

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
GENEVA, DECEMBER 2011



UNHCR
The UN
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FOREWORD

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol have served as the central instruments underpinning the international refugee protection regime for sixty years. In this anniversary year, the Division of International Protection is pleased to issue the third edition of the Handbook on Procedures and Criteria for Determining Refugee Status. It is reprinted along with the Guidelines on International Protection, which supplement the Handbook.

Since the establishment of the Office of the United Nations High Commissioner for Refugees (UNHCR) in 1950 and the adoption of the 1951 Convention, providing international protection to persons displaced across borders has remained a formidable global challenge. At the time of reissuing this Handbook, 148 States are parties to either or both the 1951 Convention and the 1967 Protocol. This growth in membership over the past sixty years demonstrates the continuing applicability of these instruments to most of today's displacement situations.

Together with its 1967 Protocol, the Convention provides a universal code for the treatment of refugees uprooted from their countries as a result of persecution, violent conflict, serious human rights violations or other forms of serious harm. The preamble to the 1951 Convention underscores one of its main purposes, which is to assure refugees the widest possible exercise of their fundamental rights and freedoms. Core principles of the 1951 Convention include those of non-discrimination, *non-refoulement*, non-penalization for illegal entry or stay, and the acquisition and enjoyment of rights over time.

The Convention has proven to be a living and dynamic instrument, covering persons fleeing a wide range of socio-political events. It is also sufficiently flexible and allows for age, gender and diversity sensitive interpretations. As illustrated in the Handbook and Guidelines, legislative and jurisprudential developments over the past decades have led to a greater understanding of refugee claims in many existing and emerging areas.

In addition, a number of regional instruments complementing the 1951 Convention have been developed, resulting in the elaboration of the refugee concept to meet particular regional challenges related to forced displacement. Parallel developments in other areas of international law, most notably international human rights law, international humanitarian law and international criminal law, have also influenced the evolution of refugee law.

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 accessions to the international refugee instruments. To preserve its integrity, the Handbook remains unchanged also in the present edition, although the annexes have again been updated.

In addition to the Handbook, and in response to the varying legal interpretations of Article 1 of the 1951 Convention in national jurisdictions, UNHCR has continued to issue legal positions on specific questions of international refugee law. In this connection, UNHCR has gazetted "Guidelines on International Protection", as envisaged under the Agenda for Protection following the 50th anniversary events in 2001-2002.* These Guidelines

* See, UNHCR, *Agenda for Protection*, A/AC.96/965/Add.1, 26 June 2002, Goal 1, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=3d3e61b84&query=agenda%20for%20protection>; UNHCR Executive Committee, *General Conclusion on International Protection*, No. 92 (LIII) – 2002, 8 October 2002, available at: <http://www.unhcr.org/refworld/docid/3dafdce27.html>; UN General Assembly, *Office of the United Nations High Commissioner for Refugees: Resolution adopted by the General Assembly*, 6 February 2003, A/RES/57/187, para. 6, available at: <http://www.unhcr.org/refworld/docid/3f43553e4.html>.

complement and update the Handbook and should be read in combination with it. Included in this edition are the first eight Guidelines in the series.

The explanations provided in this publication of key components of refugee status determination are based on the accumulated views of UNHCR, State practice, Executive Committee Conclusions, academic literature and judicial decisions at national, regional and international levels, over a sixty-year period. The Handbook and Guidelines are issued pursuant to UNHCR's supervisory responsibility contained in paragraph 8 of the 1950 Statute of UNHCR in conjunction with Articles 35 and 36 of the 1951 Convention and Article II of the 1967 Protocol.

The Handbook and the Guidelines are intended to guide government officials, judges, practitioners, as well as UNHCR staff applying the refugee definition. It is hoped that they will continue to provide an important reference for refugee status determination around the world and help resolve variations in interpretation.

Volker Türk

Director

Division of International Protection

Office of the United Nations High Commissioner for Refugees

Geneva, December 2011

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

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

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.

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 dateline² 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 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 inter-national 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

² See paras. 35 and 36 below.

³ See paras. 108 and 110 below.

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

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

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

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.

⁵ See Annex IV.

⁶ UN Document E/1618 page 39.

⁷ *Loc. cit.*

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 element, 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 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 para. graphs. 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.

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.

⁸ See also para. 53.

⁹ See para. 144 to 156.

(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 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 element 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

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.

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.

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

¹² UN Document E/1618, p. 39.

¹³ *Loc. cit.*

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.

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.

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).

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 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,

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.

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;

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

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.

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 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.

¹⁸ See para. 125 above.

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.

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.

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 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 connexion²¹ 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

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.

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.

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.

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).

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 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

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.

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).

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.

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

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

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*

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.”

* 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*

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 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;

* United Nations Treaty Series, vol. 189, p. 137.

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;

(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*

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;
 - (b) The implementation of the present Protocol;

* United Nations, Treaty Series, vol 606, p. 267.

(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 1 November 2011

Total number of States Parties to the 1951 Convention: 145

Total number of States Parties to the 1967 Protocol: 146

States Parties to both the Convention and Protocol: 143

States Parties to one or both of these instruments: 148

States Parties to the 1951 Convention only:

Madagascar, 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*	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

* 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
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
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

Country	Convention	Protocol
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
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

Country	Convention	Protocol
Somalia	10 Oct 1978 a	10 Oct 1978 a
South Africa	12 Jan 1996 a	12 Jan 1996 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
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 adhered 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*

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.”

* 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 1948 (Article III); (entered into force 12 January 1951);
- (5) Convention of the Non-Applicability of Statutory Limitations of War Crimes and Crimes Against Humanity of 1968 (entered into force 11 November 1970);
- (6) Geneva Conventions for the protection of victims of war of August 12, 1949 (Convention for the protection of the wounded, and sick, Article 50; Convention for the protection of wounded, sick and shipwrecked, Article 51; Convention relative to the treatment of prisoners of war, Article 130; Convention relative to the protection of civilian persons, Article 147);
- (7) Additional Protocol 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).

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.*

* See resolution 217 A (III).

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.

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

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

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.

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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 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

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.

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.

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 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

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.

⁷ See UNHCR, *Handbook*, para. 54.

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 persecution⁸

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, incarceration, 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

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."

⁹ Trafficking for other purposes could also amount to persecution in a particular case, depending on the circumstances.

¹⁰ See UNHCR, *Handbook*, para. 65.

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.

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.

¹¹ See Summary Conclusions – Gender-Related Persecution, no. 6.

¹² See UNHCR, *Handbook*, para. 68.

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 Group¹⁴

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 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 recognise ‘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

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).

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”.

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.

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 ISSUES²⁰

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.

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.

- 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.).
- 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.

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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

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.

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 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

3 For more information on gender-related claims, see UNHCR’s *Guidelines on International Protection: Gender-Related*

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.

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.

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.

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.

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.

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.

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;

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

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.

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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).

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:

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).

[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.

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

⁷ See Executive Committee Conclusion No. 69 (XLIII) (1992), para. a.

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.

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.

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.

⁹ This approach has been taken by UNHCR on one occasion.

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

"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 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

¹⁰ Executive Committee, Conclusion No. 69 (XLIII) (1992), para. d.

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.

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” schemes¹⁶ 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.

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

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.

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).

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 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.

¹⁹ See paras. 19–22 of these Guidelines and Executive Committee Conclusion No. 69 (XLIII) (1992).

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

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.

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 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. *Is 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

⁴ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, Geneva, re-edited 1992), (hereinafter "UNHCR, *Handbook*"), para. 91.

⁵ For issues concerning the burden of proof in establishing these issues see section III.A below.

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.

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

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 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 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

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.

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.

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.

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

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.

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).

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.

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

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.

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.

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

² For further details, see Annex A of the Background Note accompanying these Guidelines.

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.

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

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.

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.

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

⁶ For instruments pertaining to terrorism, see Annex D of the Background Note.

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.

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.

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

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.unhcr.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.)

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.

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.

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.

6 For further analysis of credibility issues, see paras. 28–33 below.

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 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

⁷ See Universal Declaration, Article 18 and International Covenant, Article 18(1).

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.

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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 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/

13 UNHCR, *Handbook*, above note 4, para. 43

14 See Human Rights Committee, General Comment No. 22, above note 1, para. 8.

15 See generally, UNHCR, *Handbook*, above note 4, paras. 54–55.

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 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

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.

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.

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. 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

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.unhcr.ch/huridocda/huridocda.nsf/0/42E7191FAE543562C1256BA7004E963C/\\$ File/G0210428.doc?OpenElement](http://www.unhcr.ch/huridocda/huridocda.nsf/0/42E7191FAE543562C1256BA7004E963C/$ File/G0210428.doc?OpenElement); “Droits Civils et Politiques et, Notamment: Intolérance Religieuse”, Rapport soumis par M. Abdelfattah Amor, Rapporteur spécial, conformément à la 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.unhcr.ch/huridocda/huridocda.nsf/2848af408d01ec0ac1256609004e770b/9fa99a4d3f9eade5c1256b9e00510d71?OpenDocument&Highlight=2_E%2FCN.4%2F2002%2F73%2FAdd.2.

21 See generally, UNHCR, *Handbook*, above note 4, paras. 167–74.

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 refugee 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.
- 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

²² UNHCR, *Handbook*, above note 4, para. 170.

²³ UNHCR, *Handbook*, above note 4, para. 55–60.

²⁴ See also, UNHCR, "Guidelines on Gender-Related Persecution", above note 19.

- 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.

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.

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

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 Traffic 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).

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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.

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;

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.

(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

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

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 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".

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.

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

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*").

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 persecution.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.

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".

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.

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

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".

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 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

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.

²⁴ See UNHCR, *Handbook*, above footnote 14, para. 94.

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 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

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.

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.

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 interlinked, 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

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

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 group³²

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.³³ It is, however, necessary 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 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

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.

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.

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 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,

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.

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.”

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 appropriate⁴⁹ 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.

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

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.

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 Rights⁵² 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.

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.

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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

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.

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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

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

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.

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/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.

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 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,

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”; *Sarjoo 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.

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).

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 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

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.

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.

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

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

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, RSA, 12 Jan. 2009, <http://www.unhcr.org/refworld/docid/49a6ac0e2.html>, paras. 112–113.

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 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 rules⁴¹ 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 international⁴³ 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

37 ExCom, *Conclusion No. 107*, para. (g)(viii).

38 CRC, Art. 24(3); International Covenant 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).

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) [xxvii] 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/3ae6afb14.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/47dfbf180.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

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.

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.

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.

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.

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 discrimination⁵⁹ 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 exploitation 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.

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.

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 FGM⁶⁴ 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 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

60 ILO Convention on the Worst Forms of Child Labour, Art. 3 (a–c).

61 *Ibid.*, Art. 3(d).

62 *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.

70 Declaration on the Elimination of Violence Against Women, <http://www.unhcr.org/refworld/docid/3b00f25d2c.html>, Art. 2(a).

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

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.

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 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

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. 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>.

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

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.

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.

92 Universal Declaration of Human Rights, <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>, Art. 15; ICPR, Arts 24(2) and (3); CRC, Art. 7.

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, opinions 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

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.

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."

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 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

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."

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

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

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/4a76ddb2.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>.

be perceived as holding a political opinion in which case the link to the Convention ground of political opinion may also be established.¹⁰⁷

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

107 UNHCR, *Handbook*, paras. 169–171; UNHCR, *Guidelines on Religion-Based Persecution*, paras. 25–26.

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.

1 institutionalized as children.¹¹⁴ The treatment as well as social and cultural perceptions
2 of orphans and other children in institutionalized care needs to be evaluated carefully
3 as such children may be the subject of societal disapproval, prejudice or abuse, thus
4 rendering the proposed site for relocation unreasonable in particular circumstances.

5 e) The application of exclusion clauses to children

6 58. The exclusion clauses contained in Article 1F of the 1951 Convention provide that
7 certain acts are so grave that they render their perpetrators undeserving of international
8 protection as refugees.¹¹⁵ Since Article 1F is intended to protect the integrity of asylum,
9 it needs to be applied “scrupulously”. As with any exception to human rights guarantees,
10 a restrictive interpretation of the exclusion clauses is required in view of the serious
11 possible consequences of exclusion for the individual.¹¹⁶ The exclusion clauses are
12 exhaustively enumerated in Article 1F, and no reservations are permitted.¹¹⁷

13 59. In view of the particular circumstances and vulnerabilities of children, the application
14 of the exclusion clauses to children always needs to be exercised with great caution. In
15 the case of young children, the exclusion clauses may not apply at all. Where children
16 are alleged to have committed crimes while their own rights were being violated (for
17 instance while being associated with armed forces or armed groups), it is important to
18 bear in mind that they may be victims of offences against international law and not just
19 perpetrators.¹¹⁸

20 60. Although the exclusion clauses of Article 1F do not distinguish between adults and
21 children, Article 1F can be applied to a child only if s/he has reached the age of criminal
22 responsibility as established by international and/or national law at the time of the
23 commission of the excludable act.¹¹⁹ Thus, a child below such minimum age cannot be
24 considered responsible for an excludable act.¹²⁰ Article 40 of the CRC requires States to
25 establish a minimum age for criminal responsibility, but there is no universally recognized
26 age limit.¹²¹ In different jurisdictions, the minimum age ranges from 7 years to higher ages,

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.

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 responsibility 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

such as 16 or 18 years, while the Statutes of the Special Court for Sierra Leone¹²² and the International Criminal Court¹²³ 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 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,

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>.

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.

- 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.

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

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/43abf5c4.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.

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://>

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/

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/42d66dd84.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

her experience is often essential 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

children can and do form views from a very early age.

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.

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, 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.

¹⁴⁵ ExCom, *Conclusion No. 107*, para. (g)(ix).

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>.

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