

**ADVISORY OPINION BY UNHCR TO THE TOKYO BAR  
ASSOCIATION**  
**Causal linkage between a 1951 Convention ground and the risk of being  
persecuted**

1. On 18 January 2006, the Tokyo Bar Association requested UNHCR to provide additional information on the causal linkage between a 1951 Convention<sup>1</sup> ground and the risk of being persecuted. The issue arose in the case of an applicant fleeing a civil war involving ethnic and religious groups. The question is whether the Convention ground (such as race or religion) needs to be the sole (or dominant) cause, or whether there may be mixed reasons stemming from the complex array of events inherent to a war or internal conflict.
2. UNHCR has a direct interest in the application of the 1951 Convention on the basis of its responsibility for providing international protection to refugees worldwide and for seeking permanent solutions for them.<sup>2</sup> Furthermore, under Article 35 of the 1951 Convention, UNHCR has a duty to supervise the application of the provisions of the 1951 Convention. UNHCR thus welcomes the opportunity to assist the Tokyo Bar Association with its comments regarding the principles to be applied in relation to the issues mentioned in paragraph 1 above. The following comments are based, *inter alia*, on the UNHCR paper “Interpreting Article 1 of the Refugee Convention” of April 2001.<sup>3</sup>

**Civil war as such neither rules out nor suffices to found refugee status**

3. Article 1 A (2) of the 1951 Convention requires that the well-founded fear of being persecuted be “for reasons of” one of the five grounds set out there. In the context of a war, the following elements need to be taken into consideration: i) even in war or conflict situations, persons may be forced to flee on account of a well-founded fear of persecution for Convention reasons; and ii) war and violence are themselves often used as instruments of persecution. They are frequently the means chosen by the persecutors to repress or eliminate specific groups, targeted on account of their ethnicity or other affiliations.<sup>4</sup> In fact, the 1951 Convention

---

<sup>1</sup> 1951 Convention relating to the Status of Refugees.

<sup>2</sup> See the Statute of the Office of the United Nations High Commissioner for Refugees, United Nations General Assembly Resolution 428(V), 14 December 1950.

<sup>3</sup> See, in annex, the English and Japanese versions of the paper.

<sup>4</sup> For a similar view, see Australia High Court, Minister for Immigration and Multicultural Affairs v. Ibrahim, 26 October 2000, [2000] HCA 55; Federal Court of Australia, Minister for Immigration and Multicultural Affairs v. Abdi, 26 March 1999, [1999] FCA 299. See also UNHCR’s note on the 1951 Convention relating to the Status of Refugees: Its relevance in the contemporary context issued in February 1999.

was drafted in the aftermath of World War II, at least in part as a means of protecting victims of persecution in that war. Where conflicts are rooted in ethnic, religious or political differences which specifically victimize those fleeing, persons fleeing such conflicts would qualify as 1951 Convention refugees. This was reaffirmed by UNHCR's Executive Committee.<sup>5</sup>

4. Likewise, on a proper interpretation of Article 1, it is not relevant how large or indeed how small the affected group may be. Whole communities may risk or suffer persecution for Convention reasons, and the fact that all members of the community are equally affected does not in any way undermine the legitimacy of any particular individual claim. On the contrary, such facts should facilitate recognition, as the sociological process of marginalization that such stigmatization engenders is a powerful archetype of persecution. National jurisprudence in some countries has also accepted that civil war as such neither rules out nor suffices to found refugee status.<sup>6</sup>

**The Convention ground must be a relevant contributing factor and needs not be the sole or dominant cause.**

5. As rightly pointed out by the Tokyo District Court, a civil war usually entails a variety of causes and consequences intrinsically connected, such as struggle for control over territories, changing alliances and retaliation acts.<sup>7</sup> However, among

---

<sup>5</sup> See, in particular, Excom Conclusion No. 85, para c).

<sup>6</sup> Federal Court of Canada, *Salibian v. Canada* [1990] 3 F.C. 250, High Court of Australia, *Minister for Immigration and Multicultural Affairs v. Ibrahim*, 26 October 2000, [2000] HCA 55, Federal Court of Australia, *Minister for Immigration and Multicultural Affairs v. Abdi*, 26 March 1999, [1999] FCA 299.

<sup>7</sup> Tokyo District Court, 27 September 2005 (Case reference: Heisei 13 nen Gyo-u No. 406, Petition to revoke the deportation order / Heisei 14 nen Gyo-u No. 255, Petition to revoke the decision to reject refugee status): “***General situation facing Shi'ite Hazaras and their qualification for refugee status***’ : (...) with regard to the risk of persecution faced by the Hazaras in general, it appears that, throughout the Afghan history, the Hazaras have been subject to socio-economic discrimination and political oppression as religious and ethnic minorities. It also appears that as a result, a deep-rooted enmity developed between Hazaras and the Pashtuns(...)it can be said that under the civil war between the Taliban and Hizb-e-Wahdat or the Northern Alliance, many Hazara civilians were subjected to egregious killings including summary executions by the Taliban forces.”

“However, the areas where the abovementioned killings were allegedly carried out were mostly in Mazar-e-sharif, Bamiyan and Yakauran, which were areas of combat (...) it is also reported that the Hizb-e-Wahadat forces (mainly Hazara) also perpetrated cruel acts against civilians in these regions (...) it can be considered that most of these acts were done for the purpose of retaliation, upon occupying the enemy groups' lands in the context of the civil war.”

“Even under the civil war between Mujahideen forces, members of different forces, including Hazaras, continued changing their factional alliances (...) after the rise of the Taliban, various Mujahideen groups, composed of different ethnicities and religious factions, which used to be hostile

these elements, the ethnic or religious factor may also be part of the motivations of the belligerents. This element arguably constitutes a “contributing factor” sufficient to satisfy the refugee definition. This view is shared by most scholars and national courts. See, in particular, “The Michigan Guidelines on Nexus to a Convention Ground” by J.C. Hathaway <sup>8</sup>:

*Para 10: The causal link may be established in the absence of any evidence of intention to harm or to withhold protection, so long as it is established that the Convention ground contributes to the applicant’s exposure to the risk of being persecuted.*

*Para 13: In view of the unique objects and purpose of refugee status determination, and taking into account the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. If however, the Convention ground is remote to the point of relevance, refugee status need not be recognized.*

*Para 17: No special rule governs application of the causal nexus standard in the case of refugees who come from a country in which there is a risk of war or other large-scale violence or oppression. Applicants who come from such a country are not automatically Convention refugees. There are nonetheless entitled to be recognized as refugees if their race, religion, nationality, membership of a particular social group or political opinion is a contributing factor to their well-founded fear of being persecuted in such circumstances. For example, persons in flight from war may be Convention refugees where either the reason for the war or the way in which the war is conducted demonstrates a causal link between a Convention ground and the risk of being persecuted.*

---

*to each other, got together to form the Northern Alliance in order to counter the Taliban. The situation thus represented a power struggle which cannot simply be attributed to ethnic and religious factors. Further, while the Taliban mainly comprised ethnic Pashtuns, the group also included Hazara members and Hizb-e-Wahadat’s Akbari Sect (...) In light of these facts, it is difficult [for the court] to accept that, under the Taliban regime, the Hazaras were persecuted and subjected to threats to life and physical integrity purely for the reasons of their ethnicity and religion, irrespective of the fighting arising from the power struggle.” (Translator’s Note: [ ] was inserted by the translator)*

<sup>8</sup> James C. Hathaway, “The Michigan Guidelines on Nexus to a Convention Ground”, Michigan Journal of International Law [Vol. 2, 2002] (enclosed in annex). See also James C. Hathaway and Michelle Foster, “The Causal Connection (“Nexus”) to a Convention Ground”, Discussion Paper No.3, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002, published in International Journal of Refugee Law (Volume 15, Number 3, 2003), and Michelle Foster, “Causation in Context: Interpreting the Nexus Clause in the Refugee Convention”, Michigan Journal of International Law [Vol. 23:265 ] (Winter 2002). For relevant jurisprudence, also, the United Kingdom Immigration Appeal Tribunal, Tumba (14742; 25 March 1997), United Kingdom Court of Appeal, Suarez v. Secretary of State for the Home Department, [2002] I WLR 2663 ( Civil Division, 22 May 2002 ) , United States Court of Appeals for the Ninth Circuit, Gafoor v. INS, (2000) 231 F 3d 645 (U.S.C.A. 9th Cir., Nov. 3, 2000)

6. Lastly, it is recognized that there are persons who flee the indiscriminate effects of violence associated with conflict with no element of persecution on account of a Convention ground in the sense of Article 1 (A). This is the case, for example, where it is established that ethnicity did not contribute to the applicant's exposure to the risk of being persecuted. It is important to stress that such persons might not meet the Convention definition, but may still require international protection on other grounds. In this regard, UNHCR's Executive Committee has developed guidance in the form of Executive Committee Conclusion on the "Provision on International Protection Including through Complementary Forms of Protection" (2005).
7. UNHCR hopes that the above observations will assist the further deliberations on these issues and stands ready to provide additional information.

**UNHCR Representation in Japan**  
**1 March 2006**

---

**Annex / Enclosures (Japanese translation available):**

**I. UNHCR's Standards**

UNHCR Geneva, "Interpreting Article 1 of the 1951 Convention", April 2001

**II. Research Paper by Refugee Law Scholar**

James C. Hathaway, "The Michigan Guidelines on Nexus to a Convention Ground", *Michigan Journal of International Law* [ Vol. 23:207 ] (Winter 2002)

**III. Extracts of relevant jurisprudence**

• **Cases cited in footnote 4 and 6: persecution in the context of a civil war**

1. Federal Court of Australia, Minister for Multicultural Affairs v. Abdi, 26 March 1999, [1999] FCA 299 (**also cited in footnote 8**)
2. Federal Court of Canada, Salibian v. Canada [1990] 3 F.C. 250
3. High Court of Australia, Minister for Immigration and Multicultural Affairs v. Ibrahim, 26 October 2000, [2000] HCA 55

• **Cases cited in footnote 8: standard of causation**

4. United Kingdom Immigration Appeal Tribunal, Tumba (14742; 25 March 1997)  
United Kingdom Court of Appeal, Suarez v. Secretary of State for the Home Department, [2002] I WLR 2663 (Civil Division, 22 May 2002)

5. United Kingdom Court of Appeal, Suarez v. Secretary of State for the Home Department, [2002] I WLR 2663 ( Civil Division, 22 May 2002 )
6. United States Court of Appeals for the Ninth Circuit, Gafoor v. INS, (2000) 231 F 3d 645 (U.S.C.A. 9th Cir., Nov. 3, 2000)

- **Cases relating to mixed motives of the persecutors**

7. Federal Court of Australia, Abdi v Minister for Immigration and Multicultural Affairs [1998] 1335 FCA (23 October 1998)
8. Federal Court of Australia, Minister for Immigration and Multicultural Affairs v. Abdi, 26 March 1999, [1999] FCA 299 (**also cited in footnotes 4 and 6**)
9. Federal Court of Australia, Rajaratnam v Minister for Immigration and Multicultural Affairs [2000] FCA 1111 (10 August 2000)

- ❖ **Cases relating to Afghan Hazaras**

10. Refugee Review Tribunal Reference: V01/13178 (8 October 2001)
11. Refugee Review Tribunal Reference: V01/13227 (9 November 2001)

**END**