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

Amicus curiae of the United Nations High Commissioner for Refugees[1] in case number 20-121835SIV-HRET regarding F.K. and others against the State/the Norwegian Appeals Board before the Supreme Court of Norway (Norges Høyesterett)

I. UNHCR's mandate and role

1. The Office of the United Nations High Commissioner for Refugees ("UNHCR") has been entrusted by the United Nations General Assembly with a mandate to provide international protection to refugees and, together with Governments, seek permanent solutions for refugees.[2] According to its Statute, UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]"[3] This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (collectively referred to as "1951 Convention").[4]

2. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention.[5] UNHCR also provides information on a regular basis to decision-makers and courts of law concerning the proper interpretation and application of the provisions in the 1951 Convention. The status of UNHCR statements and publications, including in particular the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook") and subsequent Guidelines on International Protection, as normative guides, have been acknowledged by numerous Courts and have been found by the Supreme Courts of Canada, the United Kingdom, and of the

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1 This amicus curiae does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. See, UN General Assembly, Convention on the Privileges and Immunities of the United Nations, 13 February 1946, www.refworld.org/docid/3ae6b3902.html.

2 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), www.refworld.org/docid/3ae6b3628.html.

3 UNHCR Statute, para. 8(a).

4 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, www.refworld.org/docid/3be01b964.html. According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

5 Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and complementary Guidelines on International Protection: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, www.refworld.org/docid/5cb474b27.html.

United States to be a "highly relevant authority,"[6] "highly persuasive authority,"[7] providing "significant guidance"[8] and "should be accorded considerable weight."[9]

3. UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union.[10] Secondary EU legislation also emphasizes the role of UNHCR.[11]

4. UNHCR also provides information on a regular basis to decision-makers and courts of law concerning the interpretation and application of the provisions in the 1951 Convention and has a history of third-party interventions in many national and regional jurisdictions.[12] The Executive Committee of the High Commissioner's Programme (ExCom), of which Norway has been a member since its establishment in 1958,[13] has clarified that "*amicus curiae* briefs and court submissions represent valuable tools to promote the proper interpretation of national and international refugee law".[14] The Office is often approached directly by courts or other

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6 *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, www.refworld.org/cases,CAN_SC,3ae6b68b4.html, paras. 46 and 119; *Canada (Attorney General) v. Ward, ("Ward")*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, www.refworld.org/cases,CAN_SC,3ae6b673c.html, pp. 713-714.

7 *R v. Secretary of State for the Home Department, Ex parte Adan,* United Kingdom: House of Lords (Judicial Committee), 19 December 2000, www.refworld.org/cases,GBR_HL,3ae6b73b0.html.

8 *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, U.S. Supreme Court, 9 March 1987, www.refworld.org/cases,USSCT,3ae6b68d10.html.

9 *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, www.refworld.org/cases,UK_SC,50b89fd62.html, para. 36. Similarly, the Handbook has been found "particularly helpful *as a guide to what is the international understanding of the Convention obligations, as worked out in practice". R v. Secretary of State for the Home Department, Ex parte Robinson*, Case No: FC3 96/7394/D, United Kingdom: Court of Appeal (England and Wales), 11 July 1997, www.refworld.org/cases,GBR_CA_CIV,3ae6b72c0.html, para. 11.

10 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, www.unhcr.org/refworld/docid/4b17a07e2.html.

11 For instance, Recital 22 of the recast Qualification Directive states that consultations with UNHCR *"may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention".* European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337; December 2011, pp. 9-26, www.refworld.org/docid/4f197df02.html ("EU Qualification Directive"). The supervisory responsibility of UNHCR is specifically articulated in Article 29(c) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), which obliges Member States to allow UNHCR "to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure." European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, www.refworld.org/docid/51d29b224.html.

12 In this regard, UNHCR court interventions prepared in the context of specific court cases do not have lesser legal value than other UNHCR positions such as the ones expressed in GIPs and UNHCR's thematic legal position papers since the main purpose of its amicus briefs in specific cases is to ensure international harmonization. Accordingly, for the sake of international consistency, UNHCR statements in amicus briefs should be afforded the same level of deference as other UNHCR positions.

13 ExCom functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. At present, 106 States are Members of the Executive Committee, including Norway which was an original member of the UNREF Executive Committee established in 1955 and which preceded the establishment of ExCom in 1958. See, https://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html.

14 Executive Committee of the High Commissioner's Programme, 54th Session (2003), Note on International Protection, 2 July 2003, A/AC.96/975: www.refworld.org/docid/3f1feb6d4.html.

interested parties to obtain UNHCR's "unique and unrivalled expertise"[15] on particular legal issues. UNHCR has, for example, been granted intervener status by the European Court of Human Rights ("ECtHR")[16] and has appeared as a third party before the Court of Justice of the European Union (CJEU).[17] UNHCR has also intervened before various domestic courts, such as the Supreme Court of the United States of America, the Supreme Court and former House of Lords of the United Kingdom, the German Federal Constitutional Court, the Supreme Court of Canada as well as the Supreme Court and the Borgarting Court of Appeal in Norway. Both courts in Norway have previously accepted UNHCR's written submissions and oral interventions.[18]

5. According to Section 15-8 of the "*Tvisteloven"* - the Norwegian Dispute Act[19] - written submissions may be made in court proceedings by "organisations and associations within the purpose and normal scope of the organisation" in order to shed light on matters of public interest. UNHCR has a direct interest in ensuring a proper and consistent interpretation of the 1951 Convention as part of its supervisory responsibility, including in the present case, which concerns the principal question of whether the concept of Internal Flight or Relocation Alternative ("IFA") may be applied in the context of cessation of refugee status under Article 1C (5) and (6) of the 1951 Convention. UNHCR submits this amicus curiae in order to assist the Supreme Court of Norway.

II. Question addressed in this submission

6. In the present *amicus curiae*, in light of its mandate as outlined above, UNHCR wishes to provide its views on the question of whether an IFA may be applied in the context of cessation of refugee status. In doing so, these submissions will outline UNHCR's views on the interpretation and application of the IFA concept, the "ceased circumstances" clauses of Article 1C (5) and (6) of the 1951 Convention, the material point in time for their application under Article 1 C(5), and the applicability of the IFA concept in the context of cessation for reasons of "ceased circumstances".

7. Bearing in mind the interaction between the 1951 Convention and international human rights law, UNHCR makes specific reference to relevant provisions of human rights law, including

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15 R *(on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, United Kingdom: Supreme Court, 19 February 2014, www.refworld.org/cases,UK_SC,5304d1354.html, para.72.

16 *UNHCR intervention before the European Court of Human Rights in the case of M.S.S. v. Belgium and Greece*, June 2010, www.refworld.org/docid/4c19e7512.html; *UNHCR intervention before the European Court of Human Rights in the case of Abdolkhani and Karimnia v. Turkey*, January 2009, www.refworld.org/docid/4991ad9f2.html.

17 UNHCR intervention before the CJEU in the cases of *N.S. v. Secretary of State for the Home Department in United Kingdom and M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland*, 1 February 2011, www.refworld.org/docid/4d493e822.html; *UNHCR intervention before the CJEU in the cases of Minister voor Immigratie en Asiel v. X, Y and Z*, 28 September 2012, www.refworld.org/docid/5065c0bd2.html; *Written Observations of the United Nations High Commissioner for Refugees in the cases of A and Others* (C-148/13, 149/13 and 150/13), 21 August 2013, www.refworld.org/docid/5215e58b4.html.

18 *Amicus curiae of the United Nations High Commissioner for Refugees (UNHCR) on the interpretation and application of Article 25, Article 27 and Article 28 of the 1951 Convention Relating to the Status of Refugees*, 22 December 2016, www.refworld.org/docid/58a2f9984.html; *HR-2015-02524-P*, Case no. 2015/203, Norway: Supreme Court, 18 December 2015, www.refworld.org/docid/56cc6e2c4.html, at para. 35.

19 *Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (Tvisteloven),* unofficial English translation, http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf.

the jurisprudence of the ECtHR. Moreover, UNHCR makes reference to EU primary and secondary law and the jurisprudence of the CJEU in so far as the European legal framework may provide useful guidance on the interpretation of the issues listed above.[20]

8. UNHCR only addresses issues of legal principle arising from this question and does not address or comment on the particular facts of the present case or positions taken by the parties.

The concept of "Internal Flight Alternative" in the context of Article 1A(2)

9. The criteria for the granting of refugee status are set out in Article 1A(2) of the 1951 Convention and are to be interpreted in a liberal and humanitarian spirit,[21] in accordance with their ordinary meaning, and in light of the object and purpose of the 1951 Convention.[22] UNHCR submits that the IFA concept can be applied only in the context of assessments of eligibility for international protection within Article 1A (2), and not with regard to cessation of status within Article 1C (5) and (6).

10. UNHCR's views on the interpretation and application of IFA are contained in UNHCR's Guidelines on *"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 IFA Guidelines").[23] The concept of IFA 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."[24] As such, the question of an IFA is only relevant in particular and limited circumstances.

11. The IFA concept is not a stand-alone principle of refugee law, nor is it an independent test in the determination of refugee status. The IFA is not explicitly mentioned in the 1951 Convention. However, it *may* arise in the context of refugee status determination provided the proposed IFA meets the stringency of the relevance and reasonable tests (set out below). International law does not require persons facing a threat of persecution or serious harm to exhaust all options within their own country first before seeking asylum.[25] UNHCR does

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20 The Norwegian Immigration Act of 2010 ("the Immigration Act") largely builds on provisions of the Qualification Directive, see preparatory works to the Act: Norwegian Immigration Act (NOU 2004:20) and Proposition no. 75 (2006-2007) to the Odelsting on the Immigration Act 2008. According to the preparatory works the main feature of Section 28 of the Immigration Act is that it widens the scope of refugee status to include not only refugees recognized under the 1951 Convention according to Section 28, paragraph one, litra a), but equally as regards other persons in need of international protection who are at real risk of death penalty, torture or other inhuman or degrading treatment or punishment upon return to a home country as codified in Section 28, paragraph one, litra b) of the Act.

21 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* ("UNHCR IFA Guidelines"), 23 July 2003, HCR/GIP/03/04, www.unhcr.org/refworld/docid/3f2791a44.html, para 2.

22 The Vienna Convention on the Law of Treaties confirms that a treaty shall be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose." United Nations, *Vienna Convention on the Law of Treaties,* 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, www.refworld.org/docid/3ae6b3a10.html, Article 31(1). The Vienna Convention permits recourse to supplementary means of interpretation, including the travaux préparatoires, only where the meaning of the treaty language is "ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable." Article 32.

23 UNHCR, IFA Guidelines.

24 UNHCR, IFA Guidelines, para. 6.

25 UNHCR IFA Guidelines, paras. 2 and 4.

therefore not consider the absence of an IFA as a prerequisite for being granted refugee protection.

12. Where, in the context of a holistic assessment of an asylum application, a well-founded fear of persecution linked to a 1951 Convention ground has been established in a localized part of the country of origin, the possibility of an IFA requires an assessment of the *relevance*[26] as well as the *reasonableness*[27] of relocation to the proposed area, as explained in UNHCR's IFA Guidelines.[28] The determination of whether the proposed IFA is an appropriate alternative for the applicant "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 pre-flight place of the original area, but also whether the proposed area provides a meaningful alternative in the future."[29]

13. The above standards are broadly reflected in the case law of the ECtHR. In *Salah Sheekh v. the Netherlands*,[30] the Court examined the question of an IFA in the context of return to Somalia and laid out the following principles for IFA application under Article 3 ECHR:

> "as a precondition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 [ECHR][31] may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.[32]

14. Moreover, the Court has outlined that "[i]n order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to

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26 For an IFA to be relevant, UNHCR considers that certain conditions must be met. First, an assessment of whether the applicant would be exposed to the original risk of being persecuted in the proposed area of IFA must be carried out. If the applicant has a well-founded fear of persecution at the hands of the State or its agents, there is a presumption that consideration of an IFA is not relevant, as national authorities are presumed to act throughout the country. Secondly, an assessment is needed of whether the applicant would be exposed to new risks of being persecuted, which are distinct from the original fear of persecution on which his/her claim is based, which arise in the proposed area of IFA, or to other forms of serious harm. Finally, an assessment on whether the proposed area of IFA is practically, safely and legally accessible to the individual must be conducted. For further information about the relevance analysis, see UNHCR, IFA Guidelines, paras. 9-21.

27 UNHCR emphasizes that the assessment of reasonableness must (1) include a consideration of objective, "baseline" standards, and the extent to which conditions in the proposed place of relocation meet such standards; and (2) focus on the personal circumstances of the particular individual, and how conditions in the proposed place of relocation may impact upon that particular individual. For a proposed IFA to be reasonable, the applicant must be able to exercise his/her basic human rights in the area of relocation and s/he must have possibilities for economic survival in dignified conditions. For further information about the reasonableness analysis, see UNHCR, IFA Guidelines, paras. 22-30.

28 UNHCR, IFA Guidelines, para. 7.

29 UNHCR, IFA Guidelines, para. 8.

30 *Salah Sheekh v. the Netherlands*, 1948/04, ECtHR, 11 January 2007, www.refworld.org/cases,ECHR,45cb3dfd2.html.

31 *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, www.refworld.org/docid/3ae6b3b04.html.

32 *Salah Sheekh v. the Netherlands*, note 29 above, para. 141. See also *Chahal v. The United Kingdom*, ECtHR, 15 November 1996, www.refworld.org/cases,ECHR,3ae6b69920.html and *Hilal v. The United Kingdom*, 45276/99, ECtHR, 6 June 2001, www.refworld.org/cases,ECHR,3deb99dfa.html.

the receiving country, bearing in mind the general situation there and his personal circumstances."[33]

15. The EU Qualification Directive also foresees the IFA assessment to be part of the inclusion assessment. Article 8(1) of the Directive, concerning internal protection "as part of the application of international protection", states that "Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she: (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or (b) has access to protection against persecution or serious harm […]; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there."[34]

Article 1C (5) and (6) – the "ceased circumstances" clauses

16. In line with the Vienna Convention on the Law of Treaties,[35] the cessation clauses must be read in light of the object and purpose of the 1951 Convention as a whole. Furthermore, given the Convention's object and purpose, the cessation clauses – and the guidance on interpreting them – should not be applied in a mechanistic, punitive or rote manner. Instead, Article 1C only "applies when the refugee, having secured or being able to secure national protection, either of the country of origin or of another country, no longer needs international protection […and] the approach to such cases should be to ensure that no refugee is unjustly deprived of the right to international protection."[36] This approach requires an "objective inquiry into the prospect that the State of persecution will now provide effective protection."[37] At all the steps, the burden of proof rests with the asylum State authorities, and the benefit of doubt should favour the refugee as this is consistent with the restrictive interpretation appropriate to the cessation clauses in light of the *Convention*'s overall protective goals.[38]

17. UNHCR's interpretation of Article 1C is primarily set out in the UNHCR Handbook and in its *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* ("UNHCR Cessation

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33 *Vilvarajah and Others v. The United Kingdom*, 45/1990/236/302-306, ECtHR, 26 September 1991, www.refworld.org/cases,ECHR,3ae6b7008.html, para. 108.

34 *Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU: www.refworld.org/docid/4f197df02.html.

35 United Nations, *Vienna Convention on the Law of Treaties,* 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, www.refworld.org/docid/3ae6b3a10.html.

36 UNHCR, *Note on Cessation Clauses*, 30 May 1997, EC/47/SC/CRP.30, at paras. 4, 14.

37 *Cessation of refugee protection*, Chapter 8.1 in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (eds. Erika Feller, Volker Türk and Frances Nicholson) Cambridge University Press, June 2003), at 540

38 UNHCR, 'The International Protection of Refugees: Interpreting Art. 1 of the 1951 Convention', RSQ 20 (2001–3), pp. 77–104, at para 10. It is a general legal principle that the burden of proof lies on the person who makes the assertion, 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*, 1 January 1992, HCR/1P/4/ENG/REV. 4, at para. 196; See also, *Cessation of refugee protection*, Chapter 8.1 in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (eds. Erika Feller, Volker Türk and Frances Nicholson) Cambridge University Press, June 2003), at 515, 523, 540

Guidelines").[39] As expressed in the Handbook "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."[40]

18. The 1951 Convention recognizes that refugee status ends under certain clearly and exhaustively defined conditions. Article 1C of the 1951 Convention sets out provisions for cessation of refugee status where refugee status is no longer needed or justified. While the cessation clauses in paragraphs 1 to 4 of Article 1C are linked to a change in an individual's personal circumstances brought about by the actions of that person, the clauses in 1C (5) and (6) are based on the consideration that international protection is no longer justified due to changes in the country of nationality or former habitual residence because the reasons for a person becoming a refugee have ceased to exist.[41] This means the trigger for cessation of status is either based on change in the personal circumstances of refugees or changed circumstances in the country of origin; that is, objectively verifiable facts that are outlined in Article 1C.

19. The UNHCR Handbook further provides that "the cessation clauses are negative in character and exhaustively enumerated. The clauses should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status.[42] UNHCR underlines in this regard the grave consequences flowing from unjustified or premature declaration of cessation for recognised refugees, including loss of rights that accompany refugee status and further displacement within the country of origin or renewed displacement outside, as well as risks to life and personal security.[43] The changes must be of such a nature that the refugee cannot "continue to refuse to avail him [or herself] of the protection of the country of his [her] nationality."[44] This is also consistent with the principles of legal certainty and legitimate expectations,[45] as well as Article 18 of the Charter of Fundamental Rights of the EU, according to which the right to asylum must be guaranteed with due respect for the rules of the 1951 Convention.

20. The test for cessation under Article 1C (5) and (6) requires an assessment of the extent or degree to which the circumstances, relevant in connection with the granting of refugee status, in the country have changed fundamentally and durably so that the refugee can re-avail her- or himself of the protection of her or his own country. UNHCR's Cessation Guidelines can

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39 UNHCR, Handbook, paras. 115-116, UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees* ("UNHCR Cessation Guidelines"), 10 February 2003, HCR/GIP/03/03, www.refworld.org/docid/3e50de6b4.html.

40 UNHCR, Handbook, para. 112.

41 UNHCR, Handbook; see also ExCom Conclusion No. 69 (XLIII), Cessation of Status (1992).

42 UNHCR, Handbook, para. 116. On the 'negative' character of the cessation clauses, see also the UNHCR Handbook, para 31, which states: "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…"

43 UNHCR, *Note on Cessation Clauses* (30 May 1997) ("Note on Cessation"), paras. 8 and 40: www.refworld.org/docid/47fdfaf1d.html.

44 Article 1C(5). See equivalent for stateless refugees in Article 1C(6) referring to the country of habitual residence.

45 UNHCR, *Cancellation of Refugee Status*, March 2003, PPLA/2003/02, www.refworld.org/docid/3f4de8a74.html, para. 12 and fn 13. The principles of legal certainty and legitimate expectations are also among the fundamental principles of the EU, see for example, CJEU, C-369/09 P, 24 March 2011, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-369/09%20P, para. 122.

assist in the assessment of how and to what extent conditions in the country of origin must have changed before the "ceased circumstances" clauses can be invoked.[46] The most typical situation of a fundamental change is one where hostilities have ended, and peace and stability have returned to the country.[47] If a particular cause of fear of persecution existed for a refugee, the elimination of this cause is important in assessing whether a fundamental change which would justify the application of the cessation clauses, but all the relevant factors must be taken into consideration as persecution often has multiple and inter-linked causes.[48] Furthermore, where the particular circumstances leading to flight 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.[49]

21. UNHCR's Executive Committee Conclusion[50] No. 69 (XLIII), states:

> "[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.
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> ... [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."[51]

22. For the refugee to be able to effectively re-avail her- or himself of the protection of his or her own country, such protection must be effective and available and go beyond mere physical security or safety. Such protection 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 and the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood, as evidenced by the general human rights situation in the country. Marked progress in establishing an independent judiciary, fair trials and access to courts are among key indications of the availability of effective protection in the country of origin.[52]

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46 UNHCR, Cessation Guidelines, para. 11.
47 UNHCR, Cessation Guidelines, para. 11.
48 UNHCR, Cessation Guidelines, para. 11. See also UNHCR, *Public Statement in Relation to Salahadin Abdulla and Others v. Bundesrepublik Deutschland pending before the Court of Justice of the European Union, August 2008, C-175/08; C-176/08; C-178/08 & C-179/08*, www.refworld.org/docid/48a2f0782.html, p. 7.
49 UNHCR Cessation Guidelines, para. 12.
50 The Executive Committee of the High Commissioner's Programme's advisory functions include the issuance of Conclusions on International Protection, referred to as "ExCom Conclusions". ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees.
51 ExCom Conclusion No. 69 (XLIII), Cessation of Status (1992).
52 UNHCR, Cessation Guidelines, paras. 15 and 16.

23. EU secondary law lays down similar preconditions as clarified by the CJEU in *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* where the Court held that Article 7 (Actors of protection) of the Qualification Directive imposes an obligation on the competent authorities to verify whether the actor(s) of protection of the third country in question operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution, in addition to assessing the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country.[53] This verification is a broad one, since it involves assessing, in particular, how "the institutions, authorities and security forces" operate, but also "all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution".[54] Further, not simply any change of circumstances is relevant, but only such that is "of such a significant and non-temporary nature" that the fear of persecution is "permanently eradicated."[55] This absence of a well-founded fear is precisely what is missing in a situation where only parts of the country may be considered safe (see below para. 30).

24. As stated in the Cessation Guidelines:

> "UNHCR considers that 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."[56]

25. The phrase 'in principle' does not qualify or affect the need for changes which remove the threat of persecution throughout the whole country, and not merely part, before cessation can apply. UNHCR's guidance recognizes that in some cases, cessation may only be relevant for some groups of refugees, or for those who have fled at a particular time, and aims to define the limited parameters under which cessation declarations may be made for distinct sub-groups of a general refugee population from a specific country. For instance, for refugees who fled persecution by a particular regime while it was in power, cessation could apply when the regime is no longer in power. This would not apply for those refugees who fled after that regime was deposed. This is distinct from the situation in which a general cessation declaration might be made for all groups in an entire country. A key premise of the guidance is accordingly that no cessation can be undertaken when changes affect only part of the country.

26. Where the cessation clauses are applied on an individual basis, it should not be done for the purposes of a re-hearing *de novo* or a re-assessment of the refugee's well-founded fear of persecution.[57] This would defeat the purpose of the cessation clauses based on "ceased

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53 *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, CJEU, 2 March 2010, www.refworld.org/cases,ECJ,4b8e6ea22.html, paras. 70-71. See also *Opinion of Advocate General Hogan in Case C-255/19 Secretary of State for the Home Department v OA (Request for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom),* ECLI:EU:C:2020:342: Court of Justice of the European Union, 30 April 2020: www.refworld.org/cases,ECJ,5eb933e24.html.

54 *Ibid.*, para. 71.

55 *Ibid.*, paras. 72, 73.

56 UNHCR, Cessation Guidelines, para. 17.

57 UNHCR, Cessation Guidelines, para. 18.

circumstances" under Article 1C (5) and (6) as a distinct test in contrast to the inclusion test under Article 1A(2) of the 1951 Convention. In UNHCR's view, it would be at variance with the text of Article 1 of the 1951 Convention in the context of the treaty and in light of its object and purpose for a recognized refugee to have to re-assert their claim for inclusion under Article 1A(2).[58]

The material point in time to apply the ceased circumstances clauses under Article 1 C(5) of the 1951 Convention

27. UNHCR is of the view that an approach that applies the ceased circumstances clauses on the basis of changes in the factual circumstances in the country of origin occurring *after* the cessation decision and removal of the person(s) concerned, is at variance with the 1951 Convention. In light of the fact that 'a premature or insufficiently grounded application of the ceased circumstances clauses can have serious consequences' for the individual concerned, it must be applied based on the factual circumstances in the country of origin at the time of the decision whether to cease the refugee status is made.[59] UNHCR considers that cessation procedures which allow for the application of ceased circumstances clauses on the basis of changes in the factual circumstances in the country of origin occurring *after* the cessation decision and removal of the person(s) concerned does not conform to the principles of procedural fairness and due process.[60]

28. This finds support in the jurisprudence of the ECtHR which has affirmed that '[w]ith regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion.'[61] Thus, the decision that one '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' must be made with reference to the facts that were known or ought to have been known at the time that the cessation decision is made. The decision to cease one's status cannot be supplemented by reasons *ex post facto*.

Internal flight alternative in the context of cessation

29. UNHCR submits that the IFA concept can be applied only in the context of assessments of eligibility for international protection within Article 1A (2) of the 1951 Convention, and not in the context of cessation of refugee status in accordance with Article 1C (5) and (6) of the 1951 Convention. The possibility of an IFA is part of the holistic test under Article 1A (2) of the 1951 Convention to establish whether a person has a well-founded fear of persecution and is unwilling or unable to avail her- or himself of the protection of her or his country of

[58] Unless grounds for cancellation, revocation or cessation exist. UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, www.refworld.org/docid/41a5dfd94.html.

[59] UNHCR, Cessation Guidelines, para. 7. See also, UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, 26 August 2020: www.refworld.org/docid/5e870b254.html.

[60] This includes for example, the right to an interview or hearing and to rebut or explain evidence that the cessation grounds apply.

[61] See para. 133 of *Saadi v. Italy, Appl. No. 37201/06*, ECtHR, 28 February 2008, www.refworld.org/cases,ECHR,47c6882e2.html.

nationality.[62] In contrast, cessation on the basis of "ceased circumstances" requires an assessment of whether the situation in the country of origin in connection with the reasons for recognizing the person as a refugee has changed fundamentally and durably. Further, IFA is part of a forward-looking test, whereas cessation on the basis of "ceased circumstances" concerns an assessment of the extent or degree to which past circumstances have materially changed.

30. As long as the refugee's home area continues to be unsafe, and it was this particular circumstance which led to recognition of refugee status, then the basis for refugee recognition i.e. "the circumstances in connection with which he has been recognized as a refugee" have not ceased to exist. The sole fact that an IFA has emerged is not sufficient to bring a refugee's protection need to an end, as all relevant circumstances need to be considered, bearing in mind that the "particular cause of fear of persecution" carries more weight than other factors.[63] This follows from the wording of Article 1C (5) which spells out in clear terms that "the circumstanc***es*** in connexion with which he has been recognized" must have ceased to exist (emphasis added). Accordingly, in UNHCR's view a referral to IFA in the context of cessation is at variance with the wording of Article 1C (5).

31. As this Court has found, the cessation analysis is not simply the "mirror image" of assessing whether a person has a well-founded fear of persecution and is unwilling or unable to avail her- or himself of the protection of her or his country of nationality: 'the conditions for revoking a refugee status and residence permit pursuant to section 37 subsection 1 e, are not a direct mirroring of the conditions for granting the same pursuant to section 28.'[64]

32. In addition to the absence of a well-founded fear of persecution and the availability of protection in the country of origin, cessation of refugee status requires that such protection is of a fundamental, durable and stable character. As mentioned above, the same is required by the CJEU under Article 11(2) of the Qualification Directive: for the change of circumstances to be of a "significant and non-temporary nature" the factors which formed the basis of the refugee's fear of persecution must be "permanently eradicated".[65]

33. Furthermore, for internal protection to be considered under Article 8 QD, there needs to be either (1) no well-founded fear of persecution or serious harm, or (2) access to protection in line with Article 7 QD, in addition to the requirements of relevance and reasonableness outlined above. Access to protection under Article 7(2) QD must be "effective and of a non-temporary nature." For this purpose, actors of protection must "take reasonable steps to prevent the persecution or suffering of serious harm", *inter alia* by "operating an effective legal system."[66]

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62 UNHCR, IFA Guidelines, para. 3.

63 UNHCR Cessation Guidelines, para. 11.

64 See also Supreme Court of Norway judgment of 23 March 2018, *HR-2018-572-A*, (case no. 2017/1659), civil case, appeal against judgment: www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2018-572-a.pdf, para. 44.

65 *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08: CJEU, 2 March 2010, www.refworld.org/cases,ECJ,4b8e6ea22.html, para. 73.

66 See also General Advocate General's Opinion (Request for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom), ECLI:EU:C:2020:342: Court of Justice of the European Union, 30 April 2020 in pending CJEU case in O.A. (C-255/19) on the issue of actors of protection under Article 7 QD: www.refworld.org/cases,ECJ,5eb933e24.html

34. In addition, the ceased circumstance clause under Article 11(1)(e) QD may only be applied if the "*circumstances in connection with which he or she has been recognized* as a refugee have ceased to exist." The "circumstance" that led to granting of refugee status must be understood as the existence of a well-founded fear of persecution, rather than the lack of an IFA. In other words, if it is later considered that an IFA is available, this does not remove the fear of persecution, which is still present for the rest of the country (since the IFA consideration only comes into play when a well-founded fear of persecution is established). The circumstances that led to granting of protection status have thus not changed.

35. UNHCR further submits that refugee status should only be ceased if the basis for persecution is removed without the precondition that the refugee has to return to specific safe parts of the country. As stated above, in UNHCR's view, "[r]efugee 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."[67]

36. Thus, where the risk which formed the basis of the grant of international protection persists in his or her home area, cessation should not be applied on the basis that circumstances have changed in another part of the country.[68] Where changes have only occurred in one part of the country, this may be evidence that the changes are not fundamental, durable and stable for the purposes of cessation of refugee status.[69]

37. Furthermore, in UNHCR's view, a change in the personal circumstances of the applicant may play a role in the context of cessation. In fact, the circumstances in connection with which a person has been recognised as a refugee are likely to be a combination of the general conditions in the country of origin and his or her personal circumstances or characteristics.[70] However, in the context of cessation, a change in the personal circumstances (such as the reappearance of her male spouse/partner) cannot be considered in isolation and needs to be considered holistically together with a careful assessment of the situation in the country of origin as a whole. Status can be ceased only when the situation in the country of origin – together with the personal circumstances – have led to changes that are fundamental and durable. UNHCR underlines in this regard that family members cannot be seen to provide "domestic protection" for the purpose of the cessation assessment. Such an interpretation would not only be at variance with the concept of national protection under refugee and human

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67 UNHCR, Cessation Guidelines, para. 17.

68 See Global Consultations on International Protection, *Summary Conclusions: Cessation of Refugee Status*, June 2003: www.refworld.org/docid/470a33bcd.html, para. 16: '[i]mporting the idea of relocation/internal flight alternative from refugee status determination is, for instance, not appropriate in relation to cessation and would raise human rights concerns, most notably the creation or expansion of situations of internal displacement.

69 UNHCR, Cessation Guidelines, para. 17.

70 See, *Secretary of State for the Home Department v MM (Zimbabwe)*, 22 June 2017, United Kingdom: www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2017/797.html, paras. 22-24. See also, Alfarsy v. Canada (Minister of Citizenship and Immigration), [2003] F.C.J. No. 1856; 2003 FC 1461, Canada: Federal Court, 12 December 2003: www.refworld.org/cases,CAN_FC,412f3d244.html.

rights law but would render female refugees reliant on relationships with male relatives for their longer-term safety.[71]

III. Conclusions

38. In conclusion, UNHCR submits that the consideration of a possible IFA belongs in the inclusion assessment and is a forward-looking test to be assessed at the time of original recognition of refugee status. The consideration requires an assessment of the relevance as well as the reasonableness of the proposed IFA.

39. The cessation clauses leave no room for an IFA assessment. The cessation clauses are negative in character and exhaustively enumerated. Any other reasons adduced by way of analogy to justify the withdrawal of refugee status run contrary to the purpose of the 1951 Convention. There is nothing in the preparatory works to the 1951 Convention to suggest that refugee status was meant to be ceased based on an improvement that is only local or indeed confined to a particular city or town or other smaller area. The Convention indeed refers to protection in the country of nationality and contains no language such as protection *in parts of* the country of nationality.

40. The cessation test and the IFA test are two different tests with two distinct purposes. A crucial aspect in determining whether circumstances have changed so as to justify cessation under Article 1C(5) or (6) is whether a refugee can effectively re-avail him or herself of the protection of the country of origin. Such protection must be effective and available and requires more than mere physical security or safety as the threshold for cessation is higher than for non-inclusion.

41. An approach that applies the ceased circumstances clauses on the basis of changes in the factual circumstances in the country of origin occurring *after* the cessation decision and removal of the person(s) concerned, is at variance with the 1951 Convention.

All of which is respectfully submitted.

UNHCR
16 December 2020

[71] On the issue of whether family members can be actors of protection, see Advocate General's Opinion in the pending CJEU case *O.A. (C-255/19)*, Request for a preliminary ruling from the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom)), ECLI:EU:C:2020:342, European Union: Court of Justice of the European Union, 30 April 2020, : https://www.refworld.org/cases,ECJ,5eb933e24.html. According to the Advocate General, in response to the preliminary reference question on whether protection in Article 7(1)(a) of the Qualification Directive, can also include protective acts or functions performed by purely private actors, such as families and/or clans, the simple answer is no. 'The protection envisaged by the 1951 Convention is fundamentally, in substance, the traditional protection offered by a State, namely, a functioning legal and policing system based on the rule of law. Non-State protection envisaged by Article 7(1)(b) of the Qualification Directive is not simply the protection which might be offered by purely private parties — such as, for example, that of a private security firm guarding a gated compound, but is rather that offered by non-State actors who control all or a substantial part of the territory of a state and who have also sought to replicate traditional State functions by providing or supporting a functioning legal and policing system based on the rule of law.' Paras 78-79.