 above, para. 24.

[143] *Case of the "Las Dos Erres" Massacre v. Guatemala*, Inter-American Court of Human Rights (IACrtHR), 24 November 2009, paras. 73, 79 and 152, http://www.refworld.org/docid/564ed31a4.html; *Río Negro Massacres v. Guatemala*, Inter-American Court of Human Rights (IACrtHR), 4 September 2012, paras. 56, 58-60 and 63, http://www.refworld.org/docid/564ed2714.html.

[144] *González et al. ("Cotton Field") v. Mexico*, Inter-American Court of Human Rights (IACrtHR), 16 November 2009, para. 236, http://www.refworld.org/docid/564ed5234.html.

[145] Provisional measures are an instrument used by the IACrtHR to prevent irreparable harm to the rights and freedoms ensured under the American Convention on Human Rights of persons who are in a situation of extreme gravity and urgency. The measures are ordered ex officio or at the request of a party and result in a protection request to the respondent state of the alleged victim(s). See, American Convention on Human Rights, note 43 above, Article 63(2) and Organization of American States (OAS), *Rules of Procedure of the Inter-American Court of Human Rights*, 16-29 November 2009, Article 27, https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm.

[146] Organization of American States (OAS), *Rules of Procedure of the Inter-American Commission on Human Rights*, 1 August 2013, http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp, Article 25, establishes that, in serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case, as well as to persons under the jurisdiction of the State concerned, independently of any pending petition or case.

[147] UNHCR, *Summary Conclusions on the interpretation of the extended refugee definition in the 1984 Cartagena Declaration; roundtable 15 and 16 October 2013, Montevideo, Uruguay*, 7 July 2014, p. 7, http://www.refworld.org/docid/53c52e7d4.html.

as stability of the state and society, plus the normal functioning of the institutions of the state, based on respect for the rule of law and human dignity. Circumstances seriously disturbing public order can take place in times of armed conflict within the meaning of IHL as well as in peacetime. See also paragraphs 56 to 59 of these Guidelines.

79. In the jurisprudence of the IACrtHR, circumstances seriously disturbing public order have been defined by reference in part to the acts of states derogating from their human rights obligations in cases where a state of emergency has been declared.[148] However, a declaration of a state of emergency should not be seen as a prerequisite for the existence of a circumstance seriously disturbing public order, even though it would ordinarily be indicative of such a situation.

80. The inclusion of the adjective 'other' in 'other circumstances' in the Cartagena refugee definition allows states to grant protection in circumstances beyond those related to the four situations referred to in the Cartagena refugee definition.

Threat to life, security or freedom

81. The third element of the Cartagena definition is the link between the circumstance occurring in the country of origin and the threat it poses to the lives, security and freedom of persons residing in the country. The 'threat' or risk element in the definition connotes the possibility of harm being inflicted on a person, a group or a whole population; it does not imply that the harm has actually materialized. The link between the circumstance and the threat should not be interpreted in such a manner as to curtail or restrict unnecessarily the scope of international protection granted to persons fleeing their country, for example by requiring an individualized assessment of the risk to life, security or freedom. In fact, spatial/geographical proximity of the circumstance to the person would suffice to create a threat forcing the person to flee the country.

82. Since the Cartagena refugee definition is oriented towards circumstances that affect groups or whole populations, the focus is not on the personal circumstances of the individual fleeing a danger to her or his life, security or freedom, but rather on the objective circumstances in the country of origin.

83. Reference to persons' lives, security or freedom should be interpreted broadly, encompassing persons' physical and mental integrity, security, freedoms, human dignity and livelihoods, with reference to internationally and regionally recognized human rights.

Gang violence or violence from organized criminal groups

84. People fleeing gang violence or violence by organized criminal groups may meet the refugee criteria under the 1951 Convention.[149] People fleeing such violence may also fall under one or more of the circumstances mentioned in the Cartagena refugee definition.

C. Internal flight or relocation alternative

85. The focus of the Cartagena refugee definition is on situations that seriously disrupt state and societal structures. Under such circumstances, people cannot be required to relocate to other parts of the country, even if the situation in these parts may be less disrupted. The only exception would be where the situation is isolated to a particular part of the country or to a particular region or city, and where the state is able and willing to protect its citizens in those other areas. Consideration of the likely spread of the situation and the accompanying violence and disorder into other areas would need to be carefully assessed, with a forward-looking perspective.

[148] American Convention on Human Rights, note 43 above, Article 27(1), allowing states to take derogating measures in time of war, public danger, or other emergency that threatens the independence or security of a State Party. See, *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, OC-8/87, Inter-American Court of Human Rights, 30 January 1987, paras. 19 and 20, http://www.refworld.org/docid/402795714.html.

[149] On the application of the 1951 Convention to such situations, see: UNHCR Gangs Guidance Note, note 12 above.

V. PROCEDURAL AND EVIDENTIARY ISSUES

A. Approaches to applying the 1951 Convention/1967 Protocol definition and the regional definitions

86. The various definitions of a refugee are not mutually exclusive. They each recognize a person as a refugee, thus triggering the standards of treatment foreseen by the 1951 Convention (see paragraph 8 of these Guidelines).

87. In applying the refugee definitions, a sequential approach is preferred, whereby refugee status is initially assessed under the 1951 Convention definition before an assessment is made under the regional definitions if the person is found not to be a refugee under the 1951 Convention. Such an approach underscores the universal character of the definition of a refugee in Article 1A(2) of the 1951 Convention, the primacy of that Convention,[150] and the explicitly complementary character of the regional definitions.[151]

88. However, applying the regional definitions would be more practical and efficient in group situations or in specific regional contexts,[152] as long as the 1951 Convention standards of treatment apply.

B. Establishing the facts

89. Claims for refugee status related to situations of armed conflict and violence can raise complex factual issues, turning on the particular circumstances of the applicant viewed against the causes, character and impact of the situation of armed conflict and violence. Unless prima facie recognition of refugee status is applied, claims for refugee status should be considered on their individual merits, taking into account up-to-date and relevant country of origin information.

Country of origin information

90. Up-to-date, relevant country of origin information is important for understanding the situation of armed conflict and violence and whether the country of origin is experiencing one of the situations or circumstances referred to in the regional definitions.[153]

91. Relevant country of origin information includes both qualitative and quantitative information. Qualitative information is particularly relevant to avoid misunderstandings, stereotyping and generalizations and allows for a deeper understanding of the situation of armed conflict and violence, i.e. of the history and development of the situation, the actors involved, the means and methods of warfare, strategies and tactics used and the effects the situation has on the country and the people caught up in it.[154] Quantitative information related to situations of armed conflict and violence should be used with appropriate caution. Different sources may use diverse methodologies, often depending on their motivation for collecting data, resulting in substantial divergences between sources. While statistical data can provide an indication of the impact of the situation on the population, such data may be inconclusive or unreliable regarding the risk, harm, relevant 1951 Convention ground, and/or causal link between the risk of harm and ground, or situations mentioned in the regional definitions. Statistical information tends to focus on quantifiable features of the situation, such as the number of civilian casualties or the number of displaced persons, and may not capture other forms of harm – caused directly or indirectly by the armed conflict or violence – on persons, state structures or societies.

[150] EXCOM Conclusion No. 87 (L) 1999, para. (f); EXCOM Conclusion No. 89 (LI) 2000. See also, 1969 OAU Convention, note 4 above, ninth preambular paragraph, referring to the 1951 Convention/1967 Protocol as the basic and universal instrument for the protection of refugees.
[151] An additional argument for a sequential approach under the 1969 OAU Convention is the structure of Article I, where in paragraph 1 the 1951 Convention refugee definition is replicated before paragraph 2 provides the regional definition.
[152] UNHCR Prima Facie Recognition Guidelines, note 10 above, paras. 2 and 5.
[153] *Radjabu v. The Chairperson of the Standing Committee for Refugee Affairs*, note 107 above, para. 6, according to the Court, determining whether a person qualifies for refugee status under the extended definition requires an assessment of the existence of objectively ascertainable circumstances in the person's country of origin corresponding with any of the circumstances stipulated in the definition.
[154] *Sufi and Elmi v. United Kingdom*, note 45 above, para. 241.

92. In the assessment of claims for refugee status, country of origin information must be relevant to the particular circumstances of the applicant. Obtaining reliable and accurate country of origin information that is specific to the situation of particular groups of applicants, including children,[155] or persons of diverse gender identities and/or sexual orientations,[156] frequently poses significant challenges. Such challenges may be especially pronounced in situations of armed conflict and violence. Similarly, the available country of origin information about situations of armed conflict and violence may not reflect the specific circumstances of women or of men, including the prevalence of gender-specific forms of harm, or take into account the changing composition and conduct of the actors involved.[157] Decision-makers must take due cognizance of this fact. In situations of armed conflict and violence, an absence of country of origin information about the situation of particular groups should not be interpreted as implying that such groups do not face specific threats.

Burden of proof

93. While in general the burden of proof lies with the person submitting the claim, the obligation to gather and analyse all relevant facts and supporting evidence is shared between the applicant and the decision-maker.[158] This shared responsibility is particularly important when the country of origin is experiencing a situation of armed conflict and violence, since this makes obtaining information and documentation – in general, as well as in relation to the individual – more difficult.[159] People fleeing such situations are likely to encounter significant problems in giving a detailed account of events demonstrating a need for international protection, and/or in obtaining evidence to substantiate the claim. In these circumstances, it is therefore frequently necessary to give applicants the benefit of the doubt.[160]

[155] UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para. 74, http://www.refworld.org/docid/4b2f4f6d2.html.
[156] UNHCR Gender-Related Persecution Guidelines, note 56 above, para. 37. UNHCR Sexual Orientation and/or Gender Identity Guidelines, note 56 above, para. 66.
[157] UNHCR Cape Town Summary Conclusions, note 3 above, para. 23.
[158] UNHCR Handbook, note 26 above, para. 196. See also, UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, pp. 86-88, http://www.refworld.org/docid/519b1fb54.html.
[159] *Refugee Appeal No. 71462/99, Tamil and a Citizen of the Democratic Socialist Republic of Sri Lanka v. Refugee Status Branch of the New Zealand Immigration Service*, 71462/99, note 54 above, para. 51.
[160] UNHCR Handbook, note 26 above, para. 203.

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

Distr. GENERAL | HCR/GIP/17/13 | 20 December 2017 | Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION NO. 13:

Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the Office's *Statute*, in conjunction with Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of its 1967 Protocol, as well as relevant regional instruments. These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (Geneva: UNHCR, 1979; reissued 2011) and other Guidelines on International Protection. They replace the *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, October 2009, and all prior relevant guidance. By contrast, the *Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection*, May 2013, remains applicable.

These Guidelines, having benefited from broad public consultation, are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR personnel carrying out mandate refugee status determination under its mandate.

These Guidelines have been prepared in close cooperation with the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA").

In light of UNHCR's equality and non-discrimination policies, wherever the original text of an international agreement was drafted in gender-specific language and gender was not in issue, the text needs to be read and understood today as if it applied equally to men and women; for that reason, texts quoted in UNHCR publications reflect this principle through the inclusion of appropriate wording in square brackets.

UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* and *Guidelines on International Protection* are available at: http://www.refworld.org/docid/4f33c8d92.html.

Calls for public consultation on future guidelines will be posted at: http://www.unhcr.org/544f59896.html.

I. INTRODUCTION

1. Article 1D of the 1951 Convention relating to the Status of Refugees ("1951 Convention")[1] acknowledges that certain categories of refugees may benefit from separate arrangements for their protection or assistance by organs or agencies of the United Nations other than the Office of the United Nations High Commissioner for Refugees ("UNHCR"). At present, Article 1D applies to Palestinian refugees, for whom the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA")[2] was established in order to respond to their situation.[3]

2. Article 1D of the 1951 Convention provides:[4]

> This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
>
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.[4]

2. Article 1D of the 1951 Convention is often characterised as an "exclusion clause", whereas it has both exclusionary and inclusionary aspects[5] and its two paragraphs are to be read sequentially. In other words, one must first come within the scope of the first paragraph before coming within the second paragraph. Paragraph 1 generally excludes from the protection of the 1951 Convention those Palestinian refugees who are receiving protection or assistance from UNRWA, while paragraph 2 of Article 1D operates to include those very same Palestinian refugees when that protection or assistance has ceased. Once the protection or assistance has ceased (see section II E below), they are entitled *ipso facto* to the benefits of the 1951 Convention. As refugees already recognised by the international community,[6] no separate or additional assessment under Article 1A(2) is required for them to qualify for Convention protection. Claimants need only demonstrate that they fall within the terms of Article 1D.

3. All States parties to the 1951 Convention and/or 1967 Protocol need to ensure that Article 1D is fully incorporated in national law and practice. Fully incorporating this provision in national law and practice is a matter of States parties' obligations under the international refugee instruments.

4. These Guidelines address the interpretation of Article 1D of the 1951 Convention in respect of Palestinian refugees applying for protection under the 1951 Convention *outside* of UNRWA's areas of operation. They provide UNHCR's substantive interpretation of Article 1D (Part II), and also address

[1] 1951 *Convention relating to the Status of Refugees* (28 July 1951) 189 UNTS 137 (1951 Convention), http://www.refworld.org/docid/3be01b964.html, and its Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267 (1967 Protocol), http://www.refworld.org/docid/3ae6b3ae4.html.
[2] UN General Assembly Resolution 302 (IV), *Assistance to Palestine Refugees*, 8 December 1949, A/RES/302, created UNRWA, which has responsibilities to provide assistance and protection to Palestinian refugees. The role of UNRWA is also acknowledged by courts: see, for example, *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, ("*Bolbol*"), C-31/09, Court of Justice of the European Union ("CJEU"), 17 June 2010, para. 44, http://www.refworld.org/docid/4c1f62d42.html: "It is not in dispute that UNRWA constitutes one of the organs or agencies of the United Nations other than UNHCR which are referred to in Article 12(1)(a) of the Directive and in Article 1D of the Geneva Convention ...". See also, *AD (Palestine)*, ("*AD Palestine*") [2015] NZIPT 800693-695, New Zealand: Immigration and Protection Tribunal, 23 December 2015, paras 101-116, http://www.refworld.org/docid/56b1bcc24.html.
[3] Prior to the establishment of UNRWA, the United Nations had also established the UN Conciliation Commission for Palestine ("UNCCP") to *inter alia* "facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees and, through him [or her], with the appropriate organs and agencies of the United Nations." UNGA Resolution 194 (III), *Palestine - Progress Report of the United Nations Mediator*, 11 December 1948, A/RES/194, para. 11. By 1951, the UNCCP had informed the General Assembly, and began noting on an annual basis, that it was unable to find a means of achieving progress in the implementation of paragraph 11 of Resolution 194 (III). See, UNCCP, *Progress Report of the United Nations Conciliation Commission for Palestine*, UN Doc. A/1985, 20 November 1951 at paras 79 and 80 for first report, and more recently, Report of the UNCCP, 13 August 2015, A/70/319, Annex; UN General Assembly resolution 69/86.
[4] In these Guidelines, UNHCR refers to the first paragraph of Article 1D as 'Article 1D(1)' and the second paragraph as 'Article 1D(2)'.
[5] The French representative to the Conference of Plenipotentiaries, Mr. Rochefort, stated that "the clause in question was really one which provided for deferred inclusion". Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary of the Third Meeting, 19 November 1951, UN doc. A/Conf.2/SR.3, p. 10. All UN documents are available through the UN Official Document System database at http://www.un.org/en/documents/index.html. See also, James Hathaway and Michelle Foster, *The Law of Refugee Status*, (Cambridge: Cambridge University Press, 2nd edn., 2014), 513; and Lex Takkenberg, *The Status of Palestinian Refugees in International Law*, (Oxford: Oxford University Press, 1998), p. 66. See also, Guy Goodwin-Gill and Jane McAdam, who state that Article 1D "should be seen not so much as an 'exclusion' clause," but rather as a "contingent inclusion clause". *The Refugee in International Law*, (Oxford: Oxford University Press, 3rd edn., 2007), 153; and Atle Grahl-Madsen, who refers to it as a "suspensive clause", *The Status of Refugees in International Law*, Volume I Refugee Character, A.W. Sijthoff-Leyden, 1966, p. 263.
[6] "[P]alestinian refugees - and there is no doubt but that the displaced Palestinians were considered at all relevant stages to be *refugees* - were regarded, in and out of the United Nations, as belonging to a special category." *Amer Mohammed El-Ali v. The Secretary of State for the Home Department and Daraz v. The Secretary of State for the Home Department (The United Nations High Commissioner for Refugees, Intervener), ("El-Ali")* United Kingdom: Court of Appeal (England and Wales), 26 July 2002, [2002] EWCA Civ 1103, http://www.refworld.org/cases,GBR_CA_CIV,3f278a3a4.html, para. 15.

a number of procedural and evidentiary matters (Part III), drawing on State practice, international and national jurisprudence, as well as the views of leading jurists and academic experts.

II. ANALYSIS

A. Object and purpose

5. In interpreting Article 1D, it is appropriate to have regard to its object and purpose and its context, including through recourse to the *travaux préparatoires* of the 1951 Convention and to other contemporaneous international instruments intended to address the questions of protection and institutional responsibility for Palestinian refugees. A broad interpretation is warranted, based on the intention of the parties as expressed in the ordinary meaning of the terms of the treaty, considered in context and in the light of its object and purpose.[7] By applying such, it is clear that Article 1D of the 1951 Convention has two related purposes which guide its interpretation and application. The first purpose is to ensure that Palestinian refugees continue to be recognized as a specific class,[8] and that they continue to receive protection and associated rights, until their position has been definitively settled in accordance with the relevant resolutions of the United Nations General Assembly.[9] This purpose is also reflected in the discussions regarding the drafting of the Statute of the Office of the United Nations High Commissioner for Refugees, in which it was emphasized that Palestinian refugees should continue to be granted special status.[10] It was also recognized as essential that the continuity of protection be ensured[11] for Palestinians as a *sui generis* class of refugees under the 1951 Convention.

6. The second purpose of Article 1D is to avoid duplicating and overlapping competencies between UNHCR and UNRWA. The responsibilities of the two agencies are intended to be complementary.[12] In this regard, it is noted that while UNHCR's mandate is global, its competence "shall not extend to a person … who continues to receive from other organs or agencies of the United Nations protection or assistance."[13] In contrast, UNRWA has competence in five geographical areas or 'fields' of operation: Jordan, Lebanon, the Syrian Arab Republic, the West Bank (including East Jerusalem) and Gaza.[14] Taken together, these territories constitute UNRWA's areas of operation, in which it provides protection[15] or assistance to a population of over five million Palestinian refugees.[16]

[7] Article 31 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, http://www.refworld.org/docid/3ae6b3a10.html. See also, Ian Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press, 7th edn., 2008), 631.

[8] "The Article aims, fundamentally, to ensure continued protection of Palestinians as persons whose *refugee character had already been established*". *AD (Palestine)*, para.159, note 2 above. Article 1D was "intended for an existing category of refugees in respect of which the General Assembly had already taken certain action." Takkenberg, note 5 above, 97.

[9] See also, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, European Union: Court of Justice of the European Union, 19 December 2012, ("*El Kott*"), http://www.refworld.org/cases,ECJ,50d2d7b42.html, para 62, where the CJEU affirmed that the objective of Article 1D was to "ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitely settled …".

[10] General Assembly, Fifth Session, Official Records, Third Committee, 328th Meeting, 27 November 1950, paras 52, 55 (Mr. Baroody, Saudi Arabia), UN doc. A/C.3/SR.328, available through the UN Official Document System database at http://www.un.org/en/documents/index.html. Also cited in UNHCR's intervention before the Court of Appeal of England and Wales in the case of *El-Ali*, http://www.refworld.org/docid/3d1c73c04.html ("*UNHCR intervention in El-Ali*").

[11] General Assembly, Fifth Session, Official Records, Third Committee, 344th Meeting, 11 December 1950, paras 24-25 (Mr. Baroody, Saudi Arabia); para. 28 (Mr. Lesage, Canada); paras 29-30 (Mr. Davin, New Zealand); para. 39 (Mr. Noriega, Mexico); para. 42 (Mr. Raafat, Egypt), UN doc. A/C.3/SR.344, available through the UN Official Document System database at http://www.un.org/en/documents/index.html. Also cited in *UNHCR intervention in El-Ali*, note (10) above.

[12] See Goodwin Gill and McAdam, note 5 above, 152. The importance of this complementarity is reflected in the current practice of the two agencies. Since 2005, UNHCR and UNRWA have held annual high-level meetings in order to address issues of common concern; and since 2010, a joint working group has been established which remains in regular contact and meets twice per year.

[13] *Statute of the Office of the United Nations High Commissioner for Refugees*, ("Statute"), 14 December 1950, A/RES/428(V), http://www.refworld.org/docid/3ae6b3628.html, paragraphs 1 and 7(c). With regards to the differences between the language of the Statute ("continues to receive") and that of Article 1D ("at present receiving"), UNHCR interprets the phrases as having the same meaning. "For reasons which are not clear (but which may have been dictated by time constraints), the draft Convention refugee definition was not amended to bring it into line with the UNHCR Statute before being sent on to the Conference of Plenipotentiaries." Goodwin-Gill and McAdam, note 5 above, p. 154. See also on the issue of UNHCR's Mandate, UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, http://www.refworld.org/docid/5268c9474.html.

[14] See for example, General Assembly Resolution 58/95 of 17 December 2003 and, more recently, UNGA Resolution 71/91, *Assistance to Palestine refugees: Resolution adopted by the General Assembly*, 22 December 2016, A/RES/71/91: http://www.refworld.org/docid/586cbe334.html.

[15] It is important to note that UNRWA has had a protection mandate from its inception. Nevertheless, the protection function has grown over time and has increased since 2010 with the adoption of a protection policy and the development of protection tools and standards. See UNRWA, Protecting Palestine Refugees, 2015, http://www.refworld.org/docid/5703647f4.html and https://www.unrwa.org/what-we-do/protection. However, UNRWA "does not own, administer or police the camps, as this is the responsibility of the host authorities." https://www.unrwa.org/palestine-refugees. See also note 48 below.

[16] For latest UNRWA figures, see: http://www.unrwa.org/.

B. Ratione personae: Personal scope of Article 1D

7. The following groups of persons fall within the personal scope of Article 1D:

Palestine refugees: Persons who are "Palestine refugees"[17] within the sense of UN General Assembly Resolution 194 (III) of 11 December 1948[18] and subsequent UN General Assembly Resolutions and who, as a result of the 1948 Arab-Israeli conflict, were displaced from that part of Mandate Palestine which became Israel, and who have been unable to return there.

Displaced persons: Persons who are "displaced persons" within the sense of UN General Assembly Resolution 2252 (ES-V) of 4 July 1967 and subsequent UN General Assembly resolutions, and who, as a result of the 1967 conflict, have been displaced from the Palestinian territory occupied by Israel since 1967 and have been unable to return there.[19] It also includes those persons displaced by "subsequent hostilities".[20]

Descendants: "Descendants" refers to all persons born to Palestine refugees or displaced persons, as defined above.[21] Based on principles of gender equality and non-discrimination on the basis of sex, as well as the principle of family unity, these descendants, whether they are descended through the male or female line,[22] would be considered to fall within the purview of Article 1D.[23] This includes descendants who were born outside of and who have never resided in UNRWA's areas of operation, where the criteria for the application of Article 1D are met.

8. For the purposes of these Guidelines, the term "Palestinian refugees" is used to encompass "Palestine refugees", "displaced persons" and "descendants" or one or more of these groups, whose position has not been definitively settled in accordance with relevant resolutions of the UN General Assembly.

9. Not all Palestinians fall within the class of Palestinian refugees to whom Article 1D applies.[24] Such cases are to be assessed in the same manner as other claimants for refugee status, under Article 1A(2).

C. Sequential reading

10. The two paragraphs in Article 1D are to be read jointly and operate sequentially. This means that decision-makers need to assess (i) whether the applicant falls within the class of Palestinians to whom the protection of the 1951 Convention does not apply because he or she "is at present receiving" the protection or assistance of UNRWA; and if so, (ii) whether such an applicant is nonetheless included under the second paragraph owing to the cessation of that protection or assistance.

---

[17] The term "Palestine refugees" has never been expressly defined by the General Assembly. However, for early work on interpreting the term, see UN Doc. W/61/Add.1, *Addendum to Definition of a "Refugee" Under paragraph 11 of the General Assembly Resolution of 11 December 1948*, 29 May 1951 which is to be read with its Note by the Principal Secretary, UN Doc. A/AC.25/W/61, https://unispal.un.org/DPA/DPR/unispal.nsf/0/418E7BC6931616B-485256CAF00647CC7. UNRWA's operational definition of the term "Palestine refugee" for registration purposes has evolved over the years as it was initially a subcategory of persons who were 'in need'. Since 1984 it has been "*persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict.*"

[18] The UN General Assembly resolved in para. 11 of Resolution 194 (III) that "the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date" and that "compensation should be paid for the property of those choosing not to return and for loss of or damage to property".

[19] UN General Assembly Resolution 2452 (XXIII) A of 19 December 1968 called for the return of "displaced persons", as reiterated by subsequent UN General Assembly resolutions on an annual basis, https://unispal.un.org/DPA/DPR/unispal.nsf/0/0F32DC9EB80EE553852560DF004F1352. See, also, *Bolbol*, (note 2 above) para. 47: "[I]t cannot be maintained, as an argument against including persons displaced following the 1967 hostilities within the scope of Article 1D of the Geneva Convention, that only those Palestinians who became refugees as a result of the 1948 conflict who were receiving protection or assistance from UNRWA at the time when the original version of the Geneva Convention was concluded in 1951 are covered by Article 1D of that convention […]."

[20] See UN General Assembly Resolution A/RES/37/120, 16 December 1982, which extended UNRWA's mandate to those displaced by subsequent hostilities; http://www.un.org/documents/ga/res/37/a37r120.htm.

[21] UNRWA's *Consolidated Eligibility and Registration Instructions*, 1 January 2009, ("UNRWA's CERI (2009)"), http://www.refworld.org/docid/520cc3634.html, at Part III(A)(1), p. 3, provide that "Palestine Refugees, and descendants of Palestine refugee males, including legally adopted children, are eligible to register for UNRWA services." Descendants of women who are Registered Refugees and are (or were) married to husbands who are not registered refugees are not considered to meet UNRWA's Palestine refugee criteria, but they (including legally adopted children) "are eligible to register to receive UNRWA services", Part II(A)(2).

[22] Including descendants of a Palestine refugee woman and a non-refugee male within the first paragraph of Article 1D of the 1951 Convention is compatible with the principle of non-discrimination on the basis of sex and avoids serious consequences for family unity. Further, the approach adopted in these Guidelines, which recognises descendants of Palestinian refugees, is consistent with UNHCR's general approach to protracted refugee situations in which children born to refugees in exile are registered as refugees until a durable solution has been found.

[23] Some of these descendants may have acquired the nationality of their non-refugee/non-Palestinian parent, hence an individual assessment will be required, which also considers the principle of family unity.

[24] For example, a Palestinian originally from the West Bank, who was never displaced.

D. "Exclusion clause" of Article 1D(1): Palestinian refugees receiving or eligible to receive the protection or assistance of UNRWA

11. "Exclusion" from protection under the 1951 Convention pursuant to Article 1D(1) does not mean that persons within the scope of this provision are not to be considered refugees. Quite the contrary, the express intention of the drafters was to provide a separate regime for an entire class of persons already receiving specific benefits from UN organs or agencies. Thus, Article 1D is clearly intended to cover all Palestinian refugees "falling under the mandate of UNRWA, regardless of when, or whether, they are actually registered with that agency, or actually receiving assistance."[25] To interpret Article 1D(1) as an exclusion clause in that sense would be incorrect, as it would ignore the character of Article 1D as a "contingent inclusion clause."[26] It would also be inconsistent with the object and purpose of the 1951 Convention and, in particular, with the aim of Article 1D itself, which is to ensure continuity of protection for a class of persons who are already recognised as refugees by the international community.

12. Moreover, the object and purpose of the 1951 Convention and of its provisions relating to Palestinians require that the words "at present receiving" in the first paragraph of Article 1D are understood to mean (i) "persons who were and/or are now receiving" protection or assistance, or (ii) who are eligible for such protection or assistance. Those Palestinians who are eligible are described at paragraph 8. By capturing both those actually receiving, as well as those eligible to receive the protection or assistance of UNRWA within Article 1D(1), the continuing refugee character of Palestinian refugees is acknowledged, as is their entitlement to protection.

13. In UNHCR's view, it would be incompatible with the object and purpose of Article 1D to remove from its scope those Palestinian refugees who have not accessed UNRWA protection or assistance, despite being eligible, but are nonetheless in need of 1951 Convention protection under the second paragraph in Article 1D.[27] Such a narrow interpretation of the first paragraph of Article 1D would actually result in the denial of protection for many Palestinian refugees, *whose refugee character is already established*, creating gaps in the protection regime.[28]

14. Moreover, similarly situated persons who were displaced as a result of the same conflict would be subject to different treatment depending on whether they availed themselves of assistance or not and depending on where they fled. Some would be examined under Article 1D while others would be examined under Article 1A(2). An interpretation which differentiates these similarly situated persons is "clearly unreasonable and in conflict with the intentions of the drafters."[29]

15. In the same vein, interpreting Article 1D in a way that would not cover those Palestinian refugees who are eligible for UNRWA's protection or assistance would lead to the duplication of mandates in respect of the same refugee population between UNHCR and UNRWA *inside* UNRWA's areas of operation. In UNHCR's view, this same interpretation also guides the interpretation of the provision *outside* UNRWA's areas of operation. Thus, the provision ought to be interpreted in a way that reflects the complementary mandates of the two agencies, both within and outside UNRWA's areas of operation.[30]

16. It would also be incorrect to read Article 1D as applying only to those persons who were Palestinian refugees in 1951.[31] This would run contrary to the intentions of the Convention's drafters,

[25] Guy Goodwin Gill and Susan M. Akram, 'Brief Amicus Curiae', *Palestine Yearbook of International Law*, 2000/2001, Vol. XI, 185, at p. 236. See also, *AD (Palestine)*, note 2 above, where the scope of Article 1D was found to encompass persons "who have not in fact availed themselves of protection and assistance which they are otherwise eligible to receive." Para. 160 and see paragraphs 150-153 for a discussion of the difficulties of the "actually availed" approach.
[26] See footnote 5.
[27] This interpretation is distinct from the position taken by the CJEU in *Bolbol*, (note 2 above), where only those who had "actually availed" themselves of that protection or assistance were considered to fall within the first paragraph of Article 1D, based on a "clear reading" of Article 1D (para. 51). For the purposes of how this should be approached and reconciled as a matter of European law, UNHCR notes that Article 3 of the Qualification Directive provides that Member States may introduce or retain more favourable standards for determining who qualifies as a refugee. Member States are thus recommended to adopt the more favourable interpretation put forward by UNHCR, which is more in line with the object and purpose of Article 1D.
[28] See UNHCR, *Note on UNHCR's Interpretation of Article 1D of the 1951 Convention relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the context of Palestinian refugees seeking international protection*, May 2013, http://www.refworld.org/docid/518cb8c84.html.
[29] Brenda Goddard, 'UNHCR and the International Protection of Palestinian Refugees', (2009) 28 *Refugee Survey Quarterly*, 475 at 493.
[30] *AD (Palestine)*, note 2 above, para. 159.
[31] The "historical" argument that Article 1D is limited only to those persons who were Palestinian refugees in 1951, accepted by the United Kingdom Court of Appeal in *El-Ali* note 6 above, was rejected by the CJEU in *Bolbol*, note 2 above, paras 47-48. See also the rejection by Advocate General Sharpston, paras 62, 65-68, in her Opinion in *Bolbol*, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CC0031.

who sought to ensure continuity of protection for the specific class of persons addressed in Article 1D until their position was definitively settled, a need which continues not only for those who were Palestinian refugees in 1951, but also persons who were displaced by the 1967 conflict as well as their descendants. Moreover, it disregards the critical change effected by the 1967 Protocol, which removed the temporal limitation on the 1951 Convention, with the aim, as expressed in the Preamble, of ensuring "equal status" for "all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951."[32]

E. "Inclusion clause" of Article 1D: the protection or assistance has ceased for any reason

17. Palestinian refugees (see paragraph 8) benefit from 1951 Convention protection under Article 1D(2) when the protection or assistance of UNRWA has ceased. Read in light of its ordinary meaning, considered in context and with due regard to the object and purpose of the 1951 Convention,[33] the phrase "ceased for any reason" is not to be construed restrictively. As noted in jurisprudence, exclusion from the 1951 Convention of Palestinian refugees by way of Article 1D "was intended to be conditional and temporary, not absolute and permanent."[34]

18. The application of the second paragraph of Article 1D is not, however, unlimited.[35] Protection under the 1951 Convention does not extend to those applicants who, being outside an UNRWA area of operation, refuse to (re-)avail themselves of the protection or assistance of UNRWA for reasons of personal convenience.[36] That said, the reasons why one has left an UNRWA area of operation (for example, for work or study purposes, or for protection reasons) is not of itself determinative. What is pivotal is whether the protection or assistance of UNRWA has ceased owing to one or more of the "objective reasons" for leaving or preventing them from (re)availing themselves of UNRWA's protection or assistance as set out in paragraph 22 below (see also paragraph 26ff on *sur place* claims). If a person has no objective reasons for not (re)availing themselves of UNRWA's protection or assistance, then such protection or assistance cannot be regarded or construed as having ceased within the meaning of the second paragraph of Article 1D when a Palestinian refugee can safely enter the UNRWA area of operation.

19. The inclusion assessment needs to be carried out not only having regard to UNRWA's mandate and operations, but also to the circumstances of the individual and to relevant and up-to-date country of origin information (COI).[37]

Objective reasons bringing the applicant within the second paragraph of Article 1D

20. While the drafters of the 1951 Convention envisaged primarily the application of the second paragraph in the event of the termination of UNRWA's mandate, the phrase "for any reason" is sufficiently broad to include circumstances other than the cessation of UNRWA's mandate. The *travaux préparatoires* of the 1951 Convention confirm this interpretation.[38] Importantly, where the drafters intended to limit the scope of provisions in other parts of the Convention, they did so explicitly and outlined the possible exceptions.[39]

---

[32] 1967 Protocol, preamble, third paragraph, note 1 above. See also, Goodwin-Gill and McAdam, note 5 above, p. 158, footnote 110.
[33] *Vienna Convention on the Law of Treaties*, article 31, note 7 above.
[34] *AD (Palestine)*, note 2 above, para. 99f.
[35] "Mere absence from such an area or a voluntary decision to leave it cannot be regarded as cessation of assistance.", *El Kott*, note 9 above, para. 59.
[36] See, *El Kott*, note 9 above, paras 49-51 and 59-63. See also by way of analogy regarding personal convenience, Statute of the Office of the United Nations High Commissioner for Refugees, paragraphs 6(ii)(e) and (f), note 13 above.
[37] "Country of Origin Information (COI) is information which is used in procedures that assess claims to refugee status or other forms of international protection. COI supports legal advisors and persons making decisions on international protection in their evaluation of: the human rights and security situation; the political situation and the legal framework; cultural aspects and societal attitudes; the humanitarian and economic situation; events and incidents; as well as the geography in claimants' countries of origin (or, in the case of stateless people, countries of former habitual residence) or countries of transit. To qualify as COI it is essential that the source of the information has no vested interest in the outcome of the individual claim for international protection." Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Researching Country of Origin Information: Training Manual*, October 2013, http://www.refworld.org/docid/5273a56b4.html.
[38] See for example the statement of the Egyptian delegate, Mr. Raafat, General Assembly, Fifth Session, Official Records, Third Committee, 344th Meeting, 11 December 1950, para. 13, UN doc. A/C.3/SR.344. See also the views of the French delegate, Mr. Rochefort, at the Conference of Plenipotentiaries, Summary of the Second Meeting, 20 July 1951, UN doc. A/CONF.2/SR.2, p. 27. Both documents are available through the UN Official Document System database at http://www.un.org/en/documents/index.html.
[39] For example, the drafters of the 1951 Convention set out, in a clearly limited fashion, the list of grounds on which refugee status may be considered to have ceased under Article 1C of the 1951 Convention. See, *El Kott*, note 9 above, para. 57.

21. Objective reasons,[40] which bring an applicant within the second paragraph of Article 1D, include:

(i) Termination of the mandate of UNRWA[41]

a. The termination of UNRWA's mandate would in principle require a resolution of the United Nations General Assembly. This element would consequently apply to the entire class of Palestinians, rather than particular individuals.

(ii) Inability of UNRWA to fulfil its protection or assistance mandate

b. The discontinuation of UNRWA's protection or assistance, which would apply to all Palestinians, would need to be determined to have occurred as a matter of fact, in an area of operations or on a country-wide basis. This might occur if, notwithstanding the continued existence of the agency, it were to become impossible for UNRWA to carry out its mission.[42] Evidence of this circumstance may be established, for example, by a resolution of the United Nations General Assembly, annual reports of UNRWA, statements by UNRWA that it has discontinued its activities, or other evidence brought forward by the applicant.[43]

c. "Protection or assistance" are alternatives: an applicant is not required to establish that both the protection *and* the assistance of UNRWA have ceased. In relation to the discontinuation of assistance, however, the applicant would need to establish that the assistance pursuant to UNRWA's mandate has ceased.[44]

(iii) Threat to the applicant's life, physical integrity, security or liberty or other serious protection-related reasons

d. Palestinian refugees – as refugees already recognized by the international community via various UN General Assembly resolutions – are not required to establish individually that their treatment constitutes persecution within the meaning of Article 1A(2) of the 1951 Convention or that they meet the other requirements of the refugee definition in that paragraph, in order to benefit from Article 1D.[45] That said, a Palestinian refugee at risk of persecution in the sense of Article 1A(2) would clearly fall within the second paragraph of Article 1D.

e. Beyond this, there is a range of threats that may compel a Palestinian to leave UNRWA's area of operation, with the result that UNRWA's protection and assistance would cease for him or her. In UNHCR's view, both group-based and individualised threats would qualify as circumstances beyond the applicant's control. Examples of group-based threats would include armed conflict or other situations of violence, such as civil unrest, widespread insecurity or events seriously disturbing public order.[46] Threats of a more individualised nature, which could also compel a Palestinian to leave an UNRWA area for reasons beyond his or her control, would include sexual or gender-based violence, torture, inhuman or

[40] In *El Kott*, the CJEU considered that "objective reasons" included "reasons beyond the person's control" (i.e. independent of their volition), note 9 above, para. 58. UNHCR considers that there is no significant difference between objective reasons and reasons beyond the person's control, except as noted in paragraphs 26-28 in relation to sur place claims, where the CJEU's judgment needs to be read with particular care as it did not apply to sur place claims.
[41] See note 2 and paragraph 7 above.
[42] *El Kott*, note 9 above, para. 56. The suspension of non-core services for a short period of time would not suffice.
[43] A comparison can be made with the UNCCP, which continues to exist but reports annually to the General Assembly that it is not able to carry out its mandate: see note 3 above.
[44] "Given the long-standing and continuing reality of funding deficits, should UNRWA continue to exist but in fact be unable to provide effective protection or assistance due to a lack of funding, there is no reason in principle why this should also not qualify as a cessation of activities under Article 1D, which expressly contemplates cessation 'for any reason' as activating the inclusion clause". *AD (Palestine)*, note 2 above, para. 172. See also, El Kott, note 9 above, paras 63, 65.
[45] See for example the Belgian Conseil du Contentieux des Étrangers, (Council of Alien Law Litigation) decision, which states that the recognition of the refugee status is not based on the existence of a real risk to personal safety, but is automatically granted based on Article 1D given that the person concerned is already a refugee and has demonstrated that he or she can no longer benefit from UNRWA assistance. *Arrêt No. 144 563*, Belgium: Conseil du Contentieux des Étrangers, 30 April 2015, http://www.refworld.org/cases,BEL_CCE,5963b1794.html.
[46] See, UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, 2 December 2016, HCR/GIP/16/12, http://www.refworld.org/docid/583595ff4.html.

degrading treatment or punishment, human trafficking and exploitation, forced recruitment, severe discrimination,[47] or arbitrary arrest or detention.

f. Where any of these above-mentioned threats emanate from the authorities, protection under Article 1D would be required. Similarly, where the authorities are unable or unwilling to provide protection against threats emanating from non-State actors, protection under Article 1D(2) would also apply. A case-by-case assessment is necessary to determine the application of Article 1D in these cases.[48]

(iv) Practical, legal and/or safety barriers preventing an applicant from (re)availing him/herself of the protection or assistance of UNRWA

g. Practical barriers include obstacles which prevent access the UNRWA area of operation, for example, because of border closures.

h. Legal barriers would include absence of documentation allowing the individual to travel to, or transit through, or (re)enter and reside in the relevant UNRWA area of operation. Where the authorities refuse (re)admission or the renewal of travel or other requisite documents, the second paragraph of Article 1D would be satisfied. An applicant would not, however, benefit from protection under the 1951 Convention pursuant to Article 1D(2) if he or she were to seek to frustrate his or her (re)admission and stay by refusing to co-operate, for example, in acquiring documents.[49]

i. Barriers relating to safety or personal security which prevent (re)availment could include dangers *en route* such as minefields, factional fighting, shifting battle fronts or the threat of other forms of harassment, violence or exploitation, preventing the applicant from being able to return safely. Up-to-date information on the realistic prospect of being able to re-avail oneself of the protection or assistance is required. The feasibility of (re)availment cannot be assessed in the abstract.

j. Although Article 1D focuses on the cessation of the protection or assistance of UNRWA, the situation in the State in whose jurisdiction UNRWA is operating will not only be relevant, but may be determinative of the need for 1951 Convention protection. For example, the host State or authorities – not UNRWA – will control whether a Palestinian refugee will be permitted to (re)enter their territory and (re)establish him/herself there, including whether he or she is able to obtain the necessary legal documentation establishing a right to stay in the State or territory.[50] The risk facing the applicant may emanate, for example, from the authorities directly. These assessments are to be based on reliable and up-to-date information, and special care needs to be exercised where the situation is fluid or unclear.

k. No State can safely assume that a Palestinian refugee will be able to access the protection or assistance of UNRWA in an area of operation where they have never resided, or other than that in which he or she was formerly residing. As such decision-makers should not assess the lawfulness of return in relation to an UNRWA area of operation to which the individual has no previous connection. That would impose unreasonable and insurmountable obstacles on applicants, and ignore the general workings of the State-based system of international relations and State sovereignty. Moreover, consistent with general principles of international refugee law, the assessment as to whether the protection or assistance of UNRWA has ceased for a person previously resident in an UNRWA area is to be made vis-à-vis the UNRWA area of operation where the applicant was

[47] This would often but not always include systematic or a pattern of consistent discrimination. See UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, http://www.refworld.org/docid/3b20a3914.html, at para. 17. It also includes measures of discrimination which "lead to consequences of a substantially prejudicial nature [… for example,] serious restrictions on the right to earn a livelihood, the right to practise religion, or access to normally available educational facilities." UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, http://www.refworld.org/docid/4f33c8d92.html, ("UNHCR Handbook") para. 54.

[48] The provision of services by UNRWA is not relevant for this assessment. Non-state actors, including international organisations, do not have the attributes of a State, and are not in a position to provide protection and enforce the rule of law in the same fashion as a State.

[49] Article 2 of the 1951 Convention notes that every refugee has duties to the country in which he or she finds himself or herself, which require in particular that he or she conform to its laws and regulations as well as to measures taken for the maintenance of public order.

[50] For example, in relation to the West Bank, the position of the Israeli authorities will be determinative. Likewise, for passage across the border to Gaza from Egypt, permission from Egypt is likely to be required, noting that at some times, the border is closed.

previously residing.[51] The assessment is not to be made against each of UNRWA's areas of operation but to a single UNRWA area of operation.[52]

22. The circumstances listed above are alternative, not conjunctive, such that depending on the case at hand, one or more of the aforementioned circumstances may be present, bringing the applicant within the scope of Article 1D(2).[53] The evidentiary aspects of establishing the existence of the above-mentioned circumstances are dealt with in Part III.

Personal circumstances of applicant

23. The personal circumstances of the applicant are relevant to the determination of whether one of the objective reasons exists to justify the application of the second paragraph of Article 1D. Thus, each claim must be determined on its individual merits, enabling consideration of factors that are specific to the applicant.[54] These personal circumstances may include age, sex, gender, sexual orientation and gender identity, health, disability, civil status, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, and any past experiences of serious harm and its psychological effects.

Internal relocation

24. The protection or assistance of UNRWA will not be considered to have ceased if an individual is able to access and receive protection or assistance from UNRWA elsewhere in the same UNRWA area of operation. For example, if a camp is destroyed by an armed attack and the protection or assistance of UNRWA is as a matter of fact available elsewhere within another part of that country or territory, and the individual has access to that protection or assistance, then the second paragraph of Article 1D would not be satisfied without additional factors. However, it cannot be expected that the applicant relocate (or be returned) to a different country or territory where he or she has no previous connection.[55]

Sur place protection needs

25. A *sur place* claim arises after arrival in the country of asylum, either as a result of the applicant's activities in the country of asylum or as a consequence of events, which have occurred or are occurring in the applicant's country of origin since their departure.[56] The recognition of *sur place* claims of Palestinian refugees under Article 1D is in line with general principles of international refugee law applicable to Article 1 of the 1951 Convention that accept *sur place* refugee claims, recognizing that changes in the country of origin whilst abroad may make them a refugee.[57] For example, should the mandate or activities of UNRWA cease as described in paragraph 22 above while the individual is outside UNRWA's area of operation, she or he would qualify for 1951 Convention protection under Article 1D.

26. Although "ceased for any reason" does not generally include reasons of mere personal convenience for refusing to (re-)avail oneself of the protection or assistance of UNRWA, (as noted in paragraph 19 above),[58] it is not relevant whether the applicant departed in the first place on a

[51] See also, *El Kott*, note 9 above, para. 77: "… the person concerned ceases to be a refugee if he is able to return to the UNRWA area of operations in which he was formerly habitually resident because the circumstances which led to that person qualifying as a refugee no longer exist".
[52] This is supported by the language of the CJEU in *El Kott* which repeatedly uses the expression "area of operation" in the singular when referring to the scope of the assessment to be carried out. *El Kott*, note 9 above, paras 49, 50, 55, 58, 61, 62, 63, 64, 65.
[53] While the inclusionary aspects of Article 1D(2) will be established where an applicant has been forced to leave UNRWA's area of operation where his/her personal safety is at serious risk and if it is impossible for UNRWA to guarantee his/her living conditions in accordance with that organization's mission, the applicant is not required to establish both. In *El Kott*, (note 9 above), the CJEU accepted in the context of the facts before it, that such circumstances "will" fall within the second paragraph of Article 1D (para. 65). The CJEU did not however exhaust other circumstances in which such protection or assistance would be considered to have ceased, as this will depend on the case at hand. An interpretation that requires both would lead to perverse results. For example, if an applicant's personal safety is at serious risk, the assistance provided by UNRWA in the form of cash or food rations would be irrelevant to their need for protection.
[54] An exception would be in circumstances where UNRWA has ceased to operate as an agency (see paragraph 22(i) above).
[55] UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, http://www.refworld.org/docid/3f2791a44.html.
[56] UNHCR Handbook, note 47 above, paras 94-96.
[57] *Ibid*.. There is no reason to apply a different approach to Palestinian applicants under Article 1D.
[58] This interpretation is closely aligned with State practice which has not generally accepted automatic entitlement to Article 1D by reason simply of being outside an UNRWA area of operation.

voluntary basis from an UNRWA area of operation (for example, for study or work purposes). They are still eligible to benefit from the 1951 Convention pursuant to Article 1D should they meet its criteria.[59] A careful examination of the circumstances in each case would be required.

27. A person may become a refugee *sur place* in a country in which she or he claims asylum, as a result of his or her own actions, such as associating with refugees already recognized, or expressing political views in his or her country of residence.[60] Politically active Palestinian refugees who may attract attention because of their beliefs or activities, and who may even do so at great personal risk to themselves or their families, cannot be required to cease such activities as a precondition for protection under Article 1D; that would undermine the object and purpose of the 1951 Convention overall.[61]

F. Automatic or "ipso facto" entitlement to the benefits of the 1951 Convention

28. When it is established that UNRWA's protection or assistance has ceased for any of the reasons mentioned in paragraph 22, the Palestinian refugee is automatically or "*ipso facto*" entitled to the benefits of the 1951 Convention,[62] provided Articles 1C, 1E or 1F of the 1951 Convention do not apply [see Parts G, H, and I below].[63] The term "*ipso facto*" would be entirely redundant if the provision merely meant that a Palestinian refugee could apply for international protection in accordance with the general rules and in the same way as all asylum-seekers via Article 1A(2) of the 1951 Convention.[64]

29. The phrase "benefits of this Convention" in the second paragraph of Article 1D refers to the substantive rights contained in Articles 2 to 34 of the 1951 Convention and which are attached to being a refugee, as defined in Article 1 of the 1951 Convention. The term "benefits" cannot mean simply access to asylum procedures for determining refugee status as Article 1 does not itself contain any benefits – it simply defines who *is* and who *is not* entitled to have access to those benefits.[65] This interpretation is also supported by the equally authentic French version of Article 1D, which uses the expression *"bénéficieront de plein droit du régime de cette convention."* They benefit by operation of law and "as of right" once they fulfil the criteria in Article 1D.[66]

30. Palestinian refugees protected under Article 1D are entitled to receive the same rights, benefits and standards of treatment as other refugees recognized under Articles 1A(1) or 1A(2), so there is no more favourable treatment provided to Article 1D refugees than other refugees. They each enjoy the benefits of the Refugee Convention set out in Articles 2 to 34.[67]

---

[59] *El Kott*, note 9 above, para. 59.
[60] UNHCR Handbook, note 47 above, para. 96.
[61] By analogy with the general position that one cannot be required to conceal or be discreet about a protected characteristic, see *X, Y, Z v Minister voor Immigratie en Asiel* , C-199/12 - C-201/12, European Union: Court of Justice of the European Union, 7 November 2013, http://www.refworld.org/docid/527b94b14.html; UNHCR *Observations in X, Y and Z*, 28 September 2012, http://www.refworld.org/docid/5065c0bd2.html; *Bundesrepublik Deutschland v Y and Z*, Judgment of the Court (Grand Chamber) of 5 September 2012 http://www.refworld.org/pdfid/505ace862.pdf; RT (Zimbabwe) and others v Secretary of State for the Home Department, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, http://www.refworld.org/docid/500fdacb2.html.
[62] See UNHCR, *Written Intervention before the Court of Justice of the European Union in the case of El Kott*, 27 October 2011, para 4.3, C-364/11, http://www.refworld.org/docid/4eaa95d92.html and UNHCR, *Oral intervention before the Court of Justice of the European Union in the case of El Kott and Others v. Hungary*, 15 May 2012, C-364/11, http://www.refworld.org/docid/4fbd1e112.html, paras 10, 12-14. *("UNHCR Oral intervention in El Kott").* UNHCR's views were accepted by the Court in *El Kott*, note 9 above, paras 80-81.
[63] "There can be no doubt that the category of refugees considered in the present Paragraph is subject to the exclusion clauses contained in Article E and F, as well as to the cessation clauses enumerated in Article 1C of the Refugee Convention." Grahl-Madsen, note 5 above, 142.
[64] *UNHCR Oral intervention in El Kott*, note 63 above, para. 13. Although a common interpretation of this provision is that it only entitles the person to be considered under Article 1A(2) and that they must still meet the well-founded fear standard, "this is not the correct interpretation of Art. 1D as read in light of its history and protection purpose. The plain meaning of the term '*ipso facto*' holds that no other criteria need to be used for assessing the situation – they are by the fact of that precondition alone *de jure* refugees under the 1951 Convention and should thereby be entitled to refugee status in any State party to the 1951 Convention." Mutaz M. Qafisheh and Valentina Azarov, 'Article 1D', in A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, (Oxford University Press, 2011), 537-569, at 567.
[65] *Ibid.*. *UNHCR Oral intervention in El Kott*. This view is supported by the use of the term "benefits" elsewhere in the Refugee Convention, for example in Articles 5 and 7, in a context that can only mean the substantive rights conferred by the Refugee Convention. Nor can the term benefits merely refer to *non-refoulement*.
[66] *El Kott*, note 9 above, paras 70-71. See also, *AD (Palestine)*, note 2 above, para. 192.
[67] See, *UNHCR Oral intervention in El Kott*, para. 16, note 70 above. The discrimination argument was roundly rejected by the CJEU in *El Kott*, note 9 above, para 78.

G. Applicability of Article 1C

31. The 1951 Convention will cease to apply under certain conditions, clearly defined in Article 1C.[68] Article 1C applies in principle to Palestinian refugees benefiting from the 1951 Convention on an individual basis. Although a literal interpretation of Article 1C, which explicitly references only refugees recognised under "Article 1A" of the 1951 Convention, would render it inapplicable to Article 1D Palestinian refugees, such an interpretation no longer corresponds to the reality that a number of Palestinian refugees have acquired the nationality and protection of other countries,[69] such that they no longer need the protection of the 1951 Convention. Notwithstanding the special situation of Palestinian refugees provided for by Article 1D, the provisions of Article 1C may be applied, account being taken of the considerable passage of time, changing circumstances, the practice of States, and the fact that many Palestinians have established themselves in other States, often acquiring a new nationality. This interpretation of the 1951 Convention is necessarily without prejudice to the meaning of 'the Palestinian people', as well as to the meaning of the terms 'refugees' and 'displaced persons' as used in various UN General Assembly and UN Security Council Resolutions.

32. Despite the decision by the UN General Assembly in 2012[70] to accord non-member observer State status in the United Nations to Palestine, Article 1D should continue to be interpreted and applied as outlined in these Guidelines and until the situation of Palestinians is definitively settled in accordance with General Assembly resolutions. It is premature to consider that the protection of the 1951 Convention should cease to apply to Palestinian refugees, merely by reason of Palestine having been accorded non-member observer status.

H. Applicability of Article 1E

33. The fact that some Palestinian refugees have been living in countries where they exercise rights and obligations ordinarily attached to the possession of nationality may render Article 1E[71] applicable to their case. In the case of children and other descendants of Palestinian refugees who may be enjoying rights and obligations identical to those of nationals of another country, consideration of the application of Article 1E of the 1951 Convention would also be required.[72]

34. Historically, States party to the League of Arab States *Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol")*[73] have pledged to provide a range of rights on par with their own citizens to Palestinian refugees, but many remain unimplemented in practice. Close scrutiny of the situation on the ground prior to applying Article 1E on the basis of the *Casablanca Protocol* would be required.

[68] UNHCR, "The Cessation Clauses: Guidelines on their Application", 26 April 1999, http://www.refworld.org/docid/3c06138c4.html and UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, http://www.refworld.org/docid/3e50de6b4.html.

[69] "A great number of Palestinian refugee residing in Jordan have acquired Jordanian citizenship in accordance with the relevant provisions of the Nationality Law of 4 February 1954. Citizenship has also been obtained by a number of Palestinian refugees residing in Iraq, Kuwait, Lebanon, Saudi Arabia and other countries in the region. As a result of the acquisition of a new nationality such persons are no longer to be considered as refugees for the purpose of the 1951 Convention" [depending on whether the relevant criteria set out in Article 1C paragraph 3 are met]. Takkenberg, note 5 above, 127 (footnotes omitted).

[70] UN General Assembly Resolution 67/19, *Status of Palestine in the United Nations*, 29 November 2012, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19.

[71] "The Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country." Article 1E, 1951 Convention, note 1 above.

[72] See UNHCR, *Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, March 2009, http://www.refworld.org/pdfid/49c3a3d12.pdf.

[73] League of Arab States, *Protocol for the Treatment of Palestinians in Arab States ("Casablanca Protocol")*, 11 September 1965, http://www.refworld.org/docid/460a2b252.html. The Casablanca Protocol provides for the right of employment on par with citizens, residency rights, travel documents, the right to leave and to return. However, it has not been consistently implemented and was weakened in 1991 with resolution 5093 that allows States to implement the Protocol "in accordance with the rules and laws in force in each state". See also, Goddard, note 29 above, 507.

I. Applicability of Article 1F

35. Persons with respect to whom there are serious reasons for considering that they have committed acts within the scope of Article 1F of the 1951 Convention[74] are not entitled to international protection as refugees.[75]

III. PROCEDURAL AND EVIDENTIARY ISSUES

A. Individual assessment

36. Although Article 1D recognizes a specific class of refugees receiving the protection or assistance of a United Nations entity other than UNHCR, the application of Article 1D will normally be assessed on an individual basis.[76]

B. Time of assessment

37. The assessment is whether, at the time the individual claim is considered, the protection or assistance of UNRWA has ceased such that the applicant is unable or unwilling to (re)avail him/herself of that protection or assistance for an objective reason beyond his/her control.

C. Burden and standard of proof

38. In applications for refugee status or protection, including those under Article 1D, the burden generally rests on the applicant to produce evidence as far as possible to support his or her statements and to substantiate the claim. The applicant is required to give a truthful account of facts relevant to his or her claim so far as these are within his or her own knowledge, and insofar as there is information that is available to him or her and which s/he can reasonably be expected to provide to the decision-maker. A decision-maker shares the duty of ascertaining the facts relevant to the determination.[77]

39. Article 1D requires an examination of whether (i) the applicant falls within the category of Palestinian refugees who is receiving or eligible to receive the protection or assistance of UNRWA and (ii) the protection or assistance of UNRWA has ceased for any reason. These are questions of fact. The decision-maker has a duty to inquire into the matter and to take into account all of the available evidence.

40. The assessment must consider whether, at the time the individual's claim is considered, he or she is unable to or unwilling to (re)avail himself or herself of the protection or assistance of UNRWA for a reason beyond his or her control. Inquiries also need to be made in relation to the circumstances in the State or authority, as well as the applicant's individual circumstances (see paragraphs 22(j) and 25).[78] The burden of proof lies on the decision-making authorities where it is asserted by them that the applicant could relocate internally within the same UNRWA area of

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

[75] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, http://www.refworld.org/docid/3f5857684.html. See also, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, http://www.refworld.org/docid/3f5857d24.html.

[76] A group-based approach, such as the prima facie recognition of refugee status, may be appropriate in certain circumstances: see UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, ("*Prima Facie Guidelines*"), 24 June 2015, HCR/GIP/15/11, http://www.refworld.org/docid/555c335a4.html.

[77] UNHCR Handbook, note 47 above, paras 196-205; UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998, http://www.refworld.org/docid/3ae6b3338.html.

[78] The ability of Palestinian refugees to move from one area of operation to another is contingent upon the recognition or granting of legal status by the host government of the receiving area, and the individual circumstances of the Palestinian refugee. This is also the case for a person who was never resident in an UNRWA area of operation.

operation, or absent other factors, be able to enter safely and with appropriate legal documentation per paragraph 22(iv) above.

UNRWA registration

41. Being registered by UNRWA or possessing UNRWA documentation would serve as conclusive, albeit not necessary, proof of falling within the scope of Article 1D(1).[79] In the absence of such documentation or other relevant proof, adjudicators may rely on other evidence to this effect, including through, for example, the applicant's own statements, the affidavits of others or the production of other relevant documentation.[80] Evidence of registration with UNRWA should not, however, be considered as a necessary precondition to recognition.[81] "Displaced persons" for example, are not "registered" in UNRWA's registration system, however, UNRWA keeps "due records" of such persons.[82] Lastly, by definition, a person who, despite being eligible to receive UNRWA protection and assistance, has not received such, may not be registered nor have such proof. They may nevertheless still fall within Article 1D.

Evidence of objective reasons bringing the applicant within the second paragraph of Article 1D

42. The evidence in relation to the inclusionary part of the assessment may come from a variety of sources. The applicant may provide evidence that is relevant in his or her own statements. A statement by UNRWA that it has discontinued activities in a given area of operation would be clear evidence that it had done so. Evidence from other sources that UNRWA had discontinued its activities could also be persuasive. It is important however that the applicant is not required to produce or point to any such possible statement.[83] If such a requirement were to be imposed, it would place an undue burden on UNRWA, one which it may not be able to satisfy in every case, owing to, for example, resources or logistical reasons or those of confidentiality.[84] Finally, the applicant should not be required to approach UNRWA directly, given the practical difficulties involved.[85] There may also be circumstances relevant to the particular applicant about which UNRWA would not know and could not provide relevant information.

D. Individual Procedures

43. Fair and efficient procedures for the determination of refugee status under the 1951 Convention need to take particular account of claims relating to Article 1D, with clear identification of the issues relevant to Palestinians.

44. When requesting asylum, applicants must be given adequate time to exercise their rights, including, inter alia, the right to be informed, in a language which they understand, of the procedure to be followed, of their rights and obligations during the procedure, the possible consequences of not complying with their obligations and not cooperating with the authorities, the right to receive the services of an interpreter, to consult in an effective manner a legal adviser or other counsellor. Access to legal advice is paramount to a fair asylum procedure and often constitutes a prerequisite to ensure effective access to legal remedies.[86]

[79] UNRWA, *CERI*, 2009, Section III.A.1, page 3, note 21 above. The CJEU found that "[w]hile registration with UNRWA is sufficient proof of actually receiving assistance from it, it has been explained in paragraph 45 above that such assistance can be provided even in the absence of such registration, in which case the beneficiary must be permitted to adduce evidence of that assistance by other means." *Bolbol*, note 2 above, paras 46 and 52.
[80] Special consideration would need to be given to descendants of Palestinian refugee women married to persons other than Palestine refugees registered with UNRWA, since they are not under UNRWA's CERI, registered as Palestine refugees but may be otherwise recorded for the purpose of receiving services. See, note 21 above.
[81] "Registration with UNRWA is of a declaratory nature, confirming rather than establishing that an individual falls under UNRWA's mandate." Takkenberg, note 5 above, 100.
[82] UNRWA, *CERI*, 2009, Section III.B - "Persons eligible to receive services without being registered in UNRWA's registration system" at page 6, note 21 above.
[83] Whether protection or assistance has ceased is a matter of fact susceptible of proof in the normal way.
[84] Here an analogy can be made with UNHCR's position regarding information relating to mandate recognition, see submission in *I. A. v. Secretary of State for the Home Department: Case for the Intervener*, 27 October 2013, United Kingdom Supreme Court, UKSC2012/0157, http://www.refworld.org/docid/52a098e34.html.
[85] Although verification that a person is a registered "Palestine refugee", or is recorded as receiving UNRWA services, can be sought from UNRWA.
[86] UNHCR, *Public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union*, 21 May 2010, http://www.refworld.org/docid/4bf67fa12.html, paras 12-16.

45. For Palestinians who do not come within the personal scope of Article 1D, an assessment under Article 1A(2) would then normally proceed.

46. Even though protection pursuant to Article 1D is normally carried out in individual procedures, there may be situations in which a group of Palestinian refugees may be recognised on a prima facie basis. For example, where the mandate of UNRWA is terminated in one of UNRWA's areas of operation, or comes to an end for reasons beyond its control, such as an international or non-international armed conflict, they would be considered – as a group – not to be receiving the protection or assistance of UNRWA.[87]

47. Where an applicant raises both a refugee and a statelessness claim, the latter made pursuant to the 1954 *Convention relating to the Status of Stateless Persons*, it is important that each claim is assessed and that both types of status are explicitly recognized.[88]

48. Best State practice ensures that Palestinian refugees recognised under Article 1D are properly recorded and separately registered in national asylum statistics.

E. Regional refugee instruments

49. Palestinian refugees are, like all other asylum applicants, entitled to apply for refugee status pursuant to any applicable regional refugee instruments, should they be in countries in which these apply.[89]

F. Refugee status and subsidiary or complementary protection

50. Palestinians found not to fall within the scope of Article 1D could have their claims for protection considered under Article 1A(2). Should they not fall within either provision, they are entitled, like all other asylum applicants, for any national or regional forms of subsidiary or complementary protection; and also to benefit from protection under international human rights law.

[87] UNHCR, *Prima Facie Guidelines,* note 82 above.
[88] UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, http://www.refworld.org/docid/53b676aa4.html, para. 78.
[89] See, Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45, http://www.refworld.org/docid/3ae6b36018.html; *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, http://www.refworld.org/docid/3ae6b36ec.html.

INDEX

The numbers refer to the paragraphs and the letters refer to the Handbook (H) and numbered Guidelines on International Protection (G1 to G13) respectively.


UNHCR
The UN Refugee Agency

GLOBAL CONSULTATIONS ON
INTERNATIONAL PROTECTION

EC/GC/01/12
31 May 2001

2nd Meeting

Original: ENGLISH

ASYLUM PROCESSES
(FAIR AND EFFICIENT ASYLUM PROCEDURES)

I. INTRODUCTION

1. Many countries have amended existing asylum legislation and procedures in recent years. Formal procedures have also been introduced in a number of States which have recently acceded to international refugee instruments but had not yet established individual asylum systems. They include many central and eastern European States and a number of African and Latin American States. In the context of the European Union (EU), changes have been linked to moves to harmonize procedures within the EU.

2. Asylum procedures are guided by or built around responsibilities derived from international and regional refugee instruments, notably the 1951 Convention relating to the Status of Refugees, its 1967 Protocol, international human rights law and humanitarian law, as well as relevant Executive Committee Conclusions.[1] National judicial and administrative law standards also determine the form and content of these procedures.

3. An examination of the purpose and content of asylum procedures, put in place by States to identify to whom asylum responsibilities are owed, is on the agenda of the Global Consultations process for several reasons. Firstly, State practice has evolved quite considerably since the Executive Committee last turned its attention to the form these procedures should take, and it is timely to examine recent trends with a view to identifying best practices which might be promoted. Secondly, there has been some debate in recent years about what constitutes "fairness" and "efficiency" in procedures, against the backdrop of mixed migratory movements, smuggling and trafficking of people and a degree of misuse of the asylum process for migration outcomes. States have legitimate concerns as regards procedures that are unwieldy, too costly, not necessarily able to respond effectively to misuse, and result in an unequal distribution of responsibilities. The role played by asylum procedures in the overall management of a broader migratory phenomenon is therefore of relevance to this examination.[2]

4. Finally, and most fundamentally, while the 1951 Convention defines those to whom it confers protection and establishes key principles such as non-penalization for illegal entry and *non-refoulement*,[3] it does not set out procedures for the determination of refugee status as such, either for individual cases or in situations of large-scale influx. As such, analysis of this issue forms an important element of the third track of the Global Consultations, relating to issues not fully covered by the 1951 Convention.

5. Fair and efficient procedures are an essential element in the full and inclusive application of the Convention. They enable a State to identify those who should benefit from international protection under the Convention, and those who should not. States have acknowledged their importance by recognizing the need for all asylum-seekers to have access to them.[4] The intention here is to identify the core elements necessary for fair and efficient decision-making in keeping with international refugee protection principles.

---

[1] Notably Conclusion No. 8 (XXVIII) 1977, on the determination of refugee status (A/AC.96/549, para. 53.6); Conclusion No. 30 (XXXIV) 1983 (A/AC.96/631, para. 97.2), on the problem of manifestly unfounded or abusive applications for refugee status or asylum.

[2] See also EC/GC/01/XII on Refugee protection and migration control; EC/50/SC/CRP.17 on Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, presented to the 18th meeting ot the Standing Committee.

[3] 1951 Convention relating to the Status of Refugees, Articles 1, 31 and 33.

[4] See, Conclusion No. 81 (XLVIII) 1997, para. (h) (A/AC.96/895, para. 18); Conclusion No. 82 (XLVIII) 1997 para.(d)(iii) (A/AC.96/895, para.19); Conclusion No. 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3). In mass influx situations, access to individual procedures may not, however, prove practicable.

6. This background note outlines recent developments in State practice, selecting key measures introduced by States to speed up decision-making. These range from admissibility procedures, including those at the border, to accelerated procedures, in particular for claims deemed manifestly unfounded or abusive. While by no means exhaustive, this note seeks to establish a common understanding of and structure for asylum procedures and to identify core procedural standards necessary to preserve the integrity of the asylum regime as both fair and efficient.

II. SHARING RESPONSIBILITIES MORE EQUITABLY

7. A number of States have now introduced an admissibility stage to their asylum procedures to determine whether a claim will or will not be considered in substance in the country where it has been made. This does not involve a substantive assessment of the claim, but seeks to determine the State responsible for doing so.

8. An asylum-seeker may be refused access to the substantive asylum procedure in the country where the application has been made:

- if the applicant has already found effective protection in another country (a first country of asylum), or
- if responsibility for assessing the particular asylum application in substance is assumed by a third country, where the asylum-seeker will be protected from *refoulement* and will be able to seek and enjoy asylum in accordance with accepted international standards (a "safe third country").

9. Both concepts were partly born of a concern to limit irregular secondary movement. As the following sections show, it is useful to maintain a clear distinction between the two.

A. First country of asylum

10. The majority of States deny a person access to asylum on their territory if s/he has already found protection in another country. In principle, this should not pose difficulties, assuming the surrogate protection required by the individual is available and can be accessed. Where the notion has, however, been problematic in practice has been in the judgement required as to whether protection possibilities are both genuinely "available", i.e. accessible to the individual concerned, and "effective".

11. Admissibility procedures which provide for an individual assessment of each case are clearly best practice here. It may, for example, be that although an individual previously enjoyed protection in another country, s/he can justifiably claim to have a reason to fear that his/her physical safety and/or freedom are endangered in that country.[5] It may also be that a refugee cannot secure effective protection and the full and durable enjoyment of his/her rights in a first country of asylum, for instance, if s/he is obliged to live without proper legal status. In such cases, refugees may legitimately feel compelled to seek protection elsewhere.

B. The "safe third country" concept

12. The "safe third country" notion presumes that the applicant could and should already have requested asylum if he/she passed through a safe country *en route* to the country where asylum is being requested. This notion is applied in most European States, although it is less widely used

[5] Conclusion No. 15 (XXX) 1979, para. (k) (A/AC.96/572, para.72.2); and Conclusion No. 58 (XL) 1989, para. (g) (A/AC.96/737, para. 25).

elsewhere. It is applied in various ways: to deny admission to the procedure (including directly at the border), to channel applications into accelerated procedures, and/or to reduce or exclude appeal rights. Several States have publicly available "safe third country" lists, while others apply the notion in a more informal manner.

13. Procedures that qualify as best practice are those which provide for an individualized assessment that the third country is "safe" in the case of each asylum-seeker thus ensuring respect for international protection principles and in particular that of *non-refoulement*. Such best practice procedures include an examination of the individual's own circumstances so as to give the asylum-seeker the opportunity to rebut a general presumption of safety. S/he could, for instance, demonstrate that on the facts of his/her case, the third State would apply more restrictive criteria in determining his/her status than the State where the application has been presented.[6]

14. As for the general question of "safety", this cannot be answered solely on the basis of formal criteria, such as whether or not the third State is a party to the 1951 Convention and 1967 Protocol and/or relevant international human rights treaties. The third State needs actually to implement appropriate asylum procedures and systems fairly. Any list-based general assessment of safety of the third country needs to be applied flexibly, and ensure due consideration of that country's safety for the individual asylum-seeker.

15. In accordance with recommended best State practice, procedures in such cases should explicitly provide for return to be effected only if the individual will be readmitted to the country, will be able to access fair asylum procedures and, if recognized, will be able to enjoy effective protection there.[7] In terms of formal safeguards, it is important for the returning State to provide clear information (in the language of the third State and one understood by the applicant) that the individual is an asylum-seeker and that his/her application has not been substantively examined.

16. Provision is made in certain systems for States to admit and consider the claim in substance, rather than seeking to transfer responsibility for doing so. This is appropriate if an asylum-seeker has passed through a "safe third country" but has close family and/or significant other ties with the country where asylum is claimed, or if there are compelling humanitarian reasons (e.g. health). It is also appropriate if the asylum-seeker was merely in transit for a limited period of time in an intermediate country where s/he has no links or contacts, for the sole purpose of reaching his/her destination.

17. EU States sought to address some of these issues more predictably through the conclusion of the 1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities. This Convention establishes mechanisms to determine the State responsible for assessing the claim and for mutually-agreed transfer, although States may also return asylum-seekers to a non-EU State. In practice, there have been problems with its implementation, which has often been slow and resulted in the transfer of only a small proportion of cases.[8] The Dublin Convention is being reformed in tandem with the move towards greater harmonization of EU State practice in asylum

---

[6] See, *inter alia*, European Court of Human Rights, admissibility decision in *T.I.* v. *United Kingdom*, 7 March 2000.

[7] See Note on International Protection, presented to the Executive Committee's fiftieth session, (A/AC.96/914, para. 19).
See also Recommendation No. R(97)22 of the Committee of Ministers of the Council of Europe containing Guidelines on the Application of the Safe Third Country Concept (25 Nov.1997).

[8] See working paper of the Commission of the European Communities, "Revisiting the Dublin Convention: Developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States", SEC (2000) 522 final, 21 March 2000.

matters, including the interpretation of the refugee definition. The Dublin Convention has nevertheless provided a more predictable cooperative framework in which asylum-seekers can be transferred with the agreement of both States concerned, and with an acceptance that the claim will be examined in substance.

18. In the wider context, consideration could be given to the possibility of concluding other multilateral or bilateral Dublin-type agreements to ensure that the "safe third country" notion is applied with clear safeguards as an integral part of its application. Such agreements would serve to enhance predictability, and address concerns regarding unilateral returns. It would be in the interests of States parties not to return asylum-seekers to other States except under such mutually agreed arrangements. Another important element to consider when crafting this type of agreement is the question of the criteria applicable for determining the State responsible for examining each case to ensure that the operation of any transfer mechanism is timely and equitable, in line with a burden-sharing rationale. Ultimately, the effective operation of such mechanisms is dependent upon closer harmonization among States parties in the actual application of asylum policies and procedures, as well as on equitable burden and responsibility-sharing mechanisms.

C. Imposition of time limits for applications

19. Another issue affecting admission to asylum procedures concerns the time limits within which asylum applications must be made which are applied by some States. These can range from 24 hours to one year. Moreover, some States restrict or deny access to social assistance based on the time or place the application is made.

20. A fundamental safeguard in some systems, which should, in UNHCR's view, be promoted for all, is the recognition that an asylum-seeker's failure to submit a request within a certain time limit or the non-fulfilment of other formal requirements should not in itself lead to an asylum request being excluded from consideration, although under certain circumstances a late application can affect its credibility. The automatic and mechanical application of time limits for submitting applications has been found to be at variance with international protection principles.[9]

III. RECEIVING ASYLUM-SEEKERS AT THE BORDER

21. Applications for asylum made at the border, including at airports, raise particular questions, since the asylum-seeker is generally held at the border and only given access to the territory if admitted to the full asylum procedure. In these situations, States are understandably concerned to ensure that cases not in need of international protection are dealt with without delay, and returns effected promptly where appropriate. Concerns arise, however, when for example, guards at land borders may have broadly defined powers that include assessment of the substance of the claim, but may have limited expertise in asylum matters. At airports, many States have introduced special accelerated procedures. Sometimes these include specific safeguards and support, given the particular situation of the asylum-seeker who is generally required to remain at the airport while a decision is made. Sometimes, however, such measures are not in place and those in need of international protection may be unable to gain access to procedures or even advice.

22. Since decisions at the border/airport involve substantive issues and are sometimes made within very tight time frames, the possibility of an inaccurate decision can be higher. It is therefore essential that appropriate safeguards are in place, at a minimum those included in other accelerated procedures "on shore". In particular, where decision-making deadlines cannot be met, whether for

---

[9] *Jabari* v. *Turkey*, European Court of Human Rights, 10 July 2000, para. 40; see also Conclusion No. 15 (XXX), 1979, on refugees without an asylum country, para. (i) (A/AC.96/572, para. 72.2).

administrative or substantive reasons, the asylum-seeker should logically be admitted to the regular procedure. Access to legal advice, to UNHCR and to non-governmental organizations (NGOs) working on behalf of UNHCR is also critical both at the border and in an airport transit zone. At land borders, if the situation of someone seeking entry raises issues relating to asylum, the case should be referred to the central authority responsible for asylum so that it can interview the applicant and make a decision on entry and on the claim. In some States, these basic safeguards are indeed built into the procedure. They are recommended for inclusion more broadly.

23. An additional recommended practice that has proved particularly valuable for border officials and others working with asylum-seekers is that of training, including in appropriate interviewing skills and relevant refugee protection principles. Officials also need to be aware of the particular protection needs of groups with special needs, such as torture victims, women, children notably those separated from their family, and the elderly (see section V below).

IV. EXPEDITING AND STREAMLINING EQUITABLE PROCEDURES

24. In recent years, asylum procedures in many countries have become increasingly complex. In addition to the inclusion of an admissibility stage, accelerated or shortened procedures have been introduced for certain categories of asylum claims and/or separate procedures to assess complementary protection needs.[10] These changes have often been prompted by an increased number of arrivals and a growing backlog of asylum decisions, as well as by attempts to ensure a fairer assessment of claims. Several of these tools are outlined below, although in many cases a simplified, single procedure may prove fairer and more efficient.

A. Procedures for manifestly unfounded or abusive claims

25. Many States have introduced accelerated procedures to determine applications which are clearly abusive or manifestly unfounded and can otherwise overburden asylum procedures to the detriment of those with good grounds for requesting asylum, as acknowledged in Executive Committee Conclusion No. 30. The situation is complicated by the fact that some States have introduced the "manifestly unfounded" notion at other stages of the procedure, including at the admissibility stage.

26. There is a need, in UNHCR's assessment, to promote a more common understanding of the types of claim which would merit the presumption that they are manifestly unfounded or clearly abusive, and which could be examined under an accelerated procedure. (The latter, unlike an admissibility procedure, deals with the substantive claim, albeit in a simplified and shortened manner.) If the types of application which may be categorized as clearly abusive or manifestly unfounded can be clearly defined and delimited and if appropriate safeguards are in place, the approach can be a useful case management tool within the asylum procedure to expedite decision-making in countries dealing with a significant caseload. This being said, the experience of some States demonstrates that, where relatively few applications are generally received, a focus on prompt quality decision-making under a single procedure is likely to be a more effective option (see section VI below).

27. Conclusion No. 30 describes "clearly abusive" and "manifestly unfounded" applications as "those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 ... Convention ... nor to any other criteria justifying the granting of asylum".

---

[10] See EC/50/SC/CRP.18, "Note on Complementary Forms of Protection: Their Nature and Relationship to the International Refuge Protection Regime", presented to the 18th meeting of the Standing Committee.

28. Whether a case is deemed "manifestly unfounded" or not will depend upon the degree of linkage between the stated reasons for departure and the refugee definition. One potential problem in applying this notion is that not all asylum-seekers have the capacity without assistance to articulate clearly and comprehensively why they left, and certainly not where there is an element of fear or distrust involved, or where other factors are at play, including the quality of the interpreters. There is also the issue of credibility: an asylum-seeker's description of events prompting flight may appear to relate to the refugee definition, but may still lack objective credibility, while falling short of being "fraudulent". Some States have factored credibility, or absence thereof, into the original assessment of manifest unfoundedness.

29. Among the categories of claim often deemed manifestly unfounded are those from so-called safe countries of origin, as outlined further in section C below. In recent years, a number of States have recognized, however, that certain types of cases should not be dismissed as "manifestly unfounded" either at the admissibility stage or in accelerated procedures, if such procedures are to be implemented fairly. For instance, there is now wider recognition that applications involving questions of an internal flight/relocation alternative and exclusion clauses under Article 1(F) of the 1951 Convention can give rise to complex issues of substance and credibility which are not given appropriate consideration under admissibility or accelerated procedures.[11]

30. The category of abusive or fraudulent claims involves those made by individuals who clearly do not need international protection, as well as claims involving deception or intent to mislead which generally denote bad faith on the part of the applicant. It is accepted that such claims may be subjected to accelerated procedures. They give rise to a presumption of unfoundedness and expedited procedures can be put in place to test that assumption. Though curtailed, an individual assessment of the motivation for flight is essential to support or rebut this presumption. If major substantive issues arise, best State practice transfers the claim to the regular procedure.

31. Similarly, a number of States have taken the position that repeated applications in the same jurisdiction should be considered abusive and subjected to accelerated procedures. Where such cases have been properly adjudicated in that jurisdiction, a simple administrative decision not to entertain the application rather than its reconsideration could be sufficient, in keeping with the *res judicata* principle. In such cases, however, States which provide for an individual assessment of the applicant's specific circumstances are putting in place a process to be replicated elsewhere. Such best practice involves an assessment that it is indeed a repeated application in which there are no significant substantive changes to the asylum-seeker's individual situation or to the circumstances in the country of origin. The situation is similar if an individual applies for asylum when s/he faces deportation or expulsion and his/her claim has been properly assessed and adjudicated. Where an individual faces deportation or expulsion for another reason and applies for asylum for the first time, then the application needs to be assessed under either the regular or accelerated procedure depending on the nature of the claim, since his/her earlier status may have provided *de facto* protection.

32. Where accelerated procedures are applied, it is important that appropriate procedural safeguards are in place. In addition to the basic requirements applying to all types of asylum application[12], three particular safeguards have been identified that are specifically applicable to accelerated procedures[13]. First, the applicant should be given a complete personal interview by a fully qualified official, whenever possible, by an official of the authority competent to determine

---

[11] See, for example, Commission of the European Communities, "Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status", COM(2000) 578 final, 20 Sept. 2000.
[12] Conclusion No. 8 (XXVIII) 1977, (A/AC.96/549, para. 53).
[13] Conclusion No. 30 (XXXIV) 1983, (A/AC.96/631 para. 97.2).

refugee status. Second, the authority normally competent to determine refugee status should establish the manifestly unfounded or abusive character of an application. Third, an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. This review possibility can be more simplified than that available in the case of rejected applications not considered manifestly unfounded or abusive.

33. In a few States, an accelerated procedure is used for cases where a positive decision is expected. This is a useful practice which helps reduce the burden on decision-making structures and frees up resources to deal with more complex cases.

B. Undocumented and uncooperative asylum-seekers

34. Many States have faced a growing problem of asylum-seekers who arrive with no or forged documents and/or who are unwilling to cooperate with the authorities. They present particular problems and can overload asylum procedures. A number of States tend to presume such asylum applications are abusive and often subject them to expedited removal or other separate accelerated processing. They have also applied a range of sanctions, including civil or criminal prosecution, fines, detention, more frequent reporting requirements to the authorities, the withdrawal or reduction of financial benefits or their replacement by goods in kind, and the denial of work authorization.

35. As States have long recognized, however, it is likely that refugees may need to resort to illegal means to flee, which should not result in them being subject to penalties, where they meet the process requirements of Article 31(1) of the 1951 Convention. A lack of appropriate documentation or the use of false documents does not alone render a claim abusive or fraudulent and should not be used to deny access to a procedure, since any presumption of abuse needs to be examined to determine its validity.[14]

36. The concern is to differentiate between these cases and those where the applicant has wilfully destroyed or disposed of travel or other documents for reasons materially unrelated to the substance of an asylum claim, in order to make examination of the application or expulsion more difficult. It may, however, be that an initial lack of cooperation results from communication difficulties, disorientation, distress, exhaustion, and/or fear. Credibility may be an issue. For example, continued insistence that documents are genuine, once they have been proven false clearly undermines the credibility of a claim. A refusal to provide details of the route taken to flee also undermines credibility, although this could also be because the asylum-seeker fears *refoulement*, because s/he does not wish to endanger the lives of others, or because the route taken by smugglers is not known. Those who refuse to cooperate in establishing their identity and/or refuse to provide information concerning their claim despite repeated requests to do so seriously undermine their own credibility.

37. Awareness and sensitivity are necessary to recognize these different factors. Appropriate counselling of the asylum-seeker on the meaning and nature of the asylum procedure, on his/her rights and responsibilities, and on the consequences of not cooperating have proved helpful in promoting cooperation. Access to UNHCR, relevant NGOs, and legal advice can also play an important role in giving the asylum-seeker greater confidence in and understanding of the procedure. The better procedures are those into which these factors are built. For his/her part, the asylum-seeker has an obligation to give a full and truthful presentation of his/her case and to

[14] See Note on International Protection, (A/AC.96/914, para. 23). See also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1992, para.196.

cooperate with the authorities.[15] The procedures should also be structured to promote this obligation being met.

C. Safe countries of origin

38. The safe country of origin concept has been used in certain asylum procedures either on a formal legislative or on a *de facto* basis. Some States have drawn up extensive lists of such countries, sometimes applying them as an automatic bar to access to the asylum procedure. The concept has also been used as a procedural tool to assign certain applications to accelerated procedures, or it has been given an evidentiary function, for example to create a presumption that the claim is not valid. Some States curtail appeal rights for asylum-seekers from countries of origin deemed to be safe.

39. Experience shows that, while this concept can work as an effective decision-making tool, it is important that the general assessment of certain countries of origin as safe is based on reliable, objective and up-to-date information from a range of sources. It needs to take account not simply of international instruments ratified and relevant legislation enacted there, but also of the actual degree of respect for human rights and the rule of law of the country's record of not producing refugees, of its compliance with human rights instruments, and of its accessibility to independent national or international organizations for the purpose of verifying human rights issues. If a State decides to establish a list of safe countries of origin, the procedure for adding or removing countries from any such list needs to be transparent, as well as responsive to changing circumstances in countries of origin. In addition, given the need for an individual assessment of the specific circumstances of the case and the complexities of such a decision, best State practice does not apply any designation of safety in a rigid manner or use it to deny access to procedures. Rather, it bases any presumption of safety on precise, impartial and up-to-date information and admits the applicant to the regular asylum procedure, so that s/he has an effective opportunity to rebut any general presumption of safety based on his/her particular circumstances.

40. It has been suggested that a regional or international approach to examining asylum applications could be developed which would integrate the safe country of origin concept, and allow claims to be considered under a greatly accelerated process if they emanate from persons leaving listed countries. Such a proposal could certainly be studied. It would need, however, to address the question of the appropriate criteria used to determine safety and the transparency of the procedure to do so. In addition, the 1951 Convention could not be read in any way as condoning rejection of refugee status because of national or ethnic origin. In fact, it must be recalled that the Convention envisages the positive conferral of status because of well-founded fear of persecution for reasons of race or nationality. In order for the non-discriminatory basis of the 1951 Convention to be upheld, it is crucial that the asylum-seeker be admitted to the asylum procedure and has an effective opportunity to rebut a general presumption of safety in his/her individual case. Consideration of such a mechanism would, moreover, need to take account of the fact that generic listing of countries has not proved responsive enough to the genuine protection problems in individual cases, and potentially has political complications.

D. Appeals

41. Procedures in place in most States recognize that standards of due process require an appeal or review mechanism to ensure the fair functioning of asylum procedures, although the nature of the appeal or review can vary quite widely depending on administrative law standards applicable in the country. Under regular decision-making procedures, State practice generally permits an appeal or review which involves considerations of both fact and law. In addition, most

[15] UNHCR *Handbook*, para.205.

jurisdictions permit a further judicial review, which addresses questions of law only, and may be limited by a leave requirement.

42. Where capacity is lacking or cases are assessed under an accelerated procedure, State practice has tended to be for the appeal process to take the form of an administrative review of a more simplified nature. For example, some States prioritize certain cases for appeal, reduce the number of members of a panel hearing the appeal, shorten time limits for lodging an appeal, or restrict review of certain types of cases to a review of documentation alone. In some countries, admissibility procedures offer no right of appeal against rejection on "safe third country" grounds, or such an appeal has no suspensive effect on the implementation of deportation. In cases considered under accelerated procedures, several countries only grant a right to apply for authorization to remain in the territory or at the border while the appeal is considered.

43. A key procedural safeguard deriving from general administrative law and essential to the concept of effective remedy, has become that the appeal be considered by an authority different from and independent of that making the initial decision. Other safeguards of particular importance for expedited appeals for which a time limit has been imposed within which appeals must be made, include measures to ensure that an asylum-seeker has prompt access to legal advice, interpreters and information about procedures, so that s/he still has access to an effective remedy. The possibility for the appeal or review authority to gain a personal impression of the applicant is another important safeguard. An interview is less essential if the application is presumed manifestly unfounded or clearly abusive, and a face-to-face interview by a fully qualified official has already taken place. Another broadly recognized essential safeguard for an appeal, whether made at the admissibility stage, in an accelerated or regular procedure, is that it should in principle have suspensive effect until a final decision on the appeal has been made.

V. ENHANCING AWARENESS OF SPECIAL PROTECTION NEEDS

44. Certain vulnerable asylum-seekers require particular attention, understanding and sensitivity, especially if accelerated or otherwise curtailed procedures are introduced. They include torture victims, victims of sexual violence, women under certain circumstances, children particularly unaccompanied or separated children, the elderly, psychologically disturbed persons, and stateless persons. Some States have developed specific procedures and guidelines for such groups. These could usefully be replicated elsewhere.

45. As regards female asylum-seekers, it is important that if accompanied by male relatives they are informed in private and in terms they understand of their right to make an independent asylum application at any stage, and that they are afforded the opportunity to seek legal advice before making such an application. Female asylum-seekers should in preference be given the opportunity to be interviewed by skilled female interviewers and interpreters, and should in any case be interviewed in a gender-sensitive environment. Where a principal applicant is granted protection, other members of the family should, in the interests of family unity, be given the same status.[16] Where a principal applicant is excluded from status, family members should have their claims independently adjudicated in their own right.

46. Best practices as regards unaccompanied or separated children are built around the following principles. The best interests of the child are paramount. The child should not be refused entry or returned at the point of entry, or be subjected to detailed interviews by immigration authorities at the point of entry. As soon as a separated child is identified, a suitably qualified

[16] Conclusion No. 64 (XLI) 1990, para. (a)(iii) (A/AC.96/760, para. 23 (a) (iii); Conclusion No. 88 (L) 1999, para. b(iii) (A/AC.96/928, para. 21).

guardian or adviser should be appointed to assist him/her at all stages. Interviews should be carried out by specially trained personnel and separated children should not be detained for immigration reasons.[17]

47. Targeted training can clearly enhance officials' sensitivity towards and awareness of legal and procedural issues as they relate to each of these groups and their particular needs. Similar guidelines and training are relevant to the other categories mentioned above.

VI. PROMOTING A SINGLE ASYLUM PROCEDURE

48. In many cases, a single, consolidated procedure which assesses whether an asylum-seeker qualifies for refugee status or other complementary protection represents the clearest and swiftest means of identifying those in need of international protection. It could offer a more economical and less fragmented approach, which would ultimately lend itself more readily to the establishment of a more coherent interpretation of international protection needs. The key to a credible asylum system that protects refugees and discourages people who do not have a legitimate asylum claim is quality decision-making, done promptly, and with the results enforced, including the return of those not in need of international protection.

VII. CONCLUDING OBSERVATIONS AND RECOMMENDATIONS

49. Initiatives by States to enhance the operation of the asylum system have tended in recent years to spawn an increasingly wide variety of procedures and processes. The challenge now is to refocus efforts to establish clearer and simpler procedures, which concentrate on well-resourced, quality initial decision-making with appropriate safeguards. Asylum procedures managed more expeditiously, efficiently and fairly in keeping with international refugee law standards will make an important contribution to improving the capacity of States to manage arrivals of non-nationals.

50. In order to pursue this goal, it is therefore proposed that national legislation on asylum procedures be introduced, where this does not exist. It would also be useful, in UNHCR's assessment, for the Executive Committee to reach agreement on some basic guiding principles, possibly in the form of a Conclusion on Asylum Procedures. This should build on existing Conclusions based on best State practices and should aim to offer a consolidated framework within which asylum procedures can be developed that are compatible with national systems and in keeping with international refugee protection standards. The following compilation of best practice could provide a useful basis:

a) All asylum-seekers, in whatever manner they arrive within the jurisdiction of a State, should have access to procedures to adjudicate their claim which are fair, non-discriminatory and appropriate to the nature of the claim.

b) Countries of asylum which apply admissibility procedures may return refugees to a first country of asylum, where it has first been ascertained that the person will be accepted upon return and will continue to enjoy effective protection in that country.

---

[17] See, for instance, Immigration and Refugee Board of Canada, "Child Refugee Claimants: Procedural and Evidentiary Issues", 30 Sept. 1996; UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, Feb. 1997; Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries, European Union, Official Journal C 221, 19 July 1997, pp. 23–7; Save the Children Alliance in Europe/UNHCR, "Separated Children in Europe Programme: Statement of Good Practice", October 2000.

c) An asylum-seeker should only be returned to a third State, if responsibility for assessing the particular asylum application in substance is assumed by the third country, if the asylum-seeker will be protected from *refoulement* and will be able to seek and, if recognized, enjoy asylum in accordance with accepted international standards. Any mechanisms under which responsibility for assessing the asylum claim is transferred should be clearly defined in law.

d) Accelerated procedures when employed to resolve manifestly well-founded cases can be a useful case-management tool to enhance prompt decision-making. They may also be useful where abuse or unfoundedness is manifest. The parameters for these latter cases need to be clearly defined so that decisions involving complex substantive issues are not included. Procedures need to incorporate appropriate safeguards, in particular to allow for an individual assessment of the situation where circumstances may have changed.

e) A single procedure to assess the claims of all those seeking refugee status or other complementary protection may, in many cases, represent the clearest and swiftest means of identifying those in need of international protection. Particularly in countries where there are relatively few asylum claims, a single, prompt and efficient core decision-making procedure is likely to be the most efficient and most appropriate approach.

f) The safe country of origin concept may prove to have merit as a case-management tool within the asylum procedure, for instance, to assign applications to a fast track or to decision-making teams with particular geographical expertise. It could also have an evidentiary function, for instance, giving rise to a presumption of non-validity. There needs, however, to be provision for an assessment of the individual circumstances of each case and an opportunity to rebut a presumption of safety. Any general assessment of safety of a specific country needs to be made in an impartial and transparent manner against precisely articulated and widely endorsed criteria.

g) At all stages of the procedure, including at the admissibility stage, asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel. Where free legal aid is available, asylum-seekers should have access to it in case of need. They should also have access to qualified and impartial interpreters where necessary, and the right to contact UNHCR and recognized NGOs working in cooperation with UNHCR. UNHCR's mandate requires that it have prompt and unhindered access to asylum-seekers and refugees wherever they are.

h) The examination of applications for refugee status should in the first instance allow for a personal interview, if possible before the decision-makers of the competent body, and should be based on a thorough assessment of the circumstances of each case. The asylum-seeker should have the opportunity to present evidence concerning his/her personal circumstances and conditions in the country of origin. In manifestly well-founded cases, an interview may not always be necessary where a positive decision is expected.

i) The body responsible for examining and deciding on applications for refugee status in the first instance should be a single, central specialized authority. If an initial interview is made by a border official, there should be provision that an applicant not be rejected or denied admission without reference to a central authority.

j) Decision-makers should have access to accurate, impartial, and up-to-date country of origin information from a variety of sources as a key decision-making tool. They should be trained in appropriate, cross-cultural interviewing skills, be familiar with the use of interpreters, and have requisite knowledge of refugee and asylum matters.

k) The asylum-seeker has a responsibility to cooperate with the authorities in the country of asylum. The burden of proof is shared between the individual and the State in acknowledgement of the vulnerable situation of the asylum-seeker. The procedures should reflect both of these factors.

l) A lack of appropriate documentation or the use of false documents should not in itself render a claim abusive or fraudulent. Where the asylum-seeker has wilfully destroyed identity documents and refuses to cooperate with the authorities, this can undermine the credibility of his/her claim and lead to the channelling of the claim into an appropriate expedited procedure.

m) The asylum procedure should at all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request. No information on the asylum application should be shared with the country of origin.

n) There should be special procedures and training to enable the sensitive and flexible handling of claims involving asylum-seekers with special needs, including victims of torture or sexual violence. In relation to women and children, such procedures should, for instance, take into account the following considerations:

- Where female asylum-seekers are accompanied by male relatives they should be informed in private and in terms they understand of their right to make an independent individual asylum application at any stage and be afforded the opportunity to seek legal advice before making such an application. Female asylum-seekers should preferably be given the opportunity to be interviewed by skilled female interviewers and interpreters and should in any case be interviewed in a gender-sensitive environment.
- For unaccompanied or separated children, the best interests of the child are paramount. They should never be refused entry or returned at the point of entry or subjected to detailed interviews by immigration authorities at the point of entry. As soon as a separated child is identified, a suitably qualified guardian or adviser should be appointed to assist them at all stages. Interviews should be carried out by specially trained personnel and separated children should never be detained for immigration reasons.

o) All applicants should receive a written decision automatically, whether on admissibility or the claim itself. If the claim is rejected or declared inadmissible, the decision should be a reasoned one.

p) All applicants should have the right to an independent appeal or review against a negative decision, including a negative admissibility decision, although this may be more simplified in the case of admissibility decisions or decisions made under accelerated procedures. The letter of rejection should contain information on the asylum-seeker's right to appeal, provisions of the appeal procedure and any applicable time limits. An asylum-seeker should in principle have the right to remain on the territory of the asylum country and should not be removed, excluded or deported until a final decision has been made on the case or on the responsibility for assessing the case.

Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees

Contents **Page**

Protection Policy and Legal Advice Section,
Department of International Protection,
Geneva, 4 September 2003

This Background Note forms an integral part of UNHCR's Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05, 4 September 2003).

I. INTRODUCTION

A. Background

1. The 1950 Statute of the United Nations High Commissioner for Refugees (hereinafter "the UNHCR Statute"), the 1951 Convention and 1967 Protocol relating to the Status of Refugees (hereinafter "the 1951 Convention") and the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter "the OAU Convention") contain provisions for excluding from the benefits of refugee status certain persons who would otherwise qualify as refugees. These provisions are commonly referred to as the "exclusion clauses".

2. Events in the last decade, prompted in large part by the conflicts in the Great Lakes and the former Yugoslavia and their aftermath, have resulted in increased requests for clarification of the exclusion clauses. Recent anti-terrorism initiatives have further focused attention on these provisions. This Background Note provides a detailed analysis and review of the exclusion clauses, taking into account the practice of States, UNHCR and other relevant actors, UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* (hereinafter "the Handbook"), case law, the *travaux préparatoires* of the relevant international instruments, and the opinions of academic and expert commentators. It also draws on the constructive discussion of this topic at the May 2001 Expert Roundtable held in Lisbon, Portugal, as part of UNHCR's Global Consultations on International Protection (second track). It is hoped the information provided in this Background Note, along with the Guidelines on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, will facilitate the proper application of Article 1F of the 1951 Convention through a thorough treatment of the main issues. Obviously, each case must be considered on its own merit, bearing in mind the matters discussed below. As the Executive Committee of UNHCR recognised in Conclusion No. 82 (XLVIII), 1997, paragraph d(v), the exclusion clauses must be applied "scrupulously" to protect the integrity of the institution of asylum.

B. Objectives and general application

3. The rationale behind the exclusion clauses is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice. While these underlying purposes must be borne in mind in interpreting the exclusion clauses, they must be viewed in the context of the overriding humanitarian objective of the 1951 Convention.

4. Consequently, as with any exception to human rights guarantees, the exclusion clauses must always be interpreted restrictively and should be used with great caution. As paragraph 149 of the Handbook emphasises, such an approach is particularly warranted in view of the serious possible consequences of exclusion for the individual. Moreover, the growth in universal jurisdiction and the introduction of international criminal

tribunals reduces the role of exclusion as a means of ensuring fugitives face justice, thus reinforcing the arguments for a restrictive approach.[1]

C. The exclusion clauses in the international refugee instruments

5. Paragraph 7(d) of the UNHCR Statute provides that the competence of the High Commissioner shall not extend to a person:

> In respect of whom there are serious reasons for considering that he [or she] has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the 1945 London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the 1948 Universal Declaration of Human Rights.[2]

6. Article 1F of the 1951 Convention states that the provisions of that Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that:

> (a) he [or she] has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he [or she] has committed a serious non-political crime outside the country of refuge prior to his [or her] admission to that country as a refugee; or
>
> (c) he [or she] has been guilty of acts contrary to the purposes and principles of the United Nations.

7. The grounds for exclusion are enumerated *exhaustively* in the 1951 Convention. While these grounds are subject to interpretation, they cannot be supplemented by additional criteria in the absence of an international convention to that effect. Article I(5) of the OAU Convention replicates the language contained in Article 1F of the 1951 Convention except for a reference to persons who have been "guilty of acts contrary to the purposes and principles of the Organization of African Unity". As the OAU Convention complements the 1951 Convention, the latter phrase should be read as subsumed within Article 1F(c) of the 1951 Convention, given the close connection between the OAU's and the UN's purposes.

---

[1] During the 29th meeting of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, the French delegate (M. Rochefort) maintained that the proposed Article 1F(b) was necessary because "in the present state of affairs, there was no international court of justice competent to try war criminals or violations of common law already dealt with by national legislation". (UN doc. A./CONF.2/SR.29 at 21).

[2] The provisions of the London Charter are discussed below in the section on Article 1F(a). Article 14 of the Universal Declaration of Human Rights states:

> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

D. Relationship with other provisions of the 1951 Convention

8. The exclusion clauses found in Article 1F should be distinguished from Articles 1D and 1E of the 1951 Convention, as the latter deal with persons not in need, rather than undeserving, of international protection. **Article 1D** provides that the 1951 Convention shall not apply to persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. They may, however, fall within the scope of the 1951 Convention in the event that "such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations".[3] In such circumstances, consideration of exclusion pursuant to Article 1F may arise.

9. Under **Article 1E**, the 1951 Convention does not "apply to a person who is recognized by the competent authorities of the country in which he [or she] has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country". The object and purpose of this Article can be seen as excluding from refugee status those persons who do not require refugee protection because they already enjoy greater protection than that provided under the 1951 Convention in another country apart from the country of origin where they have regular or permanent residence and where they enjoy a status that is in effect akin to citizenship.

10. Moreover, Article 1F should not be confused with **Article 33(2)** of the 1951 Convention which provides that the benefit of the *non-refoulement* provision "may not ... be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country". Unlike Article 1F which is concerned with persons who are not eligible for refugee status, Article 33(2) is directed to those who have already been determined to be refugees. Articles 1F and 33(2) are thus distinct legal provisions serving very different purposes. Article 33(2) applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason, Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual – a threat such that it can only be countered by removing the person from the country of asylum.

E. Temporal scope

11. Whereas Article 1F(b) specifies that the crime in question must have been committed "outside the country of refuge prior to [the individual's] admission to that country as a refugee",[4] the other exclusion clauses contain no temporal or territorial references. Given the serious nature of the crimes concerned, Articles 1F(a) and 1F(c) are therefore

[3] See also, UNHCR, "Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees", October 2002.
[4] See also paragraphs 44–45 below.

applicable at any time, whether the act in question took place in the country of refuge, country of origin or in a third country. Once such crimes are committed, the individual is excluded from refugee status. If the individual has already been recognised as a refugee, his or her status would need to be revoked.[5]

12. The temporal aspect of the exclusion clauses remains the same in the case of refugees *sur place* (where the claim to refugee status flows from circumstances arising after departure from the country of origin). Thus, in order for Article 1F(a) and (c) to apply, the crime in question need not have taken place before the events giving rise to the refugee claim. Indeed, if a recognised refugee subsequently engages in conduct coming within the scope of Article 1F(a) or 1F(c), revocation of refugee status would be appropriate. By contrast, for Article 1F(b), only crimes committed outside the country of refuge prior to the person's admission to that country as a refugee are relevant.

F. Cancellation of refugee status (*ex tunc*)

13. General principles of administrative law allow for the cancellation of refugee status where it is subsequently revealed that the basis for such a decision was absent in the first place, either because the applicant did not meet the inclusion criteria or because one of the exclusion clauses would have applied at the time of decision-making had all the facts been known. Cancellation is, however, not related to a person's conduct post-determination. It is important therefore to differentiate between cancellation of refugee status on the basis of exclusion and expulsion or withdrawal of protection from *non-refoulement* under Articles 32 and 33(2) of the 1951 Convention. The former rectifies a mistaken grant of refugee status,[6] while the latter provisions govern the treatment of those properly recognised as refugees.

14. Facts that would have justified exclusion may only become known after recognition of the individual as a refugee. Paragraph 141 of the Handbook states:

> Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee. In such cases, the exclusion clause will call for a cancellation of the decision previously taken.

15. The erroneous decision may be due to fraud or misrepresentation regarding facts central to the refugee claim on the part of the applicant or may be attributable to the authorities (for example, inadequate decision-making). The act of cancellation corrects an administrative or judicial decision that was wrong *ab initio* by rescinding the original erroneous determination (from then or *ex tunc*). In such a scenario, the person is not and has never been a refugee. The prompt and transparent rectification of such errors is

[5] See paragraph 17 below.

[6] On cancellation of refugee status generally, see paragraph 117 of the Handbook and also S. Kapferer, "Cancellation of Refugee Status", Legal and Protection Policy Research Series, UNHCR, Department of International Protection, PPLA/2003/02, March 2003.

necessary to preserve the integrity of the refugee definition. Generalised suspicions about involvement in terrorist activity based solely on religious, ethnic or national origin, or political affiliation do not, however, justify a process of reviewing the grant of refugee status generally to entire groups of refugees.

16. There may be occasions when, after the exclusion of an individual, information comes to light which casts doubt on the applicability of the exclusion clauses. In such cases, the exclusion decision should be reconsidered and refugee status recognised if appropriate.

G. Revocation of refugee status (*ex nunc*)

17. In principle, refugees, including those recognised on a *prima facie* basis, must conform to the laws and regulations of the country of asylum as set out in Article 2 of the 1951 Convention and if they commit crimes are liable to criminal prosecution. The 1951 Convention foresees that such refugees can be subject to expulsion proceedings in accordance with Article 32 and, in exceptional cases, to removal under Article 33(2). Neither action per se involves revocation of refugee status. Where, however, a refugee engages in conduct coming within the scope of Article 1F(a) or 1F(c), for instance, through involvement in armed activities in the country of asylum, this would trigger the application of the exclusion clauses. In such cases, revocation of refugee status (from now or *ex nunc*) is appropriate, provided of course that all the criteria for the application of Article 1F(a) or 1F(c) are met.[7]

H. Responsibility for determination of exclusion

18. Under the 1951 Convention and the OAU Convention, competence to decide whether a refugee claimant falls under the exclusion clauses lies with the State in whose territory the applicant seeks recognition as a refugee. Nevertheless, UNHCR has a responsibility under paragraph 8 of its Statute in conjunction with Article 35 of the 1951 Convention to help States that may require assistance in their exclusion determinations, and to supervise their practice in this regard.

19. As a matter of policy, UNHCR does not normally determine refugee status in countries that are party to the 1951 Convention/1967 Protocol. Determination of refugee status by States and determination of such status by UNHCR under its mandate are, however, not mutually exclusive. In some countries, for instance, UNHCR takes part in the national refugee status determination procedures. Given UNHCR's supervisory role,

[7] In the African context, the OAU Convention sets out "cessation clauses", which are in effect based on exclusion considerations. If a refugee, including a refugee recognised on a *prima facie* basis, engages in subversive activities in the sense of Article III(2) of the OAU Convention, then *prima facie* recognition could "cease" on the basis of Article I(4)(g), which provides that the Convention will cease to apply to refugees infringing its purposes and objectives. Subversive activities would include the taking up of armed activities against any OAU Member State. Since the OAU Convention complements the 1951 Convention, Article I(4)(g) should be read within the framework of Article 1F of the 1951 Convention.

States are expected to pay due regard to UNHCR's interpretation of the relevant refugee instruments, whether in individual cases or on general issues. This Background Note intends to promote a common approach to the interpretation of the exclusion clauses, thus reducing the possibility of conflict between decisions made by different States and/or UNHCR.

20. The UNHCR Statute provides that the competence of the High Commissioner shall not extend to certain persons on similar (but not identical) grounds to those found in Article 1F of the 1951 Convention. Determinations of this nature clearly fall to UNHCR. Given that Article 1F represents a later and more specific formulation of the category of persons envisaged in paragraph 7(d) of the UNHCR Statute, the wording of Article 1F is considered more authoritative and takes precedence. UNHCR officials are therefore encouraged to apply the 1951 Convention formula in determining cases of exclusion.

I. Consequences of exclusion

21. Where the exclusion clauses apply, the individual cannot be recognised as a refugee and benefit from international protection under the 1951 Convention. Nor can the individual fall within UNHCR's mandate. The State concerned is not, however, obliged to expel him or her. Moreover, it may wish to exercise criminal jurisdiction over the individual, or indeed be under an obligation to extradite or prosecute the person concerned, depending on the nature of the offence committed. A decision by UNHCR to exclude a refugee means that that individual can no longer receive protection or assistance from the Office.

22. Despite being unable to access international protection under the 1951 Convention, an excluded individual is still entitled to be treated in a manner compatible with international law and, in particular, relevant human rights obligations. Although States enjoy a considerable degree of authority to expel aliens from their territory, there are a number of restrictions to this (as illustrated in Annex A). Thus, an excluded individual may still be protected against return by operation of other international instruments, notably Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the 1966 International Covenant on Civil and Political Rights, and/or Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

II. SUBSTANTIVE ANALYSIS[8]

A. ARTICLE 1F(a): CRIMES AGAINST PEACE, WAR CRIMES AND CRIMES AGAINST HUMANITY

23. Article 1F(a) refers to persons with respect to whom there are serious reasons for considering that they have committed "a crime against peace, a war crime, or a crime

[8] For a detailed analysis of the jurisprudence and application of the exclusion clauses see the special supplementary issue of the *International Journal of Refugee Law* on exclusion from protection, vol. 12, 2000.

against humanity, as defined *in the international instruments drawn up to make provision in respect of such crimes*". Several instruments exist today which define or elaborate on the notion of "crimes against peace, war crimes and crimes against humanity".[9] Of continuing significance is the 1945 Charter of the International Military Tribunal (the London Charter), Article 6 of which is reproduced in the Handbook.[10] The most recent international effort to define these crimes is found in the Statute of the International Criminal Court (ICC) adopted in June 1998 and in force since 1 July 2002. Its definitions of crimes against humanity, war crimes and crimes against peace will be further elaborated upon in Elements of Crimes[11] to be adopted by State Parties to the ICC. Other relevant international legal instruments[12] which may be used to interpret this exclusion clause are:

- the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention);
- the four 1949 Geneva Conventions for the Protection of Victims of War;
- the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;
- the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I);
- the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II);
- the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention against Torture);[13]

---

[9] Some of these instruments are listed in Annex VI of the Handbook.

[10] The provisions of Article 6 are also set out in paragraph 26 as well as Annexes B and C below.

[11] For the ICC Statute see http://www.un.org/law/icc/statute/romefra.htm . Article 8(1) of the ICC Statute states that the Elements of Crimes will assist the ICC in the interpretation and application of the crimes under its jurisdiction. The adopted text will be identical to that currently available as the Finalized Draft Text, July 2000 (PCNICC/2000/1/Add.2); see Annex 1 (Resolution F) of the Final Act of the 1998 Diplomatic Conference in Rome.

[12] See http://www.icrc.org/ihl.nsf/WebFULL?OpenView (for Geneva Conventions and Protocols); http://www.un.org/icty/legaldoc/index.htm (for ICTY Statute); and http://www.ictr.org/ENGLISH/basicdocs/statute.html (for ICTR statute). These documents are also available on request from the Protection Policy and Legal Advice Section of the Department of International Protection, UNHCR, Geneva.

[13] Regional instruments relating to torture may also be relevant. See 1985 Inter-American Convention to Prevent and Punish Torture; 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

- The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the ICTY Statute);

- The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (the ICTR Statute).

24. Relevant non-binding but authoritative sources are the 1950 Report of the International Law Commission (ILC) to the General Assembly (including the Nuremberg Principles),[14] the 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity,[15] and the Draft Code of Crimes against the Peace and Security of Mankind which was provisionally adopted by the ILC in 1996.[16]

25. Article 1F(a) allows for a dynamic interpretation of the relevant crimes so as to take into account developments in international law. Although the ICC Statute represents the most recent attempt by the international community to define the relevant crimes, it should not be referred to exclusively when interpreting the scope of Article 1F(a) and the definitions used in other instruments must also be given due consideration. Nevertheless, the Statute and jurisprudence of the ICC may well become the principal sources for interpreting the crimes covered by Article 1F(a).

Crimes against peace

26. The London Charter remains the only international instrument to contain a definition of this crime. It considers a crime against peace to arise from the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing". Clearly, the adoption[17] of a definition of the "crime of aggression" for the purposes of the ICC Statute (Article 5(1)(d) and (2)) will provide much needed clarity regarding the scope of this offence.

27. Although non-binding in nature, discussion of "aggression" in both the UN General Assembly and the ILC is of some interest. "Aggression" has been defined by the General Assembly as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with

[14] Yearbook of ILC, 1950, vol. II.
[15] General Assembly resolution 3074 (XXVIII), 3 December 1973.
[16] A/CN.4/L.522, 31 May 1996.
[17] Pursuant to Articles 121 and 123 of the ICC Statute, adoption of such a definition will not be possible until at least seven years have elapsed from the entry into force of the Statute.

the Charter of the United Nations".[18] Article 16 of the ILC's Draft Code of Crimes Against the Peace and Security of Mankind states: "An individual, who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression."[19]

28. It is evident that crimes against peace can only be committed in the context of the planning or waging of a war or armed conflict. As wars or armed conflicts are only waged by States or State-like entities in the normal course of events, a crime against peace can only be committed by individuals in a high position of authority representing a State or State-like entity.

29. There are few precedents for exclusion of individuals under this category, (partly no doubt due to the paucity of international regulation in this area), and UNHCR is not aware of any jurisprudence dealing with crimes against peace as an exclusionary provision. Many acts that fall potentially within this concept may in any case also constitute war crimes and, indeed, crimes against humanity.

War crimes

30. War crimes involve grave breaches of international humanitarian law[20] (otherwise known as the law of armed conflict) and can be committed by, or perpetrated against, civilian as well as military persons. Attacks committed against any person not or no longer taking part in hostilities, such as wounded or sick combatants, prisoners of war, or civilians are regarded as war crimes. Although war crimes were originally considered to arise only in the context of an international armed conflict, it is now generally accepted that war crimes may be committed in non-international armed conflicts as well.[21] This is reflected in both the jurisprudence of the ICTY[22] and in the ICC Statute. An international armed conflict arises whenever the use of force is employed by one State against another. Determining the existence of a non-international armed conflict is often more complex.

[18] General Assembly resolution 3312 (XXIX), 1974.

[19] ILC Report, A/51/10, 1996, ch. II(2), paragraphs 46–48. See also, http://www.un.org/law/ilc/texts/dcodefra.htm.

[20] International humanitarian law comprises rules which, in times of armed conflict, seek to protect persons who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.

[21] The precise scope of war crimes may, however, depend on the nature of the conflict. See, for example, the differentiation between war crimes committed in international armed conflict and those committed in non-international armed conflicts in Article 8 of the ICC Statute.

[22] In the case of *Tadic*, the defence argued, unsuccessfully, that the accused could not be tried for violations of the laws or customs of war under the ICTY Statute because such violations could only be committed in the context of an international armed conflict. The Tribunal held, however, that violations of the laws or customs of war, commonly referred to as war crimes, include prohibitions of acts committed both in international and non-international armed conflicts. (ICTY Case No. IT-94-I-T, Decision of 10 August 1995 on Jurisdiction.)

Internal disturbances and tensions, such as riots and other sporadic acts of violence, do not constitute a non-international armed conflict.[23]

31. Article 8 of the ICC Statute sets out an extensive list of acts considered to be war crimes, but this list is not exhaustive, so recourse must also be made to other relevant instruments (set out in Annex B). Moreover, the forthcoming study by the International Committee of the Red Cross on customary rules of international humanitarian law[24] will provide further guidance on the scope of those war crimes found in the above instruments which are derived from customary international law.

32. War crimes, whether in the context of international or non-international armed conflict, cover such acts as:

- Wilful killing of protected persons in the context of the four Geneva Conventions
- Torture or other inhuman treatment, including biological experiments, on such persons
- Wilfully causing great suffering or serious injury to body or health
- Attacks on, or indiscriminate attacks affecting, the civilian population or those known to be *hors de combat*
- Attacking non-defended localities and demilitarised zones
- Taking civilians as hostages
- Transferring protected persons in occupied areas to the territory of the occupier
- Extensive destruction and appropriation of property, not justified by military necessity
- Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial
- Compelling a prisoner of war to serve in the forces of a hostile power
- Pillaging
- Employing prohibited weapons such as poisonous gases

[23] See Article 1 of Additional Protocol II to the 1949 Geneva Conventions and Articles 8(2)(d) and 8(2)(f) of the ICC Statute. Common Article 3 of the 1949 Geneva Conventions does not provide a clear definition of non-international armed conflicts to which it applies but it is generally thought to cover a wider range of situations than those set out in Article 1 of Additional Protocol II. This is reflected to some extent in Articles 8(2)(d) and 8(2)(f) of the ICC Statute which define situations of non-international armed conflict differently for war crimes arising from breaches of common Article 3 of the Geneva Conventions as compared with those flowing from violations of Additional Protocol II. In the case of *Tadic*, the ICTY held that an non-international armed conflict, in the context of common Article 3 of the Geneva Conventions, exists where there is "protracted armed violence between governmental armed authorities and organized armed groups or between such groups". (Case No. IT-94-I-T, Trial Chamber judgment of 7 May 1997).

[24] International Committee of the Red Cross Study on "Customary Rules of International Humanitarian Law", vols. 1 and 2, Cambridge University Press, forthcoming 2003; see also, http://www.icrc.org/web/eng/siteeng0.nsf/iwpList263/CE72DB35175CA0FEC1256D330053FA7B .

Crimes against humanity

33. Crimes against humanity involve the fundamentally inhumane treatment of the population in the context of a widespread or systematic attack against it. It is possible, however, for a single act to constitute both a crime against humanity and a war crime. While the London Charter and ICTY Statute refer to such crimes as being committed in time of international or non-international armed conflict, it is now accepted that crimes against humanity can also take place in peacetime.[25] This development is confirmed by the ICC Statute, making this the broadest category under Article 1F(a).

34. The London Charter was the first international instrument to use the term "crimes against humanity" as a distinct category of international crimes. It has been further defined in the ICTY, ICTR and ICC Statutes (see Annex C). For example, Article 7 of the ICC Statute states that murder, extermination, enslavement, deportation or forcible transfer, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other forms of serious sexual violence, persecution, enforced disappearance, apartheid and other inhumane acts of a similar character, when such acts are committed as part of a widespread or systematic attack directed against any civilian population,[26] constitute crimes against humanity.

35. Genocide is a particular crime against humanity and Article 6 of the ICC Statute[27] replicates the definition found in Article II of the 1948 Genocide Convention:

> … any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
>
> (b) causing serious bodily or mental harm to members of the group;
>
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group;
>
> (e) forcibly transferring children of the group to another group.

36. The ICC Statute confirms that crimes against humanity are distinguishable from isolated offences or common crimes as they must form part of a widespread or systematic attack against the civilian population. In some cases, this may be the result of a policy of persecution or serious and systematic discrimination against a particular national, ethnic, racial or religious group. An inhumane act committed against an individual may constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts.[28] Crimes against humanity may be identified from the

---

[25] See ICTY case of *Tadic*, No. IT-94-1-D (Decision on Jurisdiction, 2 October 1995).

[26] "'Attack directed against any civilian population' means a course of conduct involving the multiple commission of [such] acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." (Article 7(2)a, ICC Statute).

[27] Although genocide is dealt with in a separate provision to crimes against humanity in the ICC Statute, it should still be considered a crime against humanity for the purpose of Article 1F(a).

[28] See paragraph 271 of the judgment of the ICTY Appeals Chamber in the case of *Tadic* (No. IT-94-1-T, 15 January 1999).

nature of the acts in question, the extent of their effects, the knowledge of the perpetrator(s), and the context in which such acts take place.

B. ARTICLE 1F(b): SERIOUS NON-POLITICAL CRIMES

37. Article 1F(b) provides for the exclusion from refugee status of persons who have committed a "serious non-political crime" outside the country of refuge prior to being admitted to that country as a refugee. By contrast, both the Constitution of the International Refugee Organisation (IRO) and the UNHCR Statute refer to extraditable crimes in the context of exclusion. Similar language was not retained for the 1951 Convention, which instead describes the nature of the crime with greater precision. State practice in applying this provision has varied, although as noted by the Supreme Court of Canada, Article 1F(b) "contains a balancing mechanism in so far as the specific adjectives 'serious' and 'non-political' must be satisfied".[29]

Serious crime

38. The term "serious crime" obviously has different connotations in different legal systems. It is evident that the drafters of the 1951 Convention did not intend to exclude individuals in need of international protection simply for committing minor crimes. Moreover, the gravity of the crime should be judged against international standards, not simply by its characterisation in the host State or country of origin. Indeed, the prohibition of activities guaranteed by international human rights law (for example, freedom of speech) should not be considered a "crime", much less one of a serious nature.

39. In determining the seriousness of the crime the following factors are relevant:

- the nature of the act;
- the actual harm inflicted;
- the form of procedure used to prosecute the crime;
- the nature of the penalty for such a crime;
- whether most jurisdictions would consider the act in question as a serious crime.

40. The guidance in the Handbook[30] that a "serious" crime refers to a "capital crime or a very grave punishable act" should be read in the light of the factors listed above. Examples of "serious" crimes include murder, rape, arson and armed robbery. Certain other offences could also be deemed serious if they are accompanied by the use of deadly weapons, involve serious injury to persons, or there is evidence of serious habitual criminal conduct and other similar factors. On the other hand, crimes such as petty theft or the possession for personal use of illicit narcotic substances would not meet the seriousness threshold of Article 1F(b).

---

[29] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada, [1998] 1 SCR 982, paragraph 73.
[30] See paragraph 155 of the Handbook.

Non-political crime

41. State practice on the concept of "non-political" has been varied, with some jurisdictions following more closely the approaches used in extradition law. A serious crime should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, non-political motives are predominant.[31] Thus, the motivation, context, methods and proportionality of a crime to its objectives are important factors in evaluating its political nature. Egregious acts of violence, such as those commonly considered to be of a "terrorist" nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective.[32]

42. Increasingly, extradition treaties specify that certain crimes, notably those characterised as acts of terrorism, are to be regarded as non-political for their purposes (although such treaties typically also contain non-persecution clauses). Such a designation is significant in determining the political element of a crime in the Article 1F context but should nevertheless be considered in light of all relevant factors.[33]

---

[31] See paragraph 152 of the Handbook. This approach is reflected in the jurisprudence of many States. In *Aguirre-Aguirre v. Immigration and Naturalization Service (INS)*, 119 S.Ct. 1439 (1999), the US Supreme Court endorsed the approach taken in the earlier case of *McMullen v. INS*, 788 F. 2d 591 (9th Circuit 1986), which held that a "serious non-political crime" is a crime not committed out of "genuine political motives", not directed toward the "modification of the political organization or ... structure of the state", with no direct "causal link between the crime committed and its alleged political purpose and object" or where the act is disproportionate to the objective. In *T. v. Secretary of State for the Home Department*, [1996] Imm AR 443, the UK House of Lords held that a crime is political for the purposes of Article 1F(b) if it is committed for a political purpose (i.e. overthrow of government or inducing change in government policy) and there is a sufficiently close and direct link between the crime and the alleged purpose. In determining the latter, consideration must be given to whether the means employed were directed towards a military/government target and whether it was likely to involve indiscriminate killing or injury to members of the public. In *Wagner v. Federal Prosecutor and the Federal Justice and Police Department*, the Swiss Federal Tribunal ruled that "a common crime or offence constitutes a relative political offence if the act, given the circumstances and in particular the motivation and goals of the perpetrator, has a predominantly political character". This is presumed if the offence "was carried out in the context of a power struggle within the State or if it was carried out to remove someone from under the power of a State suppressing all opposition. There must be a close, direct and clear link between such acts and their intended goal". (Unofficial translation of judgment of the 2nd public law section of 3 October 1980, BGE, 106 IB 309.)

[32] See further paragraph 81 below.

[33] See *McMullen v. INS*, above footnote 31. For further, detailed analysis of extradition and how this relates to exclusion, see S. Kapferer, "The Interface between Extradition and Asylum", Legal and Protection Policy Research Series, UNHCR, Department of International Protection, PPLA (forthcoming 2003).

43. For a crime to be regarded as political in nature, the political objective should be consistent with human rights and fundamental freedoms. A political goal which breaches fundamental human rights cannot form a justification. This is consistent with provisions of human rights instruments specifying that their terms shall not be interpreted as implying the right to engage in activities aimed at the destruction of the human rights and fundamental freedoms of others.

Outside the country of refuge

44. Article 1F(b) also requires the crime to have been committed "outside the country of refuge prior to [the individual's] admission to that country as a refugee".[34] The term "outside the country of refuge" would normally be the country of origin, but it could also be another country apart from the country of refuge.[35] It cannot in principle be the country where the applicant seeks recognition as a refugee.[36] Individuals who commit "serious non-political crimes" within the country of refuge are subject to that country's criminal law process, and in the case of particularly grave crimes to Articles 32 and 33(2) of the 1951 Convention; they do not fall within the scope of the exclusion clause under Article 1F(b). The logic of the Convention is thus that the type of crimes covered by Article 1F(b) committed after admission would be handled through rigorous domestic criminal law enforcement and/or the application of Article 32 and Article 33(2) where necessary.

45. In rare cases, domestic courts have interpreted Article 1F(b) of the 1951 Convention to mean that any serious non-political crime committed before formal recognition as a refugee would lead automatically to the application of Article 1F(b). Under this interpretation, an applicant who committed a serious non-political crime in the country of asylum, but before formal recognition as a refugee, would be excluded. In UNHCR's view, it would not be correct to use the phrase "prior to admission ... as a refugee" to refer to the period in the country prior to *recognition* as a refugee, as the recognition of refugee status is declaratory and not constitutive.[37] "Admission" in this context includes mere physical presence in the country.

---

[34] See paragraphs 11 and 12 on the temporal aspect of the exclusion clauses generally.

[35] See also paragraph 153 of the Handbook.

[36] "The Conference eventually agreed that crimes committed before entry were at issue...", G. S. Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, Oxford, 2nd edition, 1996, p. 102.

[37] Likewise, the French Conseil d'Etat in a case concerning a recognised refugee who committed a crime in the country of asylum, ruled that even if Article 33(2) may permit the return of a refugee to his/her country of origin this article does not permit the removal of refugee status (*Pham*, 21 May 1997). The Conseil d'Etat further ruled that a crime committed by an asylum-seeker on the territory of a host country was subject to penal sanction and even to expulsion within the terms of Articles 32 and 33 of the 1951 Convention but did not justify exclusion from refugee status (*Rajkumar*, 28 September 1998).

C. ARTICLE 1F(c): ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UNITED NATIONS

46. Article 1F(c) excludes from international protection as refugees persons who have been "guilty of acts contrary to the purposes and principles of the United Nations".[38] The purposes and principles of the United Nations are spelt out in Articles 1 and 2 of the UN Charter,[39] although their broad, general terms offer little guidance as to the types of acts that would deprive a person of the benefits of refugee status. The *travaux préparatoires* are also of limited assistance, reflecting a lack of clarity in the formulation of this provision, but there is some indication that the intention was to cover violations of human rights which, although falling short of crimes against humanity, were nevertheless of a fairly exceptional nature. Indeed, as apparently foreseen by the drafters of the 1951 Convention, this provision has rarely been invoked.[40] In many cases, Article 1F(a) or Article 1F(b) are likely to be applicable to the conduct in question. Given the vagueness of this provision, the lack of coherent State practice and the dangers of abuse,[41] Article 1F(c) must be read narrowly.

47. The principles and purposes of the United Nations are reflected in myriad ways, for example by multilateral conventions adopted under the aegis of the UN General Assembly and in Security Council resolutions. Equating any action contrary to such instruments as falling within Article 1F(c) would, however, be inconsistent with the object and purpose of this provision. Rather, it appears that Article 1F(c) only applies to acts that offend the principles and purposes of the United Nations in a fundamental manner. Article 1F(c) is thus triggered only in extreme circumstances by activity which

---

[38] Under Article 14(2) of the Universal Declaration of Human Rights, also, the right to seek and to enjoy in other countries asylum from persecution "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".

[39] The purposes of the United Nations are: to maintain international peace and security; to develop friendly relations among nations; to achieve international cooperation in solving socio-economic and cultural problems, and in promoting respect for human rights; and to serve as a centre for harmonising the actions of nations. The principles of the United Nations are: sovereign equality; good faith fulfilment of obligations; peaceful settlement of disputes; refraining from the threat or use of force against the territorial integrity or political independence of another State; and assistance in promoting the work of the United Nations.

[40] Grahl-Madsen writes:

> It appears from the records that those who pressed for the inclusion of the clause had only vague ideas as to the meaning of the phrase "acts contrary to the purposes and principles of the United Nations"... [I]t is easily understandable that the Social Committee of the Economic and Social Council expressed genuine concern, feeling that the provision was so vague as to be open to abuse. It seems that agreement was reached on the understanding that the phrase should be interpreted very restrictively.

A. Grahl-Madsen, *The Status of Refugees in International Law*, Sijthoff, Leyden, 1972, vol. 1, p. 283.

[41] During negotiations on Article 1F(c), the delegate of Pakistan, concurring with the representative of Canada, said the phrase was "so vague as to be open to abuse by governments wishing to exclude refugees" (E/AC.7/SR.160, p. 16).

attacks the very basis of the international community's coexistence under the auspices of the United Nations. The key words in Article 1F(c) – "acts contrary to the purposes and principles of the United Nations" – should therefore be construed restrictively and its application reserved for situations where an act and the consequences thereof meet a high threshold. This threshold should be defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security. Thus, crimes capable of affecting international peace, security and peaceful relations between States would fall within this clause, as would serious and sustained violations of human rights.

48. Furthermore, given that Articles 1 and 2 of the UN Charter essentially set out the fundamental principles States must uphold in their mutual relations, in principle only persons who have been in a position of power in their countries or in State-like entities would appear capable of violating these provisions (in the context of Article 1F(c)). In this context, the delegate at the Conference of Plenipotentiaries, who pressed for the inclusion of this clause, specified that it was not aimed at the "man in the street". The UNHCR Handbook likewise states in paragraph 163 that "an individual, in order to have committed an act contrary to these principles, must have been in a position of power in a member State and instrumental to his State's infringing these principles".[42] Indications in some jurisdictions that this provision can apply to individuals not associated with a State or State-like entity do not reflect this general understanding.[43] Moves to apply this provision more broadly, for example to activities such as drug trafficking[44] or smuggling/trafficking of migrants, are also misguided.

---

[42] See, for example, the case of X. and family, judgment of 14 May 1996, EMARK 1996/18, Swiss Asylum Appeals Commission, applying Articles 1F(a) and 1F(c), concerning a high-ranking official in the Somali government, and the case of *Nader*, decision of 26 October 2001, French Commission des recours des réfugiés, sections réunis (Refugee Appeals Commission), concerning a high-ranking member of the South Lebanese Army commanding the militia group's special forces. In other cases, exclusion under Article 1F(c) was ruled out on the grounds that the individual's rank was not sufficiently high. See, for instance, the decisions of the Swiss Asylum Appeals Commission in the cases of Y.Z. and family, 14 September 1998 (former cabinet member of Najibullah regime in Afghanistan); Y.N., 27 November 2001 (former major in special presidential division (DSP) of Mobutu regime in former Zaire), and D.M., 17 December 2001 (low-ranking officer in former Zaire). By contrast, the Belgian Commission permanente de recours des réfugiés (Permanent Refuge Appeals Commission, CPRR) excluded a member of the DSP on the grounds that the applicant could not reasonably have ignored the Division's role, nor the nature of the missions entrusted to him over a period of two years, CPRR, R3468, 25 June 1996. See S. Kapferer, "Exclusion Clauses in Europe – A Comparative Overview of State Practice in France, Belgium and the United Kingdom", 12 *International Journal of Refugee Law*, 2000, p. 195 at p. 212.

[43] In *Pushpanathan*, see above footnote 29, the Supreme Court of Canada indicated that although the application of Article 1F(c) to non-state actors may be difficult, the possibility "should not be excluded a priori" (paragraph 68).

[44] In *Pushpanathan*, see above footnote 29, the Supreme Court of Canada rejected the argument that drug trafficking fell within Article 1F(c) and returned the case to the Convention Refugee Determination Division (CRDD), which excluded him from refugee status under Article 1F(a) and 1F(c) for crimes against humanity and complicity in terrorist activities associated with the Liberation Tigers of Tamil Eelam (LTTE). The Federal Court Trial Division later upheld the

49. The question of whether acts of international terrorism fall within the ambit of Article 1F(c) has nevertheless become of increasing concern, including not least since the Security Council determined in Resolutions 1373(2001) and 1377(2001) that acts of international terrorism are a threat to international peace and security and are contrary to the purposes and principles of the United Nations. Yet the assertion – even in a UN instrument – that an act is "terrorist" in nature would not by itself suffice to warrant the application of Article 1F(c), not least because "terrorism" is without clear or universally agreed definition. Rather than focus on the "terrorism" label, a more reliable guide to the correct application of Article 1F(c) in cases involving a terrorist act is the extent to which the act impinges on the international plane – in terms of its gravity, international impact, and implications for international peace and security. In UNHCR's view, only terrorist acts that are distinguished by these larger characteristics, as set out by the aforementioned Security Council Resolutions, should qualify for exclusion under Article 1F(c). Given the general approach to Article 1F(c) described above, egregious acts of international terrorism affecting global security may indeed fall within the scope of Article 1F(c), although only the leaders of groups responsible for such atrocities would in principle be liable to exclusion under this provision. As discussed in paragraphs 41, 79–84, terrorist activity may also be excludable under the other exclusion provisions.

D. INDIVIDUAL RESPONSIBILITY

50. The question of exclusion often hinges on the extent to which the individual is personally responsible for the acts in question. General principles regarding individual liability are discussed below, but specific considerations apply to crimes against peace and acts against the purposes and principles of the United Nations. As crimes against peace (Article 1F(a)) are committed in the context of the planning or waging of aggressive wars or armed conflicts and armed conflicts are only waged by States or State-like entities, traditionally personal liability under this provision can only attach to individuals in a position of high authority representing a State or State-like entity. (The ICC definition when adopted will provide clarification on this issue.)[45] Similarly, as mentioned before, it is generally understood that acts covered by Article 1F(c) can only be committed by persons holding high positions in a State or State-like entity.[46] By contrast, individuals with or without any connection to a State can perpetrate war crimes, crimes against humanity and serious non-political crimes.

51. In general, individual responsibility, and therefore the basis for exclusion, arises where the individual committed, or made a substantial contribution to, the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct. Thus, the degree of involvement of the person concerned must be carefully analysed in each case. The fact that acts of an abhorrent and outrageous nature have taken place should not be allowed to cloud the issue. Even in the face of the horrors of the Nazi regime, the

---

CRDD decision, relying on a dissenting opinion of the 1998 Supreme Court decision in the case but without otherwise addressing the issue (IMM-4427-01, judgment of 3 September 2002).

[45] See above footnote 11.

[46] See paragraph 48 above.

International Military (Nuremberg) Tribunal did not attribute collective responsibility in the cases of "persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated" in the commission of the acts in question. According to the Tribunal: "The criterion for criminal responsibility ... lies in moral freedom, in the perpetrator's ability to choose with respect to the act of which he is accused."[47] This approach is also reflected in Articles 25 and 28 of the ICC Statute. Article 25 sets out the grounds for individual responsibility for crimes under its jurisdiction. Apart from actual commission of the crime, criminal acts may include ordering, solicitation, inducement, aiding, abetting, contribution to a common purpose, attempts and, in the case of genocide, incitement to commit a crime.

52. Contemporary guidance on the nature of individual criminal responsibility can be found in the jurisprudence of the ICTY and ICTR, in particular in the ICTY judgment in the case of *Kvocka et al* (Omarska and Keraterm camps)[48] where grounds for individual responsibility were discussed under four headings – instigation, commission, aiding and abetting, and participation in a joint criminal enterprise.[49] "Instigating" was described as the prompting of another person to commit an offence, with the intent to induce the commission of the crime or in the knowledge that there was a substantial likelihood that the commission of a crime would be a probable consequence. "Commission" of a crime, the most obvious form of culpability, was considered to arise from the physical perpetration of a crime or from engendering a culpable omission in violation of the criminal law, in the knowledge that there was a substantial likelihood that the commission of the crime would be the consequence of the particular conduct.

53. "Aiding or abetting" requires the individual to have rendered a substantial contribution to the commission of a crime in the knowledge that this will assist or facilitate the commission of the offence. The contribution may be in the form of practical assistance, encouragement or moral support and must have a substantial (but not necessarily causal) effect on the perpetration of the crime. Aiding or abetting may consist of an act or omission and may take place before, during or after the commission of the crime, although the requirement of a substantial contribution must always be borne in mind, especially when failure to act is in question. Thus, presence at the scene of a crime is not in itself conclusive of aiding or abetting, but it could give rise to such liability if such presence is shown to have had a significant legitimising or encouraging effect on the principal actor. This may often be the case where the individual present is a superior to those committing the crimes (although liability in such circumstances may also arise under the doctrine of command/superior responsibility, discussed below in paragraph 56).

54. Finally, the Trial Chamber in *Kvocka et al* considered liability arising from participation in a joint criminal enterprise (or common purpose), whether as a co-

[47] Quoted in N. Weisman, "Article 1F(a) of the 1951 Convention Relating to the Status of Refuges in Canadian Law", 8 *International Journal of Refugee Law*, 1996, p. 111 at p. 132.
[48] Case No. IT-98-30/1, Trial Chamber judgment, 2 November 2001. The Trial Chamber built upon the approach taken by the ICTY Appeal Chamber in *Tadic*, Case No. IT-94-1, 15 July 1999.
[49] See paragraph 122 onwards of the judgment.

perpetrator or as an aider or abettor. A joint criminal enterprise exists wherever there is a plurality of persons, a common plan and participation of the individual in the execution of the common plan. The common plan need not be pre-arranged, however, it can arise extemporaneously and be inferred from the fact that a number of persons act together in order to put it into effect. Individual liability arises where the person concerned has "carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his [or her] acts or omissions facilitated the crimes committed through the enterprise ...".[50]

55. Whether the individual's contribution to the criminal enterprise is substantial or not depends on many factors, such as the size of the criminal enterprise, the functions performed, the position of the individual in the organisation or group, and (perhaps most importantly) the role of the individual in relation to the seriousness and the scope of the crimes committed.[51]

56. Article 28 of the ICC Statute deals with the specific issue of command/superior responsibility. This provision states that a military commander is responsible for crimes committed by those under his or her effective control if she or he knew or, in the circumstances, ought to have known that his or her subordinates were committing or about to commit such crimes but he or she failed to take all necessary and reasonable measures within his or her power to prevent or repress such acts or to submit the matter to the competent authorities for investigation and prosecution.[52] A similar responsibility is attributed to superiors outside the military context, but only where the crimes fall within his or her area of effective control and responsibility and where the superior either knew or consciously disregarded information that such crimes were about to take, or were taking, place.

---

[50] Paragraph 312 of the judgment. The Trial Chamber goes on to state:

> The culpable participant *would not need to know of each crime committed*. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. *The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning.* (ibid., emphasis added)

[51] Thus, the Trial Chamber indicated that an accountant who works for a company initially in ignorance of its involvement in distributing child pornography might become liable as a participant in the criminal enterprise if he continues to work for the company after he discovers the true nature of its activities. His ongoing role in the company would make a substantial contribution to the criminal enterprise. On the other hand, the office cleaner who becomes aware of the company's criminal activities but continues to perform his role would not attract individual responsibility as his functions are not sufficiently significant in terms of furthering the criminal enterprise (paragraphs 285–6).

[52] For an exploration of command responsibility under the ICTY Statute see the judgment in *Blaskic*, No. IT-95-14-T, 3 March 2000.

Senior officials of repressive regimes

57. Given the principles set out above, the automatic exclusion of persons purely on the basis of their senior position in a government is not justified. "Guilt by association" judges a person on the basis of their title rather than their actual responsibilities or actions. Instead, an individual determination of responsibility is required for each official in order to ascertain whether the applicant knew of the acts committed or planned, tried to stop or oppose the acts, and/or deliberately removed him- or herself from the process.[53] Moreover, consideration must be given as to whether the individual had a moral choice.[54] Persons who are found to have performed, engaged in, participated in orchestrating, planning and/or implementing, or to have condoned or acquiesced in the carrying out of criminal acts by subordinates, should be excluded from refugee status.[55]

58. Notwithstanding the above, a presumption of individual responsibility reversing the burden of proof may arise as a result of such a senior person's continued membership of a government (or part of it) clearly engaged in activities that fall within the scope of Article 1F. This would be the case, for example, where the government concerned has faced international condemnation (in particular from the UN Commission on Human Rights or the Office of the UN High Commissioner of Human Rights) for gross or systematic human rights abuses. Where the individual has remained in a senior government position despite such criticisms, exclusion may be justified, unless he or she can rebut the presumption of knowledge and personal involvement in such abuses.

---

[53] See paragraph 56 above concerning the issue of command/superior responsibility.

[54] In establishing that the acts in question were voluntary or that no choice was available for the individual, relevant questions may include: Were the acts part of official government policy of which the official was aware? Was the official in a position to influence this policy one way or the other? To what extent would the official's life or that of family members have been endangered if he or she had refused to be associated with or involved in the perpetration of the crime(s)? Did the official make any attempt to distance him- or herself from the policy, or to resign from the government? For cases examining these issues, see above footnote 42.

[55] In a recent decision of the ICTY, *Prosecutor v. Dr Milomir Stakic*, Case No. IT-97-24, 31 July 2003, the Trial Chamber II found that the defendant's participation in crimes against humanity and violations of the laws and customs of war, which had occurred in the Prijedor Municipality of Bosnia and Herzegovina, where the defendant had held leading positions in the municipality at the time, amounted to co-perpetration. The summary of the Trial Chamber judgment noted that for co-perpetration, "it is essential to prove the existence of an agreement or silent consent to reach a common goal by coordinated co-operation with joint control over the criminal conduct. The co-perpetrator must have acted in the awareness of the substantial likelihood that crimes would occur and must have been aware that his role was essential for the achievement of the common goal." The Trial Chamber also found that the "common goal could not be achieved without joint control over the final outcome and this element of interdependency characterises the criminal conduct. No participant could have achieved the common goal on his own. However, each participant could individually have frustrated the plan by refusing to play his part or by reporting crimes."

Organisations which commit violent crimes or incite others to commit them[56]

59. As with membership of a particular government, membership per se of an organisation that commits or incites others to carry out violent crimes is not necessarily decisive or sufficient to exclude a person from refugee status. The fact of membership does not, in and of itself, amount to participation in an excludable act. Consideration needs to be given to whether the applicant was personally involved in acts of violence or knowingly contributed in a substantial manner to such acts. A plausible explanation regarding the applicant's non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary, should remove the applicant from the scope of the exclusion clauses.[57]

60. Nevertheless, the purposes, activities and methods of some groups, sub-groups or organisations are of a particularly violent nature, for example where this involves indiscriminate killing or injury of the civilian population, or acts of torture. Where membership of such a group is voluntary, it raises a presumption that the individual concerned has somehow contributed significantly to the commission of violent crimes, even if this is simply by substantially assisting the organisation to continue to function effectively in pursuance of its aims.[58] In such cases, the burden of proof is reversed.[59] Membership may, in such cases, give rise to individual responsibility, for example, where the person concerned is in control of the funds of an organisation that he or she knows is dedicated to achieving its aims through violent crimes.[60]

61. Caution must be exercised when such a presumption of responsibility arises. Care should be taken to consider the actual activities of the group, the organisation's place and

---

[56] See also section on terrorism below at paragraphs 79–84.

[57] For example, in one Canadian case the applicant, who had been forcibly conscripted into the Salvadoran army, deserted at the first possible opportunity after finding out that the army used torture. The court considered this a relevant factor in concluding that the applicant was not guilty of the commission of war crimes or crimes against humanity or excludable from refugee status. *Moreno v. Canada (Minister of Employment and Immigration)*, Action A-746-91 (Federal Court of Appeal, 14 September 1993).

[58] See paragraphs 50–55 above, for discussion of individual responsibility, including in the context of a joint criminal enterprise in the ICTY judgment in *Kvocka et al* (Omarska and Keraterm camps), IT-98-30/1, 2 November 2001.

[59] See below paragraphs 105–106.

[60] See, for example, the Canadian case of *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 FC 317 (CA): "Mere membership in an organization which from time to time commits international offences is not normally sufficient for exclusion from refugee status... [N]o one can commit international crimes without personal and knowing participation". The Court found, further, that mere presence at the scene of an offence is insufficient to qualify as personal and knowing participation. The Court also held, however, that "where an organization is principally directed to a limited, brutal purpose, such as a secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts".

role in the society in which it operates,[61] its organisational structure, the individual's position in it, and his or her ability to influence significantly its activities. Regard must also be had to the possible fragmentation of certain organisations. In some cases, the group in question is unable to control acts of violence committed by militant wings. Unauthorised acts may also be carried out in the name of the group. Moreover, the nature of the group's violent conduct may have evolved, so the individual's membership must be examined in the context of the organisation's behaviour at the relevant time. Finally, defences to exclusion, such as duress, should be kept in mind.

62. Given the above, where an individual is associated with an organisation denounced as terrorist on a list drawn up by the international community (or, indeed, individual States) this does not mean exclusion is automatically justified.[62] Rather, consideration of the applicability of the exclusion clauses is triggered. A presumption of individual responsibility may arise if the list has a credible basis and if the criteria for placing a particular organisation or individual on the list are such that all members or the listed person(s) can reasonably be considered to be individually involved in violent crimes.[63]

Ex-combatants[64]

63. Former members of military units should not necessarily be considered excludable, unless of course serious violations of international human rights law and international humanitarian law are reported and indicated in the individual case. Also, the fact that such individuals may initially have been subject to separation from the refugee population in mass influx situations should not be read as tantamount to a legal finding of exclusion.[65] If ex-combatants have been involved in conflicts characterised by violations of international humanitarian law, the question of individual responsibility should be examined. This will raise similar issues to those discussed above in relation to members

[61] See *Gurung v. Secretary of State for the Home Department*, UK Immigration Appeal Tribunal, Appeal No. [2002]UKIAT04870 HX34452-2001, 15 October 2002, summary of conclusions, paragraph 3, which continues: "The more an organisation makes terrorist acts its modus operandi, the more difficult it will be for a claimant to show his voluntary membership of it does not amount to complicity."

[62] The impact of lists of terrorist suspects or organisations is discussed further in paragraphs 80, 106 and 109 below.

[63] The United Nations Security Council (UNSC) Sanctions Committee, established in 1999 by Security Council (SC) Resolution 1267(1999) which imposed sanctions on Taliban-controlled Afghanistan, has since 2000 been mandated under SC resolution 1333(2000) to establish and maintain a list of individuals and entities designated as being associated with al-Qaida and the Taliban. The existing sanctions, which the Committee is mandated to monitor, require all States to do the following in connection with listed individuals and entities: freeze assets, prevent entry into or transit through their territories, and prevent the direct or indirect sale, supply and transfer of arms and military equipment. The UNSC Counter-Terrorism Committee, established by UNSC resolution 1373(2001), does not have a list of terrorist organisations or individuals.

[64] For the purpose of this background note, the term "ex-combatant" applies to persons who took an active part in a non-international or international armed conflict.

[65] See Executive Committee, Conclusion No. 94 (LIII), 2002, paragraph (c)(vii) and, for exclusion in mass influx situations, paragraphs 96–97 below.

of organisations which commit violent crimes. It is, however, important to note that in many cases exclusion may not be relevant at all as the former combatant may not have a well-founded fear of persecution.

E. GROUNDS FOR REJECTING INDIVIDUAL RESPONSIBILITY

Lack of mental element (*mens rea*)

64. As reflected in Article 30 of the ICC Statute, criminal responsibility can normally only arise where the individual concerned committed the material elements of the offence with knowledge and intent. Where there is no such mental element (*mens rea*) a fundamental aspect of the criminal offence is missing and therefore no individual criminal responsibility arises. A person has intent where, in relation to conduct, the person means to engage in the conduct or, in relation to consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Thus, for example, an individual who intended to commit the act of murder cannot be liable for a crime against humanity if he or she was unaware of an ongoing widespread or systematic attack against the civilian population. Such knowledge is a requisite component of the mental element of a crime against humanity. In such a case, the applicability of Article 1F(b) may be more appropriate.

65. In certain circumstances the individual may actually lack the mental capacity to be held responsible for a crime, for example, on the grounds of insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity.[66]

Defences to criminal liability

66. Regard should be had to general principles of criminal liability to determine whether a valid defence exists for the crime in question, as outlined in the examples below.

(i) Superior orders

67. A commonly-invoked defence is that of "superior orders" or coercion by higher governmental authorities, although it is an established principle of law that the defence of superior orders does not absolve individuals of blame. According to the Nuremberg Principles: "The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility under international law, provided a moral choice was in fact possible for him."[67]

68. Article 7(4) of the ICTY Statute provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility". Article 33 of the ICC Statute states that the defence of superior orders

[66] See also paragraph 91 below on minors.
[67] Principle IV, Nuremberg Principles.

will only apply if the individual in question was under a legal obligation to obey the order in question, was unaware that the order was unlawful and the order itself was not manifestly unlawful (the latter being deemed so in all cases of genocide or crimes against humanity).

(ii) Duress/coercion

69. The defence of duress was often linked to that of superior orders during the post-Second World War trials. According to Article 31(d) of the ICC Statute, the defence of duress only applies if the incriminating act in question

> results from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

There are, therefore, stringent conditions to be met for the defence of duress to arise.

70. Where duress is pleaded by an individual who acted on the command of other persons in an organisation, consideration should be given as to whether the individual could reasonably have been expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise. Each case should be considered on its own facts. The consequences of desertion plus the forseeability of being put under pressure to commit certain acts are relevant factors.

(iii) Self-defence; defence of other persons or property

71. The use of reasonable and necessary force to defend oneself rules out criminal liability. Similarly, reasonable and proportionate action to defend another person or, in the case of war crimes, property which is essential for the survival of the person or another person or for accomplishing a military mission, against an imminent and unlawful use of force, may also provide a defence to criminal responsibility under certain circumstances (see, for example, Article 31(c) of the ICC Statute).

Expiation

72. The exclusion clauses themselves are silent on the role of expiation, whether by serving a penal sentence, the grant of a pardon or amnesty, the lapse of time, or other rehabilitative measures. Paragraph 157 of the Handbook states that:

> … The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

73. Bearing in mind the object and purpose behind Article 1F, it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. Each case will require individual consideration, however, bearing in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities.[68] In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply. This is more likely to be the case for crimes under Article 1F(a) or (c), than those falling under Article 1F(b).

74. As for lapse of time, this in itself would not seem good grounds for setting aside the exclusion clauses, particularly in the case of crimes generally considered not subject to a statute of limitation. A case by case approach is necessary once again, however, taking into account the actual period of time that has elapsed, the seriousness of the offence and whether the individual has expressed regret or renounced criminal activities.

75. The effect of pardons and amnesties also raises difficult issues. Although there is a trend in some regions towards ending impunity for those who have committed serious violations of human rights, this has not become a widely accepted practice. In considering the impact on Article 1F, consideration should be given as to whether the pardon or amnesty in question is an expression of the democratic will of the relevant country and whether the individual has been held accountable in other ways (e.g. through a Truth and Reconciliation Commission). In some cases, a crime may be of such a heinous nature that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.

F. PROPORTIONALITY CONSIDERATIONS

76. The incorporation of a proportionality test when considering exclusion and its consequences provides a useful analytical tool to ensure that the exclusion clauses are applied in a manner consistent with the overriding humanitarian object and purpose of the 1951 Convention.[69] State practice on this issue is not, however, uniform with courts in some States rejecting such an approach, generally in the knowledge that other human rights protection mechanisms will apply to the individual,[70] while others take account of proportionality considerations.[71]

---

[68] See, for example, the case of O.M., Swiss Asylum Appeals Commission, judgment of 25 March 1999.

[69] On a similar basis, modern extradition treaties generally include a provision prohibiting the surrender of fugitives to the requesting State where this would lead to their persecution.

[70] Such mechanisms are discussed above in paragraph 22 and Annex A.

[71] For example, the Belgian Commission permanente de recours des réfugiés has balanced the threat of persecution against the gravity of the crimes committed in the case of Ethiopian asylum-seekers (decisions W4403 of 9 March 1998 and W4589 of 23 April 1998). Proportionality

77. In UNHCR's view, consideration of proportionality is an important safeguard in the application of Article 1F. The concept of proportionality, while not expressly mentioned in the 1951 Convention or the *travaux préparatoires*, has evolved in particular in relation to Article 1F(b), since it contains a balancing test in so far as the specific terms "serious" and "non-political" must be satisfied.[72] More generally, it represents a fundamental principle of international human rights law[73] and international humanitarian law.[74] Indeed, the concept runs through many fields of international law.[75] As with any

---

considerations have also arisen in Swiss cases, for example in Decision 1993 No. 8, the Swiss Asylum Appeals Commission held:

> To determine an act to be a particularly serious crime in the sense of Article 1F(b) of the Convention, it is necessary that, all things considered, the interest of the perpetrator in being protected against serious threats of persecution in his country of origin appear less by comparison with the reprehensible nature of the crime that he committed and with his guilt. (unofficial translation. Original text reads: Pour qualifier une action de crime particulièrement grave au sens de l'art. 1 F, let. b de la Convention, il faut que, tout bien pesé, l'intérêt de l'auteur à être protégé de graves menaces de persécutions dans son pays d'origine apparaisse moindre en comparaison du caractère répréhensible du crime que celui-ci a commis ainsi que sa culpabilité.)

In the case of E.K., judgment of 2 November 2001, EMARK 2002/9, concerning two former members of the Kurdish separatist PKK from Turkey, the Swiss Asylum Appeals Commission took into account proportionality considerations, such as the length of time since the acts were committed, the young age at which they were committed, and the asylum-seekers' subsequent withdrawal from the organisation.

[72] See text above at footnote 29.

[73] This is reflected, for example, in the jurisprudence of the European Court of Human Rights. The principle of proportionality is not mentioned in the text of the 1950 European Convention on Human Rights (ECHR), but it has emerged as a key concept in the jurisprudence, in particular to assess whether an interference with an ECHR right is justified under a specified exception. For example, in the case of *Silver v. United Kingdom* (1983), the Court, in summarising certain principles to determine whether an interference to a right under the ECHR was "necessary in a democratic society", included a requirement that the interference must be "proportionate to the legitimate aim pursued" (paragraph 97). In this case, the Court found violations under Article 8 of the right of the applicants, who were convicted prisoners, to respect for their correspondence. Proportionality considerations are therefore employed in order to balance the general interests of the community with the fundamental rights of the individual. They also arise in the context of the 1966 International Covenant on Civil and Political Rights (ICCPR). For example, the Human Rights Committee in its decision in *Guerrero v. Colombia* (CCPR/C/15/D/45/1979, 31 March 1982) found a breach of Article 6(1) of the ICCPR (right to life) on the basis that the use of force by the police was disproportionate to the law enforcement requirements of the situation, thus leading to the arbitrary death of the individual concerned (paragraph 13.3).

[74] For example, Article 51(5)(b) of Additional Protocol I to the Geneva Conventions prohibits indiscriminate attacks, including attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

[75] The International Court of Justice (ICJ) in its judgment in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports, 1986, p. 14, found that the right of self-defence, as an exception to the prohibition on the use of force in the UN Charter, must be exercised in a proportionate manner. The ICJ confirmed that this proportionality

exception to a human rights guarantee, the exclusion clauses must therefore be applied in a manner proportionate to their objective, especially bearing in mind that a decision leading to exclusion does not equate with a full criminal trial[76] and that human rights guarantees may not represent an accessible "safety valve" in some States.

78. In reaching a decision on exclusion, it is therefore necessary to weigh up the gravity of the offence for which the individual appears to be responsible against the possible consequences of the person being excluded, including notably the degree of persecution feared. If the applicant is likely to face severe persecution, the crime in question must be very serious in order to exclude the applicant. This being said, such a proportionality analysis would normally not be required in the case of crimes against peace, crimes against humanity, and acts contrary to the purposes and principles of the United Nations, as the acts covered are so heinous that they will tend always to outweigh the degree of persecution feared. By contrast, war crimes and serious non-political crimes cover a wider range of behaviour. For those activities which fall at the lower end of the scale, for example, isolated incidents of looting by soldiers, exclusion may be considered disproportionate if subsequent return is likely to lead, for example, to the individual's torture in his or her country of origin. Where, however, persons have intentionally caused death or serious injury to civilians as a means of intimidating a government or a civilian population, they are unlikely to benefit from proportionality considerations.

G. APPLICABILITY OF ARTICLE 1F TO PARTICULAR ACTS

Terrorism[77]

79. There is, as yet, no internationally accepted legal definition of terrorism. The final report of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind did not include a crime of "terrorism", nor do the ICC Statute or recent Security Council Resolutions concerning action to combat terrorism in the face of the attacks in the United States on 11 September 2001. Negotiations continue on a draft UN Comprehensive Convention on International Terrorism.[78] At the regional level, however, the December 2001 European Union Common Position on the Application of Specific Measures to Combat Terrorism[79] attempts to provide a general

---

requirement was a requirement of customary international law in its Advisory Opinion on the Legality of Use of Nuclear Weapons (1996).

[76] See paragraph 107 below on standard of proof.

[77] For a recent discussion of terrorism in the context of refugee protection, see UNHCR, "Addressing Security Concerns without Undermining Refugee Protection", November 2001.

[78] See also, Report of the UN Working Group on Measures to Eliminate Terrorism, 29 October 2001 (A/C.6/56/L.9); Policy Working Group on the United Nations and Terrorism, Report, 6 August 2002 (A/57/273 S/2002/875).

[79] "Terrorist act" is defined in Article 1(3) of Council Common Position of 27 December 2001 (2001/931/CFSP) as:

> one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:
> (i) seriously intimidating a population, or

definition of terrorist acts. In the continuing absence of a universally accepted definition of terrorism, the focus has been on prohibiting specific acts that are condemned by the entire international community, irrespective of the motive behind them. There are currently some twenty global or regional treaties pertaining to international terrorism, although not all of them are in force.[80]

80. In many cases, consideration of the exclusion clauses will not be necessary in relation to terrorist suspects as their fear will be of legitimate prosecution for criminal acts as opposed to persecution for a 1951 Convention reason.[81] Where an individual has committed terrorist acts as defined within the international instruments mentioned in Annex D and a risk of persecution is at issue, the person may be excludable from refugee status.[82] In these circumstances, the basis for exclusion under Article 1F will depend on the act in question and all surrounding circumstances. In each and every case, individual responsibility must be established, that is, the individual must have committed the act of terrorism or knowingly made a substantial contribution to it. This remains the case even when membership of the organisation in question is itself unlawful in the country of origin or refuge. The fact that an individual may be on a list of terrorist suspects or

---

(ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed under (a) to (h);

(j) directing a terrorist group;

(k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group."

[80] See Annex D and UN Secretary-General's Report on Measures to Eliminate Terrorism, (A/56/160), 3 July 2001.

[81] Care must be taken to distinguish between prosecution for legitimate reasons and prosecution as a form of persecution (see paragraphs 56–60 of the Handbook).

[82] See paragraph 109 below on the care to be taken when referring to the various definitions of terrorist crimes.

associated with a proscribed terrorist organisation should trigger consideration of the exclusion clauses. Depending on the organisation, exclusion may be presumed but it does not mean exclusion is inevitable.[83]

81. In many such cases, it is Article 1F(b) that will apply as violent acts of terrorism are likely to fail the predominance test[84] used to determine whether the crime is political. Moreover, if one of the international treaties mentioned in Annex D has abolished the political offence exemption in relation to extradition for the act in question, this would suggest that the crime is non-political for the purposes of Article 1F(b). It is not, however, a case of deeming all terrorist acts to be non-political but of judging the individual act in question against the Article 1F(b) criteria.[85]

82. Moreover, although providing funds to "terrorist groups" is generally a criminal offence, (and indeed instruments such as the 1999 International Convention for the Suppression of Financing of Terrorism require this), such activities may not necessarily reach the gravity required to fall under Article 1F(b).[86] The particulars of the specific crime need to be looked at – if the amounts concerned are small and given on a sporadic basis, the offence may not meet the required level of seriousness. On the other hand, a regular contributor of large sums to a terrorist organisation may well be guilty of a serious non-political crime. Apart from constituting an excludable crime in itself, financing may also lead to individual responsibility for other terrorist crimes. For example, where a person has consistently provided large sums to a group in full knowledge of its violent aims, that person may be considered to be liable for violent acts carried out by the group as his or her monetary assistance has substantially contributed to such activities. Factors leading to individual responsibility in such circumstances are discussed in paragraphs 50–56 above.

83. Although Article 1F(b) is of most relevance in connection with terrorism, in certain circumstances a terrorist act may well fall within Article 1F(a), for example as a crime

---

[83] The evidential value of such lists is considered in paragraphs 62, 106 and 109 of this Background Note.

[84] See paragraph 41 above.

[85] In *T. v. Secretary of State for the Home Department*, [1996] Imm AR 443, the UK House of Lords stated:

> We too think it is inappropriate to characterise indiscriminate bombings which lead to the death of innocent people as political crimes. Our reason is not that all terrorist acts fall outside the protection of the Convention. It is that it cannot be properly said that these particular offences qualify as political. In our judgement, the airport bombing [at issue in the case] in particular was an atrocious act, grossly out of proportion to any genuine political objective. There was simply no sufficiently close or direct causal link between it and the appellant's alleged political purpose. It offends common sense to suppose that FIS's [Front Islamique du Salut] cause of supplanting the government could be directly advanced by such an offence.

[86] In any case, financing offences should not cover contributions to groups that are engaged in armed conflicts and who abide by the relevant rules of international humanitarian law. This is recognised, for example, in Article 2(1)(b) of the 1999 International Convention for the Suppression of the Financing of Terrorism.

against humanity. In exceptional circumstances, the leaders of terrorist organisations carrying out particularly heinous acts of international terrorism which involve serious threats to international peace and security may be considered to fall within the scope of Article 1F(c).[87]

84. In the international community's efforts to combat acts of terrorism it is important that unwarranted associations between terrorists and refugees/asylum-seekers are avoided. Moreover, definitions of terrorist crimes adopted on the international, regional and national level will need to be extremely precise to ensure that the "terrorist" label is not abused for political ends, for example to prohibit the legitimate activities of political opponents. Such definitions may influence the interpretation of the exclusion clauses and, if distorted for political ends, could lead to the improper exclusion of certain individuals.[88] Indeed, unwarranted applications of the "terrorist" label could trigger recriminations amounting to persecution against an individual.

Hijacking

85. Hijacking is an internationally condemned act as reflected by a number of the treaties listed in Annex D, but an act of hijacking does not automatically exclude the perpetrator from refugee status. Rather, it requires consideration of the exclusion clauses, notably Article 1F(b), in the light of the particular circumstances of the case. It is evident that hijacking poses a grave threat to the life and safety of innocent passengers and crew. It is for this reason that there is so much opprobrium attached to acts of hijacking. Thus, acts of hijacking will almost certainly qualify as "serious" crimes and the threshold for the proportionality test will be extremely high – only the most compelling circumstances can justify non-exclusion for hijacking.[89]

86. Among issues requiring consideration are the following:

- whether the applicant's life was at stake for persecution-related reasons (this is relevant to the political nature of the crime, the proportionality test and to the issue of defence to criminal liability);

---

[87] In general, it nevertheless remains crucial not to equate Article 1F with a simple anti-terrorism clause. Nor is it necessary for asylum legislation specifically to mention terrorist acts as being excluded from refugee status. See paragraph 49 for further discussion of this issue.

[88] The June 2002 Organisation of American States' Inter-American Convention Against Terrorism, for instance, defines offences for the purposes of the Convention very broadly as those established in ten international terrorism conventions (Article 2). Article 12 declares that States will ensure "that refugee status is not granted to any person in respect of whom there are serious reasons for considering" that he or she has committed an offence as set out in Article 2. While Article 15 affirms that nothing in the Convention shall be interpreted as affecting other rights and obligations of States and individuals *inter alia* under international refugee law, it remains to be seen how such a broad definition is to be reconciled with the exclusion clauses of the 1951 Convention and 1967 Protocol in the individual case.

[89] See also, A.C. Helton, "The Case of Zhang Zhenai: Reconciling the International Responsibilities of Punishing Air Hijacking and Protecting Refugees", 13(4) *Loyola L.A. International & Comparative Law Journal*, June 1991, p. 841.

- whether the hijacking was a last and unavoidable recourse to flee from the danger at hand, that is, whether there were other viable and less harmful means of escape from the country where persecution was feared (political act, proportionality test and defence to criminal liability);
- whether there was significant physical, psychological or emotional harm to other passengers or crew (serious crime, proportionality test).

Torture

87. The prohibition against torture, found in many treaties, is now considered part of customary international law. Article 1 of the key human rights treaty on this matter, the 1984 Convention against Torture, defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for certain purposes when "such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". Thus, to qualify as torture in the context of this Convention, an act must have been carried out with the involvement of a person acting in an official, rather than a private, capacity. Torture may take many forms, including the carrying out of medical or scientific experiments on individuals who have not given their consent.

88. Where acts of torture are part of a systematic attack against the civilian population, this could constitute a crime against humanity under Article 1F(a) of the 1951 Convention. This is explicitly recognised in the ICTY, ICTR and ICC Statutes. It is worth noting that by including torture among the elements of the crime against humanity listed in the ICC Statute,[90] the latter does not seem to envisage that the perpetrator has to be acting in an official role or for a specific purpose. Isolated acts of torture could constitute a serious non-political crime (under Article 1F(b)).

89. Torture may also constitute a war crime under Article 1F(a). The ICTY Tribunal has stated that, in the context of international humanitarian law (unlike in international human rights law), the act of torture need not be committed by a State official or any other person wielding authority.[91] It has also found that the list of prohibited purposes set out in Article 1 of the Convention against Torture is not exhaustive, but merely indicative.

Emerging crimes under international law

90. Since the Second World War, there has been an exponential rise in the types of acts that are considered to give rise to individual criminal responsibility under international law, the most recent landmark being the ICC Statute. Apart from the categories mentioned in Article 1F(a), certain other acts are emerging as possibly crimes under

[90] Article 7 of the ICC Statute taken with Article 27, which states that the Statute applies "equally to all persons without any distinction based on official capacity".
[91] Case of *Kvocka et al* (Omarska and Keraterm camps), IT-98-30/1, Trial Chamber judgment, 2 November 2001.

international law. As the law develops, consideration will need to be given as to whether, and in what way, these crimes are covered by Article 1F.

H. SPECIAL CASES

Minors

91. In principle, the exclusion clauses can apply to minors but only if they have reached the **age of criminal responsibility**. Great caution should always be exercised, however, when the application of the exclusion clauses is being considered in relation to a minor. Under Article 40 of the 1989 Convention on the Rights of the Child, States shall seek to establish a minimum age for criminal responsibility. Where this has been established in the host State,[92] a child below the minimum age cannot be considered by the State concerned as having committed an excludable offence. For those over this age limit (or where no such limit exists), the maturity of the particular child should still be evaluated to determine whether he or she had the mental capacity to held responsible for the crime in question. The younger the child, the greater the presumption that such mental capacity did not exist at the relevant time.

92. Where **mental capacity** is established, particular attention must be given to whether other grounds exist for rejecting criminal liability, including consideration of the following factors: the age of the claimant at the time of becoming involved with the armed group; the reasons for joining (was it voluntary or coerced or in defence of oneself or others?); the consequences of refusal to join; the length of time as a member; the possibility of not participating in such acts or of escape; the forced use of drugs, alcohol or medication (involuntary intoxication); promotion within the ranks of the group due to actions undertaken; the level of education and understanding of the events in question; and the trauma, abuse or ill-treatment suffered by the child as a result of his or her involvement. In the case of child soldiers, in particular, questions of duress, defence of self and others, and involuntary intoxication, often arise. Even if no defence is established, the vulnerability of the child, especially those subject to ill-treatment, should arguably be taken into account when considering the proportionality of exclusion for war crimes or serious non-political crimes.

93. At all times, regard should be had to the overwhelming obligation to act in the "best interests" of the child in accordance with the 1989 Convention on the Rights of the Child. Thus, specially trained staff should deal with cases where exclusion is being considered in respect of a child applicant.[93] In the UNHCR context, all such cases should be referred to Headquarters before a final decision is made on exclusion. The "best interests" principle should also underlie any post-exclusion action. Articles 39 and 40 of the 1989

[92] If the age of criminal responsibility is higher in the country of origin, this should also be taken into account (in the child's favour).

[93] For appropriate procedural and other safeguards, see generally, UNHCR and Save the Children, *Separated Children in Europe Programme: Statement of Good Practice*, October 2000; UNHCR, "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum", February 1997.

Convention are also relevant as they deal with the duty of States to assist in the rehabilitation of "victims" (which would tend to include child soldiers) and set down standards for the treatment of children thought to have infringed the criminal law.[94]

Family unity

94. The right to family unity generally operates in favour of dependants and not against them. Thus, where the main applicant is excluded, family members are not automatically excluded as well. Their claims to refugee status would need to be determined on an individual basis. Such claims are valid even where the fear of persecution is a result of the relationship to the excluded relative. Family members are only excluded if there are serious reasons for considering that they too are individually responsible for excludable crimes.

95. Where family members have been recognised as refugees, however, the excluded applicant cannot then rely on the right to family unity to secure protection or assistance as a refugee.

Mass influx

96. As a matter of principle, the exclusion clauses apply in situations of mass influx. From a practical perspective, however, an individual assessment may not be possible at an early stage in such circumstances. This does not mean that group exclusion is justified. Rather, humanitarian principles require that protection and assistance be afforded to all persons until such time as individual refugee status determination can take place. This is subject, though, to the separation of armed elements from the civilian population where mixed flows take place. Suspected armed elements should be interned in a location away from the refugee camp and should not automatically benefit from a *prima facie* determination of refugee status. They should not be considered as asylum-seekers until the authorities have established within a reasonable time-frame that they have genuinely renounced military activities. Only once this has been determined should a claim to refugee status, including consideration of exclusion, be examined on an individual case-by-case basis.[95] Exclusion should not be assumed for such persons – each case must be looked at on its own facts.

97. It is clear that the operational and logistical difficulties surrounding individual status determination in the mass influx context mean that without substantial assistance from

---

[94] The 2000 Optional Protocol to the 1989 Convention on the involvement of children in armed conflict, which entered into force in February 2002, similarly commits States Parties to cooperating "in the rehabilitation and social reintegration of persons who are victims of acts contrary" to the Protocol, including children under 18 years who have been forcibly recruited.

[95] See Executive Committee, Conclusion No. 94 (LIII), 2002, paragraph (c)(vii) and UNHCR, "The Civilian Character of Asylum: Separating Armed Elements from Refugees", Global Consultations on International Protection, (EC/GC/01/5), 19 February 2001, paragraph 20. See also paragraph 63 above on ex-combatants.

the international community such a task is extremely problematic. In particular, the separation and disarming of armed elements is not within UNHCR's mandate and requires a concerted effort by the host government often acting with international assistance.

III. PROCEDURAL ISSUES

A. Fairness of procedure

98. Given the severe consequences of exclusion for an individual and its exceptional nature, it is essential that rigorous procedural safeguards in relation to this issue are built into the refugee status determination procedure. Reference should be made to the procedural safeguards considered necessary in refugee status determination in general.[96] These include:

- individual consideration of each case;
- opportunity for the applicant to consider and comment on the evidence on the basis of which exclusion may be made;
- provision of legal assistance;
- availability of a competent interpreter, where necessary;
- reasons for exclusion to be given in writing;
- right to appeal an exclusion decision to an independent body; and
- no removal of the individual concerned until exhaustion of all legal remedies against decision to exclude.

B. Consideration of exclusion in the context of refugee status determination

99. In principle, in particular given the exceptional nature of the exclusion clauses, the applicability of the exclusion clauses should be examined within the regular refugee status determination procedure and not in either admissibility or accelerated procedures. Seeking to determine exclusion at the admissibility stage risks unfairly associating asylum-seekers with criminality. Rather, consideration of exclusion issues in the regular procedure allows the reasons justifying refugee status to be assessed alongside the factors pointing towards exclusion. This holistic approach facilitates a full assessment of the factual and legal issues of the case and is necessary in exclusion cases, which are often complex, require an evaluation of the nature of the alleged crime and the applicant's role in it on the one hand, and of the nature of the persecution feared on the other. This is particularly so where proportionality considerations arise (see paragraphs 76–78 above).

100. The exceptional nature of Article 1F suggests that inclusion should generally be considered before exclusion, but there is no rigid formula. The holistic approach allows for flexibility, taking into account the nature of the particular case. For example, looking at inclusion before exclusion may often be helpful as it prevents unnecessary

[96] See UNHCR, "Asylum Processes (Fair and Efficient Asylum Procedures)", Global Consultations on International Protection, (EC/GC/01/12), 31 May 2001, in particular paragraph 50 on best practice.

consideration of Article 1F in cases where non-inclusion arises. In cases of suspected terrorists, this would allow for an initial determination as to whether the individual fears legitimate criminal prosecution (and is therefore ineligible for refugee status anyway) as opposed to persecution. Inclusion before exclusion also enables a fuller understanding of the circumstances and international protection concerns about family members to be addressed. Exclusion may exceptionally be considered without particular reference to inclusion issues (i) where there is an indictment by an international criminal tribunal; (ii) in cases where there is apparent and readily available evidence pointing strongly towards the applicant's involvement in particularly serious crimes, notably in prominent Article 1F(c) cases, and (iii) at the appeal stage in cases where exclusion is the question at issue.

C. Specialised exclusion units

101. States have a legitimate interest in determining excludability as swiftly as possible, particularly in the case of suspected terrorists. This is not incompatible with undertaking a substantive factual and legal assessment. UNHCR recommends that exclusion cases be dealt with by specialised exclusion units within the institution responsible for refugee status determination, which would consider such cases on an expedited basis. Staff in these units should have expertise in both international criminal and refugee law as well as access to up-to-date background information, for example, briefings on key terrorist organisations, country of origin information, etc. Such units would maintain clear communication links with intelligence services and criminal law enforcement agencies.

D. Deferral for criminal proceedings

102. Where the individual is wanted by national courts for domestic criminal or extradition proceedings, it may be prudent to defer examination of the asylum application (including applicability of the exclusion clauses) until completion of such judicial proceedings. The latter may have significant implications for the asylum claim, although there is not necessarily an automatic correlation between extradition and exclusion under Article 1F. In general, however, the refugee claim must be determined in a final decision before execution of any extradition order.[97] This is not the case for surrender to an international criminal tribunal, since such surrender does not place the individual at risk of persecution.

E. Confidentiality of asylum claim

103. Consideration of the exclusion clauses may lead to the sharing of data about a particular asylum application with other States, for example, to gather intelligence on an individual's suspected terrorist activities. In line with established principles, information on asylum-seekers, including the very fact that they have made an asylum application,

[97] Such a determination may not be necessary, for example, where extradition to a third State does not raise the risk of indirect *refoulement* (i.e. the third State will appropriately consider the asylum application if the individual faces deportation following acquittal or completion of sentence).

should not be shared with the country of origin as this may place such persons, their families, friends or associates at risk. In exceptional circumstances, where national security interests are at stake, contact with the country of origin may be justified. For example, this may be the only method by which to obtain concrete evidence about an individual's previous and potentially ongoing terrorist activities. Even in such situations, the existence of the asylum application should still remain confidential.

104. The principle of confidentiality continues in principle to apply even when a final determination of exclusion has been made. This is necessary to preserve the integrity of the asylum system – information given on the basis of confidentiality must remain protected.

F. Burden of proof

105. In asylum procedures generally, the burden of proof is shared between the applicant and the State (reflecting the vulnerability of the individual in this context).[98] As several jurisdictions have explicitly recognised, however, the burden shifts to the State to justify exclusion under Article 1F. This is consistent with the exceptional nature of the exclusion clauses and the general legal principle that the person wishing to establish an issue should bear the burden of proof. Moreover, the factors that justify the individual being given the benefit of the doubt in refugee status determination proceedings generally apply equally when exclusion is being considered.

106. In some instances, the burden of proof may be reversed, creating a rebuttable presumption of excludability.[99] This is arguably the case where the individual has been indicted by an international criminal tribunal. It would then be up to the individual to rebut the presumption by proving, for example, mistaken identity. In the context of action against terrorism, lists established by the international community of terrorist suspects and organisations should not generally be treated as reversing the burden of proof. Unlike ICTY/ICTR indictments, such lists would be drawn up in a political, rather than a judicial, process and so the evidentiary threshold for inclusion is likely to be much lower. Moreover, the criteria for inclusion on a list may be much broader than those relevant to the test for exclusion under Article 1F. By contrast, an indictment by an international criminal tribunal will generally be in relation to activity caught by Article 1F, particularly under subparagraph (a). Terrorist lists are discussed further below in paragraph 109.

G. Standard of proof

107. The standard of proof set out in Article 1F – "serious reasons for considering" – is not a familiar concept in domestic legal systems. State practice is not consistent on this matter but does, at least, make it clear that the criminal standard of proof (e.g. beyond reasonable doubt in common law systems) need not be met. Thus, exclusion does not require a determination of guilt in the criminal justice sense. Nevertheless, in order to

[98] See Handbook, paragraphs 195–199, which discuss burden of proof and UNHCR, "Note on Burden and Standard of Proof in Refugee Claims", 16 December 1998.
[99] See also paragraph 58 above on a presumption of individual responsibility.

ensure that Article 1F is applied in a manner consistent with the overall humanitarian objective of the 1951 Convention, the standard of proof should be high enough to ensure that *bona fide* refugees are not excluded erroneously. Hence, the "balance of probabilities" is too low a threshold. As found in civil law jurisdictions, serious reasons from which arise a substantial suspicion are at least what is necessary; simple suspicions are not sufficient.[100] General reference to the standard of evidence required for an indictment is in itself unhelpful, as this standard varies between jurisdictions. Given the rigorous manner in which indictments are put together by international criminal tribunals, however, indictment by such bodies, in UNHCR's view, satisfies the standard of proof required by Article 1F. Depending on the legal system, this may also be the case for certain individual indictments.

108. It would appear that clear and credible evidence of involvement in excludable acts is required to satisfy the "serious reasons" test in Article 1F. An applicant's confession of involvement in such acts could satisfy the evidentiary test, but the credibility of such a confession would need to be examined, particularly if it was made in the country of origin where the applicant may have been subject to coercion. Again, the applicant's conviction for an excludable offence could be sufficient evidence for exclusion, if the conviction appears to have been reliable. An assessment of the fairness of the criminal proceedings is required, taking into account the relevant country's adherence to international standards on criminal justice. Similarly, the fact that an individual has been indicted in a foreign jurisdiction (rather than by an international criminal tribunal) or is subject to an extradition request should not automatically be considered sufficient evidence for exclusion. In all cases, proper recourse must be made to accurate country of origin information, for example, to evaluate whether a confession made in a criminal investigation is reliable.

109. Credible testimony of witnesses or other sources of reliable information set against the applicant's own statements (including an assessment of their credibility) may also provide sufficient evidence for the purposes of exclusion under Article 1F. With regard to the latter, an individual's inclusion on an international list of terrorist suspects should trigger consideration of the exclusion clauses but does not in itself satisfy the "serious reasons" test. As discussed in paragraph 106 above, this is due to the evidentiary and substantive criteria governing such lists. Similarly, where international lists are drawn up of terrorist organisations and an individual appears to be associated with such a group, this should prompt consideration of the applicability of the exclusion clauses. Exceptionally, where the criteria governing the list are such that the designated organisations, including its members, can reliably be considered to be heavily involved in violent crime, a presumption of individual responsibility for an excludable act may arise, but as discussed in paragraphs 57 and 58 above this should be analysed carefully. National lists of terrorist suspects or organisations will tend to have a lower evidentiary value than their international counterparts, due to the lack of international consensus.

[100] See Swiss Asylum Appeals Commission, case of M.B., 14 September 1998, 1999/12; case of S.X. 11 December 1999; case of S.M. 28 May 2001; case of Y.N., 27 November 2001.

110. When a rebuttable presumption does arise, the standard of proof to be met by the applicant to rebut the presumption is that of a plausible explanation regarding non-involvement or dissociation from any excludable acts, coupled with an absence of serious evidence to the contrary.

111. In establishing whether the standard of proof has been met in a particular case, lack of cooperation by the individual concerned may raise difficulties, although non-cooperation in itself does not establish guilt in the absence of clear and credible evidence of individual responsibility. On the other hand, an applicant's refusal to cooperate with the determination procedure may lead to non-inclusion in some cases. It should also not be a bar to establishing that sufficient evidence, as outlined in paragraphs 105 and 106, exists for Article 1F to apply.[101] Nevertheless, it is always important to assess the reasons for the individual's non-cooperation as it may be due to problems of understanding (for example, due to poor interpretation), to trauma, mental capacity, fear, or other factors.

H. Sensitive evidence

112. Exclusion should not be based on evidence that the individual concerned does not have the opportunity to challenge, as this offends principles of fairness and natural justice. Nevertheless, where revealing the source and/or the substance of the evidence may put witnesses at risk or compromise national security interests, a conflict arises with the full disclosure principle.

113. Exceptionally, anonymous evidence (where the source is concealed) may be relied upon but only where this is absolutely necessary to protect the safety of witnesses and the asylum-seeker's ability to challenge the substance of the evidence is not substantially prejudiced. Secret evidence or evidence considered in camera (where the substance is also concealed) should not be relied upon to exclude. The desire to withhold the nature of certain evidence will tend to arise where national security interests are at stake, but such interests may be protected by introducing procedural safeguards which also respect the asylum-seeker's due process rights.[102] For example, consideration should be given to disclosing the general content of the sensitive material to the individual but reserving the details for his or her legal representative only (on the basis that the latter has been vetted to received such evidence). Moreover, the exclusion decision, including the fairness of relying on such partially-disclosed material, could be challenged in private hearings before an independent tribunal (which has access to all relevant evidence).

[101] Such non-cooperation may, however, mean that exclusion is irrelevant as the refugee claim cannot in any case be established.

[102] For instance, the European Court of Human Rights noted in *Chahal v. United Kingdom* (1995) that "there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice" (paragraph 131).

ANNEX A: Consequences of exclusion

Some of the legal considerations constraining States' powers of expulsion include:

• Article 3(1) of the 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides: "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture."

• Article 7 of the 1966 International Covenant on Civil and Political Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…"

• Article 22(8) of the 1969 American Convention on Human Rights provides: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his [or her] country of origin, if in that country his [or her] right to life or personal freedom is in danger of being violated because of his [or her] race, nationality, religion, social status, or political opinions."

• Article 37(a) of the 1989 Convention on the Rights of the Child provides: States Parties shall ensure that: No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment…"

• Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The established case law of the European Court of Human Rights has determined that the expulsion or extradition of a person to a country where he or she risks being subjected to such treatment violates Article 3.[103]

• The return of a person to face the death penalty may be prohibited under applicable international human rights law, either as a form of inhuman and degrading treatment or because the host State has abolished the use of the death penalty. At the regional level, the 2003 Protocol to the Protocol amending the 1977 European Convention on the Suppression of Terrorism, adds to Article 5 of the latter Convention the statement: "Nothing in this Convention shall be interpreted either as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to the death penalty or … to life imprisonment without the possibility of parole..."

• Several international instruments embody the principle that no alien who is lawfully present in the territory of a State (or, as the case may be, no alien coming under the specific category covered by the instrument) may be expelled except in pursuance of a

[103] See "UNHCR Manual on Refugee Protection and the European Convention on Human Rights", April 2003.

decision reached in accordance with the law.[104] Some of these instruments provide that such an alien may not be expelled except on grounds of national security or public order.

• Various international instruments enshrine the principle that the collective expulsion of aliens is prohibited. In addition, the principle that an expulsion must be carried out in a manner least injurious to the person affected was well established by the beginning of the century.

• Extradition treaties often include a non-persecution clause, which prevents the surrender of an individual where this would put him or her at risk of persecution (as opposed to legitimate prosecution).

ANNEX B: Instruments defining war crimes

Article 6(b) of the **London Charter** includes within the concept of war crimes murder or ill-treatment of civilian populations, murder or ill-treatment of prisoners of war, the killing of hostages, or any wanton destruction of cities, towns or villages or devastation that is not justified by military necessity.

The "grave breaches" specified in the **1949 Geneva Conventions**[105] and Article 85 of **Additional Protocol I** also constitute war crimes. These include wilful killing, torture or other inhuman treatment, wilfully causing great suffering or serious injury to body or health, of protected persons; attacks on, or indiscriminate attack affecting the civilian population or those known to be *hors de combat*, population transfers; practices of *apartheid* and other inhuman and degrading practices involving outrages on personal dignity based on racial discrimination; and attacking non-defended localities and demilitarised zones. "Grave breaches" take place in the context of international armed conflicts.

Articles 2 and 3 of the **ICTY Statute** cover grave breaches of the 1949 Geneva Conventions and violations of the laws and customs of war. In relation to international armed conflicts, the crimes covered include wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, of protected persons; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a civilian to serve in the forces of a hostile power; wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; and taking civilians as hostages. In relation to internal armed conflicts, war crimes are considered to arise from violations of common Article 3 of the

[104] International Covenant on Civil and Political Rights, Article 13; 1984 Protocol No. 7 to the European Convention on Human Rights, Article 1(1); 1969 American Convention on Human Rights, Article 22(6); 1981 African Charter on Human and Peoples' Rights, Article 12(4); 1954 Convention relating to the Status of Stateless Persons, Article 31.

[105] See Articles 50, 51, 130 and 147 of the first, second, third and fourth Geneva Conventions respectively.

1949 Geneva Conventions, which deals with the basic humanitarian principles applicable in all armed conflicts. These include murder, the taking of hostages and outrages on personal dignity of persons not taking an active part in the hostilities. Article 4 of the **ICTR Statute** defines war crimes by reference to serious violations of common Article 3 of the 1949 Geneva Conventions and Additional Protocol II (both of which deal with non-international armed conflicts).

Amongst the acts designated as war crimes by Article 8 of the **ICC Statute** are intentional attacks against the civilian population or objects; intentional attacks against humanitarian personnel; killing or wounding a combatant who has surrendered; employing prohibited weapons (such as poisonous gases); committing rape and other forms of sexual violence; using starvation as a method of warfare; and conscripting children under the age of fifteen years. Differentiation is made in the Statute between acts constituting war crimes in the context of an international armed conflict and those arising in non-international armed conflicts.

ANNEX C: Instruments defining crimes against humanity

Article 6(c) of the **London Charter** defines crimes against humanity as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Article 5 of the **ICTY Statute** defines its responsibility for crimes against humanity as encompassing murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts when committed in armed conflict and directed against any civilian population.

Article 3 of the **ICTR Statute** refers to crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds and lists the same crimes as Article 5 of the ICTY Statute.

The relevant **ICC Statute** provisions are set out in paragraph 36 above.

ANNEX D: Instruments pertaining to terrorism

International

The text of these international instruments can be found at http://untreaty.un.org/English/Terrorism.asp .

1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (in force 4 December 1969)

1970 Convention for the Suppression of Unlawful Seizure of Aircraft (in force 14 October 1971)
1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (in force 26 January 1973)
1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (in force 20 February 1977)
1979 International Convention against the Taking of Hostages (in force 3 June 1983)
1980 Convention on the Physical Protection of Nuclear Material (in force 8 February 1987)
1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (in force 6 August 1989)
1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (in force 1 March 1992)
1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (in force 1 March 1992)
1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (in force 21 June 1998)
1997 International Convention for the Suppression of Terrorist Bombings (in force 23 May 2001)
1999 International Convention for the Suppression of the Financing of Terrorism (in force 10 April 2002)

Draft documents:
2001 Draft Comprehensive Convention on International Terrorism

Regional

1971 Organisation of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (in force 16 October 1973) (see http://www.oas.org/)
1977 European Convention on the Suppression of Terrorism (in force 4 August 1978) (see http://conventions.coe.int)
1987 South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism (in force 22 August 1988) (see http://untreaty.un.org/English/Terrorism.asp)
1998 Arab Convention on Combating Terrorism (in force 7 May 1999)
1999 African Union (formerly Organisation of African Unity) Convention on the Prevention and Combating of Terrorism (not yet in force) (see http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Algiers_convention%20on%20Terrorism.pdf)
1999 Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism (in force)
1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism (not yet in force) (see http://untreaty.un.org/English/Terrorism.asp)

2001, 19 September, Council of Europe, Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, CommDH/Rec(2001)1 (see http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/)

2002, 3 June, Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02) (not yet in force) (see http://www.oas.org/)

2002, 11 July, Council of Europe, Committee of Ministers, Guidelines on human rights and the fight against terrorism (see http://www.coe.int/t/e/human_rights/pdfs/PDF_H(2002)004%20E%20Guidelines%20terrorism.pdf)

2003, 15 May, Council of Europe, Protocol amending the European Convention on the Suppression of Terrorism (see http://conventions.coe.int/Treaty/EN/cadreprojets.htm)

Among the numerous recent European Union (EU) regulations, decisions and common positions (available on http://europa.eu.int/eur-lex/en/index.html) on combating terrorism and related measures are:

2001, 27 December, Council Regulation (2001/2580/EC) on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, Official Journal L 344/70, 28 December 2001

2001, 27 December, Council Decision (2001/927/EC) establishing the list provided for in Article 2(3) of Council Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344/83, 28 December 2001 (updated by Council Decisions Nos. 2002/334/EC of 2 May 2002, 2002/460/EC of 17 June 2002, 2002/848/EC of 28 October 2002, 2002/974/EC of 12 December 2002, 2003/480/EC of 27 June 2003)

2001, 27 December, Council Common Position (2001/931/CFSP) on the application of specific measures to combat terrorism, OJ L 344/93, 28 December 2001 (updated by Council Common Positions Nos. 2002/340/CFSP of 2 May 2002, 2002/462/CFSP of 17 June 2002, 2002/847/CFSP of 28 October 2002, 202/976/CFSP of 12 December 2002, 2003/402/CFSP of 5 June 2003, 2003/482/CFSP of 27 June 2003)

2002, 27 May, Council Regulation (2002/881/EC) imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 139/9, which by 31 July 2003 had been amended 20 times

2002, 13 June, Council Framework Decision on combating terrorism, OJ L 164/3, 22 June 2002

2002, 13 June, Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, OJ L190/1, 18 July 2002

Draft documents:

2002, 7 November, Draft OSCE Charter on Preventing and Combating Terrorism

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAPITAL AREA IMMIGRANTS' RIGHTS COALITION *et al.*, *Plaintiffs*, v. DONALD J. TRUMP *et al.*, *Defendants*.	Civil Action No. 19-2117 (TJK)
I.A. *et al.*, *Plaintiffs*, v. WILLIAM P. BARR *et al.*, *Defendants.*	Civil Action No. 19-2530 (TJK)

MEMORANDUM OPINION

Plaintiffs in these related cases are immigrant-services organizations and individual asylum applicants. They challenge an interim final rule that significantly changes the United States' asylum procedures. The rule categorically disqualifies aliens arriving at the southern border from receiving asylum unless they have already unsuccessfully sought similar protection in another country on their way here. Plaintiffs allege that the rule is unlawful for several reasons, including that it is contrary to the Immigration and Nationality Act and the Trafficking Victims Protection Reauthorization Act, is arbitrary and capricious, and was issued without notice-and-comment procedures required under the Administrative Procedure Act (APA). Plaintiffs in the first-filed case, *CAIR*, also allege that the rule violates asylum applicants' Fifth

Amendment due process rights. Defendants argue that this case is largely not justiciable, in part because the organizations lack standing, which deprives the Court of subject-matter jurisdiction over their claims.

Plaintiffs in *CAIR* moved for a temporary restraining order when they filed their complaint. At that time, Plaintiffs in that case included only nonprofit immigrant-services organizations. The Court denied their motion because they had not shown that, absent preliminary relief, they would suffer irreparable harm just because the rule would make it harder to serve asylum seekers. Those organizations then amended their complaint to add individual asylum applicants as plaintiffs and moved for a preliminary injunction. At about the same time, Plaintiffs in *I.A.*—a similar immigrant-services organization and individual asylum applicants as well—filed their suit and also moved for a preliminary injunction. After the Court consolidated the cases, all the parties jointly asked the Court to convert the motions for preliminary relief and the related briefing into cross-motions for summary judgment.

The Court holds that it has subject-matter jurisdiction over the claims brought by at least one organizational Plaintiff in each case. It also holds that Defendants unlawfully promulgated the rule without complying with the APA's notice-and-comment requirements, because neither the "good cause" nor the "foreign affairs function" exceptions are satisfied on the record here. The Court thus need not reach Plaintiffs' other claims concerning the validity of the rule. The Court will grant Plaintiffs' motions for summary judgment, deny Defendants' cross-motions, and vacate the rule.

I. Background

A. The Immigration and Nationality Act

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, governs much of the United States' immigration system. Two portions of it are relevant to this case: the standards applied to asylum applications, and the procedures for expedited removal.

1. Asylum

"Asylum is a form of discretionary relief that allows an otherwise removable alien who qualifies as a refugee to remain in the United States." *O.A. v. Trump*, 404 F. Supp. 3d 109, 118 (D.D.C. 2019). Asylum provides individuals who qualify several distinct benefits: a path to citizenship, eligibility for certain government benefits, and the chance for family members to receive asylum as well. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,832 (July 16, 2019). There are other forms of relief granting removable aliens the right to stay in this country on humanitarian grounds, but none confer those same advantages. *Id.*

Under the INA, any person physically in the United States may apply for asylum. 8 U.S.C. § 1158(a)(1). A person may file that application while she is in removal proceedings or independently. *See id.* §§ 8 U.S.C. 1225(b)(1)(A)(i), 1229a(c)(4). The former is sometimes called a defensive application and the latter an affirmative application. *O.A.*, 404 F. Supp. 3d at 121. Some persons are categorically ineligible for asylum, and several such categories are defined by statute in the INA. *See* 8 U.S.C. § 1158(b)(2)(A). For example, an alien is ineligible if she committed certain crimes, is a danger to the community, or was firmly resettled in another country before arrival in the United States.[1] *Id.* Assuming an applicant is not ineligible for some

[1] Additionally, as discussed below, the INA allows the Attorney General to create additional categories of ineligibility. 8 U.S.C. § 1158(b)(2)(C).

reason, under the INA, asylum may be granted only to an applicant physically present in the United States who is a "refugee," *i.e.*, someone with "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1158(a)(1), (b)(1)(A); *id.* § 1101(a)(42)(A).

After a person applies for asylum, she receives an interview with an asylum officer. *Id.* § 1225(b)(1)(A)(ii), (B). That officer determines whether the person is eligible for asylum—that is, first, whether she is categorically ineligible and, if not, second, whether she may be a refugee. *Id.* § 1158(b)(1)(A), (B)(i). The latter determination involves deciding whether the applicant has a "credible fear of persecution," which exists when "there is a significant possibility" that a person is a refugee. *Id.* § 1225(b)(1)(B)(v).[2] If after interviewing the applicant the officer determines that she has a credible fear of persecution, the applicant may be granted asylum in a subsequent proceeding if an immigration judge finds that she is a "refugee" under the statute. *Id.* § 1158(b)(1); 8 C.F.R. § 208.30(f). On the other hand, if the applicant is either ineligible or does not show a credible fear, the asylum officer enters a "negative credible fear determination." *See* 8 C.F.R. § 208.30(g)(1). The applicant may appeal that determination to an immigration judge. *Id.* § 208.30(g)(2); *see also* 84 Fed. Reg. at 33,837–38. But as described below, if the immigration judge agrees with the asylum officer, the applicant is issued a final order of removal. 8 C.F.R. § 1208.30(g)(2)(iv)(A).

[2] The Supreme Court has explained that an individual can qualify for asylum if she demonstrates a ten percent likelihood that she will be persecuted on the basis of race, religion, nationality, social group, or political opinion. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–32, 439–40 (1987); *see also O.A. v. Trump*, 404 F. Supp. 3d 109, 120 n.3 (D.D.C. 2019). Thus, at the initial interview stage, an asylum applicant "need only show a 'significant possibility' of a one in ten chance of persecution, i.e., a fraction of ten percent." *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127 (D.D.C. 2018) (citation omitted).

An applicant found ineligible for asylum may pursue other, more difficult avenues to avoid removal from the United States. First, she may seek withholding of removal under Section 241(b)(3) of the INA. *See* 8 U.S.C. § 1231(b)(3); 84 Fed. Reg. at 33,834. Doing so, however, requires her to prove to an immigration judge that "it is more likely than not" that she would be persecuted on a protected ground. 8 C.F.R. § 1208.16(b)(2). Second, she may seek protection under the regulations implementing Article 3 the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105–277, § 2242(b), 112 Stat. 2681; 84 Fed. Reg. at 33,834. But doing so requires her to show that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2).

As a result, these alternative paths ultimately require "a more substantial showing" than the standard in asylum cases. *O.A.*, 404 F. Supp. 3d at 120. And on either path, an immigration officer performing an initial screening interview must use a more demanding standard than in asylum cases—whether the alien has "a reasonable fear of persecution or torture," 8 C.F.R. § 208.30(e)(5)—which is satisfied only "if the alien establishes a reasonable possibility that he or she would be persecuted" because of a protected ground, *id.* § 208.31(c). *See also* 84 Fed. Reg. at 33,837 (explaining that the reasonable-fear screening standard is more demanding than the credible-fear standard applicable in asylum cases). Moreover, relief under either of these paths "does not preclude the government from removing the alien to a third country where the alien would not face persecution, does not establish a pathway to lawful permanent resident status and citizenship, and does not afford derivative protection for the alien's family members." *O.A.*, 404 F. Supp. 3d at 120.

2. Expedited Removal

The INA sets up two types of removal proceedings: regular, under 8 U.S.C. § 1229a, and expedited, under 8 U.S.C. § 1225. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. The latter applies only to certain classes of individuals, including those who are screened out of the process by asylum officers. Expedited removal proceeds very quickly. As noted above, if an asylum officer enters a "negative credible fear determination" after interviewing an asylum applicant, the applicant may appeal that determination to an immigration judge. 8 C.F.R. § 208.30(g); *id.* § 1208.30(g). But if the immigration judge agrees with the asylum officer, the applicant is given a final order of removal. *Id.* § 1208.30(g)(2)(iv)(A). The entire process, by statute, takes no more than seven days. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

Another feature of expedited removal is the limited availability of judicial review. Congress in the IIRIRA significantly curtailed federal courts' jurisdiction to review challenges to an individual's order of removal from expedited removal proceedings. *See generally* 8 U.S.C. § 1252. And the IIRIRA includes several "channeling rules" which consolidate before the courts of appeals challenges that either seek review of a removal order or that involve questions arising from a removal action or proceeding. *Id.* § 1252(a)(5), (b)(9); *see also O.A.*, 404 F. Supp. 3d at 126–38.

B. The Rule

Last year, the Departments of Justice and Homeland Security ("Departments") jointly published an interim final rule entitled "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33,829 (July 16, 2019) ("Rule"). As discussed above, the INA authorizes the Attorney General to "by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." 8 U.S.C. § 1158(b)(2)(C). Relying

on this provision, the Rule renders aliens seeking to enter the United States at its southern border categorically ineligible for asylum unless they first applied for similar protection in a third country they transited through (other than the country they fled) and were rejected there. 84 Fed. Reg. at 33,835.[3] The Rule does not limit an alien's ability to seek withholding of removal under either Section 241(b)(3) of the INA or the CAT. 84 Fed. Reg. at 33,834. But its categorical bar on asylum eligibility applies to adults and unaccompanied minors alike. *See* 84 Fed. Reg. at 33,839 n.7.

When issuing the Rule, the Departments explained that it is intended to curb the strain on the United States' immigration system "by more efficiently identifying aliens who are misusing the asylum system to enter and remain in the United States rather than legitimately seeking urgent protection from persecution or torture." *Id.* at 33,831. It also "aims to further the humanitarian purposes of asylum." *Id.* According to the Departments, the Rule will deter aliens whose claims lack merit and will instead prioritize those who have no other options or have experienced more extreme forms of human trafficking. *Id.* The Rule also seeks to combat human smuggling by diminishing "the incentive for aliens without an urgent or genuine need for asylum to cross the border." *Id.* And the Departments add that the Rule "will better position the United States as it engages in ongoing diplomatic negotiations with Mexico and the Northern Triangle countries." *Id.*

[3] The Rule excludes: (1) an alien who, while in transit to the United States, applied for and was denied protection for individuals fleeing persecution or torture; (2) an alien who is a "victim of a severe form of human trafficking," 8 C.F.R. § 214.11; or (3) an alien who transited only through "a country or countries that were not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol, or the CAT." Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,835 (July 16, 2019).

The Rule took effect the day it was published. *Id.* at 33,830. The Departments invoked two exceptions to the APA's usual requirements that regulations be published at least 30 days before they take effect and that the public be offered the opportunity to comment, 5 U.S.C. § 553 (b)–(d). According to the Departments, dispensing with the notice-and-comment period was "essential to avoid a surge of aliens who would have strong incentives to seek to cross the border during pre-promulgation notice and comment or during the 30-day delay in the effective date." 84 Fed. Reg. at 33,841. Separately, they claimed that the Rule "involves a 'foreign affairs function of the United States,'" *id.* (citation omitted), and therefore was exempt from notice-and-comment procedures, 5 U.S.C. § 553(a)(1). All the same, the Departments invited interested persons to submit comments that they represented would "be considered and addressed in the process of drafting the final rule." 84 Fed. Reg. at 33,830. To date, the Departments have not promulgated a final rule.

C. Procedural History

Capital Area Immigrants' Rights Coalition (CAIR) and the Refugee and Immigrant Center for Education and Legal Services filed the first of these two actions, challenging the Rule on the same day it took effect. *Capital Area Immigrants' Rights Coal. (CAIR) v. Trump,* No. 19-cv-2117, ECF No. 1 (D.D.C. July 16, 2019). They immediately moved for a temporary restraining order. *CAIR* ECF No. 3. About a week later, the Court denied their motion. *See CAIR*, 2019 WL 3436501, at *4 (D.D.C. July 24, 2019). As the Court explained, Plaintiffs at that time, both of which were organizations, had failed to show that the Rule would irreparably harm them. *Id.* at *1–3. The Court also emphasized that Plaintiffs were not individual asylum seekers facing immediate removal. *Id.* at *2–3.

Later, Plaintiffs in *CAIR* filed an amended complaint adding as new plaintiffs nine individuals and one additional organization. *See CAIR* ECF No. 37 ("*CAIR* Compl."). The

individual Plaintiffs, proceeding under pseudonyms, *see CAIR* ECF No. 36, are women and children who fled persecution and violence in Central America, Cuba, and Angola and transited through Mexico without applying for asylum there before crossing the United States' southern border after the Rule took effect. *CAIR* Compl. ¶¶ 13–63. The organizational Plaintiffs remain immigrant-services nonprofits that assist asylum seekers in the United States. *Id.* ¶¶ 64–66. These Plaintiffs name as Defendants President Donald J. Trump, Attorney General William P. Barr, Acting Secretary of Homeland Security Chad F. Wolf,[4] and related government agencies and leaders. *Id.* ¶¶ 67–79. About a month after the Rule was promulgated, the Tahirih Justice Center ("Tahirih"), another immigrant-services organization, and another group of individual asylum seekers brought a similar challenge to the Rule against most of the same defendants. *I.A. v. Barr*, No. 19-cv-2530, ECF No. 1 (D.D.C. Aug. 21, 2019). The *I.A.* Plaintiffs later filed an amended complaint adding more asylum seekers. *See I.A.* ECF No. 23 ("*I.A.* Compl.").[5]

Plaintiffs in these cases bring mostly the same claims. They contend that the Rule violates the APA because it contradicts the INA and the Trafficking Victims Protection Reauthorization Act (TVPRA); is arbitrary and capricious for several reasons; and that the Departments issued it without the required notice-and-comment procedures. *CAIR* Compl. ¶¶ 224–47, 256–63; *I.A.* Compl. ¶¶ 126–40. Plaintiffs in the *CAIR* suit also allege that the Rule violates asylum seekers' Fifth Amendment due process rights. *CAIR* Compl. ¶¶ 248–55.

[4] Upon assuming office in November 2019, Chad Wolf was automatically substituted for Kevin McAleenan under Federal Rule of Civil Procedure 25(d).

[5] The individual Plaintiffs in both cases, in accompanying declarations filed under seal, represent that they are fleeing threats of political persecution, severe violence, or death, and they state that they would fear for their own safety and that of their families if their names were disclosed as a result of their participation in this lawsuit. *See CAIR* ECF No. 36; *I.A.* ECF No. 26.

Plaintiffs in both cases moved for a preliminary injunction on the same day. *CAIR* ECF No. 41; *I.A.* ECF No. 6. But after the Supreme Court stayed a nationwide injunction entered in the Northern District of California, *see Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019), the parties jointly requested that the Court convert their motions and the responsive briefing into cross-motions for summary judgment. *See CAIR* ECF No. 50; *see also* Minute Orders of Sept. 18, 2019.

D. *East Bay Sanctuary Covenant* Litigation

The same day the Rule was issued, another group of immigrant-services organizations challenged the Rule in the Northern District of California. *See* Complaint, *East Bay Sanctuary Covenant v. Barr*, No. 19-cv-4073-JST (N.D. Cal. July 16, 2019).[6] The plaintiffs in that case moved the next day for a temporary restraining order, which the district court converted to a motion for a preliminary injunction. *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 935–36 (N.D. Cal. 2019). A week later, the district court in that case entered a nationwide injunction barring the defendants from implementing the Rule. *Id.* at 960. The defendants moved for a stay pending appeal, which the Ninth Circuit granted in part. *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019). Specifically, the Ninth Circuit narrowed the injunction's scope to apply only within that circuit. *Id.* It also held that while it considered the appeal, the district court retained jurisdiction "to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." *Id.* at 1030–31. A few weeks later, the district court restored the nationwide scope of the injunction. *East Bay Sanctuary Covenant*

[6] The *East Bay Sanctuary Covenant* litigation challenging the Rule is separate from other similarly named litigation challenging a different asylum-related rulemaking. *See East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018) (challenging a regulation issued by the Departments that, together with a presidential proclamation, effectively barred asylum for any alien who did not enter the United States at a designated port of entry).

v. Barr, 391 F. Supp. 3d 974, 985 (N.D. Cal. 2019). The defendants then applied to the Supreme Court for a stay of the district court's injunction. *See Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). The Supreme Court granted the application and stayed the district court's injunction pending appeal. *Id.* The Ninth Circuit has since affirmed the district court's nationwide preliminary injunction. *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020).

II. Legal Standard

Summary judgment is usually appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits [or declarations] show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as matter of law." *Air Transp. Ass'n. of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 31–32 (D.D.C. 2010) (alteration in original) (citation omitted), *aff'd*, 663 F.3d 476 (D.C. Cir. 2011). In "a case involving review of a final agency action under the Administrative Procedure Act, 5 U.S.C. § 706, however, the Court's role is limited to reviewing the administrative record, so the standard set forth in Rule 56[] does not apply." *Id.* at 32. In such cases, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Cottage Health Sys. v. Sebelius*, 631 F. Supp. 2d 80, 90 (D.D.C. 2009).[7]

[7] Plaintiffs argue—and Defendants contest—that the Court may consider evidence outside the administrative record. *See CAIR* ECF No. 59 at 1–2; *I.A.* ECF No. 50 at 10; *CAIR* ECF No. 58; *I.A.* ECF No. 48 ("Defs.' Supp. Br."). The Court need not decide this question because it finds the Rule procedurally deficient based only on the information in the administrative record.

III. Analysis

As described above, Plaintiffs allege that the Rule is unlawful for several reasons, and Defendants argue, as a threshold matter, that the Court lacks subject-matter jurisdiction over the organizational Plaintiffs' claims. First, as it must, the Court considers Defendants' justiciability arguments and concludes that at least one organizational Plaintiff in each case has standing, and that their claims fall within the INA's zone of interests. Second, the Court turns to Plaintiffs' claims and holds that because Defendants unlawfully failed to comply with the APA's notice-and-comment requirements, the Rule must be vacated. For that reason, it need not consider Plaintiffs' other challenges to the Rule. *See Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992).

A. Justiciability

Defendants advance several challenges to the Court's power to hear this case. With respect to the organizational Plaintiffs in both cases, Defendants argue that: (1) they lack standing to sue, and (2) their claims fall outside the relevant zone of interests. The Court addresses each in turn. Because the Court finds that at least one organization in each case has standing, it need not consider whether the individual Plaintiffs also have standing. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). For the same reason, the Court also need not consider whether the INA's complex jurisdiction stripping and channeling provisions—which largely apply to individual aliens' challenges that either seek review of a removal order or involve questions arising from a removal action or proceeding, *see O.A.*, 404 F. Supp. 3d at 126–38—divest the Court of jurisdiction. Indeed, the Defendants do not even appear to argue that these jurisdictional provisions apply to the organizational Plaintiffs, which are seeking to vindicate their own rights under the APA.

1. Standing

An organization may assert standing "on its own behalf, on behalf of its members or both." *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Here, the organizational Plaintiffs in both *CAIR* and *I.A.* argue they have standing based on their own interests. *See CAIR* ECF No. 22 at 3–5; *I.A.* ECF No. 6 at 10–11. The Court must therefore determine whether they have shown an "actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Equal Rights Ctr.*, 633 F.3d at 1138 (quoting *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)). The Court's standing inquiry is slightly different when a plaintiff seeks to vindicate a procedural right, such as having been unlawfully denied the opportunity to comment on a proposed rule. *See Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014). Specifically, "a plaintiff asserting a procedural violation must show 'a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest.'" *Iyengar v. Barnhart*, 233 F. Supp. 2d 5, 12–13 (D.D.C. 2002) (quoting *Fla. Audubon Soc'y. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996)). A plaintiff asserting such a violation need not, however, show that the agency would have acted any differently. *Mendoza*, 754 F.3d at 1010. Yet even in the context of a procedural injury, "the injury in fact requirement is a hard floor of Article III jurisdiction that cannot be altered by statute." *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 183 (D.C. Cir. 2017). Once a plaintiff clears that hurdle, though, "the normal standards for immediacy and redressability are relaxed." *Mendoza*, 754 F.3d at 1010.

The organizational Plaintiffs "bear[] the burden of establishing these elements," which they must support "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At summary judgment, a

plaintiff "must 'set forth' by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true." *Id.* But when evaluating standing, the Court must assume that the organizational Plaintiffs would prevail on the merits of their claims. *Conference Grp., LLC v. FCC*, 720 F.3d 957, 962 (D.C. Cir. 2013). Additionally, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester*, 137 S. Ct. at 1651.

Defendants argue that the organizational Plaintiffs in both cases lack standing because they have not suffered a legally cognizable injury. To satisfy the injury-in-fact requirement, an organization must allege that it suffered a "concrete and demonstratable injury to [its] activities—with the consequent drain on [its] resources—[that] constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The D.C. Circuit has articulated a two-prong test for determining whether an organization meets this standard. First, an organization must show that the challenged conduct "perceptibly impair[s] the organization's ability to provide services." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). This initial showing must also demonstrate a "direct conflict between the defendant's conduct and the organization's mission." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (emphasis omitted) (holding that such a conflict "is necessary—though not alone sufficient—to establish standing"). Second, an organization must show that it "used its resources to counteract [the alleged] harm." *Food & Water Watch*, 808 F.3d at 919 (citation omitted); *see also Spann*, 899 F.2d at 27 ("*Havens* makes clear . . . that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.").

At least one organizational Plaintiff in each case has met this burden. Specifically, both CAIR and Tahirih have shown how the Rule will frustrate their ability to provide legal services directly to asylum applicants, a core component of their respective missions. *CAIR* ECF No. 41-2 ("Cubas PI Decl.") ¶¶ 3–7, 19–22; *I.A.* ECF No. 6-1 ("Cutlip-Mason Decl.") ¶¶ 6, 12–13, 19–24. As discussed above, the Rule is intended to bar many individuals from qualifying for asylum. 84 Fed. Reg. at 33,835. As a result, individuals covered by the Rule may avoid removal only by meeting the heightened "reasonable fear" screening standard that applies in non-asylum withholding cases. *See id.* at 33,837. Both CAIR and Tahirih explain that preparing individuals for interviews in which that standard is applied is far more resource intensive; the Rule will therefore severely limit the number of individuals they may serve. Cubas PI Decl. ¶¶ 19, 22; Cutlip-Mason Decl. ¶¶ 20, 23. For example, CAIR "estimates that it will be able to serve 50% fewer asylum seekers under the Rule, based on its years of experience perfecting and timing its service delivery models, its client base statistics, and the human and fiscal resource shifting that it already is undertaking and will continue to undertake in an effort to respond to the Rule." Cubas PI Decl. ¶ 19. Additionally, both organizations explain how the Rule requires them to now prepare children for their own proceedings. *CAIR* ECF No. 3-3 ("Cubas TRO Decl.") ¶¶ 31–35; Cutlip-Mason Decl. ¶ 21. Tahirih also explains that the Rule will force more asylum claims to be filed defensively once an alien is in removal proceedings, requiring it to spend much more staff time on individual cases. Cutlip-Mason Decl. ¶ 19. As a result, like CAIR, Tahirih "will be forced to reduce the number of clients [it] can serve with [its] funding." *Id.* ¶¶ 23–24. And both organizations also explain how the Rule requires them to divert resources to adapt to the Rule. *Id.* ¶ 24; Cubas TRO Decl. ¶¶ 16–19.

These declarations—the substance of which Defendants do not contest—show that the Rule both conflicts with these organizations' missions and inhibits their daily activities. *See Ctr. for Responsible Sci. v. Gottlieb*, 346 F. Supp. 3d 29, 38 (D.D.C. 2018). They also show that these organizations have and will continue to be required to expend resources to counteract the Rule. *See O.A.*, 404 F. Supp. 3d at 143; *see also Sierra Club v. Jewell*, 764 F.3d 1, 7 (D.C. Cir. 2014) (explaining that an injury is sufficiently imminent when a plaintiff can show a "substantial probability of injury") (citation omitted); *Spann*, 899 F.2d at 27. "No more is required to establish standing under *Havens*." *O.A.*, 404 F. Supp. 3d at 143.

Defendants make several arguments to the contrary, but ultimately none carries the day. First, they argue that organizations like CAIR and Tahirih have no cognizable interest under the INA; thus, they say, *Havens* is inapplicable. *See CAIR* ECF No. 43, *I.A.* ECF No. 17 ("Defs.' Cross Mtn") at 12. They appear to argue that the INA's channeling provisions, 8 U.S.C. § 1252(a)(5) and (b)(9), together with the lack of a private statutory right of action, mean that these organizations cannot challenge the Rule even to the extent that it affects them. *See id.* The Court is unpersuaded. To begin with, Defendants have cited no case in which a court precluded an organization from challenging an immigration-related rule under the APA as a matter of law in this way. Indeed, the case law stands in stark contrast.[8] More fundamentally, the text of Section 1252 provides no support for the proposition that organizations may not facially

[8] *See, e.g.*, *O.A.*, 404 F. Supp. 3d at 126–38; *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 387 F. Supp. 3d 33, 45 (D.D.C. 2019); *Auyda, Inc. v. Attorney Gen.*, 661 F. Supp. 33, 34 (D.D.C. 1987), *aff'd sub nom. Ayuda, Inc. v. Attorney Gen.*, 848 F.2d 1297 (D.C. Cir. 1988); *see also Daingerfield Island Protective Soc. v. Lujan*, 797 F. Supp. 25, 29 (D.D.C. 1992) (noting that "the Supreme Court has held that under the APA, it is not necessary to find a private right of action under a particular statute in order to enforce a federal agency's compliance with that statute"), *aff'd sub nom. Daingerfield Island Protective Soc. v. Babbitt*, 40 F.3d 442 (D.C. Cir. 1994).

challenge under the APA immigration-related regulations that harm their own interests. And the specific channeling provisions cited by Defendants apply to challenges that either seek review of a removal order or involve questions arising from a removal action or proceeding. *O.A.*, 404 F. Supp. 3d at 126–38; *see Dep't of Homeland Sec. v. Regents of the Univ. of California*, No. 18-587, 2020 WL 3271746, at *8 (U.S. June 18, 2020) (noting that § 1252(b)(9) "is certainly not a bar where, as here, the parties are not challenging any removal proceedings").

Second, Defendants argue that CAIR and Tahirih lack third-party standing to challenge the Rule on behalf of aliens who might be removed. Defs.' Cross Mtn at 12–13.[9] But these organizations are not claiming standing on behalf of their clients, or any other individual asylum applicants. They are not challenging an immigration enforcement decision. Nor are they arguing they have standing because more of their clients may ultimately be denied asylum. Rather, the organizational Plaintiffs argue that the Rule will directly injure *them* by making it harder for them to conduct their own basic activities. Indeed, Defendants' position would seem to preclude an organization from bringing an APA challenge to any rule that even tangentially relates to immigration.

[9] Relatedly, Defendants also argue in passing that these organizational Plaintiffs lack standing to challenge policies related to an agency's discretionary enforcement decisions as they relate to a third party. Defs.' Cross Mtn at 12–13 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) and related cases). Again, the organizational Plaintiffs are not relying on any third party, nor are they challenging the substance of any discretionary decision. Rather, they are challenging whether the agency adhered to the procedural requirements of the APA. And Defendants have identified no language in the statute suggesting that the INA precludes that sort of review. Defendants also point out that at least one judge on the D.C. Circuit has questioned the scope of cognizable organizational injuries under *Havens*, *see People for the Ethical Treatment of Animals (PETA) v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1099, 1101–03 (D.C. Cir. 2015) (Millett, J., dubitante), but this Court lacks the power to sidestep binding Circuit precedent, *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997).

Third, Defendants argue that while "the legal landscape may have partially changed" because of the Rule, "the organizations can still provide legal services." *Id.* at 14. In Defendants' view, then, they have not suffered a cognizable injury. But under the law of this Circuit, the injury requirement is not so demanding. *O.A.*, 404 F. Supp. 3d at 143 ("Courts have never required an organization to prove that is it entirely hamstrung by challenged actions."); *see also Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 387 F. Supp. 3d 33, 45 (D.D.C. 2019). Organizations satisfy the first prong of the injury inquiry if they show "that their activities have been *impeded*" in some way. *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (emphasis added); *see also League of Women Voters of United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (finding a cognizable injury where "new obstacles unquestionably [made] it more difficult for [organizations] to accomplish their primary mission"); *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (noting that "an organization must allege that the defendant's conduct 'perceptibly impaired' the organization's ability to provide services in order to establish injury in fact") (citation omitted); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.* (*PETA*), 797 F.3d 1087, 1093 (D.C. Cir. 2015) (noting that "the key issue is whether the organization has suffered a concrete and demonstrable injury to its activities" (cleaned up)).

Fourth, Defendants argue that the injuries the organizational plaintiffs say the Rule will cause "are speculative and self-inflicted." Defs.' Cross Mtn at 14. While it is true that an organization may not base standing on "a 'self-inflicted' budgetary choice," *PETA*, 797 F.3d at 1093 (citation omitted), that is not the case here. For example, these organizational Plaintiffs do not rely on harm flowing from expenses related to these lawsuits or budgetary decisions related to their advocacy. *See id.* Rather, as discussed above, they explain how the Rule will make it

harder for them to provide their core representational services. *See also Equal Rights Ctr.*, 633 F.3d at 1140 (noting that whether an injury is self-inflicted does not "depend on the voluntariness or involuntariness of the plaintiffs' expenditures," but whether "they undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged discrimination"). Additionally, while the Court "may reject as overly speculative those links which are predictions of future events," *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (citation omitted), CAIR and Tahirih do not rely on an attenuated chain of improbable causes and effects. Rather, their declarations persuasively "demonstrate a realistic danger of sustaining a direct injury," and no more is required. *Id.*

Fifth, Defendants argue that the organizational Plaintiffs have not suffered a cognizable injury just because they "must adapt to the new requirements by spending more time on their clients' cases, adjusting staffing, . . . analyzing the new policy[,] and revising training and orientation materials." Defs.' Cross Mtn at 15. If that were all a plaintiff had to show, say Defendants, "then any legal services or advocacy organization could sue in federal court whenever there is a change in the law." *Id.* This argument has some intuitive appeal, but it is unsupported by D.C. Circuit precedent.

Indeed, the two cases that Defendants cite in support of this argument are inapposite. The passage they quote from the first case, *Food & Water Watch,* instructs only that an agency may not manufacture an injury by suing. 808 F.3d at 381–82; *see also Spann*, 899 F.2d at 27. They cite the second case, *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995), for the proposition that "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." Defs.' Cross Mtn at 15–16. But that

case is distinguishable from the situation here. There, an advocacy organization tried to assert an injury in part because it educated its members and the public about the consequences of new tax legislation, something that it would ordinarily do. *Nat'l Taxpayers Union*, 68 F.3d at 1434. The court in that case explained that plaintiffs "cannot convert [their] ordinary program costs into an injury in fact." *Id.* But the court was careful to distinguish that case from others, such as *Spann*, where an organization had to expend greater resources on education in order to counteract the harm it had suffered. *Id.*; *Spann*, 899 F.2d at 28–29 (noting that "increased education and counseling could plausibly be required" to counteract defendants' conduct). Indeed, the year before *National Taxpayers Union,* the Circuit held that an organization cleared the standing hurdle when the defendant's conduct allegedly forced it to spend additional resources on community counseling and reduced the effectiveness of its outreach efforts. *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994). Defendants' interpretation of *National Taxpayers Union* would seem to all but preclude a legal services organization from ever proving standing. That cannot be so. *Cf. Ukrainian-Am. Bar Ass'n v. Baker*, 893 F.2d 1374, 1378–80 (D.C. Cir. 1990).

Finally, Defendants argue that the organizational Plaintiffs may not rely on harm related to lack of notice and comment because they have not alleged a non-procedural injury. Defs.' Cross Mtn at 16.[10] Therefore, Defendants argue, they are impermissibly seeking to vindicate "a procedural right *in vacuo*." *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

[10] Defendants argue in passing that the Departments requested comments when promulgating the Rule, thereby "curing the very purported injuries Plaintiffs allege." Defs.' Cross Mtn at 16. This argument is unpersuasive. "Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way." *New Jersey v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (citation omitted)).

But as discussed above, CAIR and Tahirih have shown cognizable concrete injuries caused by the Rule. Moreover, both have explained that they regularly submit comments to proposed rules before they go into effect and they would have done so here if they had been given the opportunity. Cubas TRO Decl. ¶ 40; Cutlip-Mason Decl. ¶ 25. Tahirih would have "explain[ed] why the Rule is contrary to domestic law, contrary to international law, and factually unsupported." Cutlip-Mason Decl. ¶ 25. And CAIR would have "inform[ed] the Government of the substantial and irreparable harms—both to the organization and its clients—that the policy would create." Cubas TRO Decl. ¶ 40. "The procedural right at stake here—the ability to comment on [a rule which categorically bars a large number of people from qualifying for asylum]—is quite obviously linked to their concrete interest, [providing assistance with asylum applications]." *Iyengar*, 233 F. Supp. 2d at 13. Thus, CAIR and Tahirih do not seek to vindicate merely a "procedural right without some concrete interest that is affected by the deprivation." *Summers*, 555 U.S. at 496.[11] And it does not matter that some organizational Plaintiffs have in fact commented, because that does not cure the Departments' earlier failure. *New Jersey v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980).

For these reasons, the Court finds that at least one organizational Plaintiff in each case has standing, and thus, the Court has subject-matter jurisdiction to hear their claims.

2. Zone of Interests

Though not jurisdictional, the zone-of-interests test is a "tool for determining who may invoke the cause of action" in a statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*,

[11] *See also Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002) ("All that is necessary is to show that the procedural step was connected to the substantive result."); *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) ("[T]he plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.").

572 U.S. 118, 130 (2014). The test simply asks "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* at 127. For claims brought under the APA, "the test is not 'especially demanding.'" *Id.* at 130 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) ("We apply the test in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'" (citation omitted))). This is so because the APA "permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review." *Id.* To satisfy the test, the Court must "look to whether [a plaintiff] fall[s] within the zone of interests sought to be protected by the substantive statute pursuant to which the [Departments] acted: the INA." *Mendoza*, 754 F.3d at 1016. That said, no "indication of congressional purpose to benefit the would-be plaintiff" is required. *Patchak*, 567 U.S. at 225. Rather, the critical question "is whether the challenger's interests are such that they 'in practice can be expected to police the interests that the statute protects.'" *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004) (citation omitted). The test bars suit "only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that' Congress authorized that plaintiff to sue." *Lexmark Int'l*, 572 U.S. at 130 (citation omitted).

CAIR and Tahirih have no trouble clearing this low hurdle. First, their interests are neither inconsistent with nor marginally related to the INA. The INA includes a "statutory procedure for granting asylum to refugees," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427 (1987), and these organizations help individuals navigate that procedure. *See O.A.*, 404 F. Supp. 3d at 144. Moreover, the statute itself "includes provisions designed to ensure that pro bono legal services of the type that the organizational Plaintiffs provide are available to asylum seekers."

Id. (cleaned up). For example, the INA explicitly requires the Attorney General to advise an alien applying for asylum "of the privilege of being represented by counsel," and further requires that the alien be provided a regularly updated list of persons "who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis." 8 U.S.C. § 1158(d)(4). Similar statutory requirements exist throughout the INA to ensure that aliens in both expedited and regular removal proceedings can be represented by counsel. *See id.* § 1228(a)(2), (b)(4)(B); *id.* § 1362. The Court has little trouble concluding that the organizational Plaintiffs' interests fall within the zone of interests protected by the INA.

All the same, Defendants cite two cases they assert instruct otherwise. First, they point to a chambers opinion in which Justice O'Connor, sitting as a Circuit Justice, expressed her view that a legal assistance organization that assisted undocumented aliens fell outside the zone of interests of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99–603, 100 Stat. 3359. *INS v. Legalization Assistance Project of Los Angeles Cty. Fed'n of Labor* (*LAP*), 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers) (noting that the "IRCA was clearly meant to protect the interests of undocumented aliens, not the interests of organizations such as respondents"). To begin with, *LAP* represents the opinion of only a single Justice on an application for interim relief that arose under a statute other than the INA. *See O.A.*, 404 F. Supp. 3d at 145; *see also East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 769 n.10 (9th Cir. 2018); *Kimble v. Swackhamer*, 439 U.S. 1385, 1385 (1978) (Rehnquist, J., in chambers). But more importantly, recently the Supreme Court has consistently adopted a broader view of the test than the one Justice O'Connor espoused in *LAP*. *See, e.g.*, *Lexmark Int'l*, 572 U.S. at 130; *Patchak*, 567 U.S. at 225. Indeed, in *National Credit Union Administration v. First National Bank & Trust Co.*, the Supreme Court held—in an opinion authored by Justice Thomas over

Justice O'Connor's dissent—that the test is satisfied so long as "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute in question." 522 U.S. 479, 492 (1998) (cleaned up). As discussed above, the organizational Plaintiffs here easily clear this hurdle.

Defendants also rely on *Federation for American Immigration Reform, Inc. v. Reno* (*FAIR*), 93 F.3d 897 (D.C. Cir. 1996). But that case does not help them either. In *FAIR*, an organization "dedicated to 'ensuring that levels of legal immigration are consistent with the absorptive capacity of the local areas where immigrants are likely to settle'" challenged the government's decision to parole Cuban immigrants. *Id.* at 899 (citation omitted). The Circuit held that the organization was outside the INA's zone of interests because it could point to nothing in the INA that suggested Congress was concerned about the regional impact of immigration. *Id.* at 901–04. Here, by contrast, the organizational Plaintiffs have pointed to those portions of the INA that directly reference the asylum services they provide.

For these reasons, the Court finds that the zone-of-interests test does not bar the Court from considering the organizational Plaintiffs' claims.

B. The APA's Notice-and-Comment Requirements

The APA generally requires substantive rules to be promulgated through notice-and-comment rulemaking.[12] *See* 5 U.S.C. § 553. These procedures are not a mere formality. They "are designed (1) to ensure that agency regulations are tested via exposure to diverse public

[12] The Rule itself does not suggest, and Defendants do not claim, that it is covered by the APA's exception for non-legislative rules. *See generally* 84 Fed. Reg. 33,829; *see also Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 356 (D.C. Cir. 2017) ("The APA mandates that substantive, legislative rules be promulgated only after public notice and comment, but it does not extend that requirement to 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.'" (quoting 5 U.S.C. § 553(b)(3)(A))).

comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). And they "attempt[] to provide a 'surrogate political process' that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process." *Regents of the Univ. of California*, No. 18-587, 2020 WL 3271746, at *27 n.13 (Thomas, J., dissenting) (citation omitted)).

Because the Rule was promulgated without these procedures, the question for the Court is whether one of the APA's exceptions to the usual requirements applies.[13] Defendants assert that two do. First, under the "good cause" exception, an agency need not provide notice and an opportunity to comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Second, under the "foreign affairs function" exception, the normal notice-and-comment

[13] Defendants briefly suggest that the Rule does not constitute final agency action or is otherwise not ripe for review. Defs.' Cross Mtn at 24–25. This argument appears only to apply to those Plaintiffs who are individual aliens, but in any event, as applied to the organizational Plaintiffs, it surely fails. Agency action is final if it (1) "mark[s] the consummation of the agency's decisionmaking process," so that it is not "of a merely tentative or interlocutory nature," and (2) it is "one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). Here, for reasons already discussed, the Rule satisfies both criteria. Indeed, by its own terms, the Rule was effective immediately, and the organizational Plaintiffs had no opportunity to comment before it went into effect. 84 Fed. Reg. at 33,830. Additionally, the Rule is ripe for review because the issues it presents are "purely legal," there is no reason to believe they "would benefit from a more concrete setting," and—for the reasons just discussed—"the agency's action is sufficiently final." *Teva Pharm. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1308 (D.C. Cir. 2010) (citation omitted).

requirements do not apply "to the extent that there is involved . . . a military or foreign affairs function of the United States." *Id.* § 553(a)(1).

Despite their potentially broad sweep, the D.C. Circuit has instructed that these exceptions must be "narrowly construed" and "reluctantly countenanced." *New Jersey*, 626 F.2d at 1045. The Circuit has also emphasized that the broader a rule's reach, "the greater the necessity for public comment." *American Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). With these baseline principles in mind, the Court considers whether either the good cause or foreign affairs function exception applies here. Neither does.

1. The Good Cause Exception

The APA permits an agency to dispense with notice-and-comment procedures when it finds that doing so would be "impracticable, unnecessary, or contrary to the public interest," an exception said to require "good cause." 5 U.S.C. § 553(b)(B). Here, Defendants assert that providing notice and comment would have been both impracticable and contrary to the public interest. 84 Fed. Reg. at 33,841.

Even on top of the principles described above, the D.C. Circuit has set a high bar for satisfying good cause. As it recently explained, review of an "agency's legal conclusion of good cause is *de novo*." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). In other words, a court may not simply defer to an agency's judgment about whether good cause exists. Rather, the Circuit instructs, a court must "examine closely" an agency's stated rationale and the circumstances surrounding the agency's decision. *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981). The good cause inquiry is both "meticulous" and "demanding." *Sorenson*, 755 F.3d at 706 (citation omitted).

The Circuit has found notice-and-comment procedures sufficiently impracticable only in unusual cases, such as when "air travel security agencies would be unable to address threats

posing 'a possible imminent hazard to aircraft, persons, and property within the United States,'" or when "a rule was of 'life-saving importance' to mine workers in the event of a mine explosion." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (citation omitted). And it has instructed that the public interest ground "is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Id.* at 95. The good cause exception is therefore "appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal—if, for example, 'announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.'" *Id.* (citation omitted).

Defendants argue that notice-and-comment rulemaking would have been impracticable and contrary to the public interest because that process would have led to a surge of asylum seekers at the southern border of the United States. 84 Fed. Reg. at 33,841. The Departments asserted upon the Rule's promulgation that if it were published for notice and comment *before* becoming effective, smugglers might communicate its impending effects to potential asylum seekers, thus creating a "risk of a surge in migrants hoping to enter the country" beforehand. *Id.* They also asserted that pre-promulgation "notice and comment, or a delay in the effective date, would be destabilizing and would jeopardize the lives and welfare of aliens who could surge to the border to enter the United States before the rule took effect." *Id.* According to the Departments, their "experience has been that when public announcements are made regarding changes in our immigration laws and procedures, there are dramatic increases in the numbers of aliens who enter or attempt to enter the United States along the southern border." *Id.*

Common sense dictates that the announcement of a proposed rule may, at least to some extent and in some circumstances, encourage those affected by it to act before it is finalized. But

this rationale cannot satisfy the D.C. Circuit's standard in this case unless it is adequately supported by evidence in the administrative record suggesting that this dynamic might have led to the consequences predicted by the Departments—consequences so dire as to warrant dispensing with notice and comment procedures. *See Sorenson*, 755 F.3d at 707. After carefully examining the record, the Court finds that it does not contain sufficient evidence to justify invocation of the good cause exception.

The evidence that Defendants rely on begins—and for the most part ends—with a single newspaper article in the Washington Post from October 2018; indeed, it is the only specific evidence the Departments cited when promulgating the Rule. *See* 84 Fed. Reg. 33,841. That article includes several passages suggesting that: (1) after the United States abruptly stopped separating families who applied for asylum together in the spring of 2018, smugglers encouraged asylum seekers to bring their children and to speed up their efforts to reach the border; (2) those same smugglers may coach asylum seekers about what to tell interviewing officers so they can meet the credible fear standard; and (3) many months after the United States stopped separating families, a greater proportion of asylum applicants had brought children or other family members with them to the border. ECF No. 21-1 to 21-9 ("AR") at 438–49.

Under Circuit precedent, this newspaper article alone does not provide good cause to bypass notice-and-comment rulemaking procedures for the reasons cited by Defendants. Even assuming that the Rule was likely to have had a similar effect as the regulatory change described in the article, the article contains no evidence that *that* change caused a surge of asylum seekers at the border—let alone one on a scale and at a speed that would have jeopardized their lives or otherwise have defeated the purpose of the Rule if notice-and-comment rulemaking had

proceeded.[14] In fact, the article lacks any data suggesting that the number of asylum seekers increased *at all* during this time—only that more asylum seekers brought children with them. Clearly, the article suggests that smugglers are not oblivious to major changes in United States' immigration policy, and that they pass on the information they learn to some who may use it to game the asylum process. None of that is surprising. But at bottom, the article does little if anything to support Defendants' prediction that undertaking notice-and-comment rulemaking would have led to a dramatic, immediate surge of asylum applicants at the border that would have had the impact they suggest. And other articles from the administrative record that Defendants cite either do not support, or even undermine, their prediction of such a surge.[15]

Defendants offer no other data or information that persuasively supports their prediction of a surge. They point the Court to several charts that they argue support their invocation of good cause. *See* Defs.' Cross Mtn at 39–40. One shows the number of enforcement actions undertaken by Customs and Border Protection at the southwest border from October 2016

[14] The process of travelling through Mexico to the southern border of the United States to seek asylum, as described in the article, is risky for a host of reasons that have nothing to do with the Rule. Those risks are not at issue here. The question is whether there is an adequate basis for the Departments' prediction that, if notice-and-comment rulemaking had proceeded, a surge of asylum seekers would have jeopardized life and defeated the purpose of the Rule, such that Defendants' invocation of the good cause exception was justified.

[15] For example, according to one article, about a month before the Rule was promulgated, the President tweeted twice that Guatemala was preparing to sign an agreement that would force migrants crossing through it to apply for asylum there and block them from seeking asylum elsewhere, including in the United States. AR at 635. But nothing in the record suggests that those tweets caused a surge at the southern border. Another article noted that "migrants themselves don't necessarily know what asylum is or why they might or might not qualify for it," and that some migrants incorrectly believe asylum outcomes turn on whether they have relatives in the United States. AR at 681. A third reported that while migrants are aware of "the basics"—for example, they "know to request asylum" and that families are less likely to be detained—they "generally lack understanding of United States immigration law." AR at 768.

through May 2019, broken down by the alien's country of origin. *See* AR at 119. But the Court can glean little from that chart, other than that these enforcement actions decreased somewhat during the first six months of that period, increased gradually over the next few years, and then increased more sharply early in 2019. Defendants also point to a chart that depicts "Southwest Border Encounters of non-Mexican Aliens" each month from October 2012 to March 2019 and also contains some agency observations of that data. *See* AR at 208–20. But again, all this chart shows is that as of March 2019, more and more non-Mexican aliens were encountered at the southern border and that the agency projected the number to continue to rise for unspecified reasons. Interestingly, though, the agency's observations reflect that even the relatively high number of encounters reported in March 2019 was not unprecedented; a higher number had been reported a decade earlier. AR at 210.

As far as providing a basis for predicting a surge of asylum seekers prompted by the publishing of the Rule for notice and comment, these numbers would be meaningful if Defendants explained that peaks or troughs in the data corresponded with regulatory or policy changes in the United States. But Defendants have not done so, and the Court cannot find any such analysis in the record.[16] *See Achagzai v. Broad. Bd. of Governors*, 170 F. Supp. 3d 164, 178 (D.D.C. 2016) (noting that "it is not the Court's role to mine the record in an effort to identify potentially helpful evidence not identified by the parties"). At bottom, as Plaintiffs point

[16] The record *does* suggest—and the Court does not doubt—that the United States' immigration system at the southern border was significantly strained when the Rule was issued. For example, documents in the record show that more people were entering the United States without documents than had over the previous decade, AR at 676, and more of them were comprised of families or children, AR at 223, 682. But the Departments' prediction of a surge to the border brought about by notice-and-comment procedures, on which they base their invocation of good cause, is a separate matter for which the record does not contain adequate support.

out, Defendants—"despite studying migration patterns closely"—have "failed to document any immediate surge that has ever occurred during a temporary pause in an announced policy." *I.A.* ECF No. 21 at 18. That failure is striking.

The Circuit's decision in *Tennessee Gas Pipeline v. Federal Energy Regulatory Commission*, 969 F.2d 1141 (D.C. Cir. 1992), is instructive when it comes to evaluating an agency's invocation of good cause based on its prediction. That case involved a rule that required natural gas pipeline companies to provide the Federal Energy Regulatory Commission (FERC) certain environmental information on their pipeline construction plans. 969 F.2d at 1143. FERC invoked the good cause exception to dispense with notice and comment, arguing that those procedures could contribute to environmental harm because the companies "may respond to the proposed changes in the regulations by commencing construction" to avoid regulatory uncertainty. *Id.* Judge Buckley, joined by Judges Ginsburg and Williams, rejected the agency's argument because it had "provided little factual basis for its belief that pipelines [would] seek to avoid [the] future rule by rushing new construction and replacements with attendant damage to the environment." *Id.* at 1145. Indeed, the court noted that FERC had provided only a single example where covered construction had led to environmental harm. *Id.* (observing that "evidence of a single violation . . . while not insubstantial, is a thin reed on which to base a waiver of the APA's important notice and comment requirements"). The court also rejected the agency's vague and conclusory invocation of its subject-matter expertise, observing that it "does not excuse the [agency's] failure to cite such examples in support of its claim." *Id.*; *see also id.* at 1146 (noting that "if the agency has . . . a wealth of practical experience on which to draw in order to justify its action, then it was not forced to rely on the 'self-evident' need for

the interim rule").[17] To be sure, the court did not suggest that impending environmental harm or regulatory evasion could *never* constitute good cause. Rather, the court held, the agency had not provided a record sufficient to warrant invocation of the exception. *See id.* at 1145.

So too here. In *Tennessee Gas Pipeline*, the agency predicted a surge in potential pipeline construction; here, the Departments predicted a surge in potential asylum seekers. There, the agency thought that companies would act immediately to avoid more stringent regulatory requirements; here, the Departments say that so many asylum seekers would have acted so quickly to avoid more stringent requirements that a surge would have jeopardized their lives and the very purpose of the Rule. There, the agency fell back on its "ample practical experience," *id.*; here, the Departments also rely on their "experience." *See* 84 Fed. Reg. 33,841. And in both cases, the agencies failed to provide meaningful factual support for their predictions. The evidence offered by Defendants in this case—a newspaper article—is similarly too "thin [a] reed on which to base a waiver of the APA's important notice and comment requirements." 969 F.2d at 1145.

Still, Defendants argue that this Court should defer to the Departments' invocation of good cause. *See* Defs.' Supp. Br. at 4. Although the Circuit was clear in *Sorenson* that an agency's legal conclusion of good cause is subject to de novo review, Defendants point out that in a footnote in that case, the Circuit acknowledged that courts should "defer to an agency's

[17] In *Tennessee Gas Pipeline*, 969 F.2d 1141, the Circuit also distinguished *Mobil Oil Corp. v. Dept of Energy*, 728 F.2d 1477 (Temp. Emer. Ct. App. 1983), a case relied on by Defendants. *Mobil Oil*, in the court's view, presented unique circumstances. 969 F.2d at 1146. The agency in *Mobil Oil* issued a regulation "to equalize prices charged to different classes of customers by oil refiners during the energy crisis of the early 1970's." *Id.* But as the Circuit observed, "[i]t is well recognized that prices can be changed rapidly to accommodate shifts in regulatory policy." *Id.* Defendants here offered no evidence from which the Court can reasonably conclude that migratory patterns change with anything approaching the speed of commodity prices. *See id.*

factual findings and expert judgments therefrom, unless such findings and judgments are arbitrary and capricious." 755 F.3d at 706 n.3.

The *Sorenson* footnote does not save Defendants' good cause argument. To begin with, the record contains no information suggesting that the agency sought to confirm the accuracy of the article and so it is unclear whether the Court should afford it *any* deference. *Cf. City of New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) ("We have held that an agency's reliance on a report or study without ascertaining the accuracy of the data contained in the study or the methodology used to collect the data is arbitrary agency action, and the findings based on [such a] study are unsupported by substantial evidence.") (alteration in original) (quotation omitted). The press, of course, is not infallible. Even so, the Court assumes for argument's sake that the article contains findings of fact entitled to such deference. And the Court defers to them, so far as they go. For example, as discussed above, the Court does not doubt that smugglers adjust their sales pitches to some degree in response to changes in United States' immigration policy. Similarly, the Court credits the Departments' prediction that the number of non-Mexican aliens seeking asylum at the border would continue to increase as depicted, for whatever reason.

The question, though, is whether Defendants' conclusory prediction of a surge in asylum seekers so great and so rapid as to threaten life or defeat the very purpose of the Rule if notice-and-comment procedures were followed is entitled to deference on this record. And Circuit precedent commands that it is not. As explained above, in *Tennessee Gas Pipeline*, the court found that there was "little factual basis" for the agency's prediction, and thus did not defer to it, even though it was "hesitant to discount such forecasts" because they "necessarily involve deductions based on expert knowledge of the Agency." 969 F.2d at 1145 (citation omitted). The same is true here.

Sorenson itself provides another example of the Circuit declining to defer to an agency's predictive judgment without an adequate record or explanation. In that case, Judge Rogers Brown, joined by Judges Griffith and Millett, rejected the agency's invocation of good cause because, after closely examining the record, they concluded that "there were no factual findings supporting the reality of the threat"—a potential shortfall in a fund administered by the Federal Communications Commission (FCC). 755 F.3d at 706. That court emphasized that the administrative record did not reflect when the shortfall would occur or whether the FCC had considered reasonable alternatives—other than dispensing with notice and comment—to forestall it. *See id.* at 707. The record in this case suffers from similar shortcomings. For example, even assuming *some* increase in asylum applications were to occur if the Rule had been subject to notice-and-comment rulemaking, Defendants simply offer no factual basis or explanation for when or why that increase would ripen into a crisis so severe that it would justify bypassing those procedures. As in *Sorenson*, this Court in no way "exclude[s] the possibility" that the circumstances here "could conceivably justify bypassing the notice-and-comment requirement." *Id.* at 707. But "this case does not provide evidence of such an exigency." *Id.* And of course, the Court is limited to considering the evidence in the administrative record on which Defendants relied. *See AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 82 (D.D.C. 2007).

Defendants also point to *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal. 2018). Defs.' Cross Mtn at 40. In that case, several organizations challenged a regulation issued by the Departments that, together with a presidential proclamation, effectively barred asylum for any alien who did not enter the United States at a designated port of entry. *See East Bay*, 354 F. Supp. 3d at 1102. The regulation in that case was also issued without notice and comment, *see id.*, and the Departments invoked the same two exceptions under § 553, *see* 83

Fed. Reg. 55,934, 55,950–51 (Nov. 9, 2018). In granting a motion for a preliminary injunction, the district court nonetheless held in *East Bay* "that the Government is likely to prevail on its claim regarding the good cause exception" based on the same newspaper article referred to above. 354 F. Supp. 3d at 1115.

That decision is unpersuasive for several reasons. First, Ninth Circuit precedent does not require courts there to review an agency's invocation of good cause de novo, as D.C. Circuit precedent requires this Court to do. *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1278 (9th Cir. 2020). Second, even under its more deferential standard, the Ninth Circuit has since rejected the district court's conclusion that the newspaper article likely provided a basis to invoke the good cause exception. *Id.* And that conclusion echoed the earlier opinion of a different panel that denied a motion to stay the district court's order granting a temporary restraining order pending appeal, in which the panel also held that the Departments' "speculative" reasoning did not support invocation of the good cause exception. *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 777–78 (9th Cir. 2018).[18]

Finally, Defendants also cite the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34–35 (2010), to support their argument that "courts are ill-equipped to second-guess the Executive Branch's prospective judgment." Defs.' Cross Mtn at 40–41. In *Holder*, the Court denied a constitutional challenge to a criminal statute prohibiting the provision of material support to a foreign terrorist organization. *See Holder*, 561 U.S. at 7–8 (citing 18 U.S.C. § 2339B). In so doing, Defendants point out, the Court noted that the "Government,

[18] The newspaper article was apparently not part of the record when the first panel considered the matter. *See East Bay*, 950 F.3d at 1286 ("I agree with the majority that merely adding the twenty-five-word sentence from a Washington Post article was insufficient to justify changing the motions panel result.") (Fernandez, J., concurring).

when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions." *Id*. at 35.

There are many circumstances in which the law appropriately commands, as in *Holder*, that courts defer to the Executive Branch's national security judgments. But even putting aside the many other differences between that case and this one, the record in that case consisted of far more than a newspaper article. There, the basis for the judgments of both Congress and the Executive about the material support statute—the latter's set forth in an affidavit of a State Department official—were thoroughly explained to the Court. Those judgments were informed by extensive experience with how terrorist groups fund their activities, and the specific designated terrorist organizations at issue, which the Executive asserted had killed thousands. *Id.* at 29–30. Here, by contrast, the Departments rely on a single newspaper article that does not even directly address the key predictive judgment in question: the likelihood of a surge in asylum seekers so great and so rapid as to threaten human life or defeat the purpose of the Rule if notice-and-comment procedures were followed.

It bears emphasizing that in holding that the good cause exception does not apply, the Court does not suggest in any way that the Executive's broader security concerns that prompted promulgation of the Rule were unfounded. The question for the Court is simply whether, on the record before it, the prediction of a surge offered by the Departments provided good cause to dispense with notice-and-comment procedures before the Rule took effect. For the reasons explained above, the Court holds that it did not.[19]

[19] The Departments cite several other past rulemakings in which they say they invoked § 553's good cause exception to avoid a similar surge. *See* 84 Fed. Reg. at 33,841. But to the Court's

2. The Foreign Affairs Function Exception

The second exception Defendants invoke is the foreign affairs function exception. As noted above, notice-and-comment requirements do not apply "to the extent there is involved . . . a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). Unlike the good cause exception, there is little case law in this Circuit, or elsewhere, to guide the Court's application of this exception. Perhaps as a result, it presents a closer call. Still, the Court finds that Defendants' arguments in favor of the exception come up short.

Plaintiffs urge a narrow reading of the foreign affairs function exception. They note that several circuits have held that an agency may not invoke this exception just because a rule "implicates foreign affairs." *I.A.* ECF No. 6 at 24 (internal quotation and citation omitted); *CAIR* ECF No. 41-1 at 18 (internal quotation marks omitted) (citing *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)); *see also Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995), *superseded by statute on other grounds*, by 8 U.S.C. § 1101(a)(42); *Jean v. Nelson*, 711 F.2d 1455, 1478 (11th Cir. 1983). Plaintiffs in *CAIR* argue that the Court should limit its interpretation of the exception to cover only those paradigmatic cases in which the rule at issue implements treaties or regulates foreign diplomats. *CAIR* ECF No. 41-1 at 18 (citing *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) (applying the exception when an agency action concerned "the treatment of foreign missions")). And in the alternative, Plaintiffs in both cases reference a test that some courts of appeals have

---

knowledge, none of those rulemakings were challenged for any reason, let alone for failure to proceed by notice-and-comment procedures. The task before the Court is to determine whether *this* rulemaking complied with the APA. The Court cannot conclude that an agency's present conduct is lawful merely because the agency did something similar in the past. *See Analysas Corp. v. Bowles*, 827 F. Supp. 20, 25 (D.D.C. 1993) ("The court need not address whether [previous rulemakings] were proper; they are not before the court. What is before the court is the propriety of the present interim rule; the court determines that it, indeed, is contrary to law.").

adopted that extends this exception to circumstances where notice-and-comment procedures would create "definitely undesirable international consequences." *I.A.* ECF No. 6 at 23 (internal quotation and citation omitted); *CAIR* ECF No. 41-1 at 19 (internal quotation marks omitted); *see Yassini*, 618 F.2d at 1360 n.4; *see also Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008); *Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985); *Jean*, 711 F.2d at 1477. In Plaintiffs' view, Defendants have failed to meet even that test. *I.A.* ECF No. 6 at 24–25; *CAIR* ECF No. 41-1 at 19–20. In contrast, Defendants offer up various reasons why, in their estimation, the Rule does in fact involve a foreign affairs function of the United States, including its relationship with ongoing international negotiations. *See* Defs.' Cross Mtn at 41–42. And while Defendants reject the "definitely undesirable international consequences" test because "the statute requires no such showing," they also argue, for many of these same reasons, that the Rule satisfies it in any event. *Id*. at 43–44.

The Court starts, as it must, with the text of the statute: notice-and-comment procedures are unnecessary "to the extent there is involved . . . a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). The first part of that phrase, "to the extent there is involved," applies to several other categories of rulemakings as well, including those involving public benefits, 5 U.S.C. § 553(a)(2), and the D.C. Circuit has interpreted the phrase in that context. Specifically, in *Humana of South Carolina, Inc. v. Califano*, the Circuit instructed—consistent with the duty to "narrowly construe" and "reluctantly countenance" such exceptions, *New Jersey*, 626 F.2d at 1045—that "to the extent that any one of the enumerated categories is *clearly and directly* involved in the regulatory effort at issue, the Act's procedural compulsions are suspended." 590 F.2d 1070, 1082 (D.C. Cir. 1978) (citations and quotations omitted)

(emphasis added). As a result, a rule falls within the foreign affairs function exception only if it "clearly and directly" involves "a foreign affairs function of the United States."

The APA does not define the key terms in the second part of that phrase—"foreign affairs" or "function"—and so the Court turns to dictionaries in use at the time of the APA's enactment.[20] The definition of "foreign affairs" is reasonably straightforward: it refers to the conduct of international relations between sovereign states. *See* Webster's New International Dictionary 988 (2d ed. 1945) (defining foreign affairs to include "matters having to do with international relations and with the interests of the home country in foreign countries"). The meaning of "function," on the other hand, is less so. The 1945 version of Webster's New International Dictionary defines it as "[t]he natural and proper action of anything; special activity," "[t]he natural or characteristic action of any power or faculty," or "[t]he course of action which peculiarly pertains to any public officer in church or state; the activity appropriate to any business or profession; official duty." *Id.* at 1019. "Function" thus appears to narrow the exception further; to be covered, a rule must involve activities or actions that are especially characteristic of foreign affairs. Applying these definitions, then, a "foreign affairs function" encompasses activities or actions characteristic to the conduct of international relations. And to sum up, to be covered by the foreign affairs function exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations.

[20] *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 130 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring in the judgment) (noting that undefined terms are to be given "their ordinary meaning," and that courts "generally begin[] with dictionaries"); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228–29 (1994) (observing that the time of enactment is "the most relevant time for determining a statutory term's meaning").

As noted above, some circuits have adopted a test that would also permit the exception to be invoked when notice-and-comment procedures "would provoke definitely undesirable international consequences." *Am. Ass'n of Exps.*, 751 F.2d at 1249 (quotation omitted); *see also Rajah*, 544 F.3d at 437; *Jean*, 711 F.2d at 1478; *Yassini*, 618 F.2d at 1360 n.4. The D.C. Circuit has not adopted this test. And the Court declines to do so for three reasons.

First, this test is unmoored from the legislative text; it is lifted from the House Report relating to the APA.[21] But as the Supreme Court has repeatedly instructed, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material," *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Thus, the Court declines to "rest[] its interpretation on legislative history," which "is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). Second, requiring negative consequences "would render the 'military or foreign affairs function' superfluous since the 'good cause' exception . . . would apply." *Mast Indus., Inc. v. Regan*, 596 F. Supp. 1567, 1581 (Ct. Int'l Trade 1984) (citation omitted). Indeed, several courts have relied on this test to find both the foreign affairs function exception and the good cause exception satisfied on largely the same facts. *See Nademi v. INS*, 679 F.2d 811, 814 (10th Cir. 1982); *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981); *Yassini*, 618 F.2d at 1360–61. Third, the Second Circuit recently clarified that it applies this test exclusively to areas of the law "that only *indirectly* implicate international relations" rather than "quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign

[21] In full, the relevant sentence from the House Report reads: "The phrase 'foreign affairs functions,' used here and in some other provisions of the bill, is not to be loosely interpreted to mean any agency operation merely because it is exercised in whole or part beyond the borders of the United States but only those 'affairs' which so affect the relations of the United States with other governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences." H. Rep. No. 79-1980 at 257 (1946).

missions," which it characterized as "different." *City of New York*, 618 F.3d at 202 (emphasis added). "Such actions clearly and *directly* involve a foreign affairs function, and so fall within the exception without a case-by-case iteration of specific undesirable consequences." *Id.* (citations and quotations omitted) (emphasis added). But this approach conflicts with the D.C. Circuit's admonition that a rule must "clearly and directly" involve the basis for the asserted exception—here, the foreign affairs function—full stop, without exception.[22] *Califano*, 590 F.2d at 1082.

Thus, the foreign affairs function exception plainly covers heartland cases in which a rule itself directly involves the conduct of foreign affairs. For example, the exception covers scenarios in which a rule implements an international agreement between the United States and another sovereign state. Indeed, that is the *only* circumstance to which the D.C. Circuit has applied it. Specifically, in *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C.

[22] Even if the Court were to adopt this test, the Rule would not satisfy it. The Departments assert that ongoing "negotiations [with Mexico and the Northern Triangle countries] would be disrupted if notice-and-comment procedures preceded the effective date of this rule." 84 Fed. Reg. at 33,842. That disruption, in turn, would allegedly "provoke a disturbance in domestic politics in those countries, and would erode the sovereign authority of the United States to pursue the negotiating strategy it deems to be most appropriate as it engages its foreign partners." *Id.* (cleaned up). But Defendants never explain—in their briefing or in a sworn declaration from an involved official—*why* any of those things would happen merely by allowing the public to comment on the Rule. The closest they get to bridging this gap is by arguing that "public participation and comments may impact and potentially harm the goodwill between the United States and [those countries]," *id.* But the Departments' request for public comment (albeit after the Rule was in effect) severely undercuts this argument. 84 Fed. Reg. at 33,830. And in any event, a sizable gulf remains between *potential* harm to the goodwill between the United States and those countries and the kind of "definitely undesirable international consequences" that would satisfy the test. *See, e.g.*, *Rajah*, 544 F.3d at 437 (noting that "sensitive foreign intelligence might be revealed in the course of explaining why some of a particular nation's citizens are regarded as a threat" and that "relations with other countries might be impaired if the government were to conduct and resolve a public debate over why some citizens of particular countries were a potential danger to our security").

Cir. 1994), the Circuit held that the foreign affairs function exception applied to a Federal Highway Administration rule implementing a Memorandum of Understanding (MOU) between the United States and Mexico about the countries' reciprocal recognition of each other's commercial drivers' licenses. The court noted that "the rule does no more" than carry out the United States' "obligations to a foreign nation." *Id.* at 1486. The rule in that case merely "added a sentence to [a] footnote" in a regulation specifying that the Administrator had determined that Mexican commercial drivers' licenses met the United States' standards. *Id.* at 1481; *see also* Commercial Driver's License Reciprocity With Mexico, 57 Fed. Reg. 31,454 (July 16, 1992) (discussing the negotiations between the United States and Mexico and including the text of the MOU itself). The exception also certainly covers rules that regulate foreign diplomats in the United States. For example, in *City of New York v. Permanent Mission of India to United Nations*, the Second Circuit held that the exception covered an action by the State Department "exempt[ing] from real property taxes" any "property owned by foreign governments and used to house the staff of permanent missions to the United Nations or the Organization of American States or of consular posts." 618 F.3d at 175. As the court observed, "the action taken by the State Department to regulate the treatment of foreign missions implicates matters of diplomacy *directly*." *Id.* at 202 (emphasis added).

That Congress would categorically exclude rules like these from notice-and-comment procedures is unsurprising. These procedures enhance the rulemaking process by exposing proposed regulations to feedback from a broad set of interested parties. *See Int'l Union*, 407 F.3d at 1259. But comments are unlikely to impact a rule to which the United States has already effectively committed itself through international agreement. *See Pena*, 17 F.3d at 1486 ("After all . . . the agreement called for the United States to recognize Mexican [commercial divers'

licenses] even if comments revealed widespread objections."). Similarly, in the diplomatic context, agency action may be grounded in international reciprocity. *See City of New York*, 618 F.3d at 178 (noting that the State Department explained that its action "conforms to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing").

Here, however, the foreign affairs function exception does not excuse the Departments from failing to engage in notice-and-comment rulemaking before promulgating the Rule. The Rule overhauls the procedure through which the United States decides whether aliens who arrive at our southern border are eligible for asylum here, no matter the country from which they originally fled. These changes to our asylum criteria do not "clearly and directly" involve activities or actions characteristic of the conduct of international relations. They do not, for example, themselves involve the mechanisms through which the United States conducts relations with foreign states. Nor were they the product of any agreement between the United States and another country, regardless of any ongoing negotiations. To be sure, Defendants say they intended that the Rule would have downstream effects in other countries, and perhaps on those negotiations. Obviously, they expected that the Rule would cause more aliens to apply for protection in other countries before arriving in the United States and seeking asylum here. But these *indirect* effects do not clear the high bar necessary to dispense with notice-and-comment rulemaking under the foreign affairs function exception.

It may seem a quibble that the exception distinguishes between rules that "clearly and directly" involve activities characteristic of the conduct of international relations and those that have indirect international effects. And of course, the Court is bound to apply both Circuit precedent and the statutory text as it is, "even if it thinks some other approach might accord with

good policy." *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014) (cleaned up). But it is worth pointing out that the Circuit's holding in *Califano* and Congress's use of the word "function"—instead of, say, "effects" or "implications"—prevent the foreign affairs function exception from swallowing the proverbial rule. There are many rulemakings that an agency might plausibly argue have downstream effects in other countries or on international negotiations in which the United States is perpetually engaged. Courts have, for example, warned that in the immigration context, the "dangers of an expansive reading of the foreign affairs exception . . . are manifest." *City of New York*, 618 F.3d at 202. But this is true in other areas of the law as well. One agency might reach for a too-sweeping interpretation of the foreign affairs function exception to argue that a rule involving climate change that affects other countries is subject to the exception. Another might contend that a rule regarding domestic production of some good or commodity that impacts ongoing trade negotiations is covered. Thus, as Plaintiffs point out, courts of appeals have generally rejected the idea that the exception applies merely because a rule "implicate[s] foreign affairs," *City of New York*, 618 F.3d at 202; *see also Zhang*, 55 F.3d at 744; *Yassini*, 618 F.2d at 1360 n.4, or "touche[s] on national sovereignty," *Jean*, 711 F.2d at 1478. In the end, the narrowness of this exception does not mean that these agencies cannot take these hypothetical actions; it simply means that they are not excused from engaging in notice-and-comment rulemaking when they do.

Defendants argue that the Rule falls within the exception for two broad reasons, but neither passes muster. First, they say that the Rule implicates foreign affairs or the President's foreign policy agenda. For example, they note that "the flow of aliens across the southern border directly implicates the foreign policy and national security of the United States." Defs.' Cross Mtn at 41 (cleaned up). They explain that the Rule is "linked intimately with the Government's

overall political agenda concerning relations with another country." *Id.* at 43 (quoting *Am. Ass'n of Exps.*, 751 F.2d at 1249).[23] And they add that the changes embodied in the Rule "involve the relationship between the United States and its alien visitors that implicate our relations with foreign powers, and implement the President's foreign policy."[24] *Id.* (cleaned up). But for the reasons already explained, although the Rule implicates foreign affairs at least indirectly, that alone is not enough to satisfy the foreign affairs function exception.

Second, Defendants contend that notice-and-comment procedures would in some way affect ongoing negotiations with other countries. For example, they assert that the Rule will "facilitate ongoing diplomatic negotiations with foreign countries" about migration issues. *Id.* at 41 (quoting 84 Fed. Reg. at 33,842). They also argue that delaying the effective date of the Rule would disturb the domestic political situation in other countries and hinder the United States'

[23] Defendants go so far as to argue that this language should be the test for whether the foreign affairs function exception applies. Defs.' Cross Mtn at 41. But for largely the same reasons the Court declines to adopt the "definitely undesirable international consequences" test, it declines to adopt this purported one as well. Nowhere does the statutory text suggest that being "linked intimately with the Government's overall political agenda concerning relations with another country" meets the exception. And, as explained above, Congress could have—but did not—exempt rulemakings that merely affect or implicate foreign affairs. In addition, even the case from which Defendants pluck this language does not hold it out as a test for the exception; it is dicta. In fact, in that case the Federal Circuit held that the exception applied because notice and comment "would provoke definitely undesirable international consequences," specifically, trade dumping. *See Am. Ass'n of Exps.*, 751 F.2d at 1249 (quotation omitted). Finally, in that case the court appears to have weighed that the rule at issue involved authority Congress delegated to the President (that he then delegated to the agency) to negotiate export agreements with foreign countries and issue relevant regulations. *See id.* at 1241 (citing 7 U.S.C. § 1854 (1982)). Neither party here argues that the Rule involves power delegated to the President, or for that matter, that engaging in notice and comment rulemaking would unconstitutionally hinder any inherent constitutional power of the President. *Contra Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (observing that 8 U.S.C. § 1182(f) "exudes deference to the President in every clause").

[24] Defendants do not argue that this case involves a challenge to the President's own actions, which are "not reviewable . . . under the APA." *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

negotiating strategy. *Id.* at 42. And relatedly, they argue that the faster the Rule went into effect, the faster it would address the circumstances at our southern border, "thereby facilitating the likelihood of success in the United States' ongoing negotiations with Mexico regarding regional and bilateral approaches to asylum, and supporting the President's foreign-policy aims." *Id.* (cleaned up). This argument gets Defendants no further. As explained above, downstream effects on foreign affairs or negotiations with other countries—either positive or negative—do not bring the Rule under this exception. And while negative international effects could well satisfy the good cause exception, Defendants do not make that argument, or back it up with an appropriate factual record, such as sworn declarations from appropriate officials.

Defendants also argue that the Court should defer to the Departments' conclusion that the foreign affairs function exception applies. Defs.' Supp. Br. at 4 (arguing that "principles of deference are heightened in the context of Defendants' invocation of the 'foreign affairs' exception"). But they do not point to any case law suggesting that agencies are entitled to deference in interpreting the scope of the exception. That is hardly surprising. As this Circuit has explained, "an agency has no interpretive authority over the APA." *Sorenson*, 755 F.3d at 706; *see also Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (noting that "when it comes to statutes administered by several different agencies—statutes, that is, like the APA . . . —courts do not defer to any one agency's particular interpretation"). And Defendants again point to cases like *Holder*, 561 U.S. at 35, *see* Defs.' Supp. Br. at 5. The Court reiterates that there are many circumstances in which courts appropriately defer to the national security judgments of the Executive. But determining the scope of an APA exception is not one of them. As noted above, if engaging in notice-and-comment rulemaking before implementing the rule would have harmed ongoing international

negotiations, Defendants could have argued that these effects gave them good cause to forgo these procedures. And they could have provided an adequate factual record to support those predictive judgments to which the Court could defer.[25] But they did not do so.

* * *

For all the above reasons, the Court finds that the Rule is not exempt from the APA's notice-and-comment procedures. Because the Departments unlawfully dispensed with those requirements, they issued the Rule "without observance of procedure required by law," 5 U.S.C. § 706.

C. Remedy

The APA commands that courts "hold unlawful and set aside agency action[s]" taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). And the D.C. Circuit has held that "[f]ailure to provide the required notice and to invite public comment . . . is a fundamental flaw that 'normally' requires vacatur of the rule." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) (citing *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002)); *see also Mack Trucks*, 682 F.3d at 95 ("Because EPA lacked good cause to dispense with required notice and comment procedures, we conclude

[25] The portions of the administrative record that Defendants cite do not support a predictive judgment meriting deference that international negotiations would be harmed by notice-and-comment rulemaking. Some of those documents discuss an agreement between the United States and Mexico requiring aliens to remain in Mexico while their asylum cases in the United States are pending. *See* Defs.' Cross Mtn at 42 (citing AR at 231–32, 537–57). Others include asylum-related statistics. *See id.* (citing AR at 208–20, 222–30, 558–59). Still others include newspaper articles indicating that the United States is pressuring other countries to do more to help reduce the number of individuals who apply for asylum here. *See id.* (citing AR at 635–37, 698). But there is, for example, no sworn declaration from a relevant official that explains the nature of the ongoing negotiations and why notice-and-comment procedures would in fact harm them.

the IFR must be vacated without reaching Petitioners' alternative arguments."). Having found that the Rule was enacted unlawfully, the Court sees no reason why it should not be vacated.

Defendants suggest several alternative remedies, but they offer no compelling reason why they make sense here. For example, they propose remand without vacatur. *See* ECF No. 62 83:21–84:17. And indeed, the D.C. Circuit has held—despite the text of the APA—that in some cases, a court may remand a defective rule without vacating it. *See Allied–Signal, Inc. v. NRC*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (outlining the factors a court should consider when determining whether to remand without vacatur). That approach is not without some controversy. *See Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring) (arguing that remand without vacatur is unlawful). But assuming it is ever appropriate, it is not warranted here.

Under *Allied-Signal*, to decide whether remand without vacatur is appropriate, courts look to two factors: "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." 988 F.2d at 150–51 (citation omitted). When the two factors are in equipoise, the resolution generally "turns on the Court's assessment of the overall equities and practicality of the alternatives." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015).

As to the first factor, deficient notice "almost always require[s] vacatur," *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *see also Shands Jacksonville Med. Ctr.*, 139 F. Supp. 3d at 268 ("The Court is unable to evaluate whether the Secretary's decision was reasonable because her omission prevented the public from offering meaningful comments."). And as discussed above, the protections that notice-and-comment procedures afford are

especially important when the proposed regulation has an "expansive" reach, *see Block*, 655 F.2d at 1156, as the Rule does here. Moreover, offering the public the opportunity to comment after the fact is not a substitute. *New Jersey*, 626 F.2d at 1049–50. In addition, because Plaintiffs advance other colorable claims that the Rule is unlawful that the Court does not reach, "leaving the regulations in place during remand would ignore petitioners' potentially meritorious challenges," *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (citation omitted).[26] As to the second factor, Defendants have presented no evidence suggesting that "[t]he egg has been scrambled" so that "there is no apparent way to restore the status quo ante," *Sugar Cane Growers*, 289 F.3d at 97. Indeed, that recent pandemic-related administrative action appears to have effectively closed the southern border indefinitely to aliens seeking asylum only underscores that vacatur of the Rule will not result in prohibitively disruptive consequences.[27] Thus, both *Allied-Signal* factors weigh against remand without vacatur.

To be sure, courts in this Circuit have sometimes applied *Allied-Signal*, in one way or another, to stay vacatur when vacating a rule immediately would create confusion, *see Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006), when the parties both support a stay,

---

[26] *See also AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 93 (D.D.C. 2007) ("Vacatur thus has the virtue of eliminating the significant risk that unions will be forced in early 2008 to comply with a rule that this Court has found to be procedurally defective and whose substantive validity has not yet been confirmed.").

[27] *See* Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060 (Mar. 26, 2020); Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act, Order Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31,503 (May 26, 2020); *see also* Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 16,547 (Mar. 24, 2020); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 37,745 (June 24, 2020).

see Anacostia Riverkeeper, Inc. v. Jackson, 713 F. Supp. 2d 50, 52–55 (D.D.C. 2010), or "where a prolonged agency remand threatens to deprive one or more parties of significant rights," *Bauer v. DeVos*, 332 F. Supp. 3d 181, 185 (D.D.C. 2018). But this case presents none of those situations.

Defendants also urge the Court to "limit any relief to the actual parties before the Court," Defs.' Supp. Br. at 5, pointing to Justice Thomas's concurrence in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), *id.* at 7. But there, Justice Thomas addressed the propriety of nationwide injunctions, *Trump*, 138 S. Ct. at 2424–29, which is not the issue here. As the D.C. Circuit has explained—and as Defendants concede, *see* Defs.' Supp. Br. at 9 n.1—"[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (alteration in original) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)); *see also O.A.*, 404 F. Supp. 3d at 153.[28]

Defendants also contend that vacatur is prohibited by several provisions of the INA, but again, the Court is not persuaded. They first argue that Section 1252(e)(1)'s prohibition on "declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with [expedited removal]" prohibits vacatur. Defs.' Supp. Br. at 9–10.

[28] Defendants' reliance on the Fourth Circuit's opinion in *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), *overruled by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), is misplaced for the same reason. Defs.' Supp. Br. at 6. The court in that case merely observed in dicta that the APA does not mandate nationwide *injunctive* relief. *Virginia Soc'y for Human Life,* 263 F.3d at 393–94. But even setting aside the practical challenges inherent in vacating the Rule only as to Plaintiffs in this case, *see O.A.*, 404 F. Supp. 3d at 153, precedent in this Circuit instructs otherwise.

But the organizational Plaintiffs, like CAIR and Tahirih, are not challenging any specific order to exclude an individual alien; they bring a facial challenge to the Rule. For that reason, Section 1252(e)(1) does not apply. Second, Defendants point to Section 1252(f)'s dictate that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221–32] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." *Id.* at 10–11. But again, that section does not apply here. The Rule was issued under 12 U.S.C. § 1158(b)(2)(c), *see* 84 Fed. Reg. at 33,835, not one of the provisions covered by Section 1252(f). *See O.A.*, 404 F. Supp. 3d at 158. Moreover, by vacating the Rule, the Court is not enjoining or restraining the INA's operation.[29]

Finally, Defendants argue that "in light of the Supreme Court's order in *Barr v. East Bay Sanctuary Covenant*," 140 S. Ct. 3 (2019), the Court should "stay the effect of any decision concerning relief pending resolution of *East Bay*." Defs.' Supp. Br. at 12–13. The Court sees no reason to do so. The parties in *East Bay* are still litigating the propriety and scope of *preliminary* relief, and the Supreme Court's order simply stayed the nationwide scope of the preliminary injunction entered by the district court. At bottom, the Court can glean little from the Supreme

[29] The Court sees no reason why the relief available to the organizational Plaintiffs would be governed by Section 1252. *See* Defs.' Supp. Br. at 9–12. But even assuming it is, Defendants' arguments also run headlong into Section 1252(e)(3), which authorizes courts in this District to make "determinations" about whether relevant regulations issued by the Attorney General are in violation of law. According to Defendants, the INA allows the Court only to issue these "determinations" from which no legal consequences flow. *See id.* at 10. But it would be very strange if Congress—in a section entitled "Challenges on validity of the system"—empowered this Court to determine that a regulation was unconstitutional but left it powerless to remedy it. Indeed, such a result could be inconsistent with Article III. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (noting that "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" (citation omitted)).

Court's one-paragraph order other than that a majority of Justices believed the factors meriting a stay were satisfied. *See* 140 S. Ct. at 3; *see also Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (listing the factors the Supreme Court considers when deciding whether to grant a stay).

For these reasons, the Court holds that vacatur is the appropriate remedy and that neither remand without vacatur nor a stay of vacatur is warranted.

IV. Conclusion

For all these reasons, the Court will grant Plaintiffs' Motions for Summary Judgment, *CAIR* ECF No. 41, *I.A.* ECF No. 6; deny Defendants' Cross-Motions, *CAIR* ECF No. 43, *I.A.* ECF No. 17; and vacate the Rule. A separate order will issue.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: June 30, 2020

No. 19-15716
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Innovation Law Lab v. Wolf

951 F.3d 1073 (9th Cir. 2020) · 2020 U.S. App. LEXIS 6344
Decided Feb 28, 2020

No. 19-15716

October 1, 2019, Argued and Submitted, San Francisco, California. February 28, 2020, Filed

Ana C. Reyes, Williams & Connolly LLP, Washington, D.C.; Alice Farmer, United Nations High Commissioner for Refugees, Washington, D.C.; for Amicus Curiae United Nations High Commissioner.

Scott G. Stewart (argued), Deputy Assistant Attorney General; Archith Ramkumar, Trial Attorney; Erez Reuveni, Assistant Director; William C. Peachey, Director; Joseph H. Hunt, Assistant Attorney General; Office of Immigration Litigation, United States Department of Justice, Washington, D.C., Washington, D.C.; for Defendants-Appellants.

Judy Rabinovitz (argued), Michael Tan, Omar Jadwat, Lee Gelernt, Anand Balakrishnan, and Daniel Galindo, American Civil Liberties Union Foundation, Immigrants' Rights Project, New York, New York; Jennifer Chang Newell, Katrina Eiland, Cody Wofsy, and Julie Veroff, American Civil Liberties Union Foundation, Immigrants' Rights Project, San Francisco, California; Melissa Crow, Southern Poverty Law Center, Washington, D.C.; Mary Bauer, Southern Poverty Law Center, Charlottesville, Virginia; Gracie Willis, Southern Poverty Law Center, Decatur,

Georgia; Michelle P. Gonzalez, Southern Poverty Law Center, Miami, Florida; Sean Riordan and Christine P. Sun, American Civil Liberties Union Foundation of Northern California Inc., San Francisco, California; Blaine Bookey, Karen Musalo, Eunice Lee, Kathryn Jastram, and Sayoni Maitra, Center for Gender and Refugee Studies, San Francisco, California; Steven Watt, ACLU Foundation Human Rights Program, New York, New York; for Plaintiffs-Appellees.

Adeel A. Mangi, Muhammad U. Faridi, Elizabeth Riordan Hurley, W. Robert Fair, and A. Robert Quirk, Patterson Belknap Webb & Tyler LLP, New York, New York, for Amicus Curiae Local 1924.

Alan E. Schoenfeld and Olga Musayev, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York; Julia Prochazka, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts; Harold Hongju Koh, Rule of Law Clinic, Yale Law School, New Haven, Connecticut; for Amici Curiae Former U.S. Government Officials.

Xiao Wang, Rakesh Kilaru, Aleshadye Getachew, and Sophia Cooper, Wilkinson Walsh & Eskovitz LLP, Washington, D.C.; Chanakya A. Sethi, Wilkinson Walsh & Eskovitz LLP, New York, New York; for Amici Curiae Amnesty International USA, The Washington Office on Latin America, The Latin America Working Group, & Imumi.

Eleni Bakst, Human Rights First, New York, New York; W. Hardy Callcott, Naomi A. Igra, and Tom Magaña, Sidley Austin LLP, San Francisco, California; for Amicus Curiae Human Rights First.

1077*1077 W. FLETCHER, Circuit Judge:

Plaintiffs brought suit in district court seeking an injunction against the Government's recently promulgated Migrant Protection Protocols ("MPP"), under which non-Mexican asylum seekers who present themselves at our southern border are required to wait in Mexico while their asylum applications are adjudicated. The district court entered a preliminary injunction setting aside the MPP, and the Government appealed. We affirm.

I. Background

In January 2019, the Department of Homeland Security ("DHS") promulgated the MPP without going through notice-and-comment rulemaking. The MPP provides that non-Mexican asylum seekers arriving at our southern border be "returned to Mexico for the duration of their immigration proceedings, rather than either being detained for expedited or regular removal proceedings or issued notices to appear for regular removal proceedings." *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019) (quotation marks omitted). The MPP does not apply to certain groups, including "unaccompanied alien children," "aliens processed for expedited removal," "aliens with known physical [or] mental health issues," "returning [Legal Permanent Residents] seeking admission," and "aliens with an advance parole document or in parole status."

DHS issued guidance documents to implement the MPP. Under this guidance, asylum seekers who cross the 1078border and *1078 are subject to the MPP are given a Notice to Appear in immigration court and returned to Mexico to await their court date. Asylum seekers may re-enter the United States to appear for their court dates. The guidance instructs officials not to return any alien who will more likely than not suffer persecution if returned to Mexico. However, this instruction applies only to an alien "who affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico." Officers are not instructed to ask aliens whether they fear returning to Mexico. If an asylum officer determines, based on an alien's volunteered statement, that he or she will more likely than not suffer persecution in Mexico, the alien is not subject to return to Mexico under the MPP.

The MPP went into effect on January 28, 2019. It was first implemented at the San Ysidro, California, port of entry and was later expanded across the entire southern border.

The MPP has had serious adverse consequences for the individual plaintiffs. Plaintiffs presented evidence in the district court that they, as well as others returned to Mexico under the MPP, face targeted discrimination, physical violence, sexual assault, overwhelmed and corrupt law enforcement, lack of food and shelter, and practical obstacles to participation in court proceedings in the United States. The hardship and danger to individuals returned to Mexico under the MPP have been repeatedly confirmed by reliable news reports. *See, e.g.*, Zolan Kanno-Youngs & Maya Averbuch, *Waiting for Asylum in the United States, Migrants Live in Fear in Mexico*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/us/politics/asylum-united-states-migrants-mexico.html; Alicia A. Caldwell, *Trump's Return-to-Mexico Policy Overwhelms Immigration Courts*, WALL STREET J. (Sept. 5, 2019), https://www.wsj.com/articles/trumps-return-to-mexico-policy-overwhelms-immigration-courts-11567684800; Mica Rosenberg, et al., *Hasty Rollout of Trump Immigration Policy Has 'Broken' Border Courts*, REUTERS (Sept. 10, 2019), https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115; Mireya Villareal, *An Inside Look at Trump's "Remain in Mexico" Policy*, CBS NEWS (Oct. 8, 2019), https://www.cbsnews.com/news/ remain-in-mexico-donald-trump-immigration-policy-nuevo-laredo-mexico-streets-danger-migrants-2019-10-08/.

The organizational plaintiffs have also suffered serious adverse consequences. The MPP has substantially hindered the organizations' "ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers," *Innovation Law Lab*, 366 F. Supp. 3d at 1129, and has forced them to divert resources because of increased costs imposed by the MPP.

The Government has not argued in this court that either the individual or organizational plaintiffs lack standing under Article III, but we have an independent obligation to determine our jurisdiction under Article III. The individual plaintiffs, all of whom have been returned to Mexico under the MPP, obviously have Article III standing. The organizational plaintiffs also have Article III standing. The Government conceded in the district court that the organizational plaintiffs have Article III standing based on *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765-67 (9th Cir. 2018), given their decreased ability to carry out their core missions as well as the diversion of their resources, both caused by the MPP. *See Innovation Law Lab*, 366 F. Supp. at 1079 1120-22. Because *East Bay Sanctuary Covenant* was a decision by a motions *1079 panel on an emergency stay motion, we are not obligated to follow it as binding precedent. *See* discussion, *infra*, Part V.A. However, we are persuaded by its reasoning and hold that the organizational plaintiffs have Article III standing.

II. Proceedings in the District Court

Plaintiffs filed suit in district court seeking an injunction, alleging, *inter alia*, that the MPP is inconsistent with the Immigration and Nationality Act ("INA"), specifically 8 U.S.C. §§ 1225(b) and 1231(b), and that they have a right to a remedy under 5 U.S.C. § 706(2)(A). Section 706(2)(A) provides, "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (Internal numbering omitted.)

The district court held that plaintiffs had shown a likelihood of success on the merits of their claim that the MPP is inconsistent with § 1225(b). *Id.* at 1123. The Government contended that the MPP is authorized by § 1225(b)(2). Plaintiffs argued, however, that they are arriving aliens under § 1225(b)(1) rather than under § 1225(b)(2). They pointed out that there is a contiguous territory return provision in § (b)(2) but no such provision in § (b)(1). The district court agreed with plaintiffs:

On its face, . . . the contiguous territory return provision may be applied to aliens described in subparagraph (b)(2)(A). Pursuant to subparagraph (b)(2)(B), however, that *expressly* excludes any alien "to whom paragraph [(b)](1) applies."

Id. (emphasis in original). The court concluded, "Applying the plain language of the statute, [the individual plaintiffs] simply are not subject to the contiguous territory return provision." *Id.*

The district court also held that plaintiffs had shown a likelihood of success on the merits of their claim that the MPP violates § 1231(b)(3), the statutory implementation of the United States' treaty-based non-refoulement obligations. The district court held that "plaintiffs have shown they are more likely than not to prevail on the merits of their contention that defendants adopted the MPP without sufficient regard to refoulement issues." *Id.* at 1127. In so holding, the district court noted that the MPP does not instruct asylum officers to ask asylum seekers whether they fear returning to Mexico. Rather, "the MPP provides only for review of potential refoulement concerns when an alien 'affirmatively' raises the point." *Id.* The court further held that it was more likely than not that the MPP should have been adopted through notice-and-comment rulemaking with respect to the non-refoulement aspects of the MPP. *Id.* at 1128.

With respect to the individual plaintiffs, the district court found that "[w]hile the precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable, there is no real question that it includes the possibility of irreparable injury, sufficient to support interim relief in light of the showing on the merits." *Id.* at 1129. With respect to the organizational plaintiffs, the court found that they had "shown a likelihood of harm in terms of impairment of their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers." *Id.* Finally, the court held that the balance of equities and the public interest support the issuance of a preliminary injunction. *Id.*

Relying on a decision of our court, the district court issued a preliminary injunction setting aside the MPP. The court noted:

[D]efendants have not shown the injunction in this case can be limited geographically. This is not a case implicating *1080 local concerns or values. There is no apparent reason that any of the places to which the MPP might ultimately be extended have interests that materially differ from those presented in San Ysidro.

Id. at 1130.

III. Proceedings Before the Motions Panel

The district court issued its preliminary injunction on April 8, 2019. The Government filed an appeal on April 10 and the next day requested an emergency stay pending appeal. In accordance with our regular procedures, our April motions panel heard the Government's request for an emergency stay. The motions panel held oral argument on the stay on April 24. In three written opinions, the panel unanimously granted the emergency stay on May 7. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

In a per curiam opinion, the motions panel disagreed, by a vote of two to one, with the district court's holding that plaintiffs were likely to succeed in their statutory argument that the MPP is inconsistent with 8 U.S.C. § 1225(b). *Id.* at 508-09. The panel majority stated its legal conclusion in tentative terms, writing that it was " *doubtful* that subsection (b)(1) [of § 1225] 'applies' to [plaintiffs.]" *Id.* at 509 (emphasis added).

Judge Watford concurred in the per curiam opinion but wrote separately to express concern that the MPP is arbitrary and capricious because it lacks sufficient non-refoulement protections. *Id.* at 511 (Watford, J., concurring). Judge Watford expressed concern that asylum officers do not ask asylum applicants whether they have a fear of returning to Mexico: "One suspects the agency is not asking an important question during the interview process simply because it would prefer not to hear the answer." *Id.* Judge Watford concluded, "DHS's policy is virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States' non-refoulement obligations." *Id.*

Judge Fletcher concurred only in the result. He wrote separately, arguing that the MPP was inconsistent with 8 U.S.C. § 1225(b). *Id.* at 512 (W. Fletcher, J., concurring in the result). In his view, asylum seekers subject to the MPP are properly characterized as applicants under § 1225(b)(1) rather than § 1225(b)(2), and are thus protected against being returned to Mexico pending adjudication of their applications. Judge Fletcher emphasized the preliminary nature of the emergency stay proceedings before the motions panel, writing, "I am hopeful that the regular argument panel that will ultimately hear the appeal, with the benefit of full briefing and regularly scheduled argument, will be able to see the Government's arguments for what they are—baseless arguments in support of an illegal policy[.]" *Id.* at 518.

IV. Standard of Review

When deciding whether to issue a preliminary injunction, a district court considers whether the requesting party has shown "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Likelihood of success on the merits is a threshold inquiry and the most important factor. *See, e.g., Edge v. City of Everett*, 929 F.3d 657, 663 (9th Cir. 2019).

We review a grant of a preliminary injunction for abuse of discretion. *See, e.g., United States v. California*, 921 F.3d 865, 877 (9th Cir. 2019). "The district *1081 court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

V. Likelihood of Success on the Merits

A. Effect of the Motions Panel's Decision

A preliminary question is whether a merits panel is bound by the analysis of a motions panel on a question of law, performed in the course of deciding an emergency request for a stay pending appeal. On that question, we follow *East Bay Sanctuary Covenant v. Trump*, Nos. 18-17274 and 18-17436, 2020 U.S. App. LEXIS 6282 (9th Cir. 2020), argued on the same day as this case, in which we held that a motions panel's legal analysis, performed during the course of deciding an emergency motion for a stay, is not binding on later merits panels. Such a decision by a motions panel is "a probabilistic endeavor," "doctrinally distinct" from the question considered by the later merits panel, and "issued without oral argument, on limited timelines, and in reliance on limited briefing." *Id.* at 21-22, 20. "Such a predictive analysis should not, and does not, forever bind the merits of the parties' claims." *Id.* at 22. At oral argument in this case, the Government acknowledged "that law of the circuit treatment does not apply to [the motion's panel's decision]." The Government later reiterated that it was "not advocating for law of the circuit treatment." The Government "agree[d] that that is inappropriate in the context of a motions panel decision."

Even if, acting as a merits panel, we may be bound in some circumstances by a decision by a motions panel on a legal question, we would in any event not be bound in the case now before us. Two of the three judges on the motions panel disagreed in part with the Government's legal arguments in support of the MPP. Further, the motions panel's per curiam opinion did not purport to decide definitively the legal questions presented to it in the emergency stay motion. The per curiam spoke in terms of doubt and likelihood, rather than in terms of definitive holdings. *Innovation Law Lab*, 924 F.3d at 509; *see also supra* Part III. Indeed, Judge Fletcher, who concurred in granting the emergency stay, specifically addressed the effect of the legal analysis of the motions panel and expressed the hope that the merits panel, with the benefit of full briefing and argument, would decide the legal questions differently.

B. Questions on the Merits

Plaintiffs challenge two aspects of the MPP. First, they challenge the requirement that asylum seekers return to Mexico and wait there while their applications for asylum are adjudicated. They contend that this requirement is inconsistent with the INA, as amended in 1996 by the Illegal Immigration Reform and Immigrant Responsbility Act ("IIRIRA"). Second, in the alternative, they challenge the failure of asylum officers to ask asylum seekers whether they fear being returned to Mexico. They contend that this failure is inconsistent with our treaty-based non-refoulement obligations. They contend, further, that with respect to non-refoulement, the MPP should have been adopted only after notice-and-comment rulemaking.

We address these challenges in turn. We conclude that plaintiffs have shown a likelihood of success on their claim that the return-to-Mexico requirement of the MPP is inconsistent with 8 U.S.C. § 1225(b). We further conclude that plaintiffs have shown a likelihood of success on their claim that the MPP does not comply with
1082 our treaty-based non-refoulement obligations codified *1082 at 8 U.S.C. § 1231(b). We do not reach the question whether they have shown a likelihood of success on their claim that the anti-refoulement aspect of the MPP should have been adopted through notice-and-comment rulemaking.

1. Return to Mexico

The essential feature of the MPP is that non-Mexican asylum seekers who arrive at a port of entry along the United States' southern border must be returned to Mexico to wait while their asylum applications are adjudicated. Plaintiffs contend that the requirement that they wait in Mexico is inconsistent with 8 U.S.C. § 1225(b). The government contends, to the contrary, that the MPP is consistent with § 1225(b).

The relevant text of § 1225 is as follows:

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission.

. . .

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

. . .

(B) Asylum interviews

. . .

(ii) Referral of certain aliens

If the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.

. . .

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien —

(i) who is a crewman

(ii) to whom paragraph (1) applies, or

1083*1083 **(iii)** who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

There are two categories of "applicants for admission" under § 1225. § 1225(a). First, there are applicants described in § 1225(b)(1). Second, there are applicants described in § 1225(b)(2).

Applicants described in § 1225(b)(1) are inadmissible based on either of two grounds, both of which relate to their documents or lack thereof. Applicants described in § 1225(b)(2) are in an entirely separate category. In the words of the statute, they are "other aliens." § 1225(b)(2) (heading). Put differently, again in the words of the statute, § (b)(2) applicants are applicants "to whom paragraph [(b)](1)" does not apply. § 1225(b)(2)(B)(ii). That is, § (b)(1) applicants are those who are inadmissible on either of the two grounds specified in that subsection. Section (b)(2) applicants are all other inadmissible applicants.

Section (b)(2) applicants are more numerous than § (b)(2) applicants, but § (b)(2) is a broader category in the sense that § (b)(2) applicants are inadmissible on more grounds than § (b)(1) applicants. Inadmissable applicants under § (b)(1) are aliens traveling with fraudulent documents (§ 1182(a)(6)(C)) or no documents (§ 1182(a)(7)). By contrast, inadmissable applicants under § (b)(2) include, *inter alia*, aliens with "a communicable disease of public health significance" or who are "drug abuser[s] or addict[s]" (§ 1182(a)(1)(A)(i), (iv)); aliens who have "committed . . . a crime involving moral turpitude" or who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance" (§ 1182(a)(2)(A)(i)); aliens who "seek to enter the United States . . . to violate any law of the United States relating to espionage or sabotage," or who have "engaged in a terrorist activity" (§ 1182(a)(3)(A), (B)); aliens who are "likely . . . to become a public charge" (§ 1182(a)(4)(A)); and aliens who are alien "smugglers" (§ 1182(a)(6)(E)).

The Supreme Court recently distinguished § (b)(1) and § (b)(2) applicants, stating unambiguously that they fall into two separate categories:

[*A*] *pplicants for admission fall into one of two categories*, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. . . . Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).

Jennings v. Rodriguez, 138 S. Ct. 830, 837, 200 L. Ed. 2d 122 (2018) (emphasis added) (citations omitted).

Even more recently, the Attorney General of the United States, through the Board of Immigration Appeals, drew the same distinction and briefly described the procedures applicable to the two categories:

Under section 235 of the Act [8 U.S.C. § 1225], all aliens "arriv[ing] in the United States" or "present in the United States [without having] been admitted" are considered "applicants for admission," who "shall be inspected by immigration officers." INA § 235(a)(1), (3). [8 U.S.C. § 1225(a)(1), (3).] In most cases, those
1084 inspections yield one of three outcomes. First, if an alien is "clearly and *1084 beyond a doubt entitled to be admitted," he will be permitted to enter, or remain in, the country without further proceedings. *Id.* § 235(b)(2)(A). [8 U.S.C. § 1225(b)(2)(A).] Second, if the alien is not clearly admissible, then, generally, he will be placed in "proceeding[s] under section 240 [8 U.S.C. § 1229a]" of the Act—that is, full removal proceedings. *Id.* Third, if the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings. *Id.* § 235(b)(1)(A)(i) [8 U.S.C. § 1225(b)(1)(A)(i)]; *see Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011).

Matter of M-S-, 27 I. & N. Dec. 509, 510 (BIA April 16, 2019).

The procedures specific to the two categories of applicants are outlined in their respective subsections. To some extent, the statutorily prescribed procedures are the same for both categories. If a § (b)(1) applicant passes his or her credible fear interview, he or she will be placed in regular removal proceedings under 8 U.S.C. § 1229a. *See* 8 C.F.R. § 208.30(f). A § (b)(1) applicant may also be placed directly into regular removal proceedings under § 1229a at the discretion of the Government. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522 (BIA 2011). A § (b)(2) applicant who is "not clearly and beyond a doubt entitled to be admitted" is automatically placed in regular removal proceedings under § 1229a. *See* § 1225(b)(2)(A).

Both § (b)(1) and § (b)(2) applicants can thus be placed in regular removal proceedings under § 1229a, though by different routes. But the fact that an applicant is in removal proceedings under § 1229a does not change his or her underlying category. A § (b)(1) applicant does not become a § (b)(2) applicant, or vice versa, by virtue of being placed in a removal proceeding under § 1229a.

However, the statutory procedures for the two categories are not identical. Some of the procedures are exclusive to one category or the other. For example, if a § (b)(1) applicant fails to pass his or her credible fear interview, he or she may be removed in an expedited proceeding without a regular removal proceeding under § 1229a. *See* § 1225(b)(1)(A), (B). There is no comparable procedure specified in § (b)(2) for expedited removal of a § (b)(2) applicant. Further, in some circumstances a § (b)(2) applicant may be "returned" to a "territory contiguous to the United States" pending his or her regular removal proceeding under § 1229a. *See* § 1225(b)(2)(C). There is no comparable "return" procedure specified in §1225(b)(1) for a § (b)(1) applicant.

The statutory question posed by the MPP is whether a § (b)(1) applicant may be "returned" to a contiguous territory under § 1225(b)(2)(C). That is, may a § (b)(1) applicant be subjected to a procedure specified for a § (b)(2) applicant? A plain-meaning reading of § 1225(b)—as well as the Government's longstanding and consistent practice up until now—tell us that the answer is "no."

There is nothing in § 1225(b)(1) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Section (b)(1)(A)(i) tells us with respect to § (b)(1) applicants that an "officer shall order the alien removed . . . without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." Section (b)(1)(A)(ii) tells us that § (b)(1) applicants who indicate an intention to apply for asylum or a fear of persecution "shall" be referred by the immigration officer to an "asylum officer" for an interview. The remainder of § 1225(b)(1) specifies what happens to a § (b)(1) applicant depending on the
1085 determination of the asylum officer—either expedited *1085 removal or detention pending further consideration. § 1225(b)(1)(B)(ii)-(iii). There is nothing in § 1225(b)(1) stating, or even suggesting, that a § (b)(1) applicant is subject to the "return" procedure of § 1225(b)(2)(C).

Nor is there anything in § 1225(b)(2) to indicate that a § (b)(1) applicant may be "returned" under § 1225(b)(2)(C). Taking § 1225(b)(2) subparagraph by subparagraph, it provides as follows. Subparagraph (A) tells us that unless a § (b)(2) applicant is "clearly and beyond a doubt entitled to be admitted," she or he "shall be detained" for a removal proceeding under § 1229a. § 1225(b)(2)(A). Subparagraph (A) is "[s]ubject to subparagraphs (B) and (C)." *Id.* Subparagraph (B) tells us that subparagraph (A) does not apply to three categories of aliens —"crewm[e]n," § (b)(1) applicants, and "stowaway[s]." § 1225(b)(2)(B). Finally, subparagraph (C) tells us that a § (b)(2) applicant who arrives "on land . . . from a foreign territory contiguous to the United States," instead of being "detained" under subparagraph (A) pending his or her removal proceeding under § 1229a, may be "returned" to that contiguous territory pending that proceeding. § 1225(b)(2)(C). Section (b)(1) applicants are mentioned only once in § 1225(b)(2), in subparagraph (B)(ii). That subparagraph specifies that subparagraph (A)—which automatically entitles § (b)(2) applicants to regular removal proceedings under § 1229a—does not apply to § (b)(1) applicants.

The "return-to-a-contiguous-territory" provision of § 1225(b)(2)(C) is thus available only for § (b)(2) applicants. There is no plausible way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government's longstanding and consistent practice, the statutory authority upon which the Government now relies simply does not exist.

The Government nonetheless contends that § (b)(2)(C) authorizes the return to Mexico not only of § (b)(2) applicants, but also of § (b)(1) applicants. The Government makes essentially three arguments in support of this contention. None is persuasive.

First, the Government argues that § (b)(1) applicants are a subset of § (b)(2) applicants. Blue Brief at 35. Under the Government's argument, there are § (b)(1) applicants, defined in § (b)(1), and there are § (b)(2) applicants, defined as all applicants, including § (b)(2) and § (b)(1) applicants. The Government argues that DHS, in its discretion, can therefore apply the procedures specified in § (b)(2) to a § (b)(1) applicant. That is, as stated in its brief, the Government has "discretion to make the initial 'determin[ation]' whether to apply section 1225(b)(1) or section 1225(b)(2) to a given alien." Blue Brief at 30.

The Government's argument ignores the statutory text, the Supreme Court's opinion in *Jennings*, and the opinion of its own Attorney General in *Matter of M-S-*. The text of § 1225(b) tells us that § (b)(1) and § (b)(2) are separate and non-overlapping categories. In *Jennings*, the Supreme Court told us explicitly that § (b)(1) and § (b)(2) applicants fall into separate and non-overlapping categories. In *Matter of M-S-*, the Attorney General wrote that applicants are subject to different procedures depending on whether they are § (b)(1) or § (b)(2) applicants.

Second, the Government argues that § (b)(2)(B)(ii) allows DHS, in its discretion, to "apply" to a § (b)(1) applicant either procedures described in § (b)(1) or those described in § (b)(2). The Government's second argument is necessitated by its first. To understand the Government's second argument, one must keep in mind that § (b)(2)(A) automatically entitles a § (b)(2) applicant to a regular removal hearing under § 1229a. But we know from § (b)(1) *1086 that not all § (b)(1) applicants are entitled to a removal hearing under § 1229a. Having argued that § (b)(2) applicants include not only § (b)(2) but also § (b)(1) applicants, the Government needs some way to avoid giving regular removal proceedings to all § (b)(1) applicants. The best the Government can do is to rely on § (b)(2)(B)(ii), which provides: "Subparagraph (A) shall not *apply* to an alien . . . to whom paragraph [(b)](1) *applies*." § 1225(b)(2)(B)(ii) (emphasis added). The Government thus argues that § (b)(2)(B)(ii) allows DHS, in its discretion, to "apply," or not apply, § (b)(2)(A) to a § (b)(1) applicant.

1086

The Government misreads § (b)(2)(B)(ii). Subparagraph (B) tells us, "Subparagraph (A) shall not apply to an alien — (i) who is a crewman, (ii) to whom paragraph [(b)](1) applies, or (iii) who is a stowaway." The function of § (b)(2)(B)(ii) is to make sure that we understand that the automatic entitlement to a regular removal hearing under § 1229a, specified in § (b)(2)(A) for a § (b)(2) applicant, does not apply to a § (b)(1) applicant. However, the Government argues that § (b)(2)(B)(ii) authorizes the Government to perform an act. That act is to "apply" the expedited removal procedures of § (b)(1) to some of the aliens under § (b)(2), as the Government defines § (b)(2) applicants.

There is a fatal syntactical problem with the Government's argument. "Apply" is used twice in the same sentence in § (b)(2)(B)(ii). The first time the word is used, in the lead-in to the section, it refers to the application of a statutory section ("Subparagraph (A) shall not apply"). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section ("to whom paragraph [(b)](1) applies"). When the word is used the first time, it tells us that subparagraph (A) shall not apply. When the word is used the second time, it tells us to whom subparagraph (A) shall not apply: it does not apply to applicants to whom § (b)(1) applies. The word is used in the same manner both times to refer to the application of subparagraph (A). The word is not used the first time to refer to the application of a subparagraph (A), and the second time to an action by DHS.

The Government's third argument is based on the supposed culpability of § (b)(1) applicants. We know from § (b)(2)(A) that § (b)(2) applicants are automatically entitled to full removal proceedings under § 1229a. However, § (b)(2) applicants may be returned to Mexico under § (b)(2)(C) to await the outcome of their removal hearing under § 1229a. It makes sense for the Government, in its discretion, to require some § (b)(2) applicants to remain in Mexico while their asylum applications are adjudicated, for some § (b)(2)applicants are extremely undesirable applicants. As discussed above, § (b)(2) applicants include spies, terrorists, alien smugglers, and drug traffickers.

When the Government was before the motions panel in this case, it argued that § (b)(1) applicants are more culpable than § (b)(2) applicants and therefore deserve to be forced to wait in Mexico while their asylum applications are being adjudicated. In its argument to the motions panel, the Government compared § (b)(1) and § (b)(2) applicants, characterizing § (b)(2) applicants as "less-culpable arriving aliens." The Government argued that returning § (b)(2), but not § (b)(1), applicants to a contiguous territory would have "the perverse effect of privileging aliens who attempt to obtain entry to the United States by fraud . . . over aliens who follow our laws."

The Government had it exactly backwards. Section (b)(1) applicants are those who are "inadmissible under section 1182(a)(6)(C) or 1182(a)(7)" of Title 8. *1087 These two sections describe applicants who are inadmissible because they lack required documents rather than because they have a criminal history or otherwise pose a danger to the United States. Section 1182(a)(6)(C), entitled "Misrepresentation," covers, *inter alia*, aliens using fraudulent documents. That is, it covers aliens who travel under false documents and who, once they arrive at the border or enter the country, apply for asylum. Section 1182(a)(7), entitled "Documentation requirements," covers aliens traveling without documents. In short, § (b)(1) applies to bona fide asylum applicants, who commonly have fraudulent documents or no documents at all. Indeed, for many such applicants, fraudulent documents are their only means of fleeing persecution, even death, in their own countries. The structure of § (b)(1), which contains detailed provisions for processing asylum seekers, demonstrates that Congress recognized that § (b)(1) applicants may have valid asylum claims and should therefore receive the procedures specified in § (b)(1).

In its argument to our merits panel, the Government made a version of the same argument it had made earlier to the motions panel. After referring to (but not describing) § (b)(2) applicants, the Government now argues in its opening brief:

Section 1225(b)(1), meanwhile, reaches, among other classes of aliens, those who engage in fraud or willful misrepresentations *in an attempt to deceive the United States* into granting an immigration benefit. *See* 8 U.S.C. § 1182(a)(6)(C). Plaintiffs have not explained why Congress would have wanted that class of aliens to be exempt from temporary return to Mexico while their full removal proceedings are ongoing.

Blue Brief at 37-38 (emphasis in original).

We need not look far to discern Congress's motivation in authorizing return of § (b)(2) applicants but not § (b)(1) applicants. Section (b)(2)(C) was added to IIRIRA late in the drafting process, in the wake of *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). Sanchez-Avila was a Mexican national who applied for entry as a "resident alien commuter" but who was charged with being inadmissible due to his "involvement with controlled substances." *Id.* at 445; *see* 8 U.S.C. § 1182(a)(2)(A)(i) (§ (b)(2) applicants include aliens who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance"). In order to prevent aliens like Sanchez-Avila from staying in the United States during the pendency of their guaranteed regular removal proceeding under § 1229a, as they would otherwise have a right to do under § (b)(2)(A), Congress added § 1225(b)(2)(C). Congress had specifically in mind undesirable § (b)(2) applicants like Sanchez-Avila. It did not have in mind bona fide asylum seekers under § (b)(1).

We therefore conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP is inconsistent with 8 U.S.C. § 1225(b).

2. Refoulement

Plaintiffs claim that the MPP is invalid in part, either because it violates the United States' treaty-based anti-refoulement obligations, codified at 8 U.S.C. § 1231(b)(3)(A), or because, with respect to refoulement, the MPP was improperly adopted without notice-and-comment rulemaking. Our holding that plaintiffs are likely to succeed on their claim that the MPP is invalid in its entirety because it is inconsistent with § 1225(b) makes it unnecessary to decide plaintiffs' second claim. We nonetheless address it as an alternative ground, under which we hold the MPP invalid in part.

1088 Refoulement occurs when a government returns aliens to a country where their *1088 lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. The United States is obliged by treaty and implementing statute, as described below, to protect against refoulement of aliens arriving at our borders.

Paragraph one of Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, entitled, "Prohibition of expulsion or return ('refoulement')," provides:

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.

The United States is not a party to the 1951 Convention, but in 1968 we acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967. *INS v. Stevic*, 467 U.S. 407, 416, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984). "The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees." *Id.* Twelve years later, Congress passed the Refugee Act of 1980, implementing our obligations under the 1967 Protocol. "If one thing is clear from the legislative history of the . . . entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987). The 1980 Act included, among other things, a provision designed to implement Article 33 of the 1951 Convention. After recounting the history behind 8 U.S.C. § 1253(h)(1), part of the 1980 Act, the Supreme Court characterized that section as "parallel[ing] Article 33," the anti-refoulement provision of the 1951 Convention. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999).

Section 1253(h)(1) provided, in relevant part, "The Attorney General *shall not deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group, or political opinion." *Id.* at 419 (emphasis added). The current version is § 1231(b)(3)(A): "[T]he Attorney General *may not remove* an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." (Emphasis added.) The words "deport or return" in the 1980 version of the section were replaced in 1996 by "remove" as part of a general statutory revision under IIRIRA. Throughout IIRIRA, "removal" became the new all-purpose word, encompassing "deportation," "exclusion," and "return" in the earlier statute. *See, e.g., Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) ("IIRIRA eliminated the distinction between deportation and exclusion proceedings, replacing them with a new, consolidated category —'removal.'").

Plaintiffs point out several features of the MPP that, in their view, provide insufficient protection against refoulement.

First, under the MPP, to stay in the United States during the pendency of removal proceedings under § 1229a, the asylum seeker must show that it is "more likely than not" that he or she will be persecuted in Mexico.

1089 More-likely-than-not is a high standard, ordinarily applied only after an alien has had a regular removal *1089 hearing under § 1229a. By contrast, the standard ordinarily applied in screening interviews with asylum officers at the border is much lower. Aliens subject to expedited removal need only establish a "credible fear"

in order to remain in the United States pending a hearing under § 1229a. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(ii). Credible fear requires only that the alien show a "significant possibility" of persecution. § 1225(b)(1)(B)(v).

Second, under the MPP, an asylum seeker is not entitled to advance notice of, and time to prepare for, the hearing with the asylum officer; to advance notice of the criteria the asylum officer will use; to the assistance of a lawyer during the hearing; or to any review of the asylum officer's determination. By contrast, an asylum seeker in a removal proceeding under § 1229a is entitled to advance notice of the hearing with sufficient time to prepare; to advance notice of the precise charge or charges on which removal is sought; to the assistance of a lawyer; to an appeal to the Board of Immigration Appeals; and to a subsequent petition for review to the court of appeals.

Third, an asylum officer acting under the MPP does not ask an asylum seeker whether he or she fears returning to Mexico. Instead, asylum seekers must volunteer, without any prompting, that they fear returning. By contrast, under existing regulations, an asylum officer conducting a credible fear interview is directed "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). The asylum officer is specifically directed to "determine that the alien has an understanding of the credible fear determination process." § 208.30(d)(2).

The Government disagrees with plaintiffs based on two arguments. The Government first argues briefly that § 1231(b)(3)(A) does not encompass a general anti-refoulement obligation. It argues that the protection provided by § 1231(b)(3)(A) applies to aliens only after they have been ordered removed to their home country at the conclusion of a regular removal proceeding under § 1229a. It writes:

Section 1231(b)(3) codifies a form of protection from *removal* that is available only *after* an alien is adjudged removable. See 8 U.S.C. § 1231(b)(3); 8 C.F.R. 1208.16(a). Aliens subject to MPP do not receive a final order of removal to their home country when they are returned (temporarily) to Mexico, and so there is no reason why the same procedures would apply . . . .

Blue Brief at 41 (emphasis in original).

The Government reads § 1231(b)(3)(A) too narrowly. Section 1231(b)(3)(A) does indeed apply to regular removal proceedings under § 1229a, as evidenced, for example, by 8 C.F.R. § 1208.16(a) (discussing, *inter alia*, the role of the Immigration Judge). But its application is not limited to such proceedings. As described above, and as recognized by the Supreme Court, Congress intended § 1253(h)(1), and § 1231(b)(3)(A) as its recodified successor, to "parallel" Article 33 of the 1951 Convention. *Aguirre-Aguirre*, 526 U.S. at 427. Article 33 is a general anti-refoulement provision, applicable whenever an alien might be returned to a country where his or her life or freedom might be threatened on account of a protected ground. It is not limited to instances in which an alien has had a full removal hearing with significant procedural protections, as would be the case under § 1229a.

The Government's second argument is that the MPP satisfies our anti-refoulement obligations by providing a sufficiently effective method of determining whether aliens fear, or have reason to fear, returning to Mexico. In its brief, the Government *1090 contends that asylum seekers who genuinely fear returning to Mexico have "every incentive" affirmatively to raise that fear during their interviews with asylum officers, and that Mexico is not a dangerous place for non-Mexican asylum seekers. The Government writes:

[N]one of the aliens subject to MPP are Mexican nationals fleeing Mexico, and all of them voluntarily chose to enter and spend time in Mexico en route to the United States. Mexico, moreover, has committed to adhering to its domestic and international obligations regarding refugees. Those considerations together strongly suggest that the great majority of aliens subject to MPP are not more likely than not to face persecution on a protected ground or torture, in Mexico. In the rare case where an MPP-eligible alien does have a substantial and well-grounded basis for claiming that he is likely to be persecuted in Mexico, that alien will have every incentive to raise that fear at the moment he is told that he will be returned.

Blue Brief at 45. However, the Government points to no evidence supporting its speculations either that aliens, unprompted and untutored in the law of refoulement, will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico.

The Government further asserts, again without supporting evidence, that any violence that returned aliens face in Mexico is unlikely to be violence on account of a protected ground—that is, violence that constitutes persecution. The Government writes:

[T]he basic logic of the contiguous-territory-return statute is that aliens generally do not face *persecution* on account of a protected status, or torture, in the country from which they happen to arrive by land, as opposed to the home country from which they may have fled. (International law guards against torture and persecution on account of a protected ground, not random acts of crime or generalized violence.)

Blue Brief at 40-41 (emphasis in original).

Plaintiffs, who are aliens returned to Mexico under the MPP, presented sworn declarations to the district court directly contradicting the unsupported speculations of the Government.

Several declarants described violence and threats of violence in Mexico. Much of the violence was directed at the declarants because they were non-Mexican—that is, because of their nationality, a protected ground under asylum law. Gregory Doe wrote in his declaration:

I did not feel safe at Benito Juarez [a migrant shelter] because the neighbors kept trying to attack the migrant community. The people who lived near the shelter tried to hurt us because they did not want us in their country. . . .

At El Barretal [another migrant shelter], I felt a little more secure because we had a high wall surrounding us. Even so, one night someone threw a tear gas bomb into the shelter. When I tried to leave the shelter, people in passing cars would often yell insults at me like "get out of here, you *pinches* Hondurans," and other bad words that I do not want to repeat.

Alex Doe wrote:

I know from personal experience and from the news that migrants have a bad name here and that many Mexicans are unhappy that so many of us are here. I have frequently been insulted by Mexicans on the street. . . . [O]ther asylum seekers and I had to flee Playas [a neighborhood in Tijuana] in the middle of the night because
1091 a group of Mexicans threw stones at us and more people *1091 were gathering with sticks and other weapons to try to hurt us.

Christopher Doe wrote:

The Mexican police and many Mexican citizens believe that Central Americans are all criminals. They see my dark skin and hear my Honduran accent, and they automatically look down on me and label me as a criminal. I have been stopped and questioned by the Mexican police around five or six times, just for being a Honduran migrant. During my most recent stop, the police threatened to arrest me if they saw me on the street again.

. . .

I have also been robbed and assaulted by Mexican citizens. On two occasions, a group of Mexicans yelled insults, threw stones, and tried to attack me and a group of other Caravan members.

Howard Doe wrote:

I was afraid to leave the house [where I was staying] because I had seen in the news that migrants like myself had been targeted. While I was in Tijuana, two young Honduran men were abducted, tortured and killed.

. . .

On Wednesday, January 30, 2019, I was attacked and robbed by two young Mexican men. They pulled a gun on me from behind and told me not to turn around. They took my phone and told me that they knew I was Honduran and that if they saw me again, they would kill me. Migrants in Tijuana are always in danger[.]

Some of the violence in Mexico was threatened by persecutors from the aliens' home countries, and much of that violence was on account of protected grounds—political opinion, religion, and social group. Gregory Doe wrote:

I am also afraid the Honduran government will find me in Mexico and harm me. Even outside the country, the Honduran government often works with gangs and criminal networks to punish those who oppose their policies. I am afraid that they might track me down.

Dennis Doe, who had fled the gang "MS-13" in Honduras, wrote:

In Tijuana, I have seen people who I believe are MS-13 gang members on the street and on the beach. They have tattoos that look like MS-13 tattoos . . . and they dress like MS-13 members with short sleeved button up shirts. I know that MS-13 were searching for people who tried to escape them with at least one of the caravans. This makes me afraid that the people who were trying to kill me in Honduras will find me here.

Alex Doe, who had fled Honduras to escape the gang "Mara 18" because of his work as a youth pastor and organizer, wrote:

I am also afraid that the Mara 18 will find me here in Mexico. I am afraid that the Mara 18 might send someone to find me or get information from someone in the caravan. The Mara 18 has networks throughout Central America, and I have heard that their power and connections in Mexico are growing.

Kevin Doe, who fled MS-13 because of his work as an Evangelical Christian minister, wrote:

[When I was returned to Mexico from the United States], I was met by a large group of reporters with cameras. I was afraid that my face might show up in the news. . . . I was afraid that the MS-13 might see my face in the news. They are a powerful, ruthless gang and have members in Tijuana too.

Ian Doe wrote:

I am not safe in Mexico. I am afraid that the people who want to harm me in Honduras will find me here. I have learned from the news that there are *1092 members of Central American gangs and narcotraffickers that are present here in Mexico that could find and kill me. Honduran migrants like me are very visible because of our accents and the way that we look, and it would not be hard for them to find me here.

Several declarants described interviews by asylum officers in which they were not asked whether they feared returning to Mexico. Gregory Doe wrote, "The officer never asked me if I was afraid of being in Mexico or if anything bad had happened to me here [in Mexico]." Christopher Doe wrote:

I don't remember [the officer] asking if I was afraid to live in Mexico while waiting for my asylum hearing. If she had asked, I would have told her about being stopped by the Mexican police and attacked by Mexican citizens. I would also have told her I am afraid that the people who threatened me in Honduras could find me in Mexico . . . .

Kevin Doe wrote:

The officer who was doing the talking couldn't understand me, and I could not understand him very well because he was rushing me through the interview and I didn't fully understand his Spanish. The interview lasted about 4 or 5 minutes. . . . He never asked me if I was afraid of returning to Mexico.

Two declarants wrote that asylum officers actively prevented them from stating that they feared returning to Mexico. Alex Doe wrote:

When I tried to respond and explain [why I had left Honduras] the officer told me something like, "you are only going to respond to the questions that I ask you, nothing more." This prevented me from providing additional information in the interview apart from the answers to the questions posed by the officer.

Dennis Doe wrote:

I was not allowed to provide any information other than the answers to the questions I was asked. I expected to be asked more questions and to have the opportunity to provide more details. But the interview was fairly short, and lasted only about 30 minutes. . . .

No one asked me if I was afraid to return to Mexico, if I had received threats in Mexico, or if I had felt safe in Mexico.

Two declarants did succeed in telling an asylum officer that they feared returning to Mexico, but to no avail. Frank Doe wrote:

He never asked me if I was afraid of returning to Mexico. At one point, I had to interrupt him to explain that I didn't feel safe in Mexico. He told me that it was too bad. He

said that Honduras wasn't safe, Mexico wasn't safe, and the U.S. isn't safe either.

Howard Doe wrote:

I told the asylum officer that I was afraid [of returning to Mexico]. I explained that I'd been kidnapped for fifteen days by Los Zetas in Tuxtla Gutierrez, Chiapas, [Mexico], and that I'd managed to escape. . . . Migrants in Tijuana are always in danger, and I am especially afraid because the Zetas torture people who escape them.

Despite having told their asylum officers that they feared returning, Frank Doe and Howard Doe were returned to Mexico.

This evidence in the record is enough—indeed, far more than enough—to establish that the Government's speculations have no factual basis. Amici in this case have filed briefs bolstering this already more-than-
1093 sufficient evidence. For example, Amnesty International USA, the Washington *1093 Office on Latin America, the Latin America Working Group, and the Institute for Women in Migration submitted an amicus brief referencing many reliable news reports corroborating the stories told by the declarants. We referenced several of those reports earlier in our opinion.

Local 1924 of the American Federation of Government Employees, a labor organization representing "men and women who operate USCIS Asylum Pre-Screening Operation, which has been responsible for a large part of USCIS's 'credible fear' and 'reasonable fear' screenings, and for implementing [the MPP]," also submitted an amicus brief. Local 1924 Amicus Brief at 1. Local 1924 writes in its brief:

Asylum officers are duty bound to protect vulnerable asylum seekers from persecution. However, under the MPP, they face a conflict between the directives of their departmental leaders to follow the MPP and adherence to our Nation's legal commitment to not returning the persecuted to a territory where they will face persecution. They should not be forced to honor departmental directives that are fundamentally contrary to the moral fabric of our Nation and our international and domestic legal obligations.

Id. at 24.

Based on the Supreme Court's conclusion that Congress intended in § 1253(h)(1) (the predecessor to § 1231(b)(3)(B)) to "parallel" the anti-refoulement provision of Article 33 of the 1951 Convention, and based on the record in the district court, we conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP does not comply with the United States' anti-refoulement obligations under § 1231(b). We need not, and do not, reach the question whether the part of the MPP challenged as inconsistent with our anti-refoulement obligations should have been adopted through notice-and-comment rulemaking.

VI. Other Preliminary Injunction Factors

In addition to likelihood of success on the merits, a court must consider the likelihood that the requesting party will suffer irreparable harm, the balance of the equities, and the public interest in determining whether a preliminary injunction is justified. *Winter*, 555 U.S. at 20. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).

There is a significant likelihood that the individual plaintiffs will suffer irreparable harm if the MPP is not enjoined. Uncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum.

The balance of equities favors plaintiffs. On one side is the interest of the Government in continuing to follow the directives of the MPP. However, the strength of that interest is diminished by the likelihood, established above, that the MPP is inconsistent with 8 U.S.C. §§ 1225(b) and 1231(b). On the other side is the interest of the plaintiffs. The individual plaintiffs risk substantial harm, even death, so long as the directives of the MPP are followed, and the organizational plaintiffs are hindered in their ability to carry out their missions.

The public interest similarly favors the plaintiffs. We agree with *East Bay Sanctuary Covenant*:

On the one hand, the public has a "weighty" interest "in efficient administration of the immigration laws at the
1094 *1094 border." *Landon v. Plasencia*, 459 U.S. 21, 34, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982). But the public also has an interest in ensuring that "statutes enacted by [their] representatives" are not imperiled by executive fiat.

Maryland v. King, 567 U.S. 1301, 1301, 133 S. Ct. 1, 183 L. Ed. 2d 667 (2012) (Roberts, C.J., in chambers).

932 F.3d at 779 (alteration in original).

VII. Scope of the Injunction

The district court issued a preliminary injunction setting aside the MPP—that is, enjoining the Government "from continuing to implement or expand the 'Migrant Protection Protocols' as announced in the January 25, 2018 DHS policy memorandum and as explicated in further agency memoranda." *Innovation Law Lab*, 366 F. Supp. 3d at 1130. Accepting for purposes of argument that some injunction should issue, the Government objects to its scope.

We recognize that nationwide injunctions have become increasingly controversial, but we begin by noting that it is something of a misnomer to call the district court's order in this case a "nationwide injunction." The MPP operates only at our southern border and directs the actions of government officials only in the four States along that border. Two of those states (California and Arizona) are in the Ninth Circuit. One of those states (New Mexico) is in the Tenth Circuit. One of those states (Texas) is in the Fifth Circuit. In practical effect, the district court's injunction, while setting aside the MPP in its entirety, does not operate nationwide.

For two mutually reinforcing reasons, we conclude that the district court did not abuse its discretion in setting aside the MPP.

First, plaintiffs have challenged the MPP under the Administrative Procedure Act ("APA"). Section 706(2)(A) of the APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action . . . not in accordance with law." 5 U.S.C. § 706(2)(A). We held, above, that the MPP is "not in accordance with" 8 U.S.C. § 1225(b). Section 706(2)(A) directs that in a case where, as here, a reviewing court has found the agency action "unlawful," the court "shall . . . set aside [the] agency action." That is, in a case where § 706(2)(A) applies, there is a statutory directive—above and beyond the underlying statutory obligation asserted in the litigation—telling a reviewing court that its obligation is to "set aside" any unlawful agency action.

There is a presumption (often unstated) in APA cases that the offending agency action should be set aside in its entirety rather than only in limited geographical areas. "[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that rules are vacated—not that their application to the individual petitioners is proscribed." *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) (internal quotation marks omitted). "When a court determines that an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action." *Cal. Wilderness Coalition v. United States DOE*, 631 F.3d 1072, 1095 (9th Cir. 2011); *see also United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 848, 260 U.S. App. D.C. 121 (D.C. Cir. 1987) ("The APA requires us to vacate the agency's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .").

1095 Second, cases implicating immigration policy have a particularly strong claim for *1095 uniform relief. Federal law contemplates a "comprehensive and unified" immigration policy. *Arizona v. United States*, 567 U.S. 387, 401, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). "In immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *E. Bay Sanctuary Covenant*, 932 F.3d at 779. We wrote in *Regents of the University of California*, 908 F.3d at 511, "A final principle is also relevant: the need for uniformity in immigration policy. . . . Allowing uneven application of nationwide immigration policy flies in the face of these requirements." We wrote to the same effect in *Hawaii v. Trump*,

878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018): "Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights." The Fifth Circuit, one of only two other federal circuits with states along our southern border, has held that nationwide injunctions are appropriate in immigration cases. In sustaining a nationwide injunction in an immigration case, the Fifth Circuit wrote, "[T]he Constitution requires 'an *uniform* Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*'; and the Supreme Court has described immigration policy as 'a comprehensive and *unified* system.'" *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (emphasis in original; citations omitted). In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), we relied on the Fifth Circuit's decision in *Texas* to sustain the nationwide scope of a temporary restraining order in an immigration case. We wrote, "[W]e decline to limit the geographic scope of the TRO. The Fifth Circuit has held that such a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." *Id.* at 1166-67.

Conclusion

We conclude that the MPP is inconsistent with 8 U.S.C. § 1225(b), and that it is inconsistent in part with 8 U.S.C. § 1231(b). Because the MPP is invalid in its entirety due to its inconsistency with § 1225(b), it should be enjoined in its entirety. Because plaintiffs have successfully challenged the MPP under § 706(2)(A) of the APA, and because the MPP directly affects immigration into this country along our southern border, the issuance of a temporary injunction setting aside the MPP was not an abuse of discretion.

We lift the emergency stay imposed by the motions panel, and we affirm the decision of the district court.

AFFIRMED.

Dissent by: Ferdinand F. Fernandez

Dissent

FERNANDEZ, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion because I believe that we are bound by the published decision in *Innovation Law Lab v. McAleenan* (*Innovation I*), 924 F.3d 503 (9th Cir. 2019) (per curiam).

More specifically, we are bound by both the law of the circuit and the law of the case. Of course, the rules that animate the former doctrine are not the same as those that animate the latter. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

As we have said: "Circuit law . . . binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Moreover:
1096 "Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, *1096 unless overruled by the court itself sitting en banc, or by the Supreme Court." *Id.* (footnote omitted). Published opinions are precedential. *See id.* at 1177; *see also Gonzalez*, 677 F.3d at 389 n.4. That remains true, even if some later panel is satisfied that "arguments have been characterized differently or more persuasively by a new litigant," [2] or even if a later panel is convinced that the earlier decision was "incorrectly decided" and "needs reexamination." [3] And those rules are not mere formalities to be nodded to and avoided. Rather, "[i]nsofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled

basis." *Hart*, 266 F.3d at 1172. In this case, there are no material differences — in fact, the situation before this panel is in every material way the same as that before the motions panel. Furthermore, there is no doubt that motions panels can publish their opinions, [4] even though they do not generally do so. [5] Once published, there is no difference between motions panel opinions and other opinions; all are entitled to be considered with the same principles of deference by ensuing panels. Thus, any hesitation about whether they should be precedential must necessarily come before the panel decides to publish, not after. As we held in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015):

> Lair contended at oral argument that a motions panel's decision cannot bind a merits panel, and as a result we are not bound by the motions panel's analysis in this case. Not so. We have held that motions panels can issue published decisions. . . . [W]e are bound by a prior three-judge panel's published opinions, and a motions panel's published opinion binds future panels the same as does a merits panel's published opinion.

Id. at 747 (citations omitted). Therefore, the legal determinations in *Innovation I* are the law of the circuit.

We have explained the law of the case doctrine as "a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir. 1997) (en banc), *overruled on other grounds by Gonzalez*, 677 F.3d at 389 n.4. While we do have discretion to decline application of the doctrine, "[t]he prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* at 1489 (internal quotation marks and footnote omitted). [6] We have also indicated that, in general, "our decisions at the preliminary injunction phase do not constitute the law of the case," [7] but that is principally because *1097 the matter is at the preliminary injunction stage and a further development of the factual record as the case progresses to its conclusion may well require a change in the result. [8] Even so, decisions "on pure issues of law . . . are binding." *Ranchers Cattlemen*, 499 F.3d at 1114. Of course, the case at hand has not progressed beyond the preliminary injunction stage. It is still at that stage, and the factual record has not significantly changed between the record at the time of the decision regarding the stay motion and the current record. Therefore, as I see it, absent one of the listed exceptions, which I do not perceive to be involved here, the law of the case doctrine would also direct that we are bound by much of the motions panel's decision in *Innovation I*.

1097

> 2 *United States v. Ramos-Medina*, 706 F.3d 932, 939 (9th Cir. 2013).
>
> 3 *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018).
>
> 4 *See* 9th Cir. Gen. Order 6.3(g)(3)(ii); *see also id.* at 6.4(b).
>
> 5 *See Haggard v. Curry*, 631 F.3d 931, 933 n.1 (9th Cir. 2010) (per curiam).

> 6 The majority seems to add a fourth exception, that is, motions panel decisions never constitute the law of the case. That would be strange if they can constitute the law of the circuit, which they can.
>
> 7 *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1074, 1076 n.5 (9th Cir. 2015); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013).
>
> 8 *See Ctr. for Biological Diversity*, 706 F.3d at 1090.

Applying those doctrines:

(1) The individuals and the organizational plaintiffs are not likely to succeed on the substantive claim that the Migrant Protection Protocols directive (the MPP) was not authorized by 8 U.S.C. § 1225(b)(2)(C). *Innovation I*, 924 F.3d at 506-09.

(2) The individuals and organizational plaintiffs are not likely to succeed on their procedural claim that the MPP's adoption violated the notice and comment provisions of the Administrative Procedure Act. *See* 5 U.S.C. § 553(b), (c); *Innovation I*, 924 F.3d at 509-10.

(3) As the motions panel determined, due to the errors in deciding the issues set forth in (1) and (2), the preliminary injunction lacks essential support and cannot stand. Thus, we should vacate and remand.

(4) I express no opinion on whether the district court could issue a narrower injunction targeting the problem identified by Judge Watford, that is, the dearth of support for the government's unique rule [9] that an alien processed under the MPP must spontaneously proclaim his fear of persecution or torture in Mexico. *See Innovation I*, 924 F.3d at 511-12 (Watford, J., concurring)

Thus, I respectfully dissent.

10.1 Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond

WALTER KÄLIN*

Contents

* This is a revised version of the study prepared as a background paper for UNHCR's Global Consultation on International Protection which takes into account the conclusions of the second expert roundtable in Cambridge, UK, 9–10 July 2001.

I. Introduction

The expert roundtable process of the Global Consultations on International Protection initiated by the Office of the United Nations High Commissioner for Refugees (UNHCR) is intended to examine selected contemporary issues of international refugee law in detail and provide guidance to UNHCR, States, and other actors. Within this framework, the present study examines UNHCR's supervisory

role under its Statute[1] in conjunction with Article 35 of the 1951 Convention Relating to the Status of Refugees[2] and Article II of the 1967 Protocol Relating to the Status of Refugees.[3] It also looks at ways to make the implementation of these treaties more effective by creating new monitoring mechanisms going beyond the present supervisory regime.

Issues of supervision and implementation of the 1951 Convention have become relevant today not because States would challenge UNHCR's task of providing international protection as such, but because the implementation of the 1951 Convention and the 1967 Protocol is faced with many problems, including a lack of uniformity in the actual application of its provisions. This is true not only for many of the guarantees related to the status of refugees but also for such key provisions as Article 33 of the 1951 Convention on *non-refoulement* or the refugee definition as provided for by Article 1A of the 1951 Convention. UNHCR has repeatedly deplored a trend towards a more restrictive interpretation of the 1951 Convention and its 1967 Protocol in certain countries or even regions of the world.[4] These developments undermine the protection regime created by these instruments. At the same time, they create difficulties for States, for example because restrictive practices turn refugees to countries with a more generous practice.

After the introduction, the second part of this study examines the content of Article 35 of the 1951 Convention and Article II of the 1967 Protocol and their actual application by UNHCR and the States parties to these instruments. The third part of the study is devoted to a discussion of the need to complement UNHCR's supervisory activities with monitoring mechanisms that are linked to but independent of UNHCR. This examination includes a comparative analysis of different supervisory models in different areas of international law, and an assessment of their effectiveness and relevance to the international refugee protection framework. The study ends with a set of recommendations on how to achieve more effective implementation of the 1951 Convention and the 1967 Protocol.

The term 'supervision' as such covers many different activities which range from the protection work UNHCR is carrying out on a daily basis in its field activities on the one hand to the public scrutiny of State practice and the supervision of violations by expert bodies or political organs on the other hand. This makes it necessary to distinguish clearly between *supervision* carried out by UNHCR itself, and *monitoring* by other bodies or organs. The former are covered by Article 35 of the 1951 Convention and Article II of the 1967 Protocol as understood today; the latter may go beyond these provisions even though they would be consistent with their object and purpose. The division of the study into two parts reflects this distinction.

1 Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA Res. 428(V), 14 Dec. 1950.
2 189 UNTS 150 (hereinafter the '1951 Convention').
3 606 UNTS 267 (hereinafter the '1967 Protocol').
4 On UNHCR's analysis of implementation problems, see the text below at nn. 78–81.

II. UNHCR's supervisory role under Article 35 of the 1951 Convention

A. Main content

The next three subsections outline the main content of the obligations of States under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, as well as the duties of States not party to either instrument.

1. Cooperation duties

Article 35(1) of the 1951 Convention, subtitled 'Co-operation of the national authorities with the United Nations', reads:

> The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

Article II(1) of the 1967 Protocol contains the same obligations in relation to UNHCR's functions, including its 'duty of supervising the application of the present Protocol'.

What is the object and purpose of these provisions? Article 35(1) of the 1951 Convention is directly linked to the sixth preambular paragraph of the Convention,[5] noting

> that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner.

This in turn refers to UNHCR's Statute granting the organization the power 'to assume the function of providing international protection, under the auspices of the United Nations, to refugees', and to exercise this function, among others, by '[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto' and by '[p]romoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States'.[6] Article 35 is not, however, limited to cooperation in the area of the application of treaties but, as the clear

5 N. Robinson, *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation* (Institute of Jewish Affairs, New York, 1953), p. 167.

6 Ibid., paras. 1 and 8(a) and (d).

wording shows, refers to 'any and all of the functions of the High Commissioner's office, irrespective of their legal basis'.[7]

As the drafting history of Article 35(1) of the 1951 Convention shows, the significance of this provision was fully realized from the beginning. While the original draft required States to 'facilitate the work' of UNHCR,[8] the present stronger wording ('and shall in particular facilitate its duty of supervising the application of the provisions of this Convention') goes back to a US proposal submitted in order to 'remove the hesitant tone of' the original draft.[9] The fact that Article 35 was regarded as a strong obligation that might be too burdensome for some States led to the adoption of a French proposal to exclude this provision from the list of Articles to which no reservations can be made (Article 42 of the 1951 Convention).[10] The fundamental importance of this provision was also recognized by the High Commissioner when he stressed, in his opening statement to the Conference of Plenipotentiaries, that establishing, in Article 35, a link between the Convention and UNHCR 'would be of particular value in facilitating the uniform application of the Convention'.[11]

The primary purpose of Article 35(1) of the 1951 Convention and Article II(1) of the 1967 Protocol is thus to link the duty of States Parties to apply the Convention and the Protocol with UNHCR's task of supervising their application by imposing a treaty obligation on States Parties (i) to respect UNHCR's supervisory power and not to hinder UNHCR in carrying out this task, and (ii) to cooperate actively with UNHCR in this regard in order to achieve an optimal implementation and harmonized application of all provisions of the Convention and its Protocol. These duties have a highly dynamic and evolutive character. By establishing a duty of States Parties to cooperate with UNHCR 'in the exercise of its functions', Article 35(1) of the 1951 Convention does not refer to a specific and limited set of functions but to all tasks that UNHCR has under its mandate or might be entrusted with at a given time.[12] Thus, the cooperation duties follow the changing role of UNHCR.

2. Reporting duties

Article 35(2) of the 1951 Convention provides:

> In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the

7 A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (UNHCR, Geneva, 1997), p. 254.

8 See draft Art. 30 of the Working Group, reprinted in *The Refugee Convention 1951, The Travaux Préparatoires Analysed, with a Commentary by the Late Dr Paul Weis* (Cambridge International Documents Series, Vol. 7, Cambridge University Press, 1995), p. 355. For the discussions at the Conference of Plenipotentiaries, see in particular UN doc. A/CONF.2/SR.25, pp. 10–22.

9 Weis, above n. 8, p. 356, referring to UN doc. E/AC.32/L.40, pp. 59–60.

10 Conference of Plenipotentiaries, UN doc. A/CONF.2/SR.27, pp. 10–16.

11 Conference of Plenipotentiaries, UN doc. A/CONF.2/SR.2, p. 17, Statement by Mr G. van Heuven-Goedhardt.

12 V. Türk, *Das Flüchtlingshochkommissariat der Vereinten Nationen (UNHCR)* (Duncker and Humblot, Berlin, 1992), p. 162.

competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(a) the condition of refugees,
(b) the implementation of this Convention, and
(c) laws, regulations and decrees which are, or may hereinafter be, in force relating to refugees.

Article II(2) of the 1967 Protocol contains an analogous duty for the States Parties to the 1967 Protocol. Both provisions impose reporting obligations on States Parties to facilitate UNHCR's duty to 'report annually to the General Assembly through the Economic and Social Council' as provided for by UNHCR's Statute.[13] This in another area where a link between the Convention and UNHCR's Statute is established.

3. *States not party to the 1951 Convention or 1967 Protocol*

Article 35 of the 1951 Convention and Article II of the 1967 Protocol do not, of course, bind States that have not yet become parties to these two instruments. Nevertheless, these States might still have a duty to cooperate with UNHCR. Such a duty has been recognized in Article VIII of the 1969 OAU Refugee Convention[14] and Recommendation II(e) of the 1984 Cartagena Declaration on Refugees.[15] Like the 1951 Convention and the 1967 Protocol, these instruments reflect the wide supervisory powers granted to UNHCR in paragraph 8 of its Statute to provide for protection of all refugees falling under its competence and, in doing so, to supervise the application of international refugee law. The statutory power of UNHCR to supervise thus exists in relation to all States with refugees of concern to the High Commissioner regardless of whether or not the State concerned is a party to any of these instruments. The corollary duty of States to cooperate is reflected in General Assembly Resolution 428(V) on the Statute of UNHCR which called upon governments 'to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions'.[16] Arguably, this duty is not only a moral one,[17] but has a legal basis in Article 56 of the 1945 United Nations Charter on the obligation of

13 UNHCR Statute, above n. 1, para. 11.
14 Organization of African Unity, 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1000 UNTS 46 (hereinafter the 'OAU Refugee Convention').
15 Declaration on Refugees, adopted at a Colloquium entitled 'Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios', held at Cartagena, Colombia, 19–22 Nov. 1984.
16 UNGA Res. 428(V), 14 Dec. 1950.
17 M. Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff, The Hague, 1997), p. 450.

member States to cooperate with the UN,[18] a duty that extends to UNHCR in its capacity as one of the subsidiary organs of the General Assembly.

B. Current practice

In current practice, Article 35 of the 1951 Convention and Article II of the 1967 Protocol have three main functions: (i) they provide the legal basis for the obligation of States to accept UNHCR's role of providing international protection to asylum seekers and refugees; (ii) they provide the legal basis for the obligation of States to respond to information requests by UNHCR; and (iii) they support the authoritative character of certain UNHCR statements (for example, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*,[19] policy guidelines, court submissions, and so forth).[20]

1. UNHCR's protection role

International protection denotes 'the intercession of an international entity either at the behest of a victim or victims concerned, or by a person on their behalf, or on the volition of the international protecting agency itself to halt a violation of human rights' or 'to keep safe, defend, [or] guard' a person or a thing from or against a danger or injury.[21] International protection on behalf of refugees is UNHCR's core function.[22] It has evolved from a surrogate for consular and diplomatic protection of refugees who can no longer enjoy such protection by their country of origin into a broader concept that includes protection not only of rights provided for by the 1951 Convention and the 1967 Protocol but also of refugees' human rights in

18 See Grahl-Madsen, above n. 7, p. 252, pointing out that 'it seems that the provision contained in Article 35 actually gives effect to the obligation which Member States have entered into by virtue of Article 56 of the Charter'.

19 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992) (hereinafter the 'UNHCR *Handbook*').

20 In addition, these Articles give a certain foundation to bilateral cooperation agreements. See Agreement Between the Government of the People's Republic of China and the Office of the United Nations High Commissioner for Refugees on the Upgrading of the UNHCR Mission in the People's Republic of China to UNHCR Branch Office in the People's Republic of China of 1 Dec. 1995 (available on *Refworld*, CD-ROM, UNHCR, 8th edn, 1999), and the Agreement Between the Government of the Republic of Ghana and the United Nations High Commissioner for Refugees of 16 Nov. 1994 (available on *Refworld*), explicitly stating in Art. III that cooperation 'in the field of international protection of and humanitarian assistance to refugees and other persons of concern to UNHCR shall be carried out on the basis', among others, of Art. 35 of the 1951 Convention.

21 B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights* (Martinus Nijhoff, Dordrecht, 1989), pp. 17 and 20–1.

22 UNHCR Statute, above n. 1, para. 8. See n. 27 below for text of para. 8.

general.[23] It can be defined as the totality of its activities aimed at 'ensuring the basic rights of refugees, and increasingly their physical safety and security',[24] beginning 'with securing admission, asylum, and respect for basic human rights, including the principle of *non-refoulement*, without which the safety and even survival of the refugee is in jeopardy' and ending 'only with the attainment of a durable solution, ideally through the restoration of protection by the refugee's own country'.[25] As has been recognized by the UN General Assembly, such international protection is a dynamic and action-oriented function.[26]

UNHCR's protection activities are listed in some detail in paragraph 8 of its Statute.[27] For the topic of this study, paragraph (a) regarding UNHCR's task

23 V. Türk, 'UNHCR's Supervisory Responsibility', 14(1) *Revue Québécoise de Droit International*, 2001, p. 135 at p. 138.

24 UNHCR, 'Note on International Protection', UN doc. A/AC.96/930, 7 July 2000, para. 2. See also, UNHCR, 'Note on International Protection', UN doc. A/AC.96/830, 7 Sept. 1994, para. 12. On the protection of refugees by UNHCR in general, see, Türk, above n. 12, pp. 139–69; G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), pp. 207–20; F. Schnyder, 'Les aspects juridiques actuels du problème des réfugiés', Academy of International Law, *Recueil des Cours*, 1965-I, pp. 346–7 and 406–23. See also J. Sztucki, 'The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme', 1 *International Journal of Refugee Law*, 1989, pp. 291–4.

25 Note on Protection 1994, above n. 24, para. 12. See also, Note on Protection 2000, above n. 24, para. 9.

26 UNGA Res. A/RES/55/74, 12 Feb. 2001, para. 8. See also, Executive Committee, Conclusion No. 89 (LI), 2000, Conclusion on International Protection, para. 2.

27 This provision reads:

> 8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:
>
> (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
> (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
> (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
> (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
> (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
> (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
> (g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
> (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
> (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

This list of activities is non-exhaustive, as is evidenced by the many UN General Assembly resolutions that have enlarged UNHCR's protection mandate (Türk, above n. 12, p. 148).

of '[p]romoting the conclusion and ratification of international conventions for the protection of refugees [and] supervising their application' is of particular relevance.[28] UNHCR has noted that:

> 2. . . . In carrying out this mandate at a national level, UNHCR seeks to ensure a better understanding and a more uniform interpretation of recognized international principles governing the treatment of refugees. The development of appropriate registration, reception, determination and integration structures and procedures is therefore not only in the national interest of the countries concerned, but also in the interest of the international community, as it helps stabilize population movements and provide a meaningful life for those who are deprived of effective protection. In creating this mandate for UNHCR, the international community recognized that a multilateral response to the refugee problem would ensure a coordinated approach in a spirit of international cooperation.
>
> 3. The mandate for international protection gives UNHCR its distinctive character within the United Nations system. International protection involves also promoting, safeguarding and developing principles of refugee protection and strengthening international commitments, namely to treat refugees in accordance with international rules and standards . . .[29]

International protection is ultimately oriented towards finding durable solutions for the protected individuals

> be it in the form of voluntary repatriation, local integration or resettlement. In addition, preventive action is necessary to address the economic, social and political aspects of the refugee problem. The protection mandate is therefore intrinsically linked with the active search for durable solutions. This is necessarily embedded in an international legal framework which ensures predictability and foreseeability as well as a concerted approach within a framework of increased state responsibility, international cooperation, international solidarity and burden-sharing.[30]

In its 2000 Note on Protection, UNHCR mentioned the following activities as particularly important components of its protection work: (i) receiving asylum seekers and refugees; (ii) intervening with authorities; (iii) ensuring physical safety; (iv) protecting women, children, and the elderly; (v) promoting national legislation and asylum procedures; (vi) participating in national refugee status determination procedures; (vii) undertaking determination of refugee status; and (viii) providing

28 On the application *ratione personae* and *ratione materiae* of Art. 8 of the UNHCR Statute, see Türk, above n. 23, pp. 141–5.

29 Executive Committee of the High Commissioner's Programme, Standing Committee, 'Overview of Regional Developments (Oct.–Dec. 1995)', UN doc. EC/46/SC/CRP.11, 4 Jan. 1996, paras. 2 and 3.

30 Ibid., para. 3.

advice and developing jurisprudence.[31] The Executive Committee, in many of its Conclusions, has reaffirmed UNHCR's mandate in these areas of activities, in particular its role:

- to contribute to the development and observance of basic standards for the treatment of refugees, 'by maintaining a constant dialogue with Governments, non-governmental organizations (NGOs) and academic institutions and of filling lacunae in international refugee law',[32] and to provide advice on the application of the relevant instruments of refugee law;[33]
- to monitor refugee status determination and treatment of refugees by 'survey[ing] individual cases with a view to identifying major protection problems'[34] and by participating 'in various forms . . . in procedures for determining refugee status in a large number of countries',[35] either through informal intervention in individual cases or by playing a formal role, as defined by relevant domestic obligations, in decision-making procedures;
- to have prompt and unhindered access to asylum seekers, refugees, and returnees,[36] including those in reception centres, camps, and refugee settlements,[37] asylum applicants and refugees, including those in detention, being at the same time entitled to contact UNHCR and being duly informed of this right;[38] and
- to 'monitor the personal security of refugees and asylum-seekers and to take appropriate action to prevent or redress violations thereof'.[39]

In practice, the obligation to respect and accept UNHCR's international protection activities as provided by Article 35(1) is well established and well rooted in State

31 Note on Protection 2000, above n. 24, paras. 10–29.
32 Executive Committee, Conclusion No. 29 (XXXIV), 1983, paras. b and j, mentioning the areas of asylum seekers whose status has not been determined or the physical protection of refugees and asylum seekers.
33 E.g. in situations of mass influx (Executive Committee, Conclusion No. 19 (XXXI), 1980, para. d) or on the exclusion clauses (Executive Committee, Conclusion No. 69 (XLIII), 1992, second preambular para.).
34 Executive Committee, Conclusion No. 1 (XXVI), 1975, para. g.
35 Executive Committee, Conclusion No. 28 (XXXIII), 1982, para. e.
36 Executive Committee, Conclusions Nos. 22 (XXXII), 1981, para. III; 33 (XXXV), 1984, para. h; 72 (XLIV), 1993, para. b; 73 (XLV), 1994, para. b(iii); 77 (XLVI), 1995, para. q; 79 (XLVII), 1996, para. p.
37 Executive Committee, Conclusions Nos. 22 (XXXII), 1981, para. III; 48 (XXXXVIII), 1987, para. 4(d).
38 Executive Committee, Conclusions Nos. 8 (XXVIII), 1977, para. e(iv); 22 (XXXII), 1981, para. III; 44 (XXXVII), 1986, para. g.
39 Executive Committee, Conclusion No. 72 (XLIV), 1993, para. e. See also, Executive Committee, Conclusion No. 29 (XXXIV), 1983, para. b.

practice. Although paragraph 8 of the Statute does not refer to the international protection of refugees as individuals when listing the elements of international protection, it was immediately established by State practice that UNHCR could also take up individual cases.[40] Unlike, for example, in the field of human rights where interventions by an international body on behalf of individual victims or visits to the territory of States often raise problems, States do not object if UNHCR intervenes in individual cases[41] or in general issues relevant to refugees, and do not regard such activities as an intervention in their internal affairs.[42] This general acceptance of UNHCR's protection role is rooted in, among others, the fact that, due to its Statute and Article 35 of the 1951 Convention, 'UNHCR does not have to be invited to become involved in protection matters', something that makes 'UNHCR's mandate distinct, even unique, within the international system'.[43]

While not exhaustively enumerated here, current practice which has broadly met with the acquiescence of States[44] can be described as follows:[45]

- UNHCR is entitled to monitor, report on, and follow up its interventions with governments regarding the situation of refugees (for example, admission, reception, and treatment of asylum seekers and refugees). Making representations to governments and other relevant actors on protection concerns is inherent in UNHCR's supervisory function.
- UNHCR is entitled to cooperate with States in designing operational responses to specific problems and situations that are sensitive to and meet protection needs, including those of the most vulnerable asylum seekers and refugees.
- In general, UNHCR is granted, at a minimum, an advisory and/or consultative role in national asylum or refugee status determination procedures. For instance, UNHCR is notified of asylum applications, is informed of the course of the procedures, and has guaranteed access to files and decisions that may be taken up with the authorities, as appropriate. UNHCR

40 S. Aga Khan, 'Legal Problems Relating to Refugees and Displaced Persons', Academy of International Law, *Recueil des Cours*, 1976-I, p. 332; Grahl-Madsen, above n. 7, p. 254.

41 Goodwin-Gill, above n. 24, p. 213.

42 See Executive Committee of the High Commissioner's Programme, Standing Committee, 'Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It', 8th meeting, UN doc. EC/47/SC/CRP.27, 30 May 1997, para. 7. See also, Türk, above n. 12, p. 158.

43 Note on International Protection 2000, above n. 24, para. 71.

44 See also, UNHCR Global Consultations on International Protection, Cambridge Expert Roundtable, 'Summary Conclusions – Supervisory Responsibility', 9–10 July 2001, paras. 4 and 5.

45 See Standing Committee, 'Progress Report on Informal Consultations', above n. 42, para. 7; and Note on Protection 2000, above n. 24, paras. 10–29. See also Türk, above n. 23, pp. 149–54 with detailed references to State practice.

is entitled to intervene and submit its observations on any case at any stage of the procedure.

- UNHCR is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements, or letters.
- UNHCR is granted access to asylum applicants and refugees and vice versa, either by law or administrative practice.
- To ensure conformity with international refugee law and standards, UNHCR is entitled to advise governments and parliaments on legislation and administrative decrees affecting asylum seekers and refugees during all stages of the process. UNHCR is therefore generally expected to provide comments on and technical input into draft refugee legislation and related administrative decrees.
- UNHCR also plays an important role in strengthening the capacity of relevant authorities, judges, lawyers, and NGOs, for instance, through promotional and training activities.
- UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular of its supervisory responsibility.
- UNHCR is entitled to receive data and information concerning asylum seekers and refugees.

2. *Information requests by UNHCR*

Based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol, particularly their subparagraphs 2, UNHCR requests information from States Parties on a regular basis, particularly within the context of its daily protection activities, and States are obliged to provide such information. Such information represents an important source for UNHCR's annual protection reports on the state of refugee protection in individual States (which remain confidential) as well as for certain of its public statements. The gathering of such information on legislation, court decisions, statistical details, and country situations facilitates the work of UNHCR staff. Until recently, it was made available to States and their authorities, to refugees and their legal representatives, and to NGOs, researchers, and the media through the Centre for Documentation and Research (CDR) and its databases. This gathering and dissemination of information is of paramount importance for the protection of asylum seekers and refugees.[46] It helps, for example, to identify State practice in the application of the 1951 Convention and 1967 Protocol and to distribute knowledge about best practices in dealing with refugee situations. Therefore, UNHCR

46 See also Grahl-Madsen, above n. 7, pp. 254 and 255, stressing the importance of Art. 35(2) of the 1951 Convention for the supervision of the application of the Convention.

has a certain duty to make sure that relevant information is made available in an appropriate way.

Information gathering on the basis of Article 35(2) of the 1951 Convention and Article II(2) of the 1967 Protocol has never been regularized, for example in the form of an obligation to submit State reports at regular intervals. From time to time, however, UNHCR has sent questionnaires to States Parties.[47] In recent years, this has been rare and not very successful. After a discussion on issues relating to the implementation of the 1951 Convention and the 1967 Protocol during the 1989 session of the Executive Committee,[48] UNHCR sent out a comprehensive and detailed questionnaire on 9 May 1990. The response was disappointing: by July 1992, only twenty-three States had responded;[49] a call by the Executive Committee to submit outstanding answers yielded only five additional answers.[50]

3. *The authoritative character of the UNHCR* Handbook *and UNHCR guidelines and statements*

In recent years, some courts have invoked Article 35 of the 1951 Convention when deciding the relevance of the UNHCR *Handbook* or UNHCR statements regarding questions of law or of Conclusions by the Executive Committee of the High Commissioner's Programme. While UK courts, for a long time, insisted on the non-binding nature of such documents and their corresponding irrelevance for judicial proceedings,[51] their attitude has been changing recently. In the case of

47 Weis, above n. 8, pp. 362–3.

48 See Executive Committee, Conclusion No. 57 (XL), 1989, Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, para. d, requesting 'the High Commissioner to prepare a more detailed report on implementation of the 1951 Convention and the 1967 Protocol for consideration by this Sub-Committee in connection with activities to celebrate the fortieth anniversary of the Convention and called on States Parties to facilitate this task, including through the timely provision to the High Commissioner, when requested, of detailed information on implementation of the Convention and/or Protocol in their respective countries'. See also, the background document, Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SPC/54, 7 July 1989.

49 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SCP/66, 22 July 1991, para. 3.

50 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees – Some Basic Questions', UN doc. EC/1992/SPC/CRP.10, 15 June 1992, para. 6.

51 See, e.g., Lord Bridge of Harwich in *R.* v. *Secretary of State for the Home Department, ex parte Bugdaycay*, House of Lords, [1987] AC 514, [1987] 1 All ER 940, 19 Feb. 1987, on the *Handbook* and Executive Committee Conclusions: '[I]t is, as it seems to me, neither necessary nor desirable that this House should attempt to interpret an instrument of this character which is of no binding force either in municipal or international law.' See also, Staughton LJ in *Alsawaf* v. *Secretary of State for the Home Department*, Court of Appeal (Civil Division), [1988] Imm AR 410, 26 April 1988 (quoting Art. 35

Khalif Mohamed Abdi, the English Court of Appeal held that by reason of Article 35 of the 1951 Convention UNHCR should be regarded as 'a source of assistance and information'.[52] In *Adimi*, Simon Brown LJ of the English High Court, when quoting the UNHCR Guidelines on the Detention of Asylum Seekers, went even further, stating: 'Having regard to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight.'[53] The House of Lords has sought guidance from the *Handbook*[54] and Executive Committee Conclusions[55] on several occasions, without however referring to Article 35 of the 1951 Convention. In *T.* v. *Secretary of State for the Home Department*, Lord Mustill recognized that 'the UNHCR *Handbook* . . . although without binding force in domestic or international law . . . is a useful recourse on doubtful questions', and Lord Lloyd of Berwick, in the same judgment, called the *Handbook* an 'important source of law (though it does not have the force of law itself)'.[56] Similarly, the US Supreme Court, in *Cardoza Fonseca*, stressed that the *Handbook* had no force of law, but 'provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.'[57] In the Netherlands, the District Court of The Hague acknowledged the relevance of a UNHCR position paper on the basis of UNHCR's supervisory role according to Article 35(1) of the 1951 Convention.[58] The New Zealand Refugee

of the 1951 Convention and referring to Lord Bridge in *Musisi*), and *Thavathevathasan* v. *Secretary of State for the Home Department*, Court of Appeal (Civil Division), [1994] Imm AR 249, 22 Dec. 1993. In *R.* v. *Secretary of State for the Home Department, ex parte Mehari et al.*, High Court (Queen's Bench Division), [1994] QB 474, [1994] 2 All ER 494, 8 Oct. 1993, Laws J stressed the fact that the *Handbook*, Executive Committee Conclusions and UNHCR statements had no particular relevance for the decision of individual cases because Art. 35 had not been incorporated into domestic law.

52 *Secretary of State for the Home Department* v. *Khalif Mohamed Abdi*, English Court of Appeal (Civil Division), [1994] Imm AR 402, 20 April 1994, Gibson LJ.

53 *R.* v. *Uxbridge Magistrates' Court and Another, ex parte Adimi*, English High Court (Divisional Court), Brown LJ, 29 July 1999, [1999] Imm AR 560, [1999] 4 All ER 520.

54 See, e.g., Lord Lloyd of Berwick in *Horvath* v. *Secretary of State for the Home Department*, House of Lords, [2000] 3 All ER 577, [2000] 3 WLR 379, 6 July 2000, invoking the *Handbook* to buttress his argument, but also counselling that 'there is a danger in regarding the UNHCR *Handbook* as if it had the same force as the Convention itself'.

55 See, e.g., Lord Hoffmann in *R.* v. *Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah*, and *Islam* v. *Secretary of State for the Home Department*, conjoined appeals, UK House of Lords, [1999] 2 WLR 1015; [1999] 2 AC 629, quoting with approval Executive Committee, Conclusion No. 39, 1985, on 'Refugees, Women and International Protection'.

56 *T.* v. *Secretary of State for the Home Department*, UK House of Lords, 22 May 1996, [1996] 2 All ER 865, [1996] 2 WLR 766.

57 *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, US Supreme Court, 480 US 421; 107 S.Ct. 1207; 1987 US Lexis 1059; 94 L. Ed. 2d 434; 55 USLW 4313, 9 March 1987 (although Powell J, Rehnquist CJ, and White J dissented from this holding). Reaffirmed in *Immigration and Naturalization Service* v. *Juan Anibal Aguirre-Aguirre*, US Supreme Court, 526 US 415; 119 S.Ct. 1439; 3 May, 1999, where the Court, at the same time, recalled the *Handbook*'s non-binding character.

58 *Osman Egal* v. *State Secretary for Justice*, The Hague District Court (Administrative Law Sector/Unity of Law Division for Aliens' Affairs), 27 Aug. 1998, AWB 98/3068 VRWET (available in partial translation on *Refworld*).

Status Appeals Authority after invoking Article 35(1) of the 1951 Convention held that the 'Conclusions of the Executive Committee of the UNHCR Programme . . . while not binding upon the Authority, are nonetheless of considerable persuasive authority'.[59]

This case law is significant as it acknowledges that, as part of States Parties' duty to cooperate with UNHCR and to accept its supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, they have to take into account Executive Committee Conclusions, the UNHCR *Handbook*, UNHCR guidelines, and other UNHCR positions on matters of law (for example, *amicus curiae* and similar submissions to courts or assessments of legislative projects requested or routinely accepted by governments), when applying the 1951 Convention and its Protocol. 'Taking into account' does not mean that these documents are legally binding.[60] Rather, it means they must not be dismissed as irrelevant but regarded as authoritative statements whose disregard requires justification.

C. The hybrid character of supervision by UNHCR

The notion of supervision of international instruments covers all activities and mechanisms that are aimed at ensuring compliance with the obligations binding upon State Parties.[61] It comprises the three elements of (i) information gathering, (ii) analysis and assessment of this information, and (iii) enforcement.[62] Activities of UNHCR based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol cover all three elements.[63] In particular, UNHCR's interventions on behalf of individual asylum seekers and refugees and its dialogue with governments on particular laws or policies serve to enforce the Convention and the Protocol. In this sense, UNHCR is an agency vested with some power to supervise States in their application of relevant provisions of international refugee law. This arrangement reflects the development of international law before and after the Second World War when supervision of rule compliance was no longer left to the highly decentralized, 'horizontal' system of enforcement measures by individual States alone, but was complemented by the creation of international organizations having some limited supervisory power.[64] At the same time, it would be inadequate to regard UNHCR's

59 *ReS.A.*, Refugee Appeal No. 1/92, New Zealand, Refugee Status Appeals Authority, 30 April 1992, available on http://www.refugee.org.nz/rsaa/text/docs/1-92.htm.

60 See Sztucki, above n. 24, pp. 309–11, listing several reasons for what he calls 'the relative low status of the Conclusions'.

61 N. M. Blokker and S. Muller, 'Some Concluding Observations', in *Towards More Effective Supervision by International Organizations: Essays in Honour of Henry G. Schermers* (eds. N. M. Blokker and S. Muller, Martinus Nijhoff, Dordrecht/Boston/London, 1994), vol. I, p. 275.

62 See Türk, above n. 23, p. 146. 63 Ibid., pp. 147–9.

64 On this development, see Blokker and Muller, above n. 61, pp. 275–80.

activities as supervision only. UNHCR is an operational organization that is not only providing assistance but also carrying out protection work on the ground on a daily basis. In this role, UNHCR is an advisor to and an (often critical) partner of governments, as well as a supporter or advocate of refugees. This creates horizontal relationships which are clearly distinct from the vertical relationship between supervisor and subordinate. As has been stressed by Türk, it is necessary to distinguish clearly between two distinctive features of UNHCR's international protection function: '(i) its "operationality"; and (ii) its supervisory function'.[65] The two functions often complement each other, but they may also come into conflict, for instance, if a strong critique of non-compliance would endanger operations on the ground.

III. More effective implementation through third party monitoring mechanisms

A. The need to move forward

1. The struggle for improved implementation

UNHCR's supervisory role and its positive impact on the protection of asylum seekers and refugees is unique, especially when compared to the monitoring mechanisms provided for by other human rights treaties. Unlike the 1951 Convention and 1967 Protocol, these treaties do not have an operational agency with a presence of 'protection officers' in a large number of countries working to ensure that these instruments are implemented.

However, human rights mechanisms have started to play a significant role in protecting the rights of refugees and asylum seekers. Thus, for example, Article 3 of the 1984 Convention Against Torture[66] states: '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.' It thus protects among others rejected asylum seekers from forcible return to their country of origin in cases of imminent torture.[67] Similarly, the Human Rights Committee came to the conclusion that Article 7 of the International Covenant on

65 Türk, above n. 23, p. 138.

66 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, UN doc. A/RES/39/46, 10 Dec. 1984.

67 See, e.g., *Balabou Mutombo* v. *Switzerland*, views of the Committee Against Torture under Art. 22, concerning Communication No. 13/1993, adopted on 27 April 1994 (Annual Report 1994, UN doc. A/49/44), para. 9.3, p. 45; also in 15 *Human Rights Law Journal*, 1994, p. 164, and 7 *International Journal of Refugee Law*, 1995, p. 322.

Civil and Political Rights[68] forbids States Parties from exposing 'individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'.[69] The Human Rights Committee also decided that forcible return is prohibited if the individual concerned risks a violation of the right to life in the country to which he or she is to be returned[70] and applied this reasoning in the case of a rejected asylum seeker.[71] On the regional level, the prohibition of return to situations of torture and inhuman treatment has led to a particularly rich case law in Europe since the European Court of Human Rights[72] in 1989 derived such a prohibition from Article 3 of the European Human Rights Convention.[73] The Human Rights Committee and the European Court of Human Rights have also addressed other aspects of refugee protection, namely, issues relating to the detention of asylum seekers.[74]

Despite the uniqueness of UNHCR's supervisory role and the positive impact of recent developments in the area of human rights law on the protection of refugees, weaknesses of the present system persist. They have been a matter of debate on several occasions.

In 1986, the Executive Committee called upon States to adopt 'appropriate legislative and/or administrative measures for the effective implementation of the international refugee instruments'[75] and to accept the utmost importance of the 'effective application of the principles and provisions of the 1951 Convention and the 1967 Protocol'.[76] In 1989, the Executive Committee recalled 'the utmost

68 International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, 999 UNTS 171.

69 Human Rights Committee, General Comment No. 20/44 of 3 April 1992 (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc. HRI/GEN/1/Rev.5, 26 April 2001, para. 9, p. 140. See also, *Charles Chitat Ng* v. *Canada*, views of the Human Rights Committee, in respect of Communication No. 469/1991, adopted on 5 Nov. 1993, Annual Report 1994, vol. II, UN doc. A/49/40, para. 14.2, p. 189, also in 15 *Human Rights Law Journal*, 1994, p. 149.

70 *Joseph Kindler* v. *Canada*, views of the Human Rights Committee under Art. 5, para. 4, of the Optional Protocol, in respect of Communication No. 470/1991, adopted on 30 July 1993, Annual Report 1993, vol. II, UN doc. A/48/40, para. 13.1, p. 138, also in 14 *Human Rights Law Journal*, 1993, p. 307.

71 *Mrs G.T. on Behalf of Her Husband T.* v. *Australia*, views of the Human Rights Committee in respect of Communication No. 706/1996, adopted on 4 Nov. 1997, Annual Report, vol. II, UN doc. A/53/40, para. 8.2, p. 191; and *A.R.J.* v. *Australia*, views of the Human Rights Committee in respect of Communication No. 692/1996, adopted on 28 July 1997, Annual Report 1997, vol. II, UN doc. A/52/40, para. 6.9, p. 205.

72 *Soering* v. *United Kingdom*, 1989, European Court of Human Rights, Series A, No. 161.

73 Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 Nov. 1950, ETS 5, prohibits torture and inhuman and degrading treatment or punishment.

74 See, e.g., *A.* v. *Australia*, views of the Human Rights Committee, in respect of Communication No. 560/1993, adopted on 3 April 1997, Annual Report 1997, vol. II, UN doc. A/52/40, p. 225; *Amuur* v. *France*, 1996, European Court of Human Rights, *Reports* 1996-III, p. 826.

75 Executive Committee, Conclusion No. 42 (XXXVII), 1986, para. j.

76 Executive Committee, Conclusion No. 43 (XXXVII), 1986, para. 3.

importance of effective application of the Convention and Protocol', underlined 'again the need for the full and effective implementation of these instruments by Contracting States', and linked these calls to Article 35 of the 1951 Convention; in particular, it

> (a) *Stressed* the need for a positive and humanitarian approach to continue to be taken by States to implementation of the provisions of the Convention and Protocol in a manner fully compatible with the object and purposes of these instruments;
> (b) *Reiterated* its request to States to consider adopting appropriate legislative and/or administrative measures for the effective implementation of these international refugee instruments;
> (c) *Invited* States also to consider taking whatever steps are necessary to identify and remove possible legal or administrative obstacles to full implementation.[77]

The background for these calls was the acknowledgment that the implementation of the 1951 Convention and 1967 Protocol was facing considerable difficulties. UNHCR identified three categories of obstacles: socio-economic; legal and policy; and practical.[78] First, regarding socio-economic obstacles, UNHCR stressed that:

> there are inevitable tensions between international obligations and national responsibilities where countries called upon to host large refugee populations, even on a temporary basis, are suffering their own severe economic difficulties, high unemployment, declining living standards, shortages in housing and land and/or continuing man-made and natural disasters.[79]

Secondly, as legal obstacles to proper implementation of the Convention and the Protocol UNHCR mentioned:

> the clash of, or inconsistencies between, existing national laws and certain Convention obligations; failure to incorporate the Convention into national law through specific implementation legislation; or implementing legislation which defines not the rights of the individuals but rather the powers vested in refugee officials. As to the latter, this means that protection of refugee rights becomes an exercise of powers and discretion by officials, rather than enforcement of specific rights identified and guaranteed by law.

77 Executive Committee, Conclusion No. 57 (XL), 1989.
78 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', UN doc. EC/SPC/54, 7 July 1989, paras. 8–22.
79 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees – Some Basic Questions', UN doc. EC/1992/SCP/CRP.10, 15 June 1992, para. 9.

> Where the judiciary has an important role in protecting refugee rights, restrictive interpretations can also be an impediment to full implementation. Finally, the maintenance of the geographic limitation by some countries is a serious obstacle to effective implementation.[80]

Thirdly, on a practical level, UNHCR saw:

> bureaucratic obstacles, including unwieldy, inefficient or inappropriate structures for dealing with refuges, a dearth of manpower generally or of adequately trained officials, and the non-availability of expert assistance for asylum-seekers. Finally, there are certain problems of perception at the governmental level, including that the grant of asylum is a political statement and can be an irritant in inter-state relations.[81]

Many of these obstacles to full implementation persist and continue to create problems at all levels, domestic, regional, and universal. In 2000, the Executive Committee showed itself:

> *deeply disturbed* by violations of internationally recognized rights of refugees which include *refoulement* of refugees, militarization of refugee camps, participation of refugee children in military activities, gender-related violence and discrimination directed against refugees, particularly female refugees, and arbitrary detention of asylum-seekers and refugees; also *concerned* about the less than full application of international refugee instruments by some States Parties.[82]

During informal consultations on Article 35 of the 1951 Convention, conducted under the auspices of UNHCR in 1997, it was recognized that better implementation remains a challenge. Four issues were put forward for further consideration: (i) the problem of '[d]iffering interpretation regarding the content and application of provisions of the international refugee instruments, standards and principles'; (ii) the question whether and how 'State reporting as a whole' should be improved; (iii) the challenge 'of institutionalizing a constructive dialogue at regular intervals with States Parties on the application of the international refugee instruments'; and (iv) the problem of '[m]easures of enforcement'.[83]

2. *Reasons for strengthening the monitoring of the 1951 Convention and 1967 Protocol*

Taking into account that the degree of implementation of the 1951 Convention and 1967 Protocol remains unsatisfactory, strengthening the supervision of the

80 Ibid., para. 9. 81 Ibid. para. 10.
82 Executive Committee, Conclusion No. 89 on International Protection, above n. 26.
83 Standing Committee, 'Progress Report on Informal Consultations', above n. 42, para. 8.

application of these instruments is in the interest of all actors in the field of refugee protection:[84]

1. Non-implementation violates the legitimate interests of *refugees* as well as their rights and guarantees provided for by international law.
2. Prolonged toleration of non-implementation by one State violates the rights of the other *States Parties* to the Convention and other relevant instruments for the protection of refugees. Obligations to implement the provisions of these instruments are obligations *erga omnes partes*, that is, obligations towards the other States Parties as a whole.[85] This is clearly evidenced by Article 38 of the 1951 Convention and Article IV of the 1967 Protocol, entitling every State Party to the Convention or the Protocol to refer a dispute with another State 'relating to its interpretation or application' to the International Court of Justice even if it has not suffered material damage.[86] The 1969 OAU Refugee Convention contains a parallel provision.[87] Non-implementation is detrimental to the material interests of those States Parties that scrupulously observe their obligations. Disregard for international refugee law might create secondary movements of refugees and asylum seekers who have to look for a country where their rights are respected. It forces States that would be ready to treat refugees fully in accordance with international obligations to adopt a more restrictive policy in order to avoid a greater influx of refugees attracted by the higher degree of protection available on their territory.[88] At a regional level, divergent interpretations of the refugee definition or non-compliance may complicate cooperation in the determination of the country responsible for examining an asylum request.
3. Non-implementation is a serious obstacle for *UNHCR* in fulfilling its mandate properly and reduces its capacity to assist States in dealing with refugee situations.

84 On the reasons for improved monitoring of the 1951 Convention and 1967 Protocol, see also L. MacMillan and L. Olson, 'Rights and Accountability', 10 *Forced Migration Review*, April 2001, pp. 38 and 41.

85 On this concept, see, e.g., C. L. Rozakis, 'The European Convention on Human Rights as an International Treaty', in *Mélanges en l'honneur de Nicolas Valticos – Droit et Justice* (ed. Dupuy, Pedone, Paris, 1999), pp. 502–3; M. T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (University of Pennsylvania Press, Philadelphia, PA, 1992), pp. 154–76.

86 See below, text at nn. 100–1.

87 Art. IX of the OAU Refugee Convention, above n. 14, provides that any one of the parties to a dispute 'relating to its interpretation or application, which cannot be settled by other means, shall be referred to the Commission for Mediation, Conciliation and Arbitration of the Organization of African Unity'.

88 See, e.g., Standing Committee, 'Progress Report on Informal Consultations', above n. 42, para. 9.

4. Prolonged toleration of non-implementation seriously undermines the system of international protection as it was established fifty years ago and threatens a regime that has often been able adequately and flexibly to address and solve instances of flight for Convention reasons. Non-implementation is thus detrimental to the proper management of current and future refugee crises at the global level and thus hurts the interests of States Parties to the 1951 Convention and 1967 Protocol and even of the *international community* as a whole.
5. On a more practical level, States might consider a strengthening of supervisory mechanisms at the universal level in order to counterbalance emerging regional mechanisms which might respond to regional problems and expectations rather than upholding the universality of these instruments. In this context, recent developments in Europe are of particular importance as the European Court of Justice, in the near future, will be able to decide on the proper application of European Union law on refugee and asylum matters.[89] To create the possibility for regional organizations to become parties to the 1951 Convention and 1967 Protocol[90] would be another measure to safeguard the uniform application and full implementation of these instruments.

3. *The need for third party monitoring*

For all the reasons outlined above, the urgency and timeliness of taking a fresh look at the issue of supervision is evident. While UNHCR's supervisory function is of paramount importance for the protection of refugees, the persistence of

89 With the Treaty on European Union (Treaty of Amsterdam) of 10 Nov. 1997, visa, asylum, immigration, and other policies related to the free movement of persons were shifted from the 'third pillar' to the 'first pillar' of the European Union, that is, they moved from being an intergovernmental matter to become part of the law of the European Community. Art. 63 of the consolidated version of the Treaty Establishing the European Community stipulates among others that:

> [t]he Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas: . . . (b) minimum standards on the reception of asylum seekers in Member States, (c) minimum standards with respect to the qualification of nationals of third countries as refugees, (d) minimum standards on procedures in Member States for granting or withdrawing refugee status . . .

When implemented into the secondary legislation of the European Community, the European Court of Justice as the supervisor of Community law will, at least indirectly, have the competence on the European level to decide on the application of the 1951 Convention without, however, being bound by this instrument.

90 Ratification of and accession to these instruments is open only to States (Art. 39 of the 1951 Convention and Art. V of the 1967 Protocol).

implementation problems described above makes it necessary to go beyond the traditional discourse on Article 35 of the 1951 Convention and to learn from the different supervisory and monitoring mechanisms in present international law. These mechanisms have in common that they rely, although to a varying degree, on supervision by a third party not directly involved in a dispute regarding implementation of treaty obligations in a particular case.

As a result of the hybrid character of its supervisory function described above,[91] UNHCR's independence must necessarily be limited. UNHCR's 'operationality', namely, its daily protection work on the ground as a partner both of governments and of refugees, often facilitates the carrying out of its supervisory role. At the same time, a tension between the two functions will arise whenever a State or a group of States resents supervision by UNHCR in a particular case. The possibility of providing assistance and protection depends to a certain extent on the degree of confidence that exists between the government concerned and UNHCR, and such trust will often be negatively affected if UNHCR makes its criticism public in order to put more pressure on that State. It is no accident that UNHCR's annual protection reports remain confidential,[92] as their publication might endanger the success of protection and assistance in the country concerned or, in some cases, even the agency's continued presence there. Similarly, there is a tension between UNHCR's interest in putting pressure on States that do not comply with their treaty obligations and its dependence on voluntary financial contributions from the very same States. Operations on the ground and supervision may follow different logics, and conflicts of interest are unavoidable where this is the case. It is therefore necessary to examine forms of supervision that rely on independent bodies or experts, or at least States that are not directly involved in the problem giving rise to supervisory activities, that is, third parties with at least a minimal degree of independence.

The next subsection of this study examines in some detail existing mechanisms that might provide guidance for developing new approaches to supervision in the area of refugee law. In order to distinguish them from supervision by UNHCR under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, the study refers to them interchangeably as 'third party supervision' or 'monitoring by third parties'.

B. Third party supervision in present international law

1. *General framework*

One of the main tasks of international organizations is the supervision of compliance with the rules binding upon the organization and its members.[93] Such

91 See above, section II.C, 'The hybrid character of supervision by UNHCR'.

92 See above, section II.B.2, 'Information requests by UNHCR'.

93 H. G. Schermers and N. M. Blokker, *International Institutional Law* (3rd revised edn, Martinus Nijhoff, The Hague/London/Boston, 1995). I. Seidl-Hohenveldern, 'Failure of Controls in the

supervision can be internal or external. The first oversees 'compliance by an international organization with its own acts', that is the behaviour of its organs and its staff.[94] The latter evaluates 'performance by the members' of the organization 'to which [its] acts are addressed'.[95] External supervision is also at stake where a treaty entrusts an independent body with the task of examining compliance by the States Parties with their treaty obligations. These types of external supervision include 'all methods which help to realize the application of legal rules made by international organizations'[96] or contained in treaties. The present study is limited to forms of external supervision.

External supervision is critical for the effective application and implementation of international law, as '[v]iolations which receive wide attention are more difficult to commit than violations which remain practically unknown'.[97] In present-day international law, such supervision takes many different forms. Based on a categorization developed by Schermers and Blokker,[98] it is possible to distinguish the following forms of supervision:

1. supervision initiated by other States (members of the organization or other parties to the treaty) acting on their own account:
   - dispute settlement by the International Court of Justice;
   - inter-State complaints to treaty bodies or to the organs of the organization;
2. supervision by or on behalf of the organization or the treaty body:
   - supervision based on State reports;
   - supervision based on information collected by the organization;
   - supervision based on requests for an advisory opinion;
3. supervision initiated by individuals:
   - individual petitions;
   - court proceedings.

2. *Supervision initiated by other States*

(a) Dispute settlement by the International Court of Justice

Treaties granting guarantees or even rights to individuals, such as human rights treaties, remain treaties between States. As such, treaty obligations are not only owed to those individuals entitled to its guarantees but are at the same time owed to the other States Parties. This gives all States Parties the right to monitor compliance by other parties with their treaty obligations even if their own interests are not at

Sixth International Tin Agreement', in *Towards More Effective Supervision by International Organizations*, above n. 61, p. 255, regards the supervisory role of international organizations even as their very *raison d'être*.

94 Schermers and Blokker, above n. 93, p. 864. 95 Ibid., p. 865.
96 Ibid. 97 Ibid., p. 867. 98 Ibid., pp. 867–97.

stake.[99] This is an expression of the fact that international law is a highly decentralized legal order where enforcement cannot wait for actions of a centralized agency but depends on the vigilance of all members of the international community.

Many treaties in the area of human rights formalize this right of States Parties to monitor the behaviour of other parties by providing that disputes between States Parties about the interpretation and application of its provisions are to be referred to the International Court of Justice. There is no requirement that the State invoking such a provision should have suffered any material damage as a consequence of a violation; it is sufficient that there persists 'a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations'.[100] The possibility of referral to the International Court of Justice is not only foreseen in many universal conventions and treaties relating to different aspects of human rights protection,[101] but is also embodied in Article 38 of the 1951 Convention and Article IV of the 1967 Protocol.

(b) Inter-State complaints to treaty bodies

In the area of human rights law, treaties that have established a treaty body specifically entrusted with monitoring its implementation, generally do not include provisions on dispute settlement by the International Court of Justice.[102] Instead, four universal and three regional human rights instruments establish procedures allowing for the submission of inter-State complaints to the pertinent treaty body.[103] The

99 See ibid., p. 867, and also Rozakis, above n. 85, pp. 502–3.

100 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, para. 29, quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, ICJ Reports 1950, p. 74, and referring to *East Timor (Portugal* v. *Australia)*, ICJ Reports 1995, p. 100, para. 22.

101 See Art. 8 of the 1926 Slavery Convention, 212 UNTS 17; Art. 9 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; Art. 9 of the 1952 Convention on the Political Rights of Women, 193 UNTS 135; Art. 34 of the 1954 Convention Relating to the Status of Stateless Persons, 360 UNTS 117; Art. 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195; Art. 29 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13; and Art. 30 of the Convention Against Torture.

102 A notable exception is Art. 30 of the Convention Against Torture.

103 See, on the *universal* level, Art. 41 of the ICCPR; Art. 11 of the Convention on the Elimination of Racial Discrimination; Art. 13 of the 1985 Convention Against Apartheid in Sports, 1500 UNTS 161; Art. 21 of the Convention Against Torture; and, on a *regional* level, Art. 33 of the ECHR; Art. 45 of the 1969 American Convention on Human Rights (ACHR), Organization of American States (OAS) Treaty Series No. 35; Art. 47 of the 1981 African (Banjul) Charter on Human and Peoples' Rights (ACHPR), 21 ILM, 1982, p. 58. See, e.g., Kamminga, above n. 85, p. 147; P. H. Kooijmans, 'Inter-State Dispute Settlement in the Field of Human Rights', 3 *Leiden Journal of International Law*, 1990, p. 87; S. Leckie, 'The Inter-State Complaint Procedure in International Law: Hopeful Prospects or Wishful Thinking?', 10 *Human Rights Quarterly*, 1988, p. 249; W. Karl, 'Besonderheiten der internationalen Kontrollverfahren zum Schutz der Menschenrechte', in *Aktuelle Probleme des Menschenrechtsschutzes* (eds. W. Kälin, E. Riedel, W. Karl, B.-O. Bryde, C. von Bar, and R. Geimer, Berichte der Deutschen Gesellschaft für Völkerrecht 33, C. F. Müller, Heidelberg, 1994), pp. 108–10.

universal instruments normally entitle the pertinent treaty body to refer the matter to an ad hoc conciliation commission if a friendly settlement cannot be reached.[104]

The International Labour Organization (ILO) has a more complicated system.[105] Any member State has the right to file a complaint with the ILO if it is of the opinion that another member is not effectively observing an ILO Convention which both have ratified. The Governing Body (the executive body of the ILO) may refer such a complaint to a Commission of Inquiry which, on the basis of information provided to it by the pertinent member States, will prepare a report with its findings on the relevant facts and its recommendations regarding the steps to be taken. If the State concerned is not willing to implement the recommendations and does not submit the dispute to the ICJ, the matter will be referred to the Governing Body and the ILO Conference.

A mechanism that is less an inter-State complaint mechanism and more an institutionalized conciliation procedure is part of the monitoring system of the 1960 UNESCO Convention Against Discrimination in Education.[106] Articles 12–19 of its 1962 (Additional) Protocol[107] institute a Conciliation and Good Offices Commission, which is responsible for seeking a settlement of any disputes which may arise between States Parties to that Convention.[108]

Inter-State complaints to treaty bodies do not depend on the claimant being a victim of a violation directly affecting its material interests. In this sense, the European Court of Human Rights acknowledged that:

> [u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective

104 Art. 42 of the ICCPR; Art. 21 of the Convention Against Torture; Art. 12 of the Convention on the Elimination of All Forms of Racial Discrimination.

105 Arts. 26–34 of the ILO Constitution. See K. Weschke, *Internationale Instrumente zur Durchsetzung der Menschenrechte* (Arno Spitz, Berlin, 2001), pp. 326–7.

106 UN Educational, Scientific and Cultural Organization (UNESCO) Convention Against Discrimination in Education, 14 Dec. 1960, available on http://www.unesco.org/education/information/nfsunesco/pdf/DISCRI_E.PDF.

107 Protocol of 10 Dec. 1962 Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking a Settlement of Any Disputes which May Arise Between States Parties to the Convention Against Discrimination in Education, available on http://www.unesco.org/human_rights/ded.htm.

108 According to these provisions, every State party to this treaty, considering that another State party is not giving effect to one of its provisions is entitled to bring the matter to the attention of that State. Within three months, the receiving State shall afford the complaining State an explanation concerning the matter. If it turns out to be impossible for the States involved to come to a solution bilaterally, either State may submit a complaint to a Commission, which will subsequently draw up a report on the facts and indicate its recommendations with a view to reconciliation. The Commission's reports will finally be communicated to the Director General for publication and to the General Conference, which, upon request of the Commission, may decide that the International Court of Justice be requested to give an advisory opinion on the matter.

> obligations which, in the words of the preamble, benefit from a 'collective enforcement' . . . [T]he Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals.[109]

Inter-State complaints have, however, never been used by States Parties to the pertinent human rights instruments at the United Nations level. There have been a few cases within the framework of the ILO[110] and a few more under the European Convention,[111] but even there they have remained rare.

(c) Assessment

Referral of disputes about the interpretation and application of a treaty provision to the International Court of Justice or submission of an inter-State complaint to a treaty body may serve different purposes. First, proceedings started by a State Party whose own interests have been affected by a violation of international law address isolated cases of non-compliance. Here, the State taking up a case is not so much playing the role of a supervisor but acting as a victim that looks for protection against the violator and hopes for redress.[112]

Secondly, proceedings that are instigated by non-victims are more relevant for monitoring purposes. They are suitable for addressing situations of mass violations[113] or clarifying fundamental issues haunting many States Parties. Here, the *erga omnes* character of human rights[114] and similar guarantees for the individual becomes very clear.[115] States not directly affected by non-compliance have, however, little incentive to become active. First, inter-State complaints are, as Leckie put it, 'one of the most drastic and confrontational legal measures available to states',[116] and thus come with high political costs. Secondly, they obligate the State to do all the fact-finding for itself in order to present a strong case, something a State is not ready to do when international bodies (for example, the UN Commission on Human Rights) have the possibility of investigating the situation on their own.[117]

109 *Ireland* v. *UK*, 1978, European Court of Human Rights, Series A, No. 25, pp. 89–91. See also, European Commission of Human Rights, *Austria* v. *Italy*, 4 *Yearbook of the European Convention on Human Rights*, 11 Jan. 1961, p. 140. See also Inter-American Court of Human Rights, Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention, 24 Sept. 1982, para. 29, reproduced in 22 ILM, 1983, p. 47.

110 Leckie, above n. 103, p. 277.

111 J. Frowein and W. Peukert, *Europäische Menschenrechtskonvention – EMRK-Kommentar* (Engel, Kehl/Strasbourg/Arlington, 1996), p. 516.

112 Within the context of human rights treaties, this constellation is typical for cases of diplomatic protection where the human rights of a citizen of that State have been violated by another State.

113 Karl, above n. 103, p. 108.

114 See above, text at n. 85.

115 Karl, above n. 103, p. 108.

116 Leckie, above n. 103, p. 259.

117 Kälin, above n. 103, p. 17.

3. *Supervision by or on behalf of the organization or the treaty body*

(a) Supervision based on State reports

aa) State reporting under the UN human rights instruments

In the area of international human rights law, State reports are the most prevalent monitoring instrument. Seven universal[118] and two regional[119] human rights instruments oblige States Parties to submit reports on the measures they have taken to implement their treaty obligations and the difficulties they are facing in this process. Treaty monitoring by examining such State reports started in 1970, when the Committee on the Elimination of Racial Discrimination began its operations, and expanded gradually to the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women, the Committee Against Torture, the Committee on Economic, Social and Cultural Rights and, in 1991, the Committee on the Rights of the Child.[120] All these treaty bodies require States to report every four or five years.[121]

All these Committees follow a similar procedure:[122] once the report has been submitted, the secretariat, a rapporteur, or a working group of the Committee identifies key issues and questions to be addressed. This is followed by the most important phase of the whole procedure – the dialogue with the delegation of the State Party concerned. After an introduction by the head of delegation, a discussion is held with the members of the Committee asking questions, and the members of the delegation either responding or promising to give a written answer at a later stage. At the end of the meeting, the members of the Committee make individual comments. The examination of the report ends with the adoption of Concluding Observations expressing the opinion of the Committee as such and addressing both

118 Art. 40 of the ICCPR; Art. 16 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3; Art. 19 of the Convention Against Torture; Art. 9 of the Convention on the Elimination of Racial Discrimination; Art. 44 of the 1989 Convention on the Rights of the Child (CRC), UNGA Res. 44/25; Art. 18 of the Convention on the Elimination of Discrimination Against Women; Art. 73 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN doc. A/RES/45/158.

119 Art. 21 of the 1961 European Social Charter, ETS 35; Art. 62 of the African Charter on Human and Peoples' Rights.

120 H. Klein, 'Towards a More Cohesive Human Rights Treaty System' in *The Monitoring System of Human Rights Treaty Obligations* (ed. E. Klein, Arno Spitz, Berlin, 1998), p. 89. As the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families has not yet entered into force, its Committee has not become operational.

121 Klein, above n. 120, p. 90.

122 See Klein, 'The Reporting System under the International Covenant on Civil and Political Rights' in Klein, above n. 120, pp. 18–23; B. Simma, 'The Examination of State Reports: International Covenant on Economic, Social and Cultural Rights', in Klein, above n. 120, pp. 35–40; R. Wolfrum, 'International Convention on the Elimination of All Forms of Racial Discrimination', in Klein, above n. 120, pp. 55–62; H. B. Schöpp-Schilling, 'The Convention on the Elimination of All Forms of Discrimination Against Women', in Klein, above n. 120, pp. 71–88.

the main areas of progress and of concern. Formalized follow-up procedures do not exist, although some of the Committees under discussion have developed some elements of such procedures.[123]

The objectives of reporting systems were summarized by the Committee on Economic, Social and Cultural Rights in 1994[124] in a manner that can be generalized. First, the reporting duty ensures that the State Party undertakes a comprehensive review of its domestic law and practices 'in an effort to ensure the fullest possible conformity' with its treaty obligations. The second objective is 'to ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction'. Thirdly, the reporting process should enable the State Party to elaborate 'clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions' of the pertinent instrument. The fourth objective is to facilitate public scrutiny of government policies. Fifthly, the reporting process should 'provide a basis on which the state party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained' in the pertinent instrument. 'The sixth objective is to enable the state party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range' of the pertinent human rights and to identify the main difficulties in order to be able to devise more appropriate policies. Finally, the reporting process should 'enable the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the' pertinent guarantees.

bb) State reporting under ILO and UNESCO law

Reporting is an important part of the ILO monitoring system. Member States of this organization are – according to Articles 19 and 22 of the ILO Constitution – requested to report regularly, on the basis of so-called Report Forms,[125] on the measures which they have taken to give effect to the provisions of Conventions binding them, on the implementation of non-binding Recommendations, and even

123 This is particularly true for the Committee on Economic, Social and Cultural Rights: see Simma, above n. 122, pp. 39–41.

124 Committee on Economic, Social and Cultural Rights, General Comment No. 1, Reporting by States Parties, third session, 1989, paras. 2–9, in Compilation of General Comments, above n. 69, pp. 13–14.

125 The ILO has published Report Forms for all material Conventions as well as one for the reporting obligation concerning the non-ratified treaties.

on the reasons for not becoming party to all instruments adopted by the ILO.[126] Since 1926, the reports have been examined by two different organs. First, the Committee of Independent Experts[127] – appointed by the ILO Governing Body – inspects the reports in an objective, technical manner. Questions on matters of secondary importance or technical questions concerning the application of a ratified ILO Convention are sent in writing – called a direct request – directly to the government concerned. More serious or long-standing cases of failure to fulfil conventional obligations are reported as so-called observations to the Governing Body and to the annual International Labour Conference. They form the basis for discussions of individual cases in the second supervisory body, the Tripartite Conference Committee.[128] This organ holds public discussions annually on the main cases of discrepancies in the light of the experts' findings.[129] The reporting process ends with the presentation of the reports in the Plenary Sitting of the International Labour Conference.

A reporting system is also part of UNESCO's monitoring system. Article VII of its Constitution stipulates that 'each Member State shall submit to the Organization, at such times and in such manner as shall be determined by the General Conference, reports on the laws, regulations and statistics relating to its educational, scientific and cultural institutions and activities, and on the action taken upon the recommendations and conventions'. The necessary content of these reports is determined by questionnaires elaborated by the organization. The reports are considered by the UNESCO General Conference. The Conference publishes its findings in a report, which is transmitted, among others, to the member States and the United Nations.[130]

cc) Assessment

Reporting mechanisms under the UN human rights treaties serve important functions[131] and deserve a positive assessment on a conceptual level. However, there

126 The Constitution requires member States to report annually on the application of ratified conventions, but due to the large number of conventions and ratifications detailed reports are at present only requested on any given convention at less frequent intervals. See K. Samson, 'The Protection of Economic and Social Rights Within the Framework of the International Labour Organisation', in *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte* (ed. F. Matscher, Engel, Kehl/Strasbourg/Arlington, 1991), p. 128.

127 The Committee consists of twenty independent persons of the highest standing, with eminent qualifications in the legal or social fields and with an intimate knowledge of labour conditions or administration.

128 This is a political organ, consisting of 200 members who are representatives of governments, employers, or workers' organizations.

129 N. Valticos, 'Once More About the ILO System of Supervision: In What Respect is it Still a Model?' in Blokker and Muller, above n. 61, pp. 104–5; Samson, above n. 126, p. 128; Weschke, above n. 105, p. 325.

130 Adopted by the General Conference at its 5th session, and amended at its 7th, 17th, and 25th sessions.

131 See above, text at n. 124.

seems to be agreement today that in practice reporting mechanisms face serious problems for at least three reasons.

First, many States do not fulfil their reporting duties on time and a very large number of reports are overdue.[132] As of 1 December 1998, there were 124 (out of 151) States Parties with a total of 390 overdue reports within the framework of Convention on the Elimination of Racial Discrimination. The Committee on the Elimination of Discrimination Against Women had 245 overdue reports from 134 (out of 162) States Parties. The relevant 1998 figures for the other Committees were similarly bad.[133] Reasons for this include lack of resources, the burden of a multitude of reporting obligations, fears of criticism, or simply the fact that some countries ratified treaties 'without bothering much about the domestic as well as international procedural obligations entailed'.[134]

Secondly, if all reports arrived on time, the Committees would not be able to process them in due course.[135] Alston estimated in 1996 that, depending on the particular Committee, it would take between seven and twenty-four years to process all overdue reports.[136]

Thirdly, some States have a tendency not to report about the real situation but instead either focus on the law without looking at its implementation or just deny any violations.[137] Especially in these cases, the discussions between the Committees and the States Parties do not always amount to a real dialogue but rather an exchange of routine questions and routine statements that avoid focusing on the real issues.[138]

132 For the following figures see J. Crawford, 'The UN Human Rights Treaty System: A System in Crisis', in *The Future of UN Human Rights Treaty Monitoring* (eds. P. Alston and J. Crawford, Cambridge University Press, 2000), p. 5.

133 Committee Against Torture: 105 overdue reports from 72 out of 110 States Parties; Committee on the Rights of the Child: 141 overdue reports from 124 out of 191 States Parties; Committee on Economic, Social and Cultural Rights: 134 overdue reports from 97 out of 138 States Parties; and Human Rights Committee: 145 overdue reports from 97 out of 140 States Parties (source, ibid., p. 5).

134 Simma, above n. 122, p. 32. See also, Wolfrum, above n. 122, p. 63.

135 International Human Rights Instruments, Twelfth Meeting of Chairpersons of the Human Rights Bodies, 'Plan of Action to Strengthen the Implementation of the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2000–2004', UN doc. HRI/MC/2000/4, 5 May 2000, para. 12.

136 'Effective Functioning of Bodies Established Pursuant to United Nation Human Rights Instruments, Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System', prepared by P. Alston, UN doc. E/CN.4/1997/74, 27 March 1996, para. 48.

137 Committee on International Human Rights Law and Practice, 'Report on the UN Human Rights Treaties: Facing the Implementation Crisis' (by A. Bayefsky), in International Law Association, *Helsinki Conference 1996* (International Law Association, London, 1996), p. 341.

138 Klein, above n. 120, pp. 26–7. See also Bayefsky, above n. 137, p. 341.

(b) Supervision based on information collected by the organization

aa) Fact-finding by special rapporteurs or independent fact-finding commissions

Monitoring by or on behalf of an organization can avoid some of the weaknesses and pitfalls of State reporting mechanisms. Monitoring based on fact-finding by independent experts is the most important form of supervision by or on behalf of an organization in the area of human rights outside the treaty mechanisms.

The main example for the use of fact-finding by independent experts is provided by the UN Commission on Human Rights.[139] The Commission for a long time focused on standard-setting and was reluctant to deal with allegations of human rights violations in a specific country.[140] It has relied on fact-finding by Special Rapporteurs and Working Groups since the Economic and Social Council (ECOSOC) adopted Resolution 1235 (XLII) in 1967 authorizing the Commission 'to examine information relevant to gross violations of human rights' in a *public procedure* and Resolution 1503 (XLVIII) in 1970 on the *confidential discussion* of situations appearing to reveal 'a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms'.

In this regard, the Commission has developed different techniques. Within the framework of public procedures,[141] the Commission distinguishes between a 'country-oriented' and a 'thematic' approach. *Thematic procedures*, which are not restricted to the situation in a particular country, deal with specific human rights guarantees; they aim to enhance the protection of individuals and, at the same time, tend to deal with the root causes of such violations.[142] *Country-oriented*[143]

139 The following is adapted from W. Kälin and L. Gabriel, 'Human Rights in Times of Occupation: An Introduction', in *Human Rights in Times of Occupation: The Case of Kuwait* (ed. W. Kälin, Staempfli, Bern, 1994), pp. 9–10.

140 See M. Nowak, 'Country-Oriented Human Rights Protection by the UN Commission on Human Rights and its Sub-Commission', 22 *Netherlands Yearbook of International Law*, 1991, p. 39.

141 The confidential procedure in accordance with Resolution 1503 (XLVIII) is not further discussed here. For details, see P. Alston, 'The Commission on Human Rights', in *The United Nations and Human Rights – A Critical Appraisal* (ed. P. Alston, Clarendon Press, Oxford, 1992), p. 145; A. Dormenval, *Procédures onusiennes de mise en œuvre des droits de l'homme: Limites ou défauts* (Presses universitaires de France, Paris, 1991), p. 58.

142 Nowak, above n. 140, p. 44. Thematic procedures currently include the activities of the Working Groups on Enforced or Involuntary Disappearances (set up in 1980) and Arbitrary Detention (1991). They also comprise the work of the Special Rapporteurs or Independent Experts on Summary and Arbitrary Executions (1982), Torture (1985), Religious Intolerance (1986), the Use of Mercenaries as a Means of Violating Human Rights (1987), the Sale of Children (1990), Racism and Xenophobia (1993), Freedom of Opinion and Expression (1993), the Rights of Women (1994), Independence of Judges and Lawyers (1994), Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights (1995), Right to Development (1998), Right to Education (1998), Human Rights and Extreme Poverty (1998), Human Rights and Migrants (1999), Structural Adjustment Policies and Foreign Debt (2000), Adequate Housing (2000), Right to Food (2000), and Human Rights and Fundamental Freedoms of Indigenous People (2001).

143 For more information, see Alston, above n. 141, pp. 159–73; and Nowak, above n. 140, pp. 56–76.

procedures address human rights issues in a particular State. The Commission has developed several techniques for such fact-finding.[144] Reports should provide the Commission with the pertinent facts and thus enable it to adopt a resolution. Such resolutions may not only condemn the country concerned for failing to respect human rights but may also urge its government to take specific measures in order to improve the situation.

In all these procedures, the Commission is competent to consider information from all sources[145] concerning violations of any human right. As a political body it may not render a judicial decision,[146] but it can serve as a catalyst to reach a political solution resulting in the improvement of the human rights situation in the country concerned.

What is the task of the Special Rapporteurs and Working Groups? Most often, the relevant resolutions ask them to 'study', 'investigate', 'inquire into', or 'examine' either the situation of a particular human right in all States or the situation of all human rights in a particular country. The role of a Special Rapporteur is neither that of a judge nor that of a politician or diplomat. First and foremost, the task is one of *fact-finding*: he or she has to collect information, analyze it, and, on this basis, describe the pertinent events in order to enable the Commission on Human Rights to draw its conclusions.[147] Although he or she has no judicial functions, the Special Rapporteur can only properly fulfil this task of factual analysis if a study of the relevant legal obligations is included. Thus, a conclusion by the Commission regarding the question of whether and to what extent there have been gross violations of human rights in a particular country must rest not only on a careful establishment of the facts but also on a sound legal analysis; the latter must include a determination of the law applicable in the specific situation.

Besides these basic requirements, the mandates of the Special Rapporteurs and Working Groups regularly leave enough room to adopt different approaches and

144 Alston, above n. 141, pp. 160–1, mentions the appointment of (a) a special rapporteur, (b) a special representative, (c) an (independent) expert, (d) a working group, (e) a Commission delegation, (f) a member of the Sub-Commission to review the available information; in addition, the Commission sometimes asks the Secretary-General to maintain direct contacts with a particular government or to report on a particular country.

145 B. G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights* (Martinus Nijhoff, Dordrecht/Boston/London, 1989), p. 65.

146 See the Statement by the Observer Delegation of Ireland, Ambassador Michel Lillis on Behalf of the European Community and its Twelve Member States at the 46th Session of the Commission on Human Rights, 21 Feb. 1990:

> The Commission is not a Court of Law. We do not here place Governments of the world in the dock. Insofar as we can, we must strain to our utmost to achieve progress in human rights in our work here through multilateral cooperation and in a spirit of dialogue and mutual respect between Governments.

Quoted in J. A. Pastor Ridruejo, 'Les procédures publiques spéciales de la Commission des droits de l'homme des Nations Unies', Academy of International Law, *Recueil des Cours*, 1991-III, p. 244.

147 See also, Pastor Ridruejo, above n. 146, p. 238.

thus to respond to the peculiarities of each case. Alston distinguishes three principal approaches: (i) a 'fact-finding and documentation function', that is, the task of providing 'the necessary raw material against the background of which political organs can determine the best strategy under the circumstances'; (ii) a 'prosecutorial/publicity function', namely, an attempt 'to mobilize world public opinion'; and (iii) a 'conciliation function', where the 'rapporteur's role is not to confront the violators but to seek solutions which will improve . . . the situation'.[148] Which of these functions will be in the foreground in a given case depends on the content of the mandate, the individuals involved, and the specific situation.

The use of Special Rapporteurs or Working Groups has several advantages: it allows for independent fact-finding and has become an important instrument for putting pressure on States that violate human rights seriously and systematically. The rather limited number of country-specific mandates, for example, shows that, as van Dongen has put it, the 'appointment of a country rapporteur is viewed very much as the heavy artillery, brought out only when the situation so warrants'.[149] Pressure can also be exercised because the report may lead to a resolution by the Commission condemning the State and trigger corresponding resolutions by ECOSOC and the UN General Assembly. Weaknesses of the use of Special Rapporteurs and Working Groups include the fact that much depends on the individuals selected for this task. Experience in the Commission on Human Rights shows that the quality of reports varies to a very considerable extent. Another problem is the danger that the creation of a mandate for a Special Rapporteur may become a highly politicized decision. This danger is reduced where a thematic mandate instead of a country-specific mandate is chosen. Finally, Special Rapporteurs and Working Groups often lack adequate resources and staff support, indicating that the number of such mandates should be fixed within the limits of available means. Cost-effectiveness speaks in favour of using individual Special Rapporteurs instead of the more costly Working Groups.

Fact-finding by independent experts also exists in the area of humanitarian law. The International Fact-Finding Commission, which consists of fifteen members of high moral standing and acknowledged impartiality, is competent to 'enquire into any facts alleged to be a grave breach . . . or other serious violation' of the 1949 Geneva Conventions and Protocol I and to 'facilitate, through its good offices, the restoration of an attitude of respect' for the relevant provisions of humanitarian law, provided the countries involved have recognized this competence. The reports are not made public 'unless all Parties to the conflict have requested the Commission to do so'.[150]

148 Alston, above n. 141, pp. 167–8.

149 T. van Dongen, 'Vanishing Point – The Problem of Disappearances', 90/1 *Bulletin of Human Rights*, 1991, p. 24.

150 Art. 90(5)(c) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3. For the four Geneva Conventions, see 75 UNTS 31, 85, 135, and 287.

bb) Policy review

Some international organizations carry out fact-finding which focuses more on an overall assessment of the policy of a particular country than on violations. Such reports try to highlight, at the same time, the main strengths and weaknesses of how a State deals with particular problems in the area of investigation.

One of many examples is provided by the International Narcotics Control Board[151] established by the Single Convention on Narcotic Drugs.[152] This Board is the independent and quasi-judicial control organ for the implementation of the United Nations drug conventions. It examines and analyzes, among others, information received from the States Parties to the drug conventions and thereby monitors whether the treaties are being applied throughout the world as effectively as possible. This continuous evaluation of national efforts enables the Board to recommend appropriate actions and to conduct, where necessary, a dialogue with the government concerned. The Board publishes an annual report that is submitted to ECOSOC and provides a comprehensive survey of the drug control situation in various parts of the world as well as an identification of dangerous trends and necessary measures.

The Organization for Economic Cooperation and Development (OECD) has a particularly rich experience with policy review reports. Such reports include Environmental Performance Reviews, which scrutinize the efforts of OECD member States to meet their domestic objectives and international commitments in the area of environmental protection, and Development Cooperation Reviews by the Development Assistance Committee (DAC).[153] Both review systems are based on the principle of peer review. First, a small team composed of representatives of the Secretariat and officials of two member countries is designated. The government of the country to be reviewed prepares a memorandum explaining the main policy developments and changes in its activities. The team then travels to the country concerned in order to talk to the government, members of parliament, and representatives of civil society and NGOs in order to obtain first-hand information about the content and context of the country's environmental or development policy. The report is then submitted to the OECD Group on Environmental Performance or DAC respectively, where, during a session of the Group or Committee, high-level representatives of the country concerned respond to questions asked by members of that body. Depending on the outcome of these discussions, the conclusions of the draft report

151 Information about the Board is available at www.incb.org.

152 Arts. 9–15 of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961.

153 For a description, see OECD Environmental Performance Reviews, A Practical Introduction, doc. OCDE/GD(97)35 and the forewords to the DAC Development Co-operation Reviews (e.g. Comité d'aide au développement (CAD), 'Examen en matière de coopération pour le développement, Suisse, pré-impression des dossiers du CAD', vol. 1, No. 4, OECD, 2000, p. II-3.

are amended before it is published. The OECD has defined the following as goals of this process:

> to help individual governments judge and make progress by establishing baseline conditions, trends, policy commitments, institutional arrangements and routine capabilities for carrying out national evaluations; to promote a continuous policy dialogue among Member countries, through a peer review process and by the transfer of information on policies, approaches and experiences of reviewed countries; to stimulate greater accountability from Member countries' governments towards public opinion . . .[154]

Both the International Narcotics Control Board and OECD are able to produce good quality review reports on a regular basis. The model of policy assessment and review reports is interesting for three reasons: (i) it rests on independent fact-finding by experts; (ii) it focuses not only on violations but also looks at achievements; and (iii) it combines objective fact-finding with a political process aimed at a process of collective learning. Its weakness lies in the limited capacity to 'sanction' a State in cases of serious violations or continued refusal to undertake improvements.

cc) Review conferences

Review conferences are an implementation mechanism that has gained momentum in recent decades.[155] Their traditional goal was to provide a chance for States to meet on a regular basis and to determine whether there are any gaps that need to be addressed by amendments to the particular treaty.[156] Review conferences may, however, also have the task of monitoring compliance with and implementation of a treaty.

For instance, the review conferences organized under Article VIII(3) of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT),[157] the first treaty to use this approach,[158] are undertaken in order, among other things, 'to evaluate the results of the period they are reviewing, including the implementation of undertakings of the States Parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future'.[159]

154 Doc. OCDE/GD(97)35, above n. 153, p. 5.

155 The first review conferences aimed at monitoring implementation were convened in the 1980s. See B. M. Carnahan, 'Treaty Review Conferences', 81 *American Journal of International Law*, 1987, p. 226.

156 A recent example is Art. 123(1) of the Rome Statute for an International Criminal Court, providing for a review conference seven years after the entry into force of the Statute that will examine the need to include new treaty crimes.

157 This convention together with the various other disarmament-related conventions cited in this paragraph can be found at http://www.unog.ch/frames/disarm/distreat/warfare.htm.

158 Carnahan, above n. 155, p. 226.

159 Decision 1, para. 7, taken at the 1995 Review Conference, cited by R. Johnson, 'Launching an Effective Review Process of the Non-Proliferation Treaty in April 1997', 13 *Disarmament Diplomacy*, 1997, at http://www.acronym.org.uk/dd/dd13/13launch.htm.

A similar approach is followed by Article XII of the Biological Weapons Convention,[160] Article 13 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as amended on 3 May 1996),[161] and Article 12 of the 1997 Ottawa Convention.[162] The 1980 Conventional Weapons Convention[163] provides in Article 8(2) for review conferences both as an amendment and as an implementation procedure.

Review conferences are usually organized on an ad hoc basis. The rules of procedure tend to follow those adopted in 1975 to review the NPT. The first step is usually to obtain a resolution of the UN General Assembly authorizing the UN Secretariat to provide administrative support.[164] This is followed by arrangements for the meeting of a preparatory committee[165] to establish the dates for the conference, the agenda, and the draft rules of procedure, to recommend a committee structure, and to nominate a president and other members of the conference board.[166] No guidance is provided in regard to decision making, although decisions on substantive matters are usually taken by consensus[167] and incorporated in a final declaration.

dd) Inspection systems

A particularly effective method of monitoring treaty implementation is to carry out on-site visits or inspections by a monitoring body. Such systems can be found in four areas of international law:[168] (i) arms control and disarmament;[169]

160 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 1972.

161 Protocol II to the 1980 Convention on Certain Conventional Weapons, as amended on 3 May 1996.

162 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines of 18 Sept. 1997 (Ottawa Convention).

163 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 Oct. 1980.

164 E.g. on 22 Dec. 1993, States Parties to the Convention on Certain Conventional Weapons submitted a letter to the Secretary-General, asking him to establish a group of experts to facilitate preparation for a review conference, and to convene a review conference. See W. Hays Parks, 'Memorandum of Law: *Travaux Préparatoires* and Legal Analysis of Blinding Laser Weapons Protocol', *Army Lawyer*, June 1997, p. 33.

165 On the Preparatory Committee for the Non-Proliferation Treaty, see Johnson, above n. 159.

166 Carnahan, above n. 155, p. 228.

167 Ibid.; Johnson, above n. 159. See also J. H. Harrington, 'Arms Control and Disarmament', 35 *International Lawyer*, 2001, p. 581.

168 See the contributions in Association for the Prevention of Torture, *Visits Under Public International Law, Theory and Practice* (Association for the Prevention of Torture, Geneva, 2000).

169 See in particular the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), the 1996 Comprehensive Nuclear Test-Ban Treaty, and the 1997 Ottawa Convention, above n. 162.

(ii) environmental law;[170] (iii) human rights law;[171] and (iv) humanitarian law.[172] Such visits and inspections allow for direct fact-finding to verify the compliance of a State Party with its treaty obligations, and are particularly useful in situations where actions are carried out in places that are not open to the public (for example, prisons and other places of detention, military installations, nuclear power plants, chemical factories, and so forth). As a result of the degree of intrusiveness of inspections systems, they are often based on the confidentiality of the process.[173] As UNHCR is already entitled to have access to refugee camps, detention centres, and similar facilities,[174] such a system would be less significant in the area of refugee protection.

(c) Supervision based on a request for an advisory opinion

A third potential form of monitoring on behalf of an international organization can be found in the Statute of the International Court of Justice and the UN Charter. According to Article 65 of the Statute,[175] the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with Article 96 of the UN Charter to make such a request. On a regional level, the Inter-American Court of Human Rights is competent to give advisory opinions regarding the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American States upon request by any member State of the Organization of American States or by organs of that Organization.[176] Additionally, '[t]he Court, at the request of a member State of the Organization, may provide that State with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments'.[177] As outlined above, at the European Union level, the Council, Commission, or an EU member State will be able to ask the European Court of Justice to issue an interpretative opinion on matters relating to asylum which have been implemented into secondary legislation.[178]

170 E.g. Montreal Protocol on Substances that Deplete the Ozone Layer, 16 Sept. 1987, 1522 UNTS 3.

171 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 Nov. 1987, ETS 126.

172 Visits of prisoners of war and civilian detainees by International Committee of the Red Cross (ICRC) during an international armed conflict on the basis of the Third and Fourth Geneva Conventions of 1949 or of prisoners based on ICRC's right to offer its services during non-international armed conflicts and situations of internal violence.

173 Confidentiality is the basis of ICRC's visiting activities. See also, Art. 11 of the European Convention for the Prevention of Torture, above n. 171.

174 See above text at nn. 31–9.

175 Statute of the International Court of Justice, annexed to the UN Charter.

176 Art. 64(1) of the ACHR. 177 Art. 64(2) of the ACHR.

178 Treaty Establishing the European Community (consolidated version), Art. 68(3); see also, text above at n. 89.

4. *Supervision initiated by individuals*

The possibility for individuals to petition a judicial or quasi-judicial body at the international level regarding alleged violations of their rights as guaranteed by an international convention or treaty is often regarded as the most effective form of supervision.

However, petitions to a judicial organ with the power to take binding decisions exist at the regional level only,[179] whereas quasi-judicial bodies are the rule on the universal level. Five UN human rights treaties[180] and some regional instruments[181] provide for the possibility of submitting individual complaints to a treaty body if the country concerned has recognized its competence to examine such petitions.[182] The written procedure ends with the adoption of 'views' which are not legally binding,[183] but their judgment-like style as well as the establishment of follow-up procedures by some of the treaty bodies[184] to address situations of non-compliance have contributed to the relatively high degree of compliance[185] with these 'views'.

The number of individual complaints to the UN treaty bodies is significant but still limited.[186] Nevertheless, the capacity of these bodies to deal with such

179 See Art. 25 of the ECHR and Art. 44 of the ACHR.

180 First Optional Protocol to ICCPR, Art. 22 of the CAT, Art. 14 of the CERD, Art. 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN doc. A/RES/45/158, and the Optional Protocol to CEDAW of 6 Oct. 1999, UN doc. A/RES/54/4.

181 The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 9 Nov. 1995 allows certain NGOs to lodge complaints against a State Party to the Protocol alleging unsatisfactory application of the Charter with the Committee of Independent Experts. This Committee prepares and adopts a report that is submitted to the Committee of Ministers of the Council of Europe. In Africa, Art. 55 of the ACHPR permits individuals, groups of individuals, and NGOs, as well as States Parties, to make communications to the African Commission on Human and Peoples' Rights, either on their own behalf or that of someone else.

182 A draft optional protocol to the International Covenant on Economic, Social and Cultural Rights has been elaborated. See in particular UN doc. E/CN.4/1997/105, 18 Dec. 1996 and E/CN.4/2001/62, 21 Dec. 2000.

183 Art. 5(4) of the Optional Protocol to the ICCPR, Art. 22(7) of the CAT, Art. 14(7)(b) of CERD, and Art. 7(3) of the Optional Protocol to the CEDAW of 6 Oct. 1999, UN doc. A/RES/54/4.

184 See in particular, ICCPR, 'Measures Adopted at the Thirty-Ninth Session of the Human Rights Committee to Monitor Compliance with its Views under Article 5', UN. doc. A/45/40, vol. 2, Annex XI, pp. 205–6.

185 See, e.g., M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (Engel, Kehl/Strasbourg/Arlington, 1993), pp. 710–11. In more recent times, however, certain States have criticized some treaty bodies for their views, including in cases regarding asylum seekers.

186 E.g., in 1999, the Human Rights Committee received fifty-nine new cases and adopted fifty-six decisions. During the same year, the Committee Against Torture registered twenty-six new cases and adopted thirty-nine decisions. See Plan of Action, above n. 135, Annexes II and III.

complaints has already reached its limits[187] and procedures take too long.[188] At the regional level, the overload is especially dramatic in Europe.[189]

C. A new mechanism for third party monitoring of the 1951 Convention and the 1967 Protocol

1. Goals

The search for ways to strengthen monitoring of the 1951 Convention and the 1967 Protocol makes it necessary to clarify the goals to be achieved. Of course, the overall goal of new monitoring mechanisms should be to strengthen the protection of refugees, that is, to ensure that their basic rights as well as their physical safety and security are better guaranteed.[190] This overarching goal requires that UNHCR's present supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, including its responsibility to supervise State practice on a day-to-day basis, to comment on legislation, or to advise courts, not be undermined by new mechanisms. In this regard, it is of paramount importance institutionally to separate the role of providing international protection and the process of supervising States Parties on the basis of Article 35 of the 1951 Convention and Article II of the 1967 Protocol from the highly visible task of third party monitoring of State behaviour from a universal perspective. UNHCR's work of day-to-day protection and supervision or even its presence in a particular country might be endangered if it had to play too active a role in new monitoring mechanisms. Instead, these mechanisms should be the responsibility of the States Parties to the Convention. At the same time, it is of paramount importance that such monitoring does not endanger UNHCR's supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

The goal of strengthening the protection of refugees through better monitoring can be achieved if such mechanisms are framed in a way that allows:

1. monitoring of violations of applicable international instruments on the rights of refugees with a view to taking the necessary steps to convince or pressure the States concerned to honour their obligations;

187 See Plan of Action, above n. 135, paras. 13–15.

188 See, e.g., Crawford, above n. 132, p. 6, remarking that '[a]rguably, the reason the Human Rights Committee is not itself in breach of the spirit of article 14 of its own Covenant through the delay in dealing with communications is, precisely, its non-judicial character'.

189 The European Court of Human Rights in, e.g., 2000 received 10,486 new applications and delivered 695 judgments (statistical information available at http://www.echr.coe.int/BilingualDocuments/infodoc.stats[2001].bil.htm).

190 On the notion of protection, see above, section II.B.1 'UNHCR's protection role'.

2. harmonization of the interpretation of the 1951 Convention and its 1967 Protocol with a view to achieving a more uniform eligibility practice; and
3. the experience of States Parties within the framework of a policy assessment to enable identification of obstacles to proper implementation, appropriate solutions for current problems, and best practices.

In order to achieve these goals, new monitoring mechanisms should meet several requirements:

1. *Independence and expertise*. It is important that monitoring is based on fact-finding by independent experts or organs. Both independence and expertise are necessary to make monitoring credible and reduce the danger of politicization.
2. *Objectivity and transparency*. The criteria applied to assess the behaviour of a State, in particular whether it has violated its legal obligations, must be objective and transparent, that is, based on recognized norms and standards.
3. *Inclusiveness*. It is important that monitoring mechanisms include all the actors concerned. This has two implications. First, such mechanisms should not single out some States or regions; rather, they should look at all those affected by a particular problem. Secondly, such mechanisms should establish a process that allows not only States but also NGOs, civil society, and refugees to voice their concerns.
4. *Operationality*. Monitoring mechanisms must be set up and resourced in a way that allows them to become operational and work properly. Mechanisms that cannot fulfil their tasks must be avoided.
5. *Complementarity*. Appropriate mechanisms must complement supervision by UNHCR based on Article 35 of the 1951 Convention and Article II of the 1967 Protocol and avoid any weakening of the 'preeminence and authority of the voice of the High-Commissioner'.[191]

2. *Assessment of models*

Looking at different possible models for an improved monitoring in the area of refugee law, it is possible, on the basis of the goals and criteria defined above,[192] to make the following assessment.

(a) Dispute settlement by the International Court of Justice

Dispute settlement by the International Court of Justice[193] would fit the requirements of independence, objectivity and transparency and would be operational. It

191 Cambridge Expert Roundtable, Summary Conclusions, above n. 44, para. 1.
192 See immediately above, section III.C.1 'Goals'.
193 See above, section III.B.2.a 'Dispute settlement by the International Court of Justice'.

does not, however, offer real potential for strengthening monitoring in the area of international refugee law. The existing possibility of referring disputes relating to the interpretation and application of the 1951 Convention and/or 1967 Protocol to the International Court of Justice[194] has never been used, and it is unlikely that this will change in the near future.

This possibility would only become more relevant if in the future States Parties to the 1951 Convention and/or 1967 Protocol with divergent views decided to refer questions of interpretation to the International Court of Justice in a non-confrontational manner, that is, in a way where both sides to a dispute submitted their case to the Court for the sake of clarifying an important question and not of prevailing over an adversary. In this context, Article 35 of the 1951 Convention seems to imply a possibility for UNHCR to

> ask a Contracting State to intervene with another Contracting State, whose application of the Convention is not agreeable to the High Commissioner, and in case of the intervention being unsuccessful, ask the State concerned to bring the matter before the International Court of Justice according to Article 38.[195]

Whether this will become possible in the near future remains to be seen. In any case, such proceedings would remain exceptional and could not serve as a substitute for regular monitoring.

(b) Inter-State complaints

To create, within the framework of the 1951 Convention and the 1967 Protocol, a new mechanism for inter-State complaints to a treaty body cannot be recommended, although it would meet the requirements mentioned above. Such a mechanism would obviously remain as unused as the existing inter-State complaints provided by several existing human rights treaties.[196]

(c) State reports

There are certain arguments in favour of developing the reporting duties under Article 35 of the 1951 Convention and Article II of the 1967 Protocol into something closer to those under the UN human rights instruments.[197] It is, for example,

194 Art. 38 of the 1951 Convention and Art. IV of the 1967 Protocol. See also, Art. VIII of the 1969 OAU Refugee Convention.

195 Grahl-Madsen, above n. 7, p. 253.

196 See above, section III.B.2.b 'Inter-State complaints to treaty bodies'.

197 On the reporting duties under the human rights instruments, see above, section III.B.3.a.aa, 'State reporting under the UN human rights instruments'. The creation of a reporting system that tries to avoid some of the problems of the existing mechanisms is advocated in 'Overseeing the Refugee Convention, Working Paper No. 1: "Reporting"', by A. Pyati, which formed part of a collaboration entitled 'Overseeing the Refugee Convention' between the International

obvious that the implementation of international refugee law would be considerably strengthened if the objectives of reporting identified above[198] could be achieved in this area too. Furthermore, such a step would ensure that State reports are examined by an independent body, whereas reports today go to UNHCR which is not even nominally independent but governed by the fifty-six governments forming the Executive Committee and forced to be sensitive to the main donor countries.[199] Finally, unlike today where reports to UNHCR remain confidential, setting up a formalized mechanism of reporting to an independent body would make the reports public,[200] thus opening up possibilities for putting more pressure on governments not fulfilling their duties properly. As outlined above,[201] however, reporting systems in the area of human rights law are faced with serious problems (the burden on States resulting in overdue reports,[202] the impossibility of dealing with all reports in time, the tendency of some reports to describe the situation inappropriately, and so forth). It must be expected that these problems would also affect State reporting in the area of refugee law. To export current reporting mechanisms to new areas of law is not advisable as long as these problems persist.

(d) Information collected by the organization

UNHCR already collects information on the application of the 1951 Convention and 1967 Protocol and other relevant treaty law in its annual protection reports. These reports serve exclusively internal purposes, however, and are not made public. To publish these reports and to discuss them within an appropriate institutional framework would, of course, be a possible way to strengthen UNHCR's supervisory role under Article 35 of the 1951 Convention, but there are strong reasons speaking against that proposal. Especially in situations of tension between UNHCR and the State concerned, the latter's authorities are unlikely to accept the report as independent, objective, and unbiased, and may well argue that UNHCR as a party to the dispute is biased. For its part, UNHCR might be tempted to tone down its criticism in order not to endanger the effectiveness of its protection activities or even presence in a particular country. As outlined above,[203] it is preferable to separate protection and monitoring clearly on the operational level.

Council of Voluntary Agencies and the Program in Refugee and Asylum Law at the University of Michigan, USA, Dec. 2001, paras. 23–52.

198 See above, section III.B.3.a.aa, 'State reporting under the UN human rights instruments'.

199 See S. Takahashi, 'Effective Monitoring of the Refugee Convention', paper presented at 'The Refugee Convention 50 Years On: Critical Perspectives, Future Prospect', Second International Studies Association Conference, Feb. 2001 (manuscript on file with author), pp. 3–4.

200 Ibid., p. 5. The importance of publicity of reports is also stressed by MacMillan and Olson, above n. 84, pp. 39–40.

201 See above, section III.B.3.a.cc, 'Assessment'.

202 In this context, it is also appropriate to recall UNHCR's not very encouraging experiences with the questionnaire sent out in the early 1990s (above, section II.B.2, 'Information requests by UNHCR').

203 See above, section III.A.3, 'The need for third party monitoring'.

In contrast, both the models of special rapporteurs[204] and policy reviews by the organization[205] offer many advantages. They will serve as sources of inspiration for the proposals made below.[206]

(e) Advisory opinions

Under certain circumstances, UNHCR could request an advisory opinion from the International Court of Justice regarding a question of interpretation of the 1951 Convention and the 1967 Protocol.[207] This would be an efficient way of settling disputes that, as a result of divergent interpretations of key notions of these instruments, affect large numbers of refugees and asylum seekers.[208] This possibility has, however, never been used.

States are apparently reluctant to resort to advisory opinions. In 1992, the Sub-Committee of the Whole on International Protection discussed this issue. According to the report on these discussions, 'one delegation felt that resort to the ICJ might be unacceptable to Governments as compromising their sovereignty, and was joined by two other delegations in urging caution before further developing this point. Another noted that the United Nations could ask for an advisory opinion, but that this was not a way to resolve States' differences.'[209] There was no apparent support for the idea of approaching the ICJ with requests for advisory opinions, and no consensus was reached on this point.[210] Even if this attitude were to change in the future, requests for advisory opinions would be exceptional, and they could not replace but only complement other mechanisms.

(f) Individual complaints

In the context of the 1951 Convention and 1967 Protocol, the introduction of an individual complaints procedure to a newly created treaty body would be in conformity with the criteria of independence, expertise, objectivity, and transparency. It would, however, be affected by two fundamental weaknesses.[211] First, individual

204 See above, section III.B.3.b.aa, 'Fact-finding by special rapporteurs or independent fact-finding commissions'.

205 See above, section III.B.3.b.bb, 'Policy review'.

206 See below, section III.C.3, 'Proposal', and section III.D, 'Monitoring beyond the 1951 Convention and the 1967 Protocol'.

207 According to Art. 96 of the UN Charter, the General Assembly or the Security Council may request an advisory opinion on any legal matter, and other organs of the United Nations, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the ICJ on legal questions arising within the scope of their activities.

208 E.g. the question as to whether Art. 1A(2) of the 1951 Convention regards as refugees victims of non-State agents of persecution in situations where the State is unable to provide protection.

209 Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, 'Report of the 25 June Meeting of the Sub-Committee of the Whole on International Protection', UN doc. EC/SCP/76, 13 Oct. 1992, para. 12.

210 Ibid., para. 19.

211 On the weaknesses of an individual complaints system and a proposal that aims to avoid such weaknesses, see 'Working Paper No. 2: "Complaints"', by V. Bedford, which formed

complaints procedures would not be inclusive but selective. Since the treaty body would not have compulsory jurisdiction, its competence would only extend to those States Parties that have ratified the optional protocol necessary for introducing such a system. Ratification would not be universal. States following more restrictive lines of interpretation than the majority of States Parties and thus more likely to 'lose' cases would probably be especially hesitant about accepting such supervision. Secondly, if many States, including those with many asylum seekers, ratified such a protocol, the system would probably not function properly as the treaty body would immediately be confronted with a workload of up to tens of thousands of cases with which it could not cope. Rejected asylum seekers, especially in Europe and North America, would not only know about this possibility but also be encouraged to petition the treaty body in order to avoid immediate deportation. In addition, there is a certain danger that the mere existence of individual applications will weaken UNHCR's existing possibility to take up protection issues affecting any asylum seeker or refugee with a government at any time.

This does not mean that judicial or quasi-judicial monitoring of the application of the 1951 Convention and 1967 Protocol is not needed. Judicial supervision has been an issue in Europe for some time.[212] The European Court of Justice will exercise, to a certain extent, such supervision in the near future at the European Union level.[213] This court may provide a potential model for addressing the problem of high numbers of individual complaints. Individuals do not have access to the Court, but, in addition to the EU Commission and the EU member States,[214] every national court has the possibility, even the duty, to request a preliminary ruling from the Court on the interpretation of provisions of EU law.[215] This allows the workload to be kept within limits, while at the same time ensuring that the applicable law is applied in a harmonized way. It might, however, be premature to propose setting up a judicial body on the universal level that has the power to make preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR. Such an option would nevertheless meet all the goals and criteria outlined above and would therefore deserve thorough discussion at least in a long-term perspective.

part of the collaboration 'Overseeing the Refugee Convention', above n. 197, paras. 17–22 and 34–55.

212 See, e.g., the Proposal for an Additional Protocol to the European Convention on Human Rights, presented to a seminar of the European Council on Refugees and Exiles (ECRE) on asylum in Europe in April 1992 and reprinted in Goodwin-Gill, above n. 24, pp. 527–33, which, had it ever been adopted by the Council of Europe member States, would have been applied by the European Court of Human Rights.

213 Above n. 89.

214 Arts. 226 and 227 of the Treaty Establishing the European Community (consolidated version).

215 *Ibid*., Art. 234.

3. *Proposal*

It is proposed to improve monitoring of the 1951 Convention and 1967 Protocol by adopting and implementing the following model which is inspired by mechanisms using fact-finding by independent experts and policy reviews by member States of an organization.[216]

1. A Sub-Committee on Review and Monitoring comprising those members of the Executive Committee that are States Parties to the 1951 Convention or the 1967 Protocol should be set up as a permanent Sub-Committee within the framework of the Executive Committee.[217]
2. The Sub-Committee on Review and Monitoring would be responsible for carrying out Refugee Protection Reviews looking at specific situations of refugee flows or particular countries with a view to:
   - monitoring the implementation of the 1951 Convention and the 1967 Protocol;
   - identifying obstacles to full implementation of these instruments; and
   - drawing lessons from actual experience in order to overcome obstacles and achieve more effective implementation of these instruments.

   Situations or countries to be reviewed would be identified on the basis of transparent and objective criteria, taking into account, among other things, an equitable geographical distribution, the existence of particular problems or obstacles to full implementation, the number of refugees and asylum seekers involved (absolute numbers or numbers on a per capita basis), or the degree of involvement of the international community. The review system would have the following elements:
   - UNHCR would identify the situation to be reviewed and appoint a team of reviewers selected from a pool of independent experts nominated by each of the States Parties to the 1951 Convention and 1967 Protocol.[218] The Sub-Committee could initiate a review on its own.
   - The governments of the countries affected by a particular refugee situation to be reviewed would prepare a memorandum explaining the main features of their policy and setting out the main problems encountered,

216 For a critical discussion of this proposal, see 'Overseeing the Refugee Convention, Working Paper No. 4: "Investigative Capacity"', by B. Miltner, which formed part of the collaboration 'Overseeing the Refugee Convention', above, n. 197, paras. 26–8 and 37–51; and 'Overseeing the Refugee Convention, Working Paper No. 7: "Coordination with UNHCR and States"', by T. Glover and S. Russell, same series, paras. 41–6.

217 An alternative would be to reconstitute the former Sub-Committee on Protection. Such a proposal was made during the Ministerial Meeting of States Parties on 12–13 Dec. 2001 (see below, section III.E, 'A "light" version of the new mechanism . . .').

218 Each State Party would have the possibility of nominating one independent expert. Alternatively, these experts could be elected by a meeting of States Parties for a period of five years, but this might need an amendment to the 1951 Convention and 1967 Protocol.

the obstacles preventing full implementation of the 1951 Convention and 1967 Protocol, and the successes achieved.
- The governments concerned would invite the review team to study the situation on the ground and to hold talks with governmental bodies and agencies, members of parliament, representatives of civil society, and NGOs, and refugees in order to get first-hand information.
- The team would prepare its report and submit it to UNHCR which would transmit it, if appropriate, to the Sub-Committee on Review and Monitoring.
- The report would be discussed during a public meeting of the Sub-Committee on Review and Monitoring in the presence of representatives of the countries concerned; NGOs would be able to participate in these discussions. The Sub-Committee would be able to adopt observations.
- The report of the review team together with the Sub-Committee's observations, as the case may be, would be transmitted to the States Parties as a document with unrestricted distribution.

3. In addition, the Sub-Committee on Review and Monitoring would have to start a discussion, in close consultation with all States Parties to the 1951 Convention and 1967 Protocol, about the desirability and feasibility of setting up, in the long-term perspective and within the framework of a new protocol to the 1951 Convention, a judicial body entrusted with the task of making preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR.

This proposal meets all the goals and criteria mentioned above[219] that are necessary for an appropriate and functioning system of supervision. Refugee Protection Review Reports would allow the monitoring of violations, would contribute significantly to a harmonized interpretation of relevant norms, and would help to identify obstacles to full implementation as well as measures to overcome them and best practices. The Refugee Protection Review Mechanism would allow for a process of collective learning as it combines independent fact-finding and expertise with elements of peer review (discussion of reports by other States Parties). The 1951 Convention and 1967 Protocol provide objective and transparent standards to be used when assessing the behaviour and activities of States Parties. Inclusiveness would be guaranteed, as all concerned (governments, UNHCR, NGOs, refugees) would play a certain role in the process. Experience in other areas shows that policy review mechanisms work well in practice.[220] Finally, the proposed system complements supervision by UNHCR under Article 35 of the 1951 Convention and Article II of

219 See above, section III.C.1, 'Goals'.
220 See above, section III.B.3.b.bb, 'Policy review'.

the 1967 Protocol and does not endanger UNHCR's authority because the review process in a particular case is triggered by UNHCR itself. In addition, the organization could decide whether or not to submit the findings of the review team to the Sub-Committee or to keep them confidential because the State concerned is ready to change its policy and bring it into line with the requirements of the 1951 Convention and 1967 Protocol.

The legal basis for these proposals can be found in Article 35(1) of the 1951 Convention and Article II of the 1967 Protocol. These provisions oblige States Parties 'to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and ... in particular [to] facilitate its duty of supervising the application of the provisions' of the Convention and Protocol.[221] Since the Executive Committee is based on paragraph 4 of the UNHCR Statute and thus is part of the institutional framework created by the Statute, no amendments to the 1951 Convention and 1967 Protocol are needed. A resolution by ECOSOC granting the Executive Committee the power to institute the new model is sufficient. One might argue that even this is not needed, but such a step would be in line with other precedents setting up monitoring mechanisms.[222] In any case, such an approach would provide the new supervisory mechanism with enhanced legitimacy.

D. Monitoring beyond the 1951 Convention and the 1967 Protocol

Many of the current problems regarding international refugee protection as defined by UNHCR's Statute go beyond the provisions of the 1951 Convention and 1967 Protocol and also affect non-States Parties to these instruments. These problems may also endanger the present international refugee protection system. Therefore, it would be appropriate to create a mechanism that would also permit examination of whether or not States, including those that are not party to the 1951 Convention and/or 1967 Protocol, are respecting their obligations under international customary law and instruments other than the 1951 Convention that are pertinent to the protection of refugees and asylum seekers. Experience in the area of human rights law shows that thematic rapporteurs are well suited to looking into specific problem areas outside treaty mechanisms. They could play an important role in the area of international protection of refugees too.

The mechanism of thematic rapporteurs could be handled by the Standing Committee, the Executive Committee's subsidiary organ that meets several times during the year and comprises among its members States that are not party to the 1951 Convention and 1967 Protocol. This committee was established in 1995 to replace two sub-committees on international protection and on administrative and

221 For an explanation of these provisions, see above, section II.A.1, 'Cooperation duties'.
222 See the examples of ECOSOC Resolutions 1235 and 1503, in the text above following n. 140.

financial matters. The session of the Standing Committee that takes place each June is usually dedicated to international protection issues and would lend itself to the discussion of reports by special rapporteurs.

The following model is proposed here:

1. UNHCR should appoint, where appropriate and necessary, special rapporteurs with thematic mandates to look at issues of special concern (for example, on women and child refugees and asylum seekers; physical security of refugees; and access to asylum procedures). The mandates should be determined in a way that avoids overlap with the topics of Protection Review Reports as well as with the thematic mandates of Special Rapporteurs and Working Groups of the UN Human Rights Commission to a maximum extent.
2. The reports by special rapporteurs would be transmitted by UNHCR to the Standing Committee,[223] if appropriate, and would be discussed there in the presence of representatives of countries concerned; NGOs would be able to participate in these discussions. The reports, together with observations by the Standing Committee, would be disseminated as documents with unrestricted circulation.
3. The Executive Committee would be able to reflect the outcome of discussions in its own conclusions on protection.

Nothing hinders UNHCR from commissioning studies on issues relating to its competence and having them discussed at an appropriate level.

E. A 'light' version of the new mechanism as a first step?

The proposals just made are rather ambitious. They not only require strong political will on the part of States to carry out the proposed reviews properly but also put new burdens on the Executive Committee which presently has only limited capacities. In addition, there is a certain danger of an unhealthy politicization of the monitoring process that could negatively affect the position of UNHCR which cannot be entirely excluded. The Declaration of the Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Additional Protocol of 12–13 December 2001 urged 'all States to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or 1967 Protocol'.[224] At the same time, participants made it clear that it was premature to consider proposals like those made in this study. Instead, many States Parties present wished

223 Or to a revived Sub-Committee on Protection, see below, section III.E, 'A "light" version of the new mechanism . . .'.

224 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/MMSP/2001/09, 13 Dec. 2001, operative para. 9. For text see Part 1.3 of this book.

to 'reconstitute a reformed Sub-Committee on International Protection [which] would provide a forum to bring together the parties most interested in protection issues to address them in a systematic, detailed and yet dynamic way'[225] and to incorporate this proposal formally into the Agenda for Protection.[226]

Under these circumstances, it might be advisable to start with a less complex version of monitoring and review in order to gain the necessary experience. Such a 'light' version would contain the following elements: the High Commissioner could at any time ask an independent expert or a group of experts to prepare a report on matters relating to the implementation of the 1951 Convention and 1967 Protocol or other instruments relevant to the protection of refugees. Where appropriate, the High Commissioner could then submit the report for discussion to the reformed Sub-Committee on International Protection which would have the possibility of examining the report. Its discussion could be reflected in the Executive Committee's conclusions. The advantage of this model lies in the fact that it can be easily introduced and used in a very flexible way.

IV. Conclusions and recommendations

The first main section of this study examined UNHCR's supervisory responsibility and the corresponding State obligations under its Statute in conjunction with Article 35 of the 1951 Convention and Article II of the 1967 Protocol. The main conclusions of this first part can be summarized as follows.

First, Article 35 of the 1951 Convention and Article II of the 1967 Protocol impose a treaty obligation on States Parties to respect UNHCR's supervisory power and not to hinder UNHCR in carrying out this task, and also to cooperate actively with UNHCR in this regard in order to achieve optimal implementation and the harmonized application of the Convention and Protocol. Similar duties have also been recognized in Article VIII of the 1969 OAU Refugee Convention and Recommendation II(e) of the 1984 Cartagena Declaration on Refugees. Taking into account UNHCR's Statute and the organization's character as a subsidiary organ of the UN General Assembly, a certain duty to cooperate, binding also upon non-States Parties, can be derived from Article 56 of the UN Charter. These duties have a highly dynamic and evolutionary character.

Secondly, Article 35 of the 1951 Convention and Article II of the 1967 Protocol today have three main functions. They are the legal basis for the obligation of States to accept UNHCR's protection work regarding refugees and to respond to information requests by UNHCR, and they support the authoritative character of certain UNHCR statements.

225 Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Chairperson's report on Roundtable 1, '1951 Convention and 1967 Protocol Framework: Strengthening Implementation', 13 Dec. 2001, p. 2.

226 Ibid., p. 3.

Thirdly, current practice regarding Article 35 of the 1951 Convention and Article II of the 1967 Protocol which has broadly met with the acquiescence of States can be described as follows:

1. UNHCR is entitled to monitor, report on, and follow up its interventions with governments regarding the situation of refugees (for example, admission, reception, and treatment of asylum seekers and refugees). Making representations to governments and other relevant actors on protection concerns is inherent in UNHCR's supervisory function.
2. UNHCR is entitled to cooperate with States in designing operational responses to specific problems and situations that are sensitive to and meet protection needs, including those of the most vulnerable among asylum seekers and refugees.
3. In general, UNHCR is granted, at a minimum, an advisory and/or consultative role in national asylum or refugee status determination procedures. For instance, UNHCR is notified of asylum applications, is informed of the course of the procedures, and has guaranteed access to files and decisions that may be taken up with the authorities, as appropriate. UNHCR is entitled to intervene and submit its observations on any case at any stage of the procedure.
4. UNHCR is also entitled to intervene and make submissions to quasi-judicial institutions or courts in the form of *amicus curiae* briefs, statements, or letters.
5. UNHCR is granted access to asylum applicants and refugees and vice versa, either by law or administrative practice.
6. To ensure conformity with international refugee law and standards, UNHCR is entitled to advise governments and parliaments on legislation and administrative decrees affecting asylum seekers and refugees during all stages of the process. UNHCR is therefore generally expected to provide comments on and technical input into draft refugee legislation and related administrative decrees.
7. UNHCR also plays an important role in strengthening the capacity of relevant authorities, judges, lawyers, and NGOs, for instance, through promotional and training activities.
8. UNHCR's advocacy role, including the issuance of public statements, is well acknowledged as an essential tool of international protection and in particular of its supervisory responsibility.
9. UNHCR is entitled to receive data and information concerning asylum seekers and refugees.

The second main section of the study was devoted to a discussion of the need to improve monitoring of the implementation of the 1951 Convention and 1967 Protocol and an analysis of existing monitoring mechanisms outside the field of refugee law. This can be summarized in three key points.

First, since the degree of implementation of the 1951 Convention and other relevant instruments for the protection of refugees remains unsatisfactory, strengthening the monitoring of the implementation of these instruments is in the interest of all actors in the field of refugee protection. Non-implementation violates the legitimate interests of *refugees* as well as their rights and guarantees provided for under international law. It also violates the rights of the other *States Parties* to the Convention and other relevant instruments and is detrimental to their interests because disregard for international refugee law might create secondary movements of refugees. Non-implementation is a serious obstacle for *UNHCR* in fulfilling its mandate properly and reduces its capacity to assist States in dealing with refugee situations. Finally, non-implementation affects the whole international community because it seriously undermines the present system of international refugee protection, a regime which has been able adequately and flexibly to address and solve not all but many refugee protection problems in the past.

Secondly, existing supervisory mechanisms include supervision initiated by other States (dispute settlement by the ICJ and inter-State complaints to treaty bodies), supervision by or on behalf of the organization (State reports, policy reviews, review conferences, advisory opinions by the ICJ), and supervision initiated by individuals (individual complaints to a judicial or quasi-judicial organ). Many of the existing models have not found enough support from States in the area of refugee law. In particular, serious reasons speak against transferring mechanisms of State reporting and procedures regarding individual applications from the field of international human rights law to international refugee law and protection. The most promising mechanisms are policy review reports and the use of special rapporteurs, but they need to be adapted to the specific needs and circumstances prevailing in this field.

Thirdly, a strengthened supervisory mechanism for the 1951 Convention and 1967 Protocol should monitor violations of applicable international instruments on the rights of refugees, harmonize the interpretation of the 1951 Convention and its 1967 Protocol, and induce a learning process that allows States and UNHCR to identify obstacles to full implementation, best practices, and appropriate solutions for current problems. Such a system should be independent and based on expertise, it must guarantee objectivity and transparency, and it must be inclusive and operational. It is also important to ensure that UNHCR's present supervisory role under Article 35 of the 1951 Convention and Article II of the 1967 Protocol, including its responsibility to supervise State practice on a day-to-day basis, to comment on legislation, or to advise courts, is not undermined by new mechanisms. This makes it necessary to separate new mechanisms from UNHCR institutionally but, at the same time, to grant UNHCR the possibility of deciding for itself the time and extent of such reviews.

On the basis of these conclusions, it is *recommended* to improve monitoring of the 1951 Convention and 1967 Protocol by adopting and implementing the following model:

1. A Sub-Committee on Review and Monitoring comprising those Executive Committee members that are States Parties to the 1951 Convention and 1967 Protocol should be set up as a permanent Sub-Committee within the framework of the Executive Committee.[227]
2. The Sub-Committee on Review and Monitoring would be responsible for carrying out Refugee Protection Reviews looking at specific situations of refugee flows or particular countries with a view to:
   - monitoring the implementation of the 1951 Convention and the 1967 Protocol;
   - identifying obstacles to full implementation of these instruments; and
   - drawing lessons from actual experience in order to overcome obstacles and achieve more effective implementation of these instruments.

   Situations or countries to be reviewed would be identified on the basis of transparent and objective criteria, taking into account, among other matters, an equitable geographical distribution, the existence of particular problems or obstacles to full implementation, the number of refugees and asylum seekers involved (absolute numbers or numbers on a per capita basis), or the degree of involvement of the international community. The review system would have the following elements:
   - UNHCR would identify the situation to be reviewed and appoint a team of reviewers selected from a pool of independent experts nominated by each of the States Parties to the 1951 Convention and 1967 Protocol. The Sub-Committee could initiate a review on its own.
   - The governments of the countries affected by a particular refugee situation to be reviewed would prepare a memorandum explaining the main features of their policy and setting out the main problems encountered, the obstacles preventing full implementation of the 1951 Convention and 1967 Protocol, and the successes achieved.
   - The governments concerned would invite the review team to study the situation on the ground and to hold talks with governmental bodies and agencies, members of parliament, representatives of civil society and NGOs, and refugees in order to get first-hand information.
   - The team would prepare its report and submit it to UNHCR which would transmit it, where appropriate, to the Sub-Committee on Review and Monitoring.
   - The report would be discussed during a public meeting of the Sub-Committee on Review and Monitoring in the presence of representatives of the countries concerned; NGOs would be able to participate in

227 An alternative would be to reconstitute the former Sub-Committee on Protection. Such a proposal was made during the Ministerial Meeting of States Parties on 12–13 Dec. 2001 (see above n. 224).

these discussions. The Sub-Committee would be able to adopt observations.
- The report of the review team together with the Sub-Committee's observations, as the case may be, would be transmitted to the States Parties as a public document.

3. In addition, the Sub-Committee on Review and Monitoring would have to start a discussion, in close consultation with all States Parties to the 1951 Convention and 1967 Protocol about the desirability and feasibility of setting up, in the long-term perspective and within the framework of a new protocol to the 1951 Convention, a judicial body entrusted with the task of making preliminary rulings on the interpretation of international refugee law upon request by domestic authorities or courts, or by UNHCR.

Many of the current problems regarding international refugee protection as defined by UNHCR's Statute go beyond the provisions of the 1951 Convention and 1967 Protocol, and also affect non-States Parties to these instruments. These problems may also endanger the present international refugee protection system. Therefore, it would be appropriate to create a mechanism that would also permit examination of whether or not States, including those that are not party to the 1951 Convention and 1967 Protocol, are respecting their obligations under international customary law and instruments other than the 1951 Convention that are pertinent to the protection of refugees and asylum seekers. The following model is proposed:

1. UNHCR should appoint, where appropriate and necessary, special rapporteurs with thematic mandates to look at issues of special concern (for example, on women and child refugees and asylum seekers; physical security of refugees, access to asylum procedures). The mandates should be determined in a way that avoids or at least limits overlap with the topics of Protection Review Reports as well as with thematic mandates of Special Rapporteurs and Working Groups of the UN Human Rights Commission.
2. The reports by the special rapporteurs should be transmitted by UNHCR to the Executive Committee's Standing Committee,[228] if appropriate, and discussed there in the presence of representatives of the countries concerned; NGOs would be able to participate in these discussions. The reports, together with the observations of the Standing Committee, would be disseminated as documents with unrestricted circulation.
3. The Executive Committee would have the possibility of reflecting the outcome of discussions in its own conclusions on protection.

228 Or to a revived Sub-Committee on Protection, see above, section III.E, 'A "light" version of the new mechanism as a first step?'.

As the proposed model is rather ambitious, it might be advisable to start with a less complex version of monitoring and review in order to gain the necessary experience. Such a 'light' version would contain the following elements: the High Commissioner could at any time ask an independent expert or a group of experts to prepare a report on matters relating to the implementation of the 1951 Convention and 1967 Protocol or other instruments relevant to the protection of refugees. Where appropriate, the High Commissioner would then submit the report for discussion to the Executive Committee which would have the possibility of reflecting the report and the discussion in its conclusions.