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

Memorandum

UNHCR

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To/A: All Offices in the Field, attn. protection staff

From/De: Volker Türk, Chief, Protection Policy and Legal Advice Section,
Department of International Protection (HQPR02), UNHCR
Geneva

File Code/Dossier: PRL 03-01-03

Subject/Objet: **The Causal Link in International Refugee Law/The Michigan
Guidelines on Nexus to a Convention Ground**

Date: 14 October 2002

1. Please find enclosed a bilingual printed version of the Michigan Guidelines on the Nexus to a Convention Ground.

2. While the issue of the causal connection between feared persecution and the Convention grounds has not really posed major problems in civil law jurisdictions, it has given rise to inconsistent judgements in common law systems. It was therefore thought helpful to study the issue and set out an appropriate analytical framework. I am pleased to share these guidelines with all of you to keep you abreast of important doctrinal developments in international refugee law. Where this issue has indeed posed a problem, you may wish to use these guidelines in your lobbying strategies.

3. The guidelines have not as such been adopted by UNHCR but could be useful in your protection/legal work. You will see that it is a balanced and helpful document which for the most part reflects UNHCR positions as already set out in the Handbook and in UNHCR's paper on Article 1 (document B1.6 of the Protection Manual, Volume 1).

4. Please keep us informed of any developments in this area. In case you need more copies of the printed version for dissemination purposes, please let us know.

Best regards.

CC: all DIP staff, all RLAs

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THE CAUSAL NEXUS IN INTERNATIONAL REFUGEE LAW

*James C. Hathaway**

For all of its value as a critical mechanism of human rights protection, international refugee law is not an all-encompassing remedy. In at least two ways, the category of persons of concern to refugee law is significantly more narrow than the universe of victims of human rights abuse. First, only persons able somehow to leave their own country can be refugees. Alienage is a requirement for refugee status because of concerns about the limits of international resources and the potential for responsibility-shifting, as well as in recognition of the fundamental constraints which sovereignty still places on meaningful intervention by the international community. Second, not even all persons in flight from serious human rights abuse and who manage somehow to make their way to an asylum state qualify as refugees under international law. Only those able to show that their fear of being persecuted is “for reasons of race, religion, nationality, membership of a particular social group or political opinion” are entitled to the protection of the Refugee Convention. This second fundamental limitation on access to refugee status is the subject of this special collection of essays.

The University of Michigan Law School’s Second Colloquium on Challenges in International Refugee Law, convened in March 2001, was devoted to consideration of the import of the nexus (“for reasons of”) clause in the international refugee definition. Senior students enrolled in the Program in Refugee and Asylum Law prepared a comprehensive analytical survey of current state practice in leading asylum countries. This work was critiqued by a select group of experts in international refugee law, who then worked collaboratively with the students in Ann Arbor to define an understanding of the nexus clause which could be recommended to governments and decision-makers around the world. The result of that endeavor, the *Michigan Guidelines on Nexus to a Convention Ground*, appears in this volume at page 210. In addition to publication of the *Guidelines* themselves, contributors to the Colloquium unanimously recommended that portions of the analytical survey be refined for publication so that readers could appreciate more fully the complexity of the issues at stake in the nexus debate. We are pleased here to include three essays which highlight the core concerns in the contemporary jurisprudential debate, and explain why the approach

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recommended in the *Michigan Guidelines* is an apt response to those challenges.

In the first article, “Repairing the Legacy of *INS v. Elias-Zacarias*,” (p. 223), Shayna Cook critically assesses the caselaw which has applied the leading American precedent on the nexus issue. In 1992, the Supreme Court of the United States determined that the aberrational language of the US statute implementing its duties under international law—in which the reference is to “persecution . . . on account of” an enumerated ground, rather than “being persecuted for reasons of” a Convention factor—effectively requires proof of the subjective motivation of the persecutor before refugee status can be granted. Because Elias Zacarias, a young Guatemalan man who had been threatened with death for refusing to join anti-government guerrillas, could not establish that the guerrillas were motivated by animosity towards his political neutrality, his refugee claim was denied. This extraordinary interpretation—in which the protection of asylum seekers is effectively made contingent on whether persecutors choose to announce their motivations, or at least provide circumstantial evidence of their goals—is impossible to square with either the text or surrogate protection purposes of international refugee law. As Cook makes clear, it has also resulted in an inconsistent and largely unprincipled asylum jurisprudence in the United States.

In “Persecution in the Fog of War: The House of Lords’ Decision in *Adan*,” (p. 247), Michael Kagan and William Johnson consider the 1998 British precedent in which refugee status was denied to a Somali family on the grounds that the nexus requirement is not satisfied where “every group seems to be fighting some other group or groups in an endeavour to gain power.” The House of Lords opined that the “for reasons of” requirement should be interpreted in the context of a civil war to require evidence of some greater risk of adverse treatment than would befall other Somalis. Because Adan could not establish that either he as an individual or the groups of which he was a member were more at risk than others in the chaos which followed upon the 1991 collapse of the Siad Barre regime, his claim was denied. The court here did not insist on evidence of the subjective motivation of the persecutor (indeed, in its 1999 decision of *Shah and Islam*, the House of Lords held that the risk of “being persecuted” could be said to be “for reasons of” a protected ground where the Convention ground accounted for *either* the infliction of the harm *or* the concomitant failure of state protection). But it mistakenly elevated one means of proving a causal nexus, namely evidence of differential risk, to an absolute requirement in the case of refugees from civil war. Kagan and Johnson cogently critique the court’s *sui generis*

approach to cases arising in the context of civil war, and argue for a “simple impact” test of causation in refugee law.

In the final essay, “Causation in Context: Interpreting the Nexus Clause in the Refugee Convention,” (p. 265), Michelle Foster takes up the extraordinarily difficult question of just what degree of “connection” between a Convention ground and the risk of being persecuted is required for the refugee definition to be satisfied. Foster argues that the causation standard in refugee law should be context-specific. In the result, the propensity of many courts uncritically to import causation standards from other bodies of law (in particular, the “but for” test from tort law) should be rejected. After a careful survey of the relationship between refugee law and the major bodies of law in which causation concerns are frequently canvassed, she explains why inspiration from analysis of anti-discrimination law and equity is particularly apposite. Foster concludes that a “contributing cause” approach to causation best realizes the objectives of the Refugee Convention, taking account in particular of the practical context within which protection decisions must be made.

The essence of the approach to causation recommended by this set of *Michigan Guidelines* is, in the end, fairly straightforward. Most fundamentally, both the language and the context of the Refugee Convention make clear that the required causal nexus may be established by evidence of the reason for the threat or infliction of harm, for the withholding of state protection, or simply for the predicament faced (whether intentional or not). A Convention ground need not be the sole, or even the dominant cause of the risk of being persecuted, but it must be a contributing cause to the risk. The same test should be applied whether the risk is experienced individually or as part of a group, and whether in war or in peace.

THE MICHIGAN GUIDELINES ON NEXUS TO A CONVENTION GROUND

Efforts to promote the contemporary vitality of the Convention refugee definition have usually focussed on refining our understanding of the circumstances in which an individual may be said to be at risk of “being persecuted,” or on giving contemporary relevance to the content of the five grounds upon which risk must be based—race, religion, nationality, membership of a particular social group or political opinion. Comparatively little thought has been given to how best to conceive the causal linkage or nexus between the Convention ground and the risk of being persecuted. In what circumstances may the risk be said to be “for reasons of” one of the five Convention grounds?

The jurisprudence of many leading asylum states is simply silent on this issue, while decisions rendered in other states assume that causation in refugee law can be defined by uncritical analogy to standards in other branches of the law. Only rarely have senior courts sought carefully to conceive an understanding of causation of specific relevance to refugee law, including the critical questions of a standard of causation and the types of evidence which should inform the causation inquiry.

With a view to promoting a shared understanding of the basic requirements for the recognition of Convention refugee status, we have engaged in sustained collaborative study and reflection on the norms and state practice relevant to the causation inquiry. This research was debated and refined at the Second Colloquium on Challenges in International Refugee Law, convened in March 2001 by the University of Michigan’s Program in Refugee and Asylum Law. These Guidelines are the product of that endeavour, and reflect the consensus of Colloquium participants on how the causal nexus to a Convention ground should be understood in international refugee law.

General Considerations

1. Not every person who is outside his or her own country and has a well-founded fear of being persecuted is a Convention refugee. The risk faced by the applicant must be causally linked to at least one of the five grounds enumerated in the Convention—race, religion, nationality, membership of a particular social group or political opinion.
2. In many states, the requisite causal linkage is explicitly addressed on the basis of the requirement that a refugee's well-founded fear of being persecuted be “. . . *for reasons of* race, religion, nationality, membership of a particular social group or political opinion . . .” In other states causation is not treated as a free-standing definitional requirement, but rather is subsumed within the analysis of other Convention requirements. Whether treated as an independent definitional factor or as part of a general understanding of refugee status, the existence of a nexus to a Convention ground must be assessed in the light of the text, context, objects and purposes of the Refugee Convention and Protocol.
3. It is not the duty of the applicant accurately to identify the reason that he or she has a well-founded fear of being persecuted. The state assessing the claim to refugee status shall decide which, if any, Convention ground is relevant to the applicant's well-founded fear of being persecuted.
4. The risk of being persecuted may sometimes arise in circumstances where two or more Convention grounds combine in the same person, in which case the combination of such grounds defines the causal connection to the well-founded fear of being persecuted.
5. An individual shall not be expected to deny his or her protected identity or beliefs in order to avoid coming to the attention of the State or non-governmental agent of persecution.

Nature of the Required Causal Link

6. The causal connection required is between a Convention ground and the applicant's well-founded fear of "*being persecuted*" (in French, "... *d'être persécutée* ...") The focus on the applicant's predicament follows both from the passive voice employed in the official texts of the Convention and from the Convention's fundamental purpose of defining the circumstances in which surrogate international protection is warranted.
7. Because it is the applicant's predicament which must be causally linked to a Convention ground, the fact that his or her subjective fear is based on a Convention ground is insufficient to justify recognition of refugee status.
8. The causal link between the applicant's predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm, or which cause the applicant's country of origin to withhold effective protection in the face of a privately inflicted risk. Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.
9. A causal link may be established whether or not there is evidence of particularized enmity, malignity or *animus* on the part of the person or group responsible for infliction or threat of a relevant harm, or on the part of a State which withholds its protection from persons at risk of relevant privately inflicted harm.
10. The causal link may also be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the Convention ground contributes to the applicant's exposure to the risk of being persecuted.

Standard of Causation

11. Standards of causation developed in other branches of international or domestic law ought not to be assumed to have relevance to the recognition of refugee status. Because refugee status determination is both protection-oriented

and forward-looking, it is unlikely that pertinent guidance can be gleaned from standards of causation shaped by considerations relevant to the assessment of civil or criminal liability, or which are directed solely to the analysis of past events.

12. The standard of causation must also take account of the practical realities of refugee status determination, in particular the complex combinations of circumstances which may give rise to the risk of being persecuted, the prevalence of evidentiary gaps, and the difficulty of eliciting evidence across linguistic and cultural divides.
13. In view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.

Evidence of Causation

14. The requisite causal connection between the risk of being persecuted and a Convention ground may be established by either direct or circumstantial evidence.
15. A fear of being persecuted is for reasons of a Convention ground whether it is experienced as an individual, or as part of a group. Thus, evidence that persons who share the applicant's race, religion, nationality, membership of a particular social group or political opinion are more at risk of being persecuted than others in the home country is a sufficient form of circumstantial evidence that a Convention ground was a contributing factor to the risk of being persecuted.
16. There is, however, no requirement that an applicant for asylum be more at risk than other persons or groups in his or her country of origin. The relevant question is instead whether the Convention ground is causally connected to the applicant's predicament,

irrespective of whether other individuals or groups also face a well-founded fear of being persecuted for the same or a different Convention ground.

17. No special rule governs application of the causal nexus standard in the case of refugees who come from a country in which there is a risk of war or other large-scale violence or oppression. Applicants who come from such a country are not automatically Convention refugees. They are nonetheless entitled to be recognized as refugees if their race, religion, nationality, membership of a particular social group or political opinion is a contributing factor to their well-founded fear of being persecuted in such circumstances. For example, persons in flight from war may be Convention refugees where either the reason for the war or the way in which the war is conducted demonstrates a causal link between a Convention ground and the risk of being persecuted.
18. Refugee status is not restricted to persons who are members of a political, religious or other minority group. While members of minority groups are in practice more commonly exposed to the risk of being persecuted than are persons who are part of majority populations, the only requirement for recognition of refugee status is demonstration that a Convention ground is a contributing factor to the risk of being persecuted.

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The Michigan Guidelines on Nexus

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These Guidelines reflect the consensus of all the participants at the Second Colloquium on Challenges in International Refugee Law, held at Ann Arbor, Michigan, USA, on March 23–25, 2001.

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