The International Protection of Refugees:

Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees

I. Introduction

1. The immediate goal of this note is to elucidate contemporary issues in the interpretation of the terms of Article 1 of the 1951 Convention relating to the Status of Refugees, taking into account recent academic and jurisprudential developments. It is hoped that its contents will be useful in a number of contexts, not least in the efforts currently underway in Europe to harmonise understanding of the refugee definition. The UNHCR **Handbook on Procedures and Criteria for Determining Refugee Status**[1] provides the basic guidance of the Office on the interpretation of the refugee definition and should be referred to for a full understanding of UNHCR's views on various interpretative issues. This note highlights key points from the Handbook and in addition discusses various topics that have become prominent in refugee law discourse since its publication. Some of these issues will also be considered in four expert roundtables that will take place in the context of the UNHCR Global Consultations on International Protection. The results of these roundtables will help to refine or develop further the views of UNHCR, governments and other concerned actors on these issues.

II. Preliminary Considerations

i. An Analysis Informed by Human Rights Principles

2. According to Article 31 of the Vienna Convention on the Law of Treaties, a treaty such as the 1951 Convention is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[2] The Vienna Treaty Convention specifies that the context includes, *inter alia*, the preamble,[3] as a source of the object and purpose of the instrument.

3. The ordinary meaning of the elements of Article 1 is often clear from the wording and should accordingly be ascribed. Where the object and purpose of the 1951 Convention is needed to interpret the meaning of terms, the preamble provides important direction. A close reading of the preamble leads to the conclusion that the object and purpose of the instrument is to ensure the protection of the specific rights of refugees, to encourage international cooperation in that regard, including through UNHCR, and to prevent the refugee problem from becoming a cause of tensions between states.

4. The preamble contains strong human rights language. The first paragraph refers to the international community's affirmation of the principle that human beings shall enjoy fundamental rights and freedoms, such as those set out in the Universal Declaration of Human Rights, without discrimination. The second paragraph recalls the United Nations' profound concern for refugees and its endeavours to assure refugees the widest possible exercise of their fundamental rights and freedoms. These precepts indicate the aim of the drafters to incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation, in harmony with the Vienna Treaty Convention, of the provisions of the 1951 Convention.

5. Refugees are owed international protection precisely because their human rights are under threat. The most fundamental protection owed to a refugee is protection against *refoulement* to a territory where the refugee's life or freedom would be threatened on a Convention ground. *Non-refoulement* is guaranteed, *inter alia*, by Article 33 of the Convention.[4] It is this protection, and the protection of other rights as set out in the 1951 Convention, which is the objective of the exercise of refugee status determination. Human rights principles, not least because of this background, should inform the interpretation of the definition of who is owed that protection. Indeed, the natural complementarity between refugee protection and the international system for the protection of human rights has been expressed and elaborated in a number of UNHCR documents and Conclusions of the Executive Committee.[5]

6. In the European context, the interrelationship between human rights principles and international refugee protection has long been recognised in the work of the Council of Europe's Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR) and the Committee of Ministers[6], that of the European Court (and earlier Commission) of Human Rights,[7] as well as in Parliamentary Assembly and other Council of Europe activities. The correlation has recently been explicitly reiterated by the Heads of States and Governments of the European Union who met at the Tampere Summit in October of 1999. The Presidency Conclusions adopted there reaffirmed the Union's full commitment to the obligations of the 1951 Convention and other relevant human rights instruments[8] and the importance of absolute respect of the right to seek asylum.[9] In the same Conclusions, the participants agreed to work towards establishing a common European asylum system based on the full and inclusive application of the 1951 Convention, thus ensuring that nobody is sent back to persecution.[10]

ii. One Holistic and Integrated Analysis

7. The Article 1 definition can, and for purposes of analysis should, be broken down into its constituent elements. Nevertheless, it comprises only *one* holistic test. This has been recognised and reflected in various formulations of the "test" for refugee status.[11] The key to the characterisation of a person as a refugee is risk of persecution for a Convention reason.[12]

8. When attempting to apply the Article 1 criteria in the course of individual asylum procedures, decision-makers should have regard to all the relevant circumstances of the case.[13] They need to have both a full picture of the asylum-seeker's personality, background and personal experiences,[14] as well as an analysis and up-to-date knowledge of all the relevant objective circumstances in the country of origin. [15]

9. It should be recalled in this context that, to use the words of the UNHCR Handbook, a person does not become a refugee because of recognition, but is recognised because s/he is a refugee.[16] It follows that failure to meet formal, technical requirements such as time limitations does not negate the refugee character of the person.

iii. Burden and Standard of Proof

10. In determining refugee status, the issues of the burden and standard of proof arise,[17] as also does the related question of assessing the credibility of the individual. While these are primarily procedural questions and thus will not be fully discussed in this note, the well-developed jurisprudence and other guidance on these issues found, not least, in the UNHCR Handbook itself[18] can be summarised:

- in accordance with general principles of the law of evidence, the burden of proof lies on the person who makes the assertion – in the case of refugee claims, on the asylum-seeker. This burden is discharged by providing a truthful account of relevant facts so that, based on the facts, a proper decision may be reached. The asylum-seeker must also be provided an adequate opportunity to present evidence to support his or her claim. However, because of the particularly vulnerable situation of asylum-seekers and refugees, the responsibility to ascertain and evaluate the evidence is shared also by the decision-maker. In the context of exclusion and cessation, it is the authorities who assert the applicability of these clauses, therefore the onus is on them to establish the reasons justifying exclusion or cessation.[19]
- the standard of proof for establishing a well-founded fear of persecution has been developed in the jurisprudence of common law jurisdictions. While various formulations have been used, it is clear that the standard required is less than the balance of probabilities required for civil litigation matters. It is generally agreed that persecution must be proved to be "reasonably possible" in order to be well-founded.[20]
- because the particular circumstances of asylum-seekers often mean that they encounter obstacles in obtaining corroborative evidence and sometimes in providing evidence themselves,[21] the assessment of the credibility of refugees may in some cases be particularly difficult. Inability to remember all dates or minor details, minor inconsistencies, insubstantial vagueness or incorrect statements which are not material to the determinative issues should not be used as decisive factors in determining credibility, though they may be taken into account, together with other factors, in the overall assessment on credibility. Credibility is established where the applicant has presented a claim which is coherent and plausible and is therefore capable of being believed. Once the examiner is satisfied with the applicant's general credibility, the latter should be given the benefit of the doubt as regards those statements for which evidentiary proof is lacking.[22]

III. Analysis of the Inclusion Elements:

Key Inclusion Elements (Article 1A(2)):
...the term "refugee" shall apply to any person who: ...owing to a 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...[23]

i. Well-Founded Fear[24]

11. The Handbook identifies ''well-founded fear of being persecuted" as the key phrase of the definition, and discusses well-founded fear in some detail.[25] While fear is a subjective emotion, for purposes of refugee status determination, it must be well-

founded; that is, it must have an objective basis. There are varying degrees to which each of these two elements may be important in any individual case. In cases where there is a failure to express subjective fear, objectively the circumstances may well justify recognition, in that *anyone* in such circumstances would run such an obvious risk that the absence of fear would be immaterial. Conversely, there may be instances where objective circumstances in themselves do not appear to be compelling, but taking into account the individual's own background, belief system and activities, the circumstances may indeed be considered as substantiating a well-founded fear for that individual, although the same objective circumstances might not be so considered for another.[26] These examples illustrate that it is essential that decisions on refugee status, and particularly the well-founded fear aspect, be taken only after having studied all the relevant circumstances of the case, and having weighed them appropriately. Objective and reliable country of origin information relevant to the particularities of the case is a necessity for this component of the analysis.

12. One aspect of the well-founded fear element which has given rise to particular problems in recent years is that of determining when a person ought reasonably to move to another part of the country and live safely there, rather than exercising his or her right to seek asylum from persecution outside his or her own country. In some jurisdictions this notion, the so-called "internal flight alternative" or "relocation principle," has been used, incorrectly, to deny refugee status to persons who are in fact entitled to it. This occurs particularly when the concept is used as a bar to access to asylum procedures for whole groups of individuals. The analysis is rather one which must be applied on a case-by-case basis, taking into account all the individual circumstances of the case. Other problems with its application relate to a flawed understanding of how the analysis relates to the refugee definition,[27] to a failure to adequately consider the circumstances in the area of displacement and the reasonableness of relocating there as opposed to seeking asylum abroad, and to heavy evidentiary requirements.[28]

13. The need for such an analysis does not arise in every case. It is only relevant where the fear of persecution is limited to a specific part of the country, outside of which the feared harm cannot materialise. In practical terms, this excludes virtually all cases where the feared persecution emanates from or is condoned or tolerated by state agents, as these are normally presumed to exercise authority in all parts of the country.[29] Furthermore, the alternative must be reasonable. This means that it must offer a habitable and safe environment, free from the threat of persecution, where the person can live a "normal" life, including the exercise and enjoyment of civil and political rights, together with family members, in economic, social and cultural conditions comparable to those enjoyed by others ordinarily living in that country.[30]

14. The requirements listed above – freedom from persecution, ability to exercise and enjoy civil, political, economic, social and cultural rights – lead to reflection on one often discussed element in refugee status determination: the availability and sufficiency of protection by the authorities. Some commentators describe "failure of state protection" as a key criterion of the 1951 Convention definition;[31] others attribute much less importance to it, noting that persecution under the Convention is a complex of reasons, interests and measures.[32]

15. Consideration of effective national protection is, in UNHCR's view, neither a separate nor a seminal issue, but rather one of a number of elements concomitant to determining refugee status in certain cases, particularly those involving a fear of persecution emanating from non-state agents. The question is whether the risk giving rise to the fear is sufficiently mitigated by available and effective national protection

from that feared harm. Where such an assessment is necessary, it requires a judicious balancing of a number of factors both general and specific, including the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents.

ii. Persecution

16. Persecution, for the purposes of refugee status determination, is nowhere defined in international law. Some commentators argue that no definition was felt necessary as its meaning was well-understood from previous instruments and experience,[33] others suggest it was deliberately left undefined in order that newly emerging forms of persecution would be covered.[34] Whatever the reasons, the fact that the Convention does not legally define persecution is a strong indication that, on the basis of the experience of the past, the drafters intended that all future types of persecution should be encompassed by the term.

17. The on-going development of international human rights law subsequent to the adoption of the 1951 Convention has helped to advance the understanding, expressed in the UNHCR Handbook, that persecution comprises human rights abuses or other serious harm, often but not always with a systematic or repetitive element.[35] While it is generally agreed that "mere" discrimination may not, in the normal course, amount to persecution in and of itself (though particularly egregious forms undoubtedly will be so considered),[36] a persistent pattern of consistent discrimination will usually, on cumulative grounds, amount to persecution and warrant international protection.[37]

18. Confusion sometimes arises between prosecution under a law of general application and persecution for a Convention reason. This occurs perhaps most frequently with respect to cases involving refusal to perform compulsory military service, whether in the form of draft evasion or desertion. It arises as well in other contexts, particularly when a law of general application has a differential impact on a person or group of persons on account of one of the Convention grounds, or where the enforcement of the law risks to or does violate human rights. The UNHCR Handbook is helpful on these points and should be referred to as the starting point in any analysis.[38] What follows is essentially a summary of that advice. In distinguishing the ordinary prosecution of offences from persecution, it is necessary to take into account and analyse at least some of the following factors:

- whether the law is in conformity with human rights standards or is inherently persecutory (for example where it prohibits legitimate religious belief or activity);[39]
- whether implementation of the law is carried out in a manner which amounts to persecution based on a Convention reason. Elements to be considered in this regard include:[40]
  - whether persons charged under the law are denied due process of law for a Convention reason;
  - whether prosecution is discriminatory (for example where only members of certain ethnic groups are prosecuted);
  - whether punishment is meted out on a discriminatory basis, (for example, the usual penalty is a six month prison term but those judged to hold a certain political opinion are routinely sentenced to a 1 year imprisonment);
  - whether punishment under the law amounts to persecution (for example where the punishment amounts to cruel, inhuman or degrading treatment);
  - in the case of refusal to perform military service, there may be additional considerations, including

- whether the service which would be required to be performed would be in relation to a type of military action condemned by the international community as contrary to the basic rules of human conduct;
- whether the service which would be required could not reasonably be expected to be performed by the individual because of his or her specific individual circumstances, relating to genuine beliefs or convictions of a religious, political, humanitarian or philosophical nature, or, for instance, in the case of internal conflict of an ethnic nature, on account of ethnic background; [41]
- whether there is an exception for conscientious objectors and whether that exception is acceptable and proportionate.

19. A few asylum States restrict the meaning of 'persecution' in the sense of the 1951 Convention to harm emanating from the State itself, or its agents.[42] These States follow an analysis that makes determinative the perpetrator or source of the feared or experienced harm. State practice elsewhere in the world, though sometimes based on very different analyses, is overwhelmingly supportive of the position adopted by UNHCR, that persecution by non-state agents falls within the scope of the 1951 Convention refugee definition.[43] In UNHCR's view, the source of the feared harm is of little, if any, relevance to the finding of whether persecution has occurred, or is likely to occur. It is axiomatic that the purpose and objective of the 1951 Convention is to ensure the protection of refugees. There is certainly nothing in the text of the Article that suggests the source of the feared harm is in any way determinative of that issue. UNHCR has consistently argued, therefore, that the concerns of well-foundedness of fear, of an actual or potential harm which is serious enough to amount to persecution, for a reason enumerated in the Convention are the most relevant considerations.[44]

20. It is sometimes argued that the 1951 Convention does not provide a suitable legal framework for addressing present-day refugee problems, as these often occur in the context of war and armed conflicts. In a similar vein, national jurisprudence in some countries has developed criteria arguing that in order for it to be said that an asylum-seeker is persecuted, he or she must be "singled out" or in some way "individually targeted".[45] Courts in yet other States, while accepting that civil war as such neither rules out nor suffices to found refugee status, use criteria such as a "differential risk" or "differential impact".[46] These criteria tend, however, to obscure two key facts: 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.[47]

21. It should be recalled that the Convention 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 victimise those fleeing, as is so often the case today, persons fleeing such conflicts would qualify as 1951 Convention refugees. The Executive Committee has reaffirmed this on a number of occasions, most recently during its 1998 session.[48] 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 marginalisation that such stigmatisation engenders is a powerful archetype of persecution. This approach, counselled by the Handbook and

in various Executive Committee Conclusions,[49] has also been adopted by refugee scholars and in well-reasoned jurisprudence.[50]

22. This being said, however, it is equally recognised that there are persons who flee the indiscriminate effects of violence associated with conflict with no element of persecution. Such persons might not meet the Convention definition, but may still require international protection on other grounds.[51]

iii. Convention Grounds

23. Article 1 A(2) requires that the well-founded fear of being persecuted be "for reasons of" one of the five grounds set out there. Though there has in general not been a great deal of difficulty in establishing the character of this causal link, in some jurisdictions jurisprudence posing some questions as to its nature has developed. In UNHCR's practice, the Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause.

24. Three of the five grounds set out in Article 1 (**race, religion and political opinion**) usually require scant interpretation. The fact that there is often considerable overlap between the five Convention grounds should not confuse the issue. Persons may experience or fear persecution for a number of inter-related reasons enumerated in the Convention,[52] or one reason for persecution, for instance a person's ethnicity, may fall under more than one ground, that is, under both race and nationality.[53] Neither of these instances in any way undermines or renders invalid the connection between the feared persecution and its basis.

25. It is now generally agreed that **imputed or perceived grounds**, or mere political neutrality, can form the basis of a refugee claim. For example, a person may not in fact hold any political opinion, or adhere to any particular religion, but may be perceived by the persecutor as holding such an opinion or being a member of a certain religion. In such cases, the imputation or perception which is enough to make the person liable to a risk of persecution is likewise, for that reason, enough to fulfil the Convention ground requirement, because it is the perspective of the persecutor which is determinative in this respect.[54]

26. The **nationality** ground has at times given rise to some confusion, because the same word can be used both to denote a person's ethnicity or ethnic origin, and a person's citizenship or the legal bond between an individual and a State. There is a separate international legal framework designed to address the problems faced by persons who do not have a legal bond of citizenship with any State, and are therefore stateless.[55] It is worth recalling that stateless persons can also be 1951 Convention refugees on the same grounds as others, or may become refugees, for example, where their very lack of citizenship attracts upon them severe discrimination amounting to persecution. In the eligibility practice of States, though, the most frequent meaning of nationality is that denoting ethnicity or ethnic origin.[56] In the present context, where ethnic-based conflict is common, this ground has considerable significance.[57]

27. **Membership of a particular social group** is perhaps the ground with least clarity. Varying interpretations have been given to the phrase in different jurisdictions. One interpretation emphasises the perception of the persecutor and/or others within the relevant society, focusing on some characteristic attribute, activity, belief, interest or goal.[58] Another approach in widespread use holds that characteristics that identify such groups are those which are either innate or historical and therefore cannot be changed, or those which, though it is possible to change them, ought not be required

to be changed because they are so closely linked to the identity of a person and/or are an expression of fundamental human rights.[59] Examples of the first sort of characteristic might be sex, sexual orientation and heritage.[60] Examples of the second sort might be membership in a trade union or a vocation as a journalist or critic.[61]

28. A holistic approach would in effect accept the validity of both of the approaches described above. This would best ensure protection for those legitimately in need of it. It would include those who cannot change their innate or historic characteristics, and those who should not be required to renounce them, as well as those in the first category, that is, those members of groups which are perceived by the persecutor to be in opposition, or to pose a threat. Where the persecutor acts or is likely to act against the member of the group on that perception, the potential victim may be protected on this ground on account of the perception of the persecutor, which imputes motives or characteristics to the victim as a member of the group.

29. One sphere in which the membership of a particular social group ground has been much discussed is that of **gender-related persecution**. Since neither "sex" nor "gender"[62] is listed as one of the Convention grounds in Article 1, it is sometimes argued that persons who suffer gender-related persecution can never be covered by its terms, or that the only possible ground for recognition must always be "particular social group." Neither of these assertions is correct. Persecution may be gender-related in the sense that the method used to achieve the persecution is related to sex or to gender roles. For example, women of a certain ethnic group may be subjected to rape as a form of persecution, not for reasons related to sex or gender, but to nationality or religion.[63]

30. At the same time, the underlying causes of persecution that appears, because of gender roles in that society, to be on account of sex or gender may in fact be based on one or more of the other four grounds. An example of this might be refusal to wear clothing or to behave in ways prescribed for women. This may be objectionable for the authorities not because of the sex of the individual who is refusing to behave in the prescribed fashion, but because the refusal indicates an "unacceptable" religious or political opinion.[64]

31. This illustrates that many cases which have been considered under this rubric in fact can be decided on the basis of an imputed political opinion, or on the basis of religion, and need not necessarily involve a social group analysis. There will nonetheless be cases, particularly but not exclusively gender-related cases, which do not fall into any other ground and may only be determined under the particular social group rubric. Persecution may be gender-related in the sense that it is experienced on account of a person's sex, sexual orientation or gender role, and in the appropriate case, this could be because of membership in a particular group. For example, a homosexual transvestite may suffer persecution because of behaviour and perceptions associated with that group.[65] In certain circumstances, domestic violence cases have been recognised as falling under Article 1 of the 1951 Convention on the basis of particular social group.[66]

32. The refugee definition is adequate, if properly interpreted, to provide protection in most cases of gender-related persecution in which international protection is warranted. There is, therefore, no need to suggest adding sex or gender as a ground to the Convention.[67] The Office is concerned, however, that in some States, complementary protection is routinely offered to women or others fearing or suffering gender-related persecution without an adequate consideration of whether

the person should be recognised as a 1951 Convention refugee. Persons whose cases are covered, on a proper interpretation, by Article 1 should be recognised as such and receive refugee protection, and should not be denied such protection on account of the existence of complementary forms of protection. [68]

iv. Outside the country of nationality or habitual residence

33. The requirement that a refugee be outside his or her country of nationality or habitual residence is a factual issue which is easily determined and, in most cases, uncontroversial.[69] As pointed out in the Handbook, however, it should not be thought that a refugee need necessarily have *left* the country of origin for fear of persecution for Convention reasons. A person might find him or herself outside the country – as a student, a diplomat, a traveller – when an event occurs which engenders a well-founded fear of persecution. Such a person is known as a "refugee *sur place.*" [70] The events giving rise to a well-founded fear may be external to the refugee, such as a military coup in the country of nationality, or they may be closely linked to the behaviour of the refugee, such as public statements in opposition to the government of the country of origin.

34. Where the fear of persecution arises as a result of the refugee's own behaviour, the issue of credibility arises, as it may be thought that the activities are self-serving. It is particularly important in such cases that the full details are examined and analysed carefully in light of the likelihood of a risk of persecution actually arising in consequence. A paramount consideration will be whether the behaviour has or could come to the knowledge of the authorities in the country of origin, [71] and how the asylum-seeker's actions are, in reality, likely to be viewed by the authorities of the country of origin. In some jurisdictions a consideration of the asylum-seeker's "good faith" in pursuing his or her actions, or a consideration of the continuity of his or her action from before flight has been postulated as necessary in this regard.[72] Assessing these elements may form part and parcel of the analysis, and may provide useful information for the eventual decision, but are not, and in UNHCR's view cannot be, determinative. The determinative factors must always remain, as they are for all cases, the likelihood of the feared harm occurring, the severity of the harm, and whether it is related to a Convention ground.[73]

v. Unable/Unwilling to avail of state protection

35. The meaning of this element of the definition has recently been much debated. According to one view, it refers to protection by the state apparatus inside the country of origin, and forms an indispensable part of the test for refugee status, on an equal footing with the well-founded fear of persecution test.[74] According to others, this element of the definition refers only to diplomatic or consular protection available to citizens who are outside the country of origin.[75] Textual analysis, considering the placement of this element, at the end of the definition and following directly from and in a sense modifying the phrase "is outside his country of nationality," together with the existence of a different test for stateless persons,[76] suggests that the intended meaning at the time of drafting and adoption was indeed external protection. Historical analysis leads to the same conclusion.[77] Unwillingness to avail oneself of this external protection is understood to mean unwillingness to expose oneself to the possibility of being returned to the country of nationality where the feared persecution could occur.[78]

36. Despite this apparent clarity, there now exists jurisprudence[79] that has attributed considerable importance in refugee status determination to the availability of state protection inside the country of origin, in line with the first view described

above. This somewhat extended meaning may be, and has been, seen as an additional – though not necessary[80] – argument in favour of the applicability of the Convention to those threatened by non-state agents of persecution.[81]

37. It has been suggested above[82] that the internal protection element is best considered and determined as an element of well-foundedness of fear.[83] It has been argued elsewhere that the last phrase of Article 1A(2) may be given more contemporary content by reinterpreting it in the following fashion: if the country of origin is unable to provide protection against persecution (whether the inability be despite best efforts of a weak state or on account of the total failure of the state), then the victim will fear persecution in case of return and therefore has good reason to be unwilling, owing to that fear, to avail him or herself of the protection of that country.[84] These approaches are, in effect, not contradictory. Whichever approach is adopted, it is important to recall that the definition comprises one holistic test of inter-related elements. How the 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.

IV. Analysis of the Exclusion and Cessation Elements:

i. Exclusion from Refugee Status

Key Elements of the Exclusion Clauses (Article 1D, E, and F):
This Convention shall not apply to

- **persons who are at present receiving from organs or agencies of the United Nations other than the UNHCR protection or assistance …**
- **a person who is recognised 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 nationality of that country**
- **any person with respect to whom there are serious reasons for considering**
    - **has committed a crime against peace, a war crime or a crime against humanity…**
    - **has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;**
    - **has been guilty of acts contrary to the purposes and principles of the United Nations.**

38. It is helpful in interpreting the exclusion clauses of Article 1 to bear in mind the underlying rationale of these clauses, which is to ensure that refugee status is not enjoyed by persons who neither need[85] nor deserve it.[86] The clauses relating to the undeserving are particularly complex and therefore more problematic. With respect to both branches of exclusion, however, it is essential to recall that, like all provisions that operate as exceptions and as stressed in the Handbook, these clauses must be interpreted restrictively.[87]

39. **Article 1D** excludes from Convention protection persons who are already receiving protection or assistance from an agency or organ of the United Nations other than UNHCR. As is explained in the Handbook, this provision is currently applied to persons who are, or could be, receiving assistance from the United

Nations Relief and Works Agency for Palestine Refugees in the Near East.[88] Since no other UN agency currently has a specific refugee protection or assistance mandate, this clause cannot be used in other situations. United Nations transitional or interim administrations in areas or regions which have given rise to refugee flows normally have mandates which relate to the administration of the territory only, including for protecting the rights of returnees, but have no specific mandate for refugees. As persons must be inside such a territory to benefit from the protection of or any assistance available from such an administration, this clause cannot be used to exclude from refugee status persons from those territories who are in asylum states.[89]

40. Likewise, **Article 1E** excludes – on account of the lack of a need for international protection – persons who are recognised by competent authorities of the country of their residence as having the rights and obligations of nationals of the country. The Handbook emphasises the importance, when interpreting this clause, of recognising that the person concerned must actually enjoy such rights and obligations in a practical sense. In particular, in line with the *non-refoulement* provision of Article 33, persons must benefit from the right not to be deported or expelled in order for this clause to operate to exclude from refugee status.[90]

41. Giving rise to considerably more interpretative difficulty is **Article 1F**, which excludes persons with respect to whom there are serious reasons to believe they have committed war crimes, crimes against peace or humanity, serious non-political crimes or acts contrary to the purposes and principles of the United Nations. In other words, the exclusion relates to persons who have committed such egregious acts that, though they may well have a well-founded fear of persecution for Convention reasons, their personal behaviour has been so abhorrent as to render them unworthy of receiving international protection under the 1951 Convention. In interpreting these provisions, it is crucial to recall that it is not every criminal who is excluded by the terms of Article 1F, but only those guilty of these most serious and unacceptable of acts.[91]

42. The standard of proof required for the operation of Article 1F is expressed as "serious reasons for considering" that a person has been guilty of such acts. While it is clear that proof of conviction is, therefore, not required, it has proven difficult to explain consistently the exact degree of proof necessary reasonably to support a finding under this standard.[92] Indictment for such an act by an international court[93] may certainly be considered "serious reasons for considering" and has been so considered by UNHCR.[94] Conversely, the mere fact that a person may at some point in his or her life have been associated in some way with an organisation or government members of which are known to have committed such acts is not sufficient to prove "serious reasons" with respect to that individual. For exclusion to operate, the reasons must be specifically related to the individual concerned and to his/her acts or omissions.[95]

43. According to its terms, the crimes to which **Article 1F(a)** relate are those so defined in international instruments. This formulation allows developments in international law in respect of such crimes to be considered. For example, the adoption of the Rome Statute of the International Criminal Court[96] has defined such crimes in the contemporary context and will be a useful source for interpreting the exclusion clauses.[97]

44. Article **1F(b)** excludes from status persons who are seeking to avoid legitimate prosecution for the commission of serious non-political crimes, even if they would otherwise qualify as refugees. While legitimate state concerns about

safeguarding the community are obviously addressed by this provision, the numerous qualifying components inserted in the provision demonstrate that protection of refugees who have committed less serious crimes is to be preserved. These various elements of Article 1F(b) are most usefully discussed, as the Handbook does, separately.

45. Evidently the term "serious" envisions a grave punishable act, and not a minor offence, even if the latter may be referred to as a "crime" in the penal code or other legislation of a country.[98] Seriousness is not merely a question of how domestic law views the issue, but must take into account comparative and international law as well. Some of the indicators which might point to the seriousness of a common crime include

- the form of procedure used to prosecute it – whether it is an indictable offence or is dealt with in a summary manner;
- the prescribed punishment, including the length and conditions of any prison term;
- whether there is international consensus that it be considered as among the most serious of crimes;
- whether it is extraditable or subject to universal criminal jurisdiction;
- the actual harm inflicted as a result of the commission of the crime.[99]

46. The crime defined in Article 1F(b), must be "non-political" or, in other words, common crime, committed not for political ends but for other reasons, such as personal gain or revenge.[100] This qualification ensures that persons prosecuted for expressing political beliefs in a way that would be acceptable in a State where individuals are free to express their views and exercise other human rights in non-harmful ways cannot be excluded from refugee status by the simple expedient of the passing of a law which does not respect those basic human rights.

47. By the same token, the perpetrators of some "political" crimes, or grave punishable acts which are committed for political ends, such as hijacking or kidnapping, may not be, as a matter of course, excused from the operation of the exclusion clauses by reference to the "non-political" qualification. There must be a careful analysis of whether the seriousness of the harm inflicted outweighs the political end to be achieved. If the so-called "political" crime is extremely harmful or disproportionate in its effects, compared to the political end sought by the perpetrator, the person may be excludable despite the political motivation. On the other hand, if the commission of the crime is, for example, the only means by which to escape persecution by a repressive regime, it may well be judged to be justified and exclusion will not necessarily follow, depending on the circumstances of the case.[101]

48. If Article 1F(b) is judged to apply, then, in UNHCR's view and in the practice in some jurisdictions, it is 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 the well-founded fear is of very severe persecution endangering the applicant's life or freedom, the crime committed must be very grave indeed to exclude the person from status.[102]

49. Finally with respect to Article 1F(b), the crime in question must have been committed "outside" the country of asylum prior to admission there as a refugee. Common crime committed on the territory of the asylum state should be subject to the criminal jurisdiction of that State, including prosecution and, if found guilty, punishment as would be the case for anyone else on the asylum State's territory.[103]

50. The last exclusion provision, **Article 1F(c)**, refers to acts contrary to the purposes and principles of the United Nations. As explained in the relevant paragraphs of the Handbook, the purposes and principles of the United Nations are set out in Articles 1 and 2 of the Charter of the United Nations, and by their very nature relate to member States of the UN. The *travaux prJparatoires* reflect a lack of clarity with respect to the use of this provision. Comments by delegates suggest that the drafters viewed this provision as one that would be rarely invoked, and applicable only to individuals who were in a position of power or influence in a State and instrumental in the State's infringement of the UN purposes and principles.[104] There may be overlap with Article 1F(a), in that crimes against peace and crimes against humanity also are acts against the purposes and principles of the United Nations.

51. Applying Article 1F often involves consideration of a myriad of issues, some of them related to criminal law concepts, which require careful and differentiated analysis in this context. Such issues include individual liability, complicity, guilt by association, membership of groups which advocate or commit acts of violence, the situation of former officials of repressive regimes, the defences of duress and necessity, and other such notions. Detailed examination of the complexities of these topics is beyond the scope of this note.[105] Reference should be made to UNHCR's Exclusion Guidelines[106] for more specific advice.

ii. Cessation of Status

Key Elements of the Cessation Clauses (Article 1C):
This Convention shall cease to apply to any person...if:

- **he has voluntarily re-availed himself of the protection of the country of his nationality; or**
- **having lost his nationality, he has voluntarily re-acquired it; or**
- **he has acquired a new nationality and enjoys the protection of the country of his new nationality; or**
- **he has voluntarily re-established himself in the country which he fled or outside which he remained owing to fear of persecution; or**
- **he can no longer, because the circumstances in connection with which he has been recognised 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 [last] paragraph shall not apply to a refugee ... 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...

52. As the paragraphs in the Handbook on this Article point out,[107] refugee status, which affords its beneficiaries international protection in the absence of national protection, is foreseen to last only as long as that surrogate protection is needed. Article 1C of the Convention sets out in some detail the circumstances under which refugee status ceases. As with all provisions which take away rights or status, the cessation clauses must be carefully applied, after a thorough assessment, to ensure that in fact refugee protection is no longer necessary, a point also stressed in the Handbook.[108]

53. With respect to the grounds which arise as a result of actions by the refugee him or herself, these actions must be truly *voluntary* on the part of the refugee, and

must result in him or her in fact being able to benefit from effective and durable national protection. Unless this is so, refugee status does not cease.[109]

54. Relatively more difficult interpretation issues arise, however, with respect to the cessation ground which relates to changes in circumstances in the country of origin such that the reasons for which refugee protection was required no longer exist.[110] In interpreting this clause there has been some question about the nature and degree of change necessary. UNHCR's Executive Committee has stated that the changes must be fundamental, stable, durable and relevant to the refugees' fear of persecution.[111] Cessation of refugee status may be understood as, essentially, the mirror of the reasons for granting such status found in the inclusion elements of Article 1A(2). When those reasons disappear, in most cases so too will the need for international protection. Recognising this link, and exploiting it to understand whether the changes in circumstance are relevant and fundamental to the causes of flight, will serve to elucidate circumstances which should lead to cessation of status. This is particularly important with respect to individual cessation.

55. UNHCR has identified a number of factors which, while in no way exhaustive of the relevant considerations, may need to be taken into account in assessing, in a general way and for the purposes of group cessation, whether there has been such a fundamental change:

- the level of political stability, which may be demonstrated in a number of ways, one example being the successful completion of democratic elections judged by the international community to be fair;
- the existence of non-discriminatory laws to protect fundamental rights and freedoms, including both civil and political and economic, social and cultural rights;
- the existence of machinery to ensure law and order and redress in situations where human rights may be violated, for instance, functioning police who operate without discrimination, an independent judiciary and functioning courts;
- the general level of respect for human rights and ability to exercise and enjoy human rights;
- where conflict was an issue, the level of national reconciliation and implementation of any peace agreements and accords.[112]

56. Where there is a determination that the changed circumstances cessation clause applies to a particular refugee group, any individual affected by the declaration of cessation must have an adequate opportunity to have his or her case reviewed and determined individually, in case there are any factors which render the cessation not applicable to that individual. Particularly relevant in this respect is the exception to this cessation clause, expressed in the Convention as applying only to "statutory" refugees[113] (that is, those who were refugees before the adoption of the 1951 Convention) but which reflects a general humanitarian principle which can, and should, also be applied to other refugees. Those who can invoke "compelling reasons" arising out of past persecution or experiences leading to their recognition as refugees should not involuntarily cease to be refugees, despite a relevant, fundamental, stable and durable change. The exception essentially recognises that some forms and experiences of persecution are so atrocious, and have such devastating psychological effects, that even after a fundamental change in circumstances, individuals should not be forced to return against their will. This exception is as relevant today as it was when the Convention was adopted, and it is applied by UNHCR, and many States.[114]

57. The consequence of cessation may not necessarily be return to the country of origin or former habitual residence.[115] In some cases, refugees who cease to be

refugees may already have acquired and exercised rights to residence or to obtain citizenship as a result of the length of their stay and the operation of law in the country of asylum. In others, they may have married, had children or developed other ties in the country of asylum such that they are in fact fully integrated and eligible to reside in that country through mechanisms other than asylum.

V. Concluding Observations

58. The refugee definition in Article 1 of the 1951 Convention has been the principal tool for providing effective protection to millions of refugees since it was crafted fifty years ago. It has proven its resilience and adaptability over those years, demonstrating that a proper interpretation of Article 1 respects and furthers the objects and purposes of the 1951 Convention. A principled approach to the inclusion elements, and a careful application of the exclusion and cessation clauses are indispensable for the continuing efficacy of refugee protection, ensuring that refugee protection will neither be brought into disrepute by its abuse, nor weakened by its unwarranted restriction. In sum, a balanced and holistic application of the definition, incorporating human rights law principles, has the best chance of yielding the correct result.

UNHCR Geneva
April 2001

Endnotes

[1] The *Handbook* was produced in 1979 by the (then) Division of International Protection at the request of the Executive Committee for the guidance of governments. The *Handbook* represents the knowledge of the Office of the High Commissioner for Refugees regarding the various elements of the criteria for refugee status accumulated during its first 25 years, including and taking into account UNHCR and state practice, exchanges of views between the Office and States Parties to the 1951 Convention, and the literature on the subject up until its publication. The *Handbook*, which was re-edited in 1992 by UNHCR, has proven in the past, and continues presently, to be a useful guide for government officials, UNHCR staff and courts determining refugee claims.

[2] Article 31 (1), Vienna Convention on the Law of Treaties, done at Vienna 23 May 1969, 1155 U.N.T.S. 331, (1969) 8 I.L.M. 679. Article 31 is generally accepted as representing the existing state of customary international law.

[3] Article 31 (2), Vienna Convention on the Law of Treaties.

[4] The principle of *non-refoulement* is also codified, explicitly or by interpretation, in Article 3 of the 1984 United Nations Convention against Torture, in Article 7 of the International Covenant on Civil and Political Rights, and in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is considered by many authorities to be a norm of customary international law, as evidenced in a number of conclusions or resolutions of international bodies, including Executive Committee Conclusions No. 25(b) and 79(i) and in Article 2 of the Declaration adopted at the Fourth Seminar of Arab Experts in Asylum and Refugee Law held in Cairo in November 1992.

[5] See the High Commissioner's Note on International Protection for 1998 (A/AC.96/898) as well as Executive Committee Conclusions No. 80(e) (i), 81(h), 82(d)(vi), and 85(f) through (m).

[6] CAHAR has been making important refugee protection recommendations, which are subsequently adopted by the Committee of Ministers, based on a human rights analysis, since the 1970s.

[7] See, for instance, *Cruz-Varas v. Sweden*, 20 March 1991, Series A, vol. 201, (1992) 14 E.H.R.R. 1; *Vilvarajah v. United Kingdom*, 20 October 1991, Series A, vol. 215, (1992) 14 E.H.R.R. 248; *Chahal v. United Kingdom*, 15 November 1996, Reports of Judgments and Decisions 1996-V, (1996) 23 E.H.R.R. 413; *Ahmed v. Austria*, 17 December 1996, Reports 1996-VI, (1996) 22 E.H.R.R. 279; *H.L.R. v. France*, 29 April 1997, Reports 1997-III, (1998) 26 E.H.R.R. 29; *D v. United Kingdom*, 2 May 1997, Reports 1997-III, (1997) 24 E.H.R.R. 423; *Jabari v. Turkey*, 11 July 2000, Application No. 40035/98.

[8] "Towards a Union of Freedom, Security and Justice: The Tampere Milestones" Presidency Conclusions, Tampere European Council, 15 and 16 October, 1999, at paragraph 4.

[9] Ibid., paragraph 13.

[10] Ibid.

[11] This is done perhaps most recently in the UK House of Lords decision in the case of *Horvath v. Secretary of State for the Home Department*, 6 July 2000, (2000) 3 W.L.R. 379, in which several of the Law Lords confirm the holistic nature of the test, including Lord Lloyd of Berwick, who indicates that "I accept of course that in the end there is only one question, namely, whether the applicant has brought himself within the definition of refugee in Article 1A(2) of the Convention." (p. 390) To the same end, Lord Clyde cautions against too "detailed analysis of its component elements" which "may distract and divert attention from the essential purpose of what is sought to be achieved" (p. 395). See also Federal Court of Australia in *Kuldip Ram v. Minster for Immigration and Ethnic Affairs and the Refugee Review Tribunal*, 27 June 1995, No. SG 17 of 1995 Fed No. 433/95 Immigration (1995) 130 ALR 314, particularly paragraph 12.

[12] See the *Handbook*, paragraph 37; Guy S. Goodwin-Gill, *The Refugee in International Law* (2d ed.) Clarendon Press, Oxford, 1996 at 41.

[13] Lord Clyde in *Horvath* also cites with approval the words of Simon Brown L.J. in *Ravichandran v. Secretary of State for the Home Department* [1996] Imm.A.R. 97, 109, where he says "the question whether someone is at risk of persecution for a Convention reason should be looked at in the round and all the relevant circumstances brought into account" (p. 399). See also Goodwin-Gill, at 41.

[14] See UNHCR *Handbook* paragraphs 34 to 50. See also the EU *Joint Position on the Harmonised Application of the Definition of the term "refugee" in Article 1 of the Geneva*

Convention, point 2.

[15] This note on the interpretation of Article 1 of the 1951 Convention addresses directly issues of interpretation which arise in the context of individual status determination. The issue of group determination under the Convention is not addressed here. This should not be taken to mean that the Convention does not or cannot apply in situations where individual status determination is not done. See UNHCR *Handbook*, paragraph 44 and the recently published work *The Refugee Concept in Group Situations*, Ivor C. Jackson, Martinus Nijhoff Publishers, The Hague, 1999.

[16] See UNHCR *Handbook*, paragraph 28.

[17] Please refer to UNHCR's *Note on Burden and Standard of Proof in Refugee Claims* issued in December 1998 for an overview of UNHCR's position generally.

[18] See Part II of the *Handbook,* particularly paragraphs 195 to 219.

[19] See particularly paragraphs 5 and 6 of the UNHCR *Note on Burden and Standard of Proof* referenced in note 17, and paragraph 196 of the *Handbook*.

[20] See paragraphs 16 and 17 and the jurisprudence quoted in the Annex to the *Note on Burden and Standard of Proof* referred to above in note 17. See also the *Handbook* at paragraph 42.

[21] See paragraphs 9 and 10 of the *Note on Burden and Standard of Proof* referenced above in note 17. See also paragraphs 196 to 199 in the *Handbook*.

[22] See paragraphs 11 and 12 of the *Note on Burden and Standard of Proof* (note 17) and *Handbook* paragraphs 199 and 202.

[23] There is a similar provision for stateless persons, citing not the country of nationality but that of former habitual residence. That provision is not quoted here, as it does not change the interpretation of the key inclusion elements. In addition, there is a second paragraph to Article 1A(2), which specifies that in the case of a person who has more than one nationality, "the country of his nationality" in the first paragraph shall mean each of the countries of which he or she is a national, with the result that if, without any valid reason based on well-founded fear, that person has not availed him or herself of the protection of one of the countries of which he or she is a national, the person shall not be deemed to be lacking the protection of his or her country of nationality. This is a factual element, requiring first a determination of whether the claimant has more than one nationality, and if so, requiring an analysis of whether he or she has a valid reason based on well-founded fear for not availing of the protection of that State. See, for example, Commission de Recours des Réfugiés (C.R.R.) (France), *Nzoghu Musakirwa*, 21 October 1999, 330.953; *Sywiolek ép. Farrayan*, 26 February 1999, 326.802; *Atranik Youssef ép. Tchakmakdyian*, 11 February 1999, 318.703.

[24] It should be recalled, as noted above, that this paper addresses only some of the substantive interpretation issues which arise in applying the Article 1 criteria. It does not address in any detail the procedural questions.

[25] See paragraphs 37 to 50 of the *Handbook*.

[26] See in particular paragraphs 40 and 41 of the *Handbook.* In jurisprudence, see for example New Zealand Refugee Status Appeals Authority (R.S.A.A.), *Re MN*, 12 February 1996, Refugee Appeal No. 2039/93 and numerous cases cited therein.

[27] Some jurisprudence and commentators have analysed this aspect under the last clause of Article 1, as an issue related to willingness or ability of the asylum-seeker to avail him or herself of the protection of the country of nationality or former habitual residence. For the reasons discussed below in paragraphs 15 and 35 to 37, the true "home" of this analysis lies rather here, in assessing well-foundedness of fear.

[28] In some cases, courts have required claimants to prove that they would not be protected anywhere in the country, which is both an impossible burden and one which is patently at odds with the refugee definition, the key criterion of which is that the asylum-seeker show that he or she has a well-founded fear of being persecuted for a Convention reason.

[29] But see the discussion in the Annex "Relocation and State Agents" to the Position Paper on *Relocating Internally* (following note) for possible exceptions. Even where the state may not have *de facto* control over part of its territory, however, as in Northern Iraq, it may not be assumed that an internal relocation possibility will exist, there must be an assessment of all the circumstances. See for example the jurisprudence of the Swiss Asylum Appeals Commission (ACC), Decision of 12 July, 2000.

[30] See UNHCR's Position Paper *Relocating Internally as an Alternative to Seeking Asylum: (the So-Called "Internal Flight Alternative" or "Relocation Principle")*, issued in Geneva in

February 1999. See also UNHCR *Handbook*, paragraph 91.

[31] See James C. Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991 p. 101 *et seq.*, in particular 104/105. See also the related discussion in paragraphs 35 to 37 *infra* on the meaning of the "unable/unwilling" element.

[32] See G. Goodwin-Gill at 77.

[33] See J. Hathaway at p. 7, footnote 36.

[34] See the comments by Paul Weis in UN Doc. HCR/INF/49, 22; ibid., *The concept of the refugee in international law* (1960), 87 JDI 928 at 970; Atle Grahl-Madsen, *The Status of Refugee in International Law*, Sijthoff, Leyden, 1966, vol. I, Section 21, paragraph 82, p. 193. See also Federal Court of Australia in *Kuldip Ram v. Minster for Immigration and Ethnic Affairs and the Refugee Review Tribunal*, 27 June 1995, No. SG 17 of 1995 Fed No. 433/95 Immigration (1995) 130 ALR 314, paragraph 7: "It seems to me that those who framed the provision wisely chose broad expressions, which it is not the court's task to constrict." (Burchett J.).

[35] See UNHCR *Handbook* paragraphs 51 – 53; see also Supreme Court of Canada, *Canada (Attorney General) v. Ward*, 30 June 1993, [1993] 2 S.C.R. 689 at 734; High Court of Australia, *Applicant A v. Minister for Immigration and Ethnic Affairs*, 24 February 1997, (1997) 190 C.L.R. 225 (McHugh J.); and *Minister for Immigration and Multicultural Affairs v. Ibrahim*, 26 October 2000, [2000] HCA 55 at paragraph 65 (McHugh J.).

[36] See UNHCR *Handbook*, paragraph 54; see also High Court of Australia, *Chen Shi Hai v. Minister of Immigration and Multicultural Affairs*, 13 April 2000, [2000] HCA 19 at paragraph 25.

[37] See UNHCR *Handbook*, paragraph 55.

[38] See generally paragraphs 56 to 60 and 167 to 174 of the *Handbook*.

[39] See in particular *Handbook* paragraphs 59 and 60, as well as the related sections in UNHCR's position paper on *Gender-Related Persecution* referenced in note 67 below.

[40] See the Handbook and see also UNHCR's position papers on draft evasion in particular circumstances. In particular, see paragraphs 1 and 8 – 10 of the paper *Deserters and Persons avoiding Military Service originating from the Federal Republic of Yugoslavia in Countries of Asylum: Relevant Considerations* of 1 October 1999.

[41] Even if the military action in which the person is required to participate is generally conducted within the limits prescribed by the laws of war, he/she may be regarded as a conscientious objector and, hence, qualify as a refugee, if he/she can establish that his/her moral, religious or political objections to participating in such action are so genuine, serious and profound that it would be morally wrong to require him/her to participate in such action. One case that may fall under this description is that of a member of an ethnic minority who, in a situation of internal conflict, may be required to participate in military action against his/her own ethnic community. This exception is reflected in paragraph 10 in the UNHCR position paper on avoidance of military service in the Federal Republic of Yugoslavia, referenced in the immediately preceding note.

[42] UNHCR is aware of four Western European states which take this view. Of these, one is currently studying the approach with a view to perhaps changing it. See, for instance, Conseil d'Etat (France), *Henni*, 12 October 1998, 179.364; *Dankha*, 27 May 1983, 42.047; Federal Constitutional Court (Germany), 10 July 1989, BVerfGE 80, 315; Swiss Asylum Appeals Commission, EMARK 1995, No. 2.

[43] See, for instance, Supreme Court of Canada, *Canada (Attorney General) v. Ward*, 30 June 1993, [1993] 2 S.C.R. 689; United States Court of Appeals, *Rosa v. INS*, 440 F.2d 100 (1st Cir. 1971) and *In re McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981); Australia High Court, *Minister for Immigration and Multicultural Affairs v. Ibrahim*, 26 October 2000, [2000] HCA 55; New Zealand R.S.A.A., 16 August 2000, Refugee Appeal No. 71427/99; House of Lords, *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another ex parte Shah*, 25 March 1999,[1999] 2 A.C. 629 and *Horvath v. Secretary of State for the Home Department*, 6 July 2000, [2000] 3 W.L.R. 379; Rechtseenheidskamer (REK) Den Haag, 27 August 1998, Ref.-No. AWB 98/3068 VRWET and Ref.-No. 98/3057 VRWET; Commission permanente de réfugiés (C.P.R.) (1 ch.) (Belgium), 21 November 1991, F035; Refugee Appeals Board (R.A.B.) (Denmark), 1 February 1994, No. 21-0486 and 24 June 1994, No. 21-0435; see also the ELENA Research Paper on Non-State Agents of Persecution by ECRE (2000).

[44] See, for instance, UNHCR's position paper on agents of persecution (1995); UNHCR, *An*

Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR, European Series Vol. 1 No. 3, September 1995, p. 28-30; *Opinion of UNHCR regarding the question of non-State persecution, as discussed with the Committee on Human Rights and Humanitarian Aid of the German Parliament (Lower House)* on 29 November 1999, sections IV and V; Volker Thrk, *Non-State Agents of Persecution*, presentation at the Colloquium of the Graduate Institute of International Studies, 3 November 2000, Geneva. See also the *Handbook*, paragraphs 37 and 65.

[45] See, for instance, Commission des Recours des Réfugiés (CRR) (France), 3 July 1991, 144.955; 14 January 1991, 70.854; 19 February 1988, 30.022; Conseil d'Etat (Belgium), *Muric*, 26 May 1993, 43.082, (1993) Rev.Dr.Etr. 366; Commission Permanente de Recours des Réfugiés (C.P.R.R.) (1 ch.) (Belgium), 8 February 1994, F246; R.A.B. (Denmark), 14 October 1994, No. 21-1479; see also the former US jurisprudence in *Kotasz v. INS*, 31 F.3d 847 at 849 (4th Cir. 1988) and *Arteaga v. INS*, 836 F.2d 1227 at 1232 (9th Cir. 1988); see however now, e.g., U.S. Court of Appeals, *Chen v. INS*, 195 F.3d 198 (4th Cir. 1999).

[46] See House of Lords, *Adan v. Secretary of State for the Home Department*, 2 April 1998, [1999] 1 A.C. 293 at 311 (Lord Lloyd of Berwick); Swiss Asylum Appeals Commission (A.C.C.), EMARK 1999 No. 7, para. 4 a).

[47] For a similar view see Australia High Court, *Minister for Immigration and Multicultural Affairs v. Ibrahim*, 26 October 2000, [2000] HCA 55, paragraphs 196-199 (Kirby J.); Federal Court of Australia, *MIMA v. Abdi*, 26 March 1999, [1999] 87 FCR 280. 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.

[48] Executive Committee Conclusion No. 85 (1998), paragraph (c).

[49] See paragraphs 39 and 164-166 of the *Handbook*; Executive Committee Conclusions No. 22 (1981) paragraph I.1; No. 74 (1994) paragraph (l); No. 85 ((1998) paragraph (c).

[50] See, for example, G. Goodwin-Gill at 75; J. Hathaway at 185-8; Walter K@lin, *Refugees and Civil Wars: Only a Matter of Interpretation?* (1991) 3 I.J.R.L. 435; Serge Bodart, *Les réfugiés apolitiques: guerre civil et persecution de groupe au regard de la Convention de Genève* (1995) 7 I.J.R.L. 39. For jurisprudence, see Australia High Court, *Minister for Immigration and Multicultural Affairs v. Ibrahim*, 26 October 2000, [2000] HCA 55; Federal Court of Canada, *Salibian v. Canada* [1990] 3 F.C. 250; Swiss Asylum Appeals Commission (A.C.C.), EMARK 1997 No. 14, paragraph 4.d) dd); U.S. Court of Appeals, *Montecino v. INS*, 915 F.2d 518 (9th Cir. 1990); for the "similarly situated" alternative instead of the "singled out" rule in U.S. law, cf. Deborah Anker, *Law of Asylum in the United States*, Refugee Law Center, Boston, 1999, p. 67-76.

[51] For a fuller discussion see UNHCR's companion paper on *Complementary Protection* referenced below in note 68.

[52] For instance, a person's refusal to practise a particular religion may be perceived by authorities as political opposition to a regime based on that religion; see, for example, New Zealand (R.S.A.A.), *Re MN*, 12 February 1996, Refugee Appeal No. 2039/93; and 16 August 2000, No. 71427/99.

[53] See UNHCR *Handbook* paragraphs 66 and 67.

[54] See UNHCR *Handbook* paragraphs 78 and 80. See also Supreme Court of Canada, *Attorney General (Canada) v. Ward*, 30 June 1993, [1993] 2 SCR 689, 747; Federal Court of Appeal, *Inzunza v. Canada*, [1979], 103 D.L.R. (3d) 105, 109 (F.C.A.); U.S. Court of Appeals, *Sangha v. INS*, 103 F.2d 1402, 1489 (9th Cir. 1997); *Lopez-Galarza*, 99 F.3d 954 (9th Cir. 1996); *Desir v. Ilchert*, 840 F.2d 723, 728 (9th Cir. 1988); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985); C.P.R. (2 ch.) (Belgium), 25 February, F059; Higher Administrative Court, VGH Baden-Wurttemberg (Germany), 31 August 1992, A 16 S 1055/92; (United Kingdom) *Secretary of State for the Home Department v. Patrick Kwame Otchere*, [1988] Imm.A.R. 21 (Tribunal); *Re Gholam Hussain Ershadi-Oskoi*, 4 May 1993, No. 10120 (Immigration Appeals Tribunal); Hoge Raad (H.R.) (Netherlands), *A.B.*, 26 February 1993, 493, 1993; Council of State (ARRvS), 15 June 1993, *R.V.*, 1993, 10.

[55] There are two international instruments, the 1954 Convention relating to the Status of Stateless Persons (done at New York, 28 September 1954, 360 U.N.T.S. 117) and the 1961 Convention on the Reduction of Statelessness (done at New York, 30 August 1961, UN document A/CONF.9/15, 1961), which address this problem, and provide the legal framework for national and regional legislation. UNHCR has a mandate from the United Nations General Assembly with respect to statelessness, stemming largely from its designation as the body to

which a person claiming the benefit of the 1961 Convention may apply. See UNGA Resolutions 3274 (XXIV) of 10 December 1974, 31/36 of 30 November 1976 and 50/152 of 9 February 1996. See also Executive Committee Conclusion No. 78 (XLVI) of 1996. For more on this issue, see the article by Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status* (1998) 10 I.J.R.L. 156.

[56] See the *Handbook*, paragraphs 74 to 76 and paragraph 89. See also Goodwin-Gill, *The Refugee in International Law* (2d ed) at section 4.2.3 (p. 45) and notes thereto.

[57] See the discussion above in paragraph 20 re the current importance of persecution on account of ethnicity.

[58] See, for example, High Court of Australia, *Applicant A v. Minister for Immigration and Ethnic Affairs*, 24 February 1997, [1997] C.L.R. 225 (McHugh J.); Federal Court of Australia, *Minister for Immigration and Multicultural Affairs v. Khawar*, 23 August 2000, [2000] FCA 1130 (Hill J.); C.P.R. (1 ch.) (Belgium), 23 January 1992, R319; see also UNHCR *Handbook*, paragraphs 77 to 79 and G. Goodwin-Gill at 47.

[59] See, U.S. Board of Immigration Appeals, *Matter of Acosta*, 1 March 1985, 19 I & N Dec. 221, and *In re Kasinga*, 13 June 1996, Interim Decision 3278, reported in (1997) I.J.R.L. – Special Issue, 213-234; Supreme Court of Canada, *Attorney General (Canada) v. Ward*, 30 June 1993, [1993] 2 SCR 689; Refugee Appeals Board (V.B.C.) (2 ch.) (Belgium), 8 April 1992, E024; House of Lords, *Islam v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal, ex parte Shah*, 25 March 1999, [1999] 2 A.C. 629; see also J. Hathaway at p. 160-161.

[60] See, for instance, Council of State (ARRvS) (Netherlands), 26 May 1993, *R.V.*, 1993, 4; Federal Administrative Court (BVerwG), 15 March 1988, 9 C 178.86; Ansbach Administrative Court (VG), 19 February 1992, AN 17 K 91.44245; Austrian Supreme Administrative Court (VwGH), 20 October 1999, 99/01/0197; Conseil d'Etat (France), *Ourbih*, 23 June 1997, 171.858; C.R.R. (France), *Ourbih*, 15 May 1998, 269.875; *Djellal*, 12 May 1999, 328.310.

[61] See, for example, Federal Court of Canada, *Cardozo Porto v. Canada* [1992] F.C.J. No. 881 (QL); C.R.R. (France), 12 July 1985, 26.971 and 5 December 1985, 30.819; see also in F. Tiberghien, *La protection des refugies en France*, Paris, Economica, 1988, p. 316.

[62] It is important to note that sex and gender, while related, are not synonymous. Sex refers only to biological characteristics and difference, while gender denotes the whole social construct surrounding, and including, that difference. Gender, therefore, is a term which includes sex, and UNHCR uses the term "gender-related persecution" to denote both forms of and reasons for persecution.

[63] See the recent decision of the Trial Chamber of the International Criminal Tribunal for former Yugoslavia in the Kunarac, Kovac and Vukovic judgement, which can be found at http://www.un.org/icty/foca/trialc2/judgement/index.htm for a discussion, from the criminal law perspective, of rape as persecution on ethnic grounds. See in particular section V (C), paragraphs 570 et seq.

[64] See, for instance, U.S. Court of Appeals, *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996); Board of Immigration Appeals, *In Re SA*, 27 June 2000, Decision No. 3433; cf. also Deborah Anker, *Law of Asylum in the United States*, pp. 365 *et seq.*; Federal Court of Canada, *Namitabar v. Canada (MEI)*, 5 November 1993, [1994] 2 FC 42; C.R.R. (France), 19 December 1989, 60.025; New Zealand R.S.A.A., 27 September 1999, Refugee Appeal No. 71462/99; *Re MN*, 12 February 1996, Refugee Appeal No. 2039/93.

[65] See US Court of Appeals, *Hernandez-Montiel v. INS*, 24 August 2000, (9th Cir. 2000).

[66] See, for instance, House of Lords, *Islam v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal, ex parte Shah* 25 March 1999, [1999] 2 A.C. 629; Federal Court of Australia, *Minister for Immigration and Multicultural Affairs v. Khawar*, 23 August 2000, [2000] F.C.A. 1130; New Zealand R.S.A.A., 16 August 2000, Refugee Appeal No. 71427/99; Immigration and Refugee Board (Canada), *Re Mayers and Minister of Employment and Immigration* (1992) 97 DLR (4th) 729; U.S. Courts of Appeals, *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

[67] For more detail on UNHCR's thinking about gender-related persecution, see UNHCR's paper, *Gender-Related Persecution,* recently presented to CIREA. For a review of the jurisprudence up to the time of publication, see *Gender-Related Persecution: An Analysis of Recent Trends* (1997) I.J.R.L. – Special Issue p. 79. UNHCR's approach is largely coherent with the approaches taken in the several asylum countries which have published guidance on

the issue of gender-related claims. See Canadian Immigration and Refugee Board: *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (9 March 1993,updated 25 November 1996), (1993) 5 I.J.R.L. pp. 278-318; cf. Chantal Bernier, *The IRB Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (1997) I.J.R.L.-Special Issue, p. 167; the "Considerations for Asylum Officers Adjudicating Asylum Claims from Women" issued by the Immigration and Naturalization Service of the United States, (1995) 7 I.J.R.L. pp. 700-719; cf. Lori L. Scialabba, *The Immigration and Naturalization Service Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, (1997) I.J.R.L. – Special Issue, p. 174; Australian Department of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants: "Guidelines on Gender Issues for Decision Makers" (July 1996), (1997) I.J.R.L.-Special Issue, p. 195; and United Kingdom Immigration Appellant Authority, "Asylum Gender Guidelines" issued in November 2000, available from the IAA.

[68] UNHCR has published a companion note on complementary protection, The *International Protection of Refugees: Complementary Forms of Protection,* UNHCR, 2001, which should be referred to for the Office's view of the persons who should benefit from such protection, the procedures necessary to determine beneficiaries and the standards of treatment from which such persons should benefit. There is also reference therein to the types of cases that should NOT be provided complementary protection, but rather should be recognised as refugees.

[69] In fact in *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation, A Commentary* (first published by the World Jewish Congress in 1953, reprinted by UNHCR in 1997) by Nehemiah Robinson (who was among the most active participants of the Conference of Plenipotentiaries which drafted the Convention), the author calls this part of Article 1 one of two "conditions" which apply to refugees, suggesting it is not an element to be interpreted but merely a factual consideration. (p.10)

[70] See UNHCR *Handbook*, paragraphs 94 to 96.

[71] Ibid., paragraph 96; from the jurisprudence see Higher Administrative Court (OVG) of Nordhein-Westfalen (Germany), 22 September 2000, 1 A 2531/98.A (Vietnam); OVG Niedersachsen, 19 September 2000, 11 L 2068/00 (China); OVG Rheinland-Pfalz, 18 February 2000, 10 A 11821/98, NVwZ 2000, Beilage Nr. 7, p. 84-86 (Turkey); C.R.R. (France), *Oumar*, 11 December 1998, 319.389; Refugee Appeals Board (Belgium), V.B.C. (2 ch.), 12 October 1992, W676; C.P.R., 13 September 1990, F014; Swiss Asylum Appeals Commission (AAC), EMARK 1999 No. 29.

[72] See, for instance, UK Court of Appeal, *R. v. Immigration Appeal Tribunal, ex parte B*, [1989] Imm.A.R. 166 and *R. v. Secretary of State for the Home Department, ex parte Gilgham* [1995] Imm.A.R. 129; for the continuation element: Higher Administrative Court, VGH Baden-Wurttemberg, 10 December 1992, A 16 S 559/92; Netherlands Council of State, Jurisdiction Section (ARRvS.), 12 July 1978, *R.V.*, 1978, 27.

[73] See, for example, UK Court of Appeal, *Danian v. Secretary of State for the Home Department* [2000] Imm.A.R. 96 (28 October 1999); U.S. Court of Appeals, *Bastanipour v. INS*, 980 F.2d (7th Cir. 1992); Federal Court of Australia, *Minister for Immigration and Multicultural Affairs v. Mohammed*, 5 May 2000, [2000] F.C.A. 576; New Zealand R.S.A.A., *Re HB*, 21 September 1994, Refugee Appeal No. 2254/94; C.P.R.R. (Belgium), C.P.R. (2 ch.), 8 July 1992, F106; clearly against a good faith requirement: Federal Administrative Court (BVerwG), 10 January 1995, 9 C 276.94, (1995) DVBl., p. 573; BverwG, 4 December 1990, 9 C 99/89, Buchholz 402.25, para. 28 AsylVfG Nr. 20.

[74] See for example Hathaway, James C., op. cit. at note 31 above; Zalzali v. Canada (Minister of Employment and Immigration), Fed. Ct of Appeal, 27 ACWS 3d 90, 30 April 1991; and more recently, the judgments of Lord Lloyd of Berwick in Adan v. Secretary of State for the Home Department [1999] 1 AC 293 at 304 C-E and in Horvath, see note 11 above.

[75] See the *Handbook,* paragraphs 97 – 100, with respect to this phrase, which, though they are not explicit on the point, provide only examples relating to diplomatic or consular protection. See also the unpublished paper by Antonio Fortin, *The Meaning of "Protection" in the Refugee Definition*, (summer 2000) which covers in great detail the drafting and subsequent history of this element of the definition.

[76] In the final part of Article 1A(2) the test for stateless persons is not, as it is for those with a nationality, willingness or ability to avail of the protection of the state of formal habitual residence, but is rather whether the refugee is unwilling to return there. This helps to confirm the original meaning of this phrase of the article is diplomatic or consular protection offered to

citizens outside the State.

[77] See the paper of Walter K@lin, *Non-State Agents of Persecution and the Inability of the State to Protect*, presented at the IARLJ Conference in Bern, Switzerland in October 2000, section 2.2.2.

[78] See the Fortin paper, referenced in note 75, at page 30.

[79] See note 74 above.

[80] See paragraph 19 of this paper and the explanation in the following note.

[81] In this respect, an interpretation of the refugee definition in Article 1 which makes the availability of state protection from threatened persecution a crucial element supports the argument that those threatened by non-state agents are refugees within the meaning of the Convention, because they lack state protection. It is worth pointing out, however, that accepting the historically correct "external protection" meaning of this phrase is not incompatible with the view that those fearing non-state agents of persecution are also refugees. As pointed out in the final paragraphs of the Fortin paper (note 75), it may surely be legitimate for a person who fears non-state agents not to accept diplomatic protection outside the country as this would provide the country of origin with the possibility of lawfully returning him or her to that country. This would expose the refugee to the feared harm and therefore would make his or her unwillingness to avail of such external protection both reasonable and "owing to such fear" of persecution.

[82] See paragraph 15.

[83] This is also the position adopted in the Fortin paper on the meaning of protection referenced in note 75 above.

[84] See the K@lin paper, note 77, section 3.2.

[85] Articles 1D and E.

[86] Article 1F.

[87] See UNHCR *Handbook*, paragraph 149; J. Hathaway, p. 191; C.P.R. (2 ch.) (Belgium), 29 June 1994, F274.

[88] See UNHCR *Handbook*, paragraph 142.

[89] By analogy to paragraph 143 of the *Handbook*, it is reasonable to say that those outside the territory concerned, if they otherwise meet the criteria of Article 1, should not be excluded from refugee status on the basis of the existence of such an entity.

[90] See UNHCR *Handbook*, paragraph 145.

[91] See *The Exclusion Clauses: Guidelines on their Application*, UNHCR, December 1996, particularly paragraphs 6 and 7 (issued under cover of IOM/83/96/FOM/93/96 of 2 December 1996, and also available in the UNHCR REFWORLD refugee policy and practice database.)

[92] See, for example, Federal Court of Appeal, *Canada (MCI) v. Hussein*, 7 January 2000, Docket: A-800-95, paragraph 25: "more than suspicion or conjecture, but less than proof on a balance of probabilities" and *Moreno v. Canada (MEI)*, 14 September 1993, [1993] 1 F.C. 298; see also U.S. Court of Appeals, *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986); Conseil d'Etat (France), *Ressaf*, 15 May 1996, 153.491; C.R.R. (France), *Warnakulasuriya Ichchampullege*, 20 May 1996, 295.425; U.K. Court of Appeal (Civil Division), *T. v. Secretary of State for the Home Department*, 3 November 1994, [1995] 1 W.L.R. 545; C.P.R.R. (Belgium), 18 January 1996, F390; Swiss AAC, EMARK 1999 No. 12, paragraph 5; see also G. Goodwin-Gill, p. 97.

[93] The qualification that the indictment, or its confirmation, be done by an international as opposed to a national tribunal is deliberate, and is based on the fact that there may be instances where national authorities, through a court or tribunal, may seek to silence enemies and critics through the use of such prosecutions, sometimes in the aftermath of a civil war. For a description of the Rwanda Tribunal's procedure for indictment and confirmation of indictment (which must occur before arrest or detention warrants, or other orders necessary to prepare for trial, will be issued) see the paper of Erik Mrse, Vice-President, International Criminal Tribunal for Rwanda, prepared for the 4th Conference of the International Association of Refugee Law Judges, Bern, Switzerland, October 2000, paragraphs 27 to 31. The paper suggests that the confirmation of the indictment, which is said to be done on the test of whether a *prima facie* case has been made out by the Prosecutor, would clearly satisfy the "serious reasons for considering" test.

[94] UNHCR has done this with respect to Rwandans. See the Press Release issued by the High Commissioner on 25 September, 1996 in which it was announced that 20 Rwandans indicted by the International Criminal Tribunal for Rwanda were excluded from refugee status

by the High Commissioner's Office, and that UNHCR urged States to follow suit if the 20 named Rwandans sought asylum. The Press Release states in its final paragraph, after describing the exclusion clauses of the 1951 Convention and the 1969 OAU Convention, that: "UNHCR believes that the indictments by the tribunal constitute sufficient grounds for exclusion from refugee status in accordance with its own mandate and the OAU Convention."

[95] For a fuller explanation regarding these issues, please refer to *The Exclusion Guidelines* (referenced in note 91 above) particularly at paragraphs 36 to 48; see also Michael Bliss, *"Serious reasons for considering": Minimum standards of procedural fairness in the application of the article 1 (F) exclusion clauses*, in (2000) 12 I.J.R.L. – Special Supplementary Issue on Exclusion at 92.

[96] Adopted at Rome on 17 July 1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and amended by proces-verbaux of 10 November 1998 and 12 July 1999. Particularly relevant for exclusion are articles 6, 7 and 8 of the Statute, which define genocide, crimes against humanity and war crimes.

[97] From national jurisprudence, see, for instance, Federal Court of Appeal, *Sivakumar v. Canada (MEI)*, 4 November 1993, [1994] 1 F.C. 433; *Equizabal v. Canada (MEI)*, 26 May 1994, [1994] 48 A.C.W.S. 3d 793; C.R.R. (France), *Bicamumpaka*, 23 October 1997, 294.336; *Galimov*, 5 May 1997, 307.510; *Ntagerura*, 19 June 1996, 282.004; *Mbarushimana*, 19 June 1996, 280.634; C.P.R.R. (Belgium), 18 May 1995, R2747; 28 March 1995, R2632; 23 July 1993, R1338; Swiss AAC, EMARK 1999 No. 12; see also Jelena Pejic, *Article 1 F (a): The notion of international crimes*, in (2000) 12 I.J.R.L. 11 – Special Supplementary Issue on Exclusion.

[98] UNHCR *Handbook*, paragraph 155.

[99] See UNHCR *Handbook* paragraph 60. From national jurisprudence, see, for example, Queen's Bench division, *R. v. Secretary of State for the Home Department, ex parte Baljit Singh*, [1994] Imm.A.R. 42 (Q.B.D.); Conseil d'Etat (France), *Ressaf*, 15 May 1996, 153.491; 25 September 1985, 62.847; C.R.R. (France), 26 November 1993, 222.900; *Wilfred Karalasingham*, 20 July 1993, 233.673; *Rajkumar*, 12 March 1993, 230.875; Convention Refugee Determination Division (C.R.D.D.) (Canada), *A. (T.W.) (Re)*, [1991] C.R.D.D. No. 430 (QL); US Board of Immigration Appeals (B.I.A.), *In re Ballester-Garcia*, [1980] 17 I. & N. Dec. 592, 595; *In re Rodriguez-Palma*, [1980] 17 I. & N. Dec. 465, 468. See also A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. I, paragraph 107, p. 294 *et seq.*; J. Hathaway, p. 221-226; G. Goodwin-Gill, p. 104-108 and Walter Kälin and Jörg Künzli, *Article 1 F (b) of the 1951 Refugee Convention: Freedom Fighters, Terrorists, and the notion of serious non-political crimes*, (2000) 12 I.J.R.L. 46 – Special Supplementary Issue on Exclusion.

[100] See UNHCR *Handbook*, paragraph 152; from national jurisprudence, see Federal Court of Australia, *Singh v. MIMA*, 19 November 1999, [1999] F.C.A. 1599; U.S. Supreme Court, *INS v. Aguirre Aguirre*, 3 May 1999, 119 S.C. 1439 (1999), (1999) 38 I.L.M. 786, 791; House of Lords, *T. v. Immigration Officer*, [1996] 2 W.L.R. 766; U.S. Court of Appeals, *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986); Federal Court of Canada, *Gil v. Canada (MEI)*, 21 October 1994, [1994] F.C.J. No. 1559; Conseil d'Etat (France), *Urizar-Murgoito*, 14 December 1987, Rec. Dalloz Sirey, 1988, Inf. rap. p. 20.

[101] See UNHCR *Handbook*, paragraphs 159-161.

[102] See *The Exclusion Guidelines* (note 91); see also UNHCR *Handbook*, paragraph 156; C.P.R.R. (Belgium), 23 April 1998, W4589; 9 March 1998, W4403; 9 August 1995, W1916; U.K. Court of Appeal, *R. v. Secretary of State for the Home Department, ex parte Chahal*, 22 October 1993, (1994) 1 W.L.R. 526; G. Goodwin-Gill, p. 106-107; J. Hathaway, p. 225; see, however, U.S. Supreme Court, *INS v. Aguirre-Aguirre*, 3 May 1999, 119 S.C. 1439 (1999), (1999) 38 I.L.M. 786, 791, see also in (1999) 11 I.J.R.L. 375.

[103] See UNHCR *Handbook*, paragraph 154. From jurisprudence, see, e.g., Conseil d'Etat (France), *Rajkumar*, 25 September 1998, 165.525; *Pham*, 21 May 1997, 148.997; Federal Court of Australia, *Ovcharuk v. Minister for Immigration and Multicultural Affairs*, 16 October 1998; *Dhayakpa v. Minister for Immigration and Ethnic Affairs*, [1995] 62 F.C.R. 556; Federal Court of Canada, *Malouf v. Canada (MCI)*, 31 October 1994, [1995] 1 F.C. 537.

[104] See the *Exclusion Guidelines* (note 91), and UNHCR *Handbook*, paragraphs 162 and 163; see also Supreme Court of Canada, *Pushpanathan v. Canada (MCI)*, 4 June 1998, [1998] 1 S.C.R. 982; Conseil d'Etat (France), *Mahboub*, 25 March 1998, 170.172; C.R.R. (France),

Duvalier, 18 July 1986, 50.265, confirmed by the Conseil d'Etat on 31 July 1992; Swiss AAC, EMARK 1999, No. 11; cf. also G. Goodwin-Gill, p. 114 and Edward Kwakwa, *Article 1 F (c): Acts contrary to the purposes and principles of the United Nations*, (2000) 12 I.J.R.L. 79 – Special Supplementary Issue on Exclusion.

[105] See, however, the following examples from national jurisprudence: Federal Court of Appeal, *Ramirez v. Canada (MEI)*, 7 February 1992, [1992] 2 F.C. 306; *Sivakumar v. Canada (MEI)*, 4 November 1993, [1994] F.C. 433; New Zealand R.S.A.A., *Re TP*, 31 July 1995, Refugee Appeal No. 1248/93.

[106] See note 91 above for the full reference to the Exclusion Guidelines. For the issues noted in this paragraph see in particular paragraphs 36 to 48 of those Guidelines. See also documentation on exclusion prepared for the Executive Committee, in particular *Note on the Exclusion Clauses* (EC/47/C/CRP.29) of May 1997 and *Background Paper on the Article 1F Exclusion Clauses* of June 1998.

[107] See the *Handbook*, paragraphs 118 to 133.

[108] See the *Handbook*, paragraph 116.

[109] These grounds are described in Article 1C(1), (2), (3) and (4) and elaborated in the *Handbook* paragraphs cited in note 107; from national jurisprudence, see, for example, C.R.R. (France), *Ciftci*, 16 January 1998, 290.107; *Cagalj*, 21 May 1997, 301.944; Swiss AAC, EMARK 1998 No. 29.

[110] These grounds are described in Article 1C(5) and (6); see paragraphs 134 to 139 of the *Handbook*, and from national jurisprudence, see, for example, Swiss AAC, EMARK 1998 No. 19.

[111] Executive Committee Conclusion No. 69 (XLIII) paragraphs a) and c).

[112] See the Standing Committee Report: Note on the Cessation Clauses, EC/47/SC/CPR.30 of 30 May 1997 as well as UNHCR's *Guidelines on the Application of the Cessation Clauses*, issued in April 1999.

[113] Paragraph 2 of Article 1C (5) and (6).

[114] See UNHCR *Handbook*, paragraph 136; from national jurisprudence, see, for example, C.R.R. (France), *Bizimungu*, 4 June 1997, 300.063; *Sokolova*, 10 March 1997, 200.999; V.B.C. (2 ch.) (Belgium), 3 October 1994, E84; Swiss AAC, EMARK 1997 No. 14, paragraph 6 c) dd) and ff); EMARK 1998 No. 16, paragraph 4 b) and c).

[115] This is self-evident with respect to Article 1C(3).