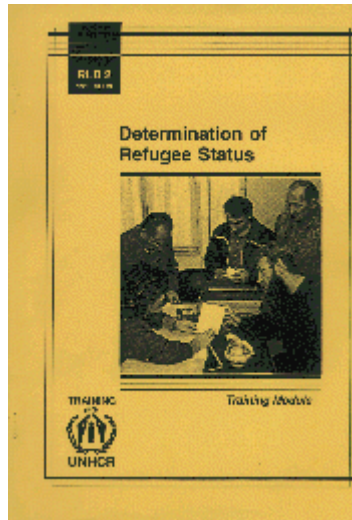


Determination of Refugee Status (RLD 2)



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Training Service
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Foreword

This training module has been produced by the Division of Refugee Law and Doctrine with the assistance of the Training Service. Copies may be obtained from the Training Resource Centre.

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Introduction

The purpose of **Determination of Refugee Status** is to help you learn:

- the criteria that apply in granting refugee status
- how to assess whether an application meets those criteria
- how to identify applications on which you should seek specialised legal advice
- the essential features of eligibility procedures
- how to recommend improvements to existing or proposed procedures for determining refugee status.

This booklet contains an introduction, two chapters, and a series of annexes:

Chapter 1 is mainly devoted to defining the criteria applied to applications for refugee status.

Chapter 2 concerns the procedures for determining refugee status, as applied by national authorities and by UNHCR.

The *annexes* include the refugee eligibility questionnaire and various texts mentioned in the course of the module.

This training tool is intended for anyone concerned with determining the eligibility for refugee status. Its users may thus be UNHCR staff at Headquarters or in the field, government officials at various levels,

UNDP staff, as well as staff of non-governmental organisations with whom UNHCR cooperates.

A Trainers Guide is issued separately, giving suggestions as to how to use this booklet as a basis for, or part of a training programme. Each chapter includes case studies based on actual situations you may encounter. You will find summary analyses of these case studies towards the back of the module. These summaries also refer you to the relevant sections of the *Handbook on Procedures and Criteria for Determining Refugee Status*, which is an essential complement to this module. Each chapter also includes a self-assessment test. This test is for your own use; it provides both a review of the material and a way to measure what you have learned. Answers are provided in pop-up boxes.

See glossary for important terms used throughout this text.

Chapter 1: Definition of A Refugee

Chapter

Learning

Objectives You will be able to:

- analyse the criteria governing refugee status
- identify circumstances in which the cessation and exclusion clauses are applied
- apply this knowledge to specific cases of persons applying for refugee status

Introduction

The meaning behind the words

The words "determination of eligibility for refugee status" are forbidding and legalistic. But the process they refer to concerns human beings, usually in circumstances of great distress. Expressed more simply, they correspond to the question:

"Is Mr. X or Mrs. Y a refugee?"

The answer to this question is obviously of vital concern to Mr. X or Mrs. Y. If recognised as a refugee, he/she will be entitled to benefit from a number of important advantages, notably:

- the right not to be sent back to the country of origin
- other rights (such as the issue of travel documents) specified in the 1951 Convention or 1967 Protocol, or, in countries which have not signed these instruments, rights accorded by general international law
- immediate assistance or protection measures if necessary
- assistance in finding a durable solution (voluntary repatriation, local integration or resettlement).

Of these various measures, the most important is the first. It is the application of the principle of "non-refoulement" (to not return the asylum seeker to the country of origin). This could be a matter of life and death. If the wrong decision sends the applicant's back to their country of origin, the consequences could be dramatic.

References

Basic reference texts to keep at hand are as follows:

1951 Convention and 1967 Protocol Relating to the Status of Refugees

These define the conditions an individual must meet to qualify as a refugee.

The Convention definition applied to persons who became refugees before 1 January 1951, in other words who were refugees as a result of World War II. It soon became apparent, however, that new refugee movements were occurring which were totally unrelated to the post-war period in Europe. The 1967 Protocol formally excluded such restrictions, giving a universal dimension to the Conventions provisions.

There are now 105 nations (Contracting States) abiding by these instruments. In adhering to them, these States accept a number of obligations towards persons on their territory whom they recognise as refugees.

Handbook on Procedures and Criteria for Determining Refugee Status

This booklet, published in 1979, is an invaluable guide for anyone resolving eligibility questions. It is widely used by government officials of contracting States. It explains who is a refugee, and gives some guidance on how to determine if someone is a refugee.

UNHCR's Statute

Besides providing for the functioning of the High Commissioners Office, the Statute adopted by the General Assembly in 1950 defines persons of concern to the High Commissioner. This definition is almost identical to that of the Convention, although it has subsequently evolved. As indicated in the section below on the OAU Convention, this text is of special importance in countries which are not parties to the Convention or Protocol.

1969 OAU Convention Governing the Specific Aspects of Refugee Problems In Africa

The definition of a refugee contained in this regional instrument is wider than that of the Convention. The difference lies in the fact that it extends the qualification of *refugee* "... to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

Although this module is confined to the universal definition of the 1951 Convention, it is essential for staff working in the African context to understand the importance of the wider OAU definition.

Seeking Recognition

How do refugees ask for recognition?

The notion of refugee status is not always clearly understood by the refugees themselves. To people having fled their country, it is difficult to understand procedures they must now follow to avoid being sent back.

There are a variety of channels through which requests may come forward:

- directly to the government
- directly to UNHCR
- through the United Nations Development Programme (UNDP)
- through a non-governmental organisation (NGO)

Who decides upon eligibility?

Governments

Convention refugees. If the State is a party to the Convention or Protocol, it is the responsibility of the Government to grant refugee status. Various procedures exist at national level to decide upon refugee status. UNHCR normally participates in these procedures. From the refugees point of view, Convention refugee status is the most favourable: not only is it a guarantee against *refoulement*, but it also confers a number of *economic and social rights* as contained in the Convention and Protocol. These entitlements include the right to obtain travel documents, which is of vital importance.

A humanitarian status (Status B, exceptional leave to remain, etc.) is applied by some Governments to persons whom they do not consider to qualify as Convention refugees, but who would be in danger if returned to their country of origin as a result of generalised violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed public order. (1)(1)

UNHCR

Refugees in this category also benefit from the principle of non-refoulement. They cannot, however, make claims to benefits in the same way as Convention refugees.

Mandate refugees. Mandate refugees are persons recognised as refugees by the High Commissioner by virtue of his Statute, which contains virtually the same definition as in the Convention. They are referred to as mandate refugees. The recognition of persons as mandate refugees does not therefore depend on whether the State of asylum is a party to the Convention or Protocol. They may even be persons whose application for recognition as Convention refugees has been refused.

A person recognised as a mandate refugee will benefit from UNHCR's protection against refoulement, and be assured of treatment in conformity with basic humanitarian principles. It does not, however, imply the same entitlements as accorded to Convention refugees.

Wider definition. Persons applying to be recognised as refugees may not be able to claim a "well-founded fear of persecution", yet would risk danger if returned to their country of origin for the reasons listed above. Such persons may also be recognised by UNHCR as refugees in a wider sense than the statutory definition. They will be protected against refoulement and treated according to basic humanitarian principles.

It is important to note that this training module is limited to the *determination of Convention and Statutory refugees* - that is to say persons who meet the criteria defined in the Convention and Statute. Decisions as to the wider definition are not covered by this module.

Group movements

What is meant by "prima facie" eligibility?

"Prima facie" eligibility - in other words, eligibility based on first impressions - is applied in the case of *group movements*, when the determination of eligibility on an individual basis would not be practicable for obvious reasons. This has been a regular practice since the 1960s, when UNHCR first saw regular mass movements of refugees, particularly in Africa.

As explained in the UNHCR Handbook for Emergencies, the need for immediate action to secure protection frequently occurs before a determination of status is possible. If those seeking refuge are of concern to UNHCR, the Statute of the Office calls for action on their behalf. Furthermore, the aim is to secure treatment in accordance with universally-recognised humanitarian principles not directly linked to the status of those in need. In short, *when in doubt, act*.

The process of determining "prima facie" eligibility is again *outside the scope* of this training module.

Decisions are normally reached through consultations between the Field Office and Headquarters (Division of Refugee Law and Doctrine in conjunction with the Regional Bureau concerned.)

Legal expertise

Does one need to be a legal expert to determine eligibility?

The simple answer is NO. Your best guides are common sense, and a clear understanding of the definitions as contained in the Convention and Protocol. If you find complex cases which you feel ill-equipped to deal with, refer them to UNHCR Headquarters. The sections which follow give a few examples of such complex cases. Hard facts are rarely available, and the credibility of the case before you will be a matter of personal judgment.

Always remember that, in the final analysis, it is wisest to give the benefit of the doubt.

Criteria of Refugee Status

A person is a refugee as soon as the criteria contained in the definition are fulfilled. This necessarily occurs before refugee status is formally determined. Recognition of refugee status is therefore declaratory, i.e. stating the fact that the person is a refugee.

A person does not become a refugee because of recognition, but is recognised because he or she is a refugee.

The provisions of the 1951 Convention defining who is a refugee consist of:

Inclusion clauses which define the criteria that a person must satisfy in order to be recognised as a refugee. These form the positive basis upon which the determination of refugee status is made.

Cessation and exclusion clauses which have a *negative* significance; the former indicate the conditions under which a refugee ceases to be a refugee. These clauses set out the circumstances in which a person is excluded from refugee status, even though the positive criteria of the inclusion clauses have been met.

Inclusion Clauses

According to Article I/A(2) of the 1951 Convention the term "refugee" applies 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; or who, not having a nationality and being outside the country of his former habitual residence (as a result of such events), is unable or, owing to such fear, is unwilling to return to it.

There are thus four main elements in the refugee definition:

- **well-founded fear**
- **persecution**
- **reasons of race, religion, nationality, membership in a particular social group or political opinion**
- **outside the country of origin.**

Well-founded fear

The phrase "well-founded fear of being persecuted" is the *key phrase of the definition*. The term "well-founded fear" contains a subjective and an objective element, and you must consider both in determining refugee status.

Subjective

element

Fear is, by definition, a state of mind and hence a subjective condition. In some cases the facts on record will be sufficient to attest to its authenticity. In many others, you must assess the personality and *credibility* of the applicant. Consider the applicant's:

- personal and family background
- membership in a racial, religious, national, social or political group
- interpretation of his or her situation
- personal experiences.

Objective

element

The applicant's statements must be assessed in the context of the background situation. Knowing the conditions in the applicant's country of origin is a central element in assessing the applicant's credibility and the well-foundedness of the claim.

In general, you can consider the applicant's fear well-founded if there is reason to believe that his or her continued stay in the country of origin has become intolerable for the reasons stated in the definition, or would be intolerable if the applicant returned.

Persecution

The well-founded fear must relate to persecution. Persons fearing famine or natural disasters are not refugees, unless they also have a well-founded fear of persecution for one of the reasons in the definition. Persecution is not defined in the 1951 Convention or in any other international instrument. From Article 33 you can infer that a threat to *life or physical freedom* on account of race, religion, nationality, political opinion, or membership of a particular social group constitutes persecution.

The Universal Declaration of Human Rights (adopted and proclaimed by the UN General Assembly in 1948) lists the basic rights which constitute the integrity and inherent dignity of the individual. Their violation, for reasons given above, can be considered as persecution. These rights include:

The Universal Declaration of Human Rights

- freedom from torture, or cruel, inhuman or degrading treatment or punishment
- freedom from slavery or servitude
- recognition as a person before the law
- freedom of thought, conscience, and religion
- freedom from arbitrary arrest and detention
- freedom from arbitrary interference in private, home and family life.

According to the circumstances of each case, *other prejudicial actions or threats* may also amount to persecution including the following:

- punishment or repeated punishment for a breach of the law which is out of proportion with the offence committed
- punishment for a reason mentioned in the definition, (for example, illegal religious instruction)
- economic restrictions so severe as to deprive a person of all means of earning a livelihood
- severe penalties for illegal departure or unauthorised stay abroad if the person left for one of the reasons outlined in the definition.

Persecution is normally associated with action by the authorities of a country. There are situations, however, where the government of a country of origin cannot be immediately implicated.

Example: Refugees have fled mob violence or the activities of so-called death squads. Governments may be unable to suppress such activities, they may be unwilling or reluctant to do so, or they may even be colluding with those responsible.

In such cases, there is *an absence* of protection which may lead to persecution. The concept is therefore *not limited to the actions of governments or their agents*.

Applicants may justifiably claim to have a well-founded fear of persecution on "cumulative grounds". They might have endured various forms of *discrimination* that affect their social and economic status. Such treatment might cause a feeling of apprehension and insecurity concerning the future. Such cases, if combined with other adverse factors such as a general atmosphere of insecurity in the country of origin, can produce a justifiable claim to well-founded fear of persecution.

Economic Migrants

It is true that severe economic restrictions which deprive a person of all means of earning a livelihood can amount to persecution. However, persons who leave their countries solely to improve their economic situation, and not because they fear persecution, are not refugees, but rather are economic migrants.

Passports

The possession of a valid passport is not a bar to refugee status. Refugees sometimes obtain passports through official channels. In other cases, passports are issued for the sole purpose of having "undesirables" leave the country. In still others, the passports are illegal.

Race, religion, nationality, membership of a particular social group, or political opinion

These are the five grounds for persecution specified in the Convention. Frequently, these elements are combined; for example when a member of a religious or ethnic group is also a political opponent.

Race Race should be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Refer to the 1965 Convention on the elimination of all forms of racial discrimination.

Religion The 1948 Universal Declaration of Human Rights and the 1966 Covenant on Civil and Political Rights proclaim the right to freedom of thought, conscience, and religion. This includes the freedom to change religion and to manifest it in public or private, and in teaching, practice, worship, and observance.

Examples of persecution for reasons of religion include:

- prohibition of membership of a religious community
- prohibition of worship in private or in public
- prohibition of religious instruction
- serious discrimination because of religious practice or membership in a given religious community.

Nationality Interpretation of the term "nationality in the definition is not limited to "citizenship", but includes membership of particular ethnic, religious, cultural, or linguistic communities.

Social Group A particular social group normally comprises persons of *similar background, habits, or social standards*. A family can, for example, be considered a particular social group, as can a union or a class of society. A claim to a fear of persecution under this heading often overlaps with a claim to fear of persecution on other grounds such as race, religion or nationality.

The 1951 Convention is not the only international instrument which recognises the importance of social factors. Article 2 of the 1948 Universal Declaration of Human Rights includes "national or social origin", as grounds on which discrimination should be prohibited. Similar clauses are contained in the 1966 Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.

Political Opinion The fifth and last ground for well-founded fear of persecution included in the Convention is that of political opinion. A definition of this concept is based on Article 19 of the Universal Declaration of Human Rights which states that:

"Every one has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas to any media and regardless of frontier."

The basic principle is restated in Article 19 of the 1966 Covenant on Civil and Political Rights.

Political opinion should therefore be understood in a broad sense, incorporating the holding and expression of views *on any matter in which the machinery of State, Government and policy may be engaged*. The mere fact of holding political opinions which are different from those of the Government is not in itself a ground for claiming refugee status. The applicant must show grounds for a well-founded fear of persecution for holding such opinions. This presupposes:

1. that the applicant's views are not tolerated by the authorities
2. that the applicant's views are known to the authorities, or are attributed by them to the applicant
3. that the applicant or others in a similar position have suffered or been threatened with repressive measures.

The situation is more complex when measures taken against the applicant take the form of sanctions for alleged criminal acts against the ruling power. It is necessary in these circumstances to establish the

applicant's political opinion, and determine whether or not it has led or may lead to the persecution that is feared.

Case Study

The issues at stake, both for the asylum seeker and those making the refugee status determination, are made more apparent through the illustration of a case study. The following is an example of the types of questions and dilemmas which you may confront in making an eligibility determination.

Case Study A

Mr. H, a farmer with no political opinions, belonged to an ethnic minority, many members of which wanted more autonomy compared with the ethnic majority governing the country. In support of their ideas certain members of the minority undertook guerilla activities. Each time one of these guerilla actions took place Mr. H., because of his ethnic origin, was threatened by some of his neighbors belonging to the ethnic majority. He asked the authorities, composed of people from both ethnic groups, for protection; however, they were so overcome by the events they could not grant the protection requested. In addition, Mr. H. also received threats from extremist members of his own ethnic groups who blamed him for not taking their side.

Tension grew in the country, provoking the deaths of many citizens. Following the murder of three members of his family living in the same village without the perpetrators being identified, Mr. H. obtained a passport, left his country of origin by plane and arrived in a third country where he requested asylum.

As a person charged with making a recommendation on this case, what would you identify as the main issues regarding the determination of eligibility as a refugee that are portrayed in this case?

What would you recommend to a refugee determination board?

Analysis of Case Study A

Refugees

"sur place" The case of *refugees "sur place"* is somewhat different. These are persons who have become refugees due to developments in their country of origin (for example, a "coup") or because of their own actions outside the country, (for example, dissident political behavior). Here applicants claiming fear of persecution because of political opinion need not show that the authorities of the country of origin knew of their opinions before they left the country. They may, indeed, have concealed political opinions and never suffered any discrimination or persecution. However, the mere fact of refusing the protection of the Government, or a refusal to return, might indicate a well-founded fear of persecution. In such circumstances, you should consider the consequences that an applicant having certain political opinions would have to face if he or she returned.

Where a person is subject to prosecution or punishment for a political offence, you must decide whether the prosecution is for a *political opinion* or for *politically-motivated acts*. If the prosecution concerns a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of prosecution *will not in itself* make the applicant a refugee.

However, prosecution for an offence could be a pretext for punishing the offender for holding or expressing political opinions. Moreover, the political offender might be exposed to *excessive or arbitrary punishment* which could amount to persecution.

In determining whether a political offender can be considered a refugee, examine the following aspects:

- his or her personality
- political opinion
- the motive behind the act

- the nature of the act
- the nature of the prosecution and its motives
- the nature of the law upon which the prosecution is based.

Gender

Gender does not belong to the grounds for persecution which have been specified in the Convention. Nevertheless, in certain situations women asylum-seekers have been found to have suffered persecution on grounds of their sex. This has occurred, for example, when they have suffered cruel and inhuman treatment for having transgressed the social mores of the society. Other examples include having been subjected to serious and systematic discrimination for being women. Both the European Parliament and UNHCR's Executive Committee (Conclusion 39 XXXVI) have recommended that in such circumstances Convention refugee status should be granted. If no other criterion is applicable, women in such a situation can be considered to belong to a "particular social group," and be recognised on that ground.

Outside the country of nationality or former habitual residence

International protection cannot be invoked as long as a person is within the territorial jurisdiction of his or her home country. It is important to note, however, that the Convention does not state that prosecution only takes place within the borders of the country of origin. The fear may derive from conditions arising after the person has left the country, as in the case of a "refugee sur place" (see above).

The text of the Convention relevant to this condition continues as follows:

". . . and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Stateless

Refugees

The Convention thus makes separate provision for refugees *with a nationality* and those who are *stateless*. The criterion for those with a nationality is that they should be unable or unwilling to avail themselves of the protection of their state of nationality. For stateless persons the criterion is that they should be unwilling or unable to return to their State of former residence.

Unable to have

protection

Being unable to avail himself or herself of protection implies circumstances that are beyond the will of the person concerned. There could, for example, be a state of war, a civil war, or some other grave disturbance, which prevents the country of nationality from extending protection, or makes such protection ineffective. Protection by the country of nationality or the country of habitual residence, may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.

Unwilling to accept

protection

The term *unwilling* refers to refugees who refuse to accept the protection of the Government of their country of nationality or of the country of former habitual residence. It is qualified by the phrase "owing to such fear." Where a person is willing to accept the protection of the home country, such willingness is normally incompatible with a claim of a well-founded fear of persecution. Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned does not need international protection, and is not a refugee. Statelessness and refugee status are not identical phenomena. All stateless persons are not refugees, and all refugees are not stateless. While on occasion those fleeing

their countries are deprived of their nationality, it is quite common for the formal link to remain. Stateless persons must be outside the country of their former habitual residence for the reasons indicated in the definition. If these reasons do not exist, the stateless person is not a refugee.

Multiple nationality

In cases of *dual or multiple nationality*, refugee status may be granted if the individual is unable or unwilling, on the basis of a well-founded fear, to secure the protection of *any* of the States of nationality. The link of nationality as in general international law is applied in these cases.

The criteria in this section describe the 1951 Convention inclusion clauses, to help you determine who qualifies as a refugee. However, the 1951 Convention also describes when refugee status shall terminate (cessation clauses) and when the benefits of status shall be denied (exclusion clauses).

Cessation Clauses

Article 1 C of the 1951 Convention states that refugee status shall cease when a refugee:

- voluntarily accepts the protection of the country of his nationality
- voluntarily re-acquires his nationality after losing it
- acquires a new nationality and enjoys the protection of that country
- has voluntarily re-established himself in the country which he left owing to fear of persecution
- can no longer refuse to accept the protection of his country because the circumstances which led to his being recognised as a refugee have ceased to exist.

Since cessation clauses put an end to refugee status you should interpret them restrictively: no other reasons than the ones listed above can justify withdrawal of refugee status.

Cancellation of refugee status

A distinction must be made between cessation and *cancellation* of refugee status. Cancellation takes place when it comes to light that a person has obtained refugee status by fraud or by omitting material facts, which would have led to the application of an exclusion clause. Cessation clauses are examined in detail in the Handbook on Procedures and Criteria for Determining Refugee Status, (paras.118-139). The government in the country of asylum or the UNHCR field officer should only take decisions on cessation *after reference to UNHCR Headquarters*. It mainly occurs in situations where the reasons for becoming a refugee have ceased to exist.

Example: In recent years, the cessation clause has been applied in the case of refugees from *Argentina* and *Uruguay*.

Exclusion Clauses

Article 1 D, E, and F of the Convention stipulates that the following persons cannot benefit from refugee status:

- persons already receiving United Nations protection or assistance. This applies in particular to Palestinian refugees within the area of operations of UNRWA. However, Palestinian refugees *outside this area* are normally considered to be within UNHCR's mandate, unless they fall within the terms of a cessation or exclusion

clause.

- persons not considered to be in need of international protection because they have the rights and obligations of nationals within the country of asylum; and
- any person with respect to whom there are serious reasons for believing that:
 - he or she has committed a crime against peace, a war crime or a crime against humanity;
 - he or she has committed a serious non-political crime outside the country of refuge prior to being admitted to that country as a refugee;
 - he or she has been guilty of acts contrary to the purposes and principles of the United Nations.

A detailed interpretation of these terms is provided in the Handbook on Procedures and Criteria (paras.142-163). Exclusion cases are usually complex and should be *referred to UNHCR Headquarters* by either the government of the country of asylum or a UNHCR field officer.

In practice the exclusion clause which will normally arise relates to a serious, non-political crime committed outside the country of refuge. Such cases necessitate analysis in the following fashion:

Political vs.

nonpolitical First, was the crime political or non-political? As indicated in the Handbook, this is often a difficult distinction to make. Regard must be had to the nature and purpose of the crime (whether it was committed out of genuine political motives or for personal gain). The link between the crime and its purpose and object must also be examined. In addition, the political element of the case must be compared with its common-law character. Acts of an atrocious nature, grossly out of proportion with the alleged objective, will normally not be determined to be political crimes. To determine whether or not the crime was political, one must in fact look at all of the following: the personality of the applicant, his political opinion, the motive behind the act and the nature of the act committed. If it is determined that the crime was political, this exclusion clause may not be applied.

Seriousness

of crime Second, (assuming that the crime is determined as being non-political), the question must be put was it serious nor not? To answer this, all the circumstances of the crime must be considered. It is not possible, for example, to rely simply on the fact that the applicant was given a prison sentence. Certain legal systems punish some "crimes" very severely, whereas others are far more lenient in judging the same events. It is the act or crime itself which must be serious in order to trigger an application of the exclusion clause.

Outside country

of refugee Third, the crime must have been committed outside the country of refuge. A crime committed inside the country of refuge cannot lead to exclusion. In very serious cases, it could, however, lead to the application of Article 33(2).

Balance

Fourth, if the crime is determined to be serious and non-political, it is essential to seek to strike a *balance*. On the one hand, you must weigh the nature of the offence presumed to have been committed by the applicant and, on the other hand, the degree of persecution feared. Thus, the exclusion clause cannot be applied automatically. If a person has a well-founded fear of severe persecution, execution on return, for example, the crime must be *extremely grave* for the exclusion clause to be applied. All the facts of the case, including any mitigating circumstances, must be applied. These could include the fact that the crime was committed in order to flee persecution (a hijacking

for example).

You must remember that exclusion clauses are only considered after it has been determined that a person has a well-founded fear of persecution on return to the country of origin. They must, therefore, be applied restrictively and only when it is clear that the criminal character clearly outweighs the refugee character. As in other areas of refugee determination, when it is not clear which way the balance tips, the refugee should be given the *benefit of the doubt*.

Special Cases

Are draft-evaders or deserters refugees? Both are normally severely punished under national law. This punishment is not, however, necessarily persecution. But it might be, as demonstrated in the following examples:

- persecution within the armed forces due to race or religion
- disproportionately severe punishment for draft evasion or desertion for one of the reasons in the definition
- performance of military duty (especially when such military duty is internationally condemned), is contrary to genuine political, religious, or moral convictions, or for valid reasons of conscience.

Consider each on its individual merits. Carefully assess of the sincerity of the persons beliefs, and whether the possibility of acceptable alternative service existed.

Background documents

Handbook on Procedures and Criteria for Determining Refugee Status, United Nations Office of the High Commissioner for Refugees. HCR/IP/4/Eng. Rev. 1, Geneva, January 1988.

1951 Convention relating to the Status of Refugees, and *1967 Protocol*. United Nations Office of the High Commissioner for Refugees. HCR/IP/10/Eng. 1983.

1948 Universal Declaration of Human Rights

1965 Convention on the Elimination of All Forms of Racial Discrimination

1966 Covenant on Economic, Social and Cultural Rights

1966 Covenant on Civil and Political Rights

All of these documents are found in the Collection of International Instruments Concerning Refugees, published by UNHCR in 1979. Copies are readily available at the Centre for Documentation on Refugees at the UNHCR Headquarters.

Case Studies B-E

Read the following individual cases: set out the main eligibility issues involved and your recommendation on each case.

CASE B

Tired of economic restriction imposed by the government in her country, Mrs. C decided to seek bluer skies. She left her country after obtaining a passport and exit visa valid for 3 months and travelled to country X. In country X, she met an old friend who had fled her country because of political problems and who had received refugee status in X. Her friend continued her political activities against her country and soon convinced Mrs. C. to participate in them.

Mrs. C. took part in several public demonstrations against her government. After remaining in X for four months she claimed refugee status, indicating that her photo had been taken during a recent

demonstration and had appeared on the front page of the local paper. Even without this, she said that the authorities had been made aware of her political activities outside the country. She also added that she would be imprisoned for six months to one year for having overstayed her visa.

This case raises question which relate to the situation of refugees "sur place". What are these questions?

Does Mrs. C qualify as a refugee?

What other issue does this case raise?

Analysis of Case Study B

CASE C

Mr. K. just turned 18. In order to avoid doing his military service of two years, he fled his country. He did not want to do his service because his country is now at war and, as a member of the opposition party, he would have to go to the front. He has nothing against military service or fighting a war, but he does not believe in this war. It is being fought against country Z. The political party in power in this country is closely associated with his party and he does not want to kill his "brothers".

Which eligibility issue does this case raise?

What would you seek to establish in preparing this case?

Analysis of Case Study C

CASE D

A member of a group opposed to the regime governing his country, Mr. R. clandestinely distributed pamphlets in the factory where he worked calling for an uprising of the people against the regime. Surprised in the act of distributing these tracts, he was arrested and condemned to five years imprisonment. After two years he managed to escape, however, during his escape he wounded one of the prison guards who will be seriously handicapped for the rest of his life.

After a long and complicated journey, Mr. R. managed to leave his country and request asylum in S.

On what grounds might this application be excluded from refugee status?

What elements need to be taken into consideration in examining this case?

What would you recommend to a refugee determination board?

Analysis of Case Study D

CASE E

Mr. Y. was a member of the armed forces in his country. He did not like the totalitarian regime which governed his country and soon joined a small group of like-minded officers. The group decided to make some sort of public demonstration against the government. Unable to legally demonstrate against the government within the country, they decided to hijack an air force plane, fly it to a neighbouring country, and make a press statement there, condemning the human rights abuses of their government. It was decided that Mr. Y would choose the plane to be hijacked, as he worked in the radio tower. The leader of the group would embark on the plane and hijack it. Although the leader would be armed, it was decided that there should be no violence.

The hijacking was a failure. No one knows exactly what happened, but the plane crashed and all aboard died. The government learned of the plot and arrested Mr. Y and five others. They were convicted to 15 years in prison for hijacking. While waiting to be transferred to prison, three of Mr. Y's colleagues were summarily executed. Mr. Y then escaped, fearing the same. He left his country without the necessary

exit visa and is now claiming refugee status.

Which issue does this case raise?

What aspects of the crime need to be considered?

What would you recommend to a refugee determination board?

Analysis of Case Study E

Chapter Review

1. *When a person is recognised as a refugee, what are the four principal benefits?* Answer
- (2)2. *Define the principle of non-refoulement.* Answer
- (3)3. *The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees establish responsibilities towards refugees on the part of: (choose one)*
 - a. UNHCR
 - b. states which become parties to them.
 - c. International Court of Justice.
 - d. Non-governmental organisations. Answer
- (4)4. *How does the 1969 OAU Convention widen the UN definition of a refugee?* Answer
- (5)5. *To whom can a person go in order to request refugee status?* Answer
- (6)6. *Does a person need to be a legal expert to determine refugee eligibility? Why or why not?* Answer
- (7)7. *List the four main elements in the refugee definition.* Answer
- (8)8. *Why should the person evaluating an application for refugee status know about the conditions in the applicant's country to evaluate the applications credibility?* Answer(9)
9. *How would you distinguish an economic migrant from a refugee?* Answer(10)
10. *Describe when a person becomes a refugee "sur place".* Answer(11)
11. *When is a stateless person not a refugee?* Answer(12)
12. *When does a refugee cease to be a refugee?* Answer(13)
13. *Which people are excluded from being granted refugee status?* Answer(14)
14. *Can draft-evaders or deserters be refugees if they are violators of legitimate national laws?* Answer(15)

Chapter 2: Procedures for Determining Refugee Status

Chapter Learning Objectives

In this chapter you will learn how to:

- *assess the importance of ensuring fair and effective procedures*

- *identify essential features of these procedures*
- *detect deficiencies in existing or proposed procedures*

Introduction

This chapter describes the procedures you must follow to determine whether or not a person fulfils the criteria of refugee status; and the mechanisms involved in reaching a decision as to whether a person is a refugee of concern to UNHCR. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status contains more in-depth information. The importance of these procedures and of their effective functioning cannot be over-emphasised.

A wrong decision might cost the person's life or liberty.

Who determines eligibility?

In countries that are parties to the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, questions of eligibility are usually decided by the *competent government authorities*, according to procedures specifically established for this purpose. Where such procedures exist, you should refer applicants to these authorities. In some cases, UNHCR is associated with the actual procedures. Persons recognised by the authorities as refugees under these instruments are normally considered by UNHCR as coming within its mandate. However, if national authorities do not recognise a person as a refugee, the applicant might still be of concern to UNHCR. In States that are not parties to the Convention or Protocol, or which have not established refugee status determination procedures, UNHCR determines whether an applicant is a refugee within the terms of its mandate.

General principles

While it is a general legal principle that a person making a claim bears the *burden of proof*, the situation of the refugee is special. In most cases it is not possible for the asylum-seeker to provide documentary or other proof, given the circumstances of his departure and the nature of the claims made. The applicant is duty-bound to tell the truth and to provide as much information as possible, but it is up to the examiner to ascertain and evaluate the relevant facts. In many cases, even after independent research by the examiner, there will be no "proof" of the applicants statements. If the applicant's account appears credible, *give the applicant the benefit of the doubt*.

Misrepresentations or failure to divulge relevant facts can sometimes occur for a variety of reasons. Untrue statements by themselves are not a reason to refuse refugee status. They might be explained in the course of further examination, or re-evaluated when all the circumstances of the case are known.

Determination by National Authorities

Procedures for determining refugee status are essential in order to ensure the effective implementation of the 1951 Convention and the 1967 Protocol. Neither of these instruments, however, defines the procedures the States should adopt. Moreover, since administrative and judicial systems vary from one State to another, it has not been possible to propose a uniform refugee status determination procedure.

UNHCR's experience has shown, however, that all procedures for the determination of refugee status should meet *certain minimum requirements*, set out on the checklist below. Most of these requirements are identified in Executive Committee Conclusions No. 8 (Annex 2), 28 (Annex 4), and 30 (Annex 5); and in Recommendation No. R (81) 16 of the Council of Europe Committee of Ministers on the Harmonization of National Procedures relating to Asylum (Annex 6).

Determination Procedures

Checklist

One of UNHCR's functions is to promote the adoption of *fair and effective procedures* for determining refugee status. Various means of achieving that goal are included in the following checklist. Follow the checklist when determination procedures are being established or revised at the national level:

1. Examine all requests for refugee status within the framework of *pecially established procedures*. Examiners must know the subject matter, and understand the circumstances of the applicant.
2. Designate a clearly identified authority (wherever possible a *single central authority*) to initially evaluate applications for refugee status.
3. Permit the applicant to present his or her case *in person* to the decision-maker whenever possible, at the level of the first instance and/or appeal decision. The personal hearing is extremely important given the difficulty of assessing credibility solely on the basis of an interview transcript or report. A personal hearing allows the decision maker to assess the applicant's manner and demeanour, and to ask supplementary and detailed questions.
4. Always remember that information provided by the applicant to the authorities in the course of the asylum procedure is confidential and can only be used by the authorities for the purpose for which it was solicited, that is, for the purpose of determining the claim to refugee status/asylum. Applicants can have access to this information, which otherwise cannot be released to any third party without the express consent of the individual. Such consent must be freely offered and not obtained under duress.
5. It is important that applicants be informed of the procedures for claiming refugee status by the *immigration or border officers* with whom they come in contact. These officers should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. They should allow the applicants to remain in the country, and refer their cases to a higher authority.
6. Ensure that the applicant has the necessary facilities, including the services of a *competent interpreter*, when submitting his or her case to the authorities. Make sure that the applicant has the opportunity *to contact a representative of UNHCR*.
7. *Permit the applicant to remain in the country* pending a decision on the initial request, unless the decision-maker establishes that the request is clearly abusive. An applicant should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.
8. Inform the applicant of any decision regarding the request. If the applicant is recognised, issue the necessary *documentation* certifying refugee status.
9. Arrange for the *appeal or review* of any negative decision concerning refugee status. If the applicant is not recognised, the reasons on which the negative decision is based should be made available to him. He should also be informed of the possibilities open to him of requesting an appeal or review, and given a reasonable time in which to do so. The actual procedure will vary according to the prevailing system. If the review is made by the same authority, *different persons* should formally reconsider the case.
10. Arrange for UNHCR participation in the procedure in whatever manner is appropriate.
11. Ensure that any procedure dealing with manifestly *unfounded or abusive*

applications meet the following standards:

- The authorizing agency that determines whether the case is manifestly unfounded or abusive should be the same as the one that normally determines refugee status.
- As in the case of requests for refugee status or asylum, the applicant should be given a complete personal interview by a fully qualified official belonging to this authority.
- A negative decision should be reviewed before the applicant is rejected at the frontier or forcibly removed from the territory.

Special measures

Special measures to be taken in the case of applications by refugee women and unaccompanied minors.

Refugee women

Specially trained staff should be made available for the purpose of interviewing female asylum-seekers. Persecution of women may often take the form of rape and other forms of sexual violations, about which women may be very reluctant to talk. Since the form of persecution suffered constitutes an important element when deciding upon the refugee claim, female interviewers and interpreters should be present. It is also important to provide them, as well as the adjudicator, with extensive background information on the situation of women in the country of origin.

Unaccompanied minors

Special procedural safeguards for the handling of refugee claims submitted by unaccompanied minors have been developed by UNHCR and included in the Office Guidelines on Refugee Children. These point to the need for child experts to participate in the process, *inter alia*, to help determine the degree of the child's mental development and maturity. Ideally, an expert with sufficient knowledge of the psychological, emotional and physical development and behaviour of children should be called upon to make the necessary assessment, bearing in mind that children may manifest their fears in ways different from adults. In addition, since the child has not yet reached the age of legal maturity, he or she should be represented by an adult whose task it would be to promote a decision that will be in the child's best interest. The examiner will have to mainly rely on his knowledge of the objective situation, taking account of the situation of the family and wishes of the parents if these are known. These cases also call for a liberal application of the benefit of the doubt.

Mentally disturbed

Expert medical advice, must, if possible, be sought regarding:

- the nature and degree of the mental illness
- the ability of the person to present a case

Detailed examination of the case will depend on the results of the medical report. As a general rule, the burden of proof will be lighter. The examiner will rely on other sources of information than the applicant himself, and give greater emphasis to objective elements of his situation.

It should nevertheless be underlined that many if not most applicants for refugee status are psychologically distressed. What is required in all cases, therefore, is a sensitivity to the range of such problems on the part of the interviewers and decision-makers.

UNHCR's participation in determining refugee status

UNHCR participation is of particular importance because UNHCR supervises the application of the 1951 Convention and the 1967 Protocol by monitoring both the procedures and criteria applied. It can take various forms:

- *sole decision-maker*
- *participant at first instance by voting on the application or as an observer/adviser*
- *participant at the appeal stage by voting on the appeal or as an observer/adviser*
- *case reviewer, outside the procedure itself, of rejected applicants who are due to be expelled.*

There are advantages and disadvantages to each of these types of participation. The most appropriate will depend upon circumstances within the country itself. Our experience has shown, however, that UNHCR's participation in national determination procedures is most valuable at the appeal stage or, if necessary, at the first instance level (when the application is first introduced). In either case, UNHCR should have observer status, with full access to all individual case files. The UNHCR observer should attend meetings and express views on individual cases.

Determination by UNHCR

In addition to its involvement in national procedures, one of UNHCR's essential functions is examining applications. The decisions reached are of direct relevance not only to the application itself, but also in determining the form of assistance provided by UNHCR. These might include measures to reunite families, voluntary repatriation, resettlement, or material assistance of various kinds. As with national procedures, UNHCR procedures for determining refugee status vary. The main elements listed in the previous section must also apply to UNHCR procedures if we are to ensure fair and proper examination of applications. Thus, qualified staff should examine the applications within a set procedure; decisions should be based on a personal interview (after completion of the UNHCR Eligibility Determination Form, see Annex 1); an interpreter should be available; recognised refugees should be so informed and given appropriate documentation; rejected applicants should be told the reasons for the rejection and advised how to appeal against it; the appeal should be considered by a different staff member or by a panel of staff members.

Techniques for Interviewing

Applicants It is the applicant's duty to tell the facts of the case truthfully and explicitly. As the interviewer you are responsible for obtaining the maximum amount of relevant information, and using it to make a preliminary assessment of credibility. The experience of UNHCR has shown that a few interview techniques can help you with this task. They help to reach an immediate decision, or to assemble information for Headquarters in complex or doubtful cases.

Climate of confidence

1. Create a *climate of confidence* in which the applicant will feel free to tell his or her story in all frankness. Remember to inform the applicant that all statements will be treated as strictly confidential. In counselling the applicant before the interview, make a point of explaining how important it is to tell the truth, or to avoid exaggeration or fabricated information designed to embellish the account. Explain that doubts about credibility can arise if portions of the story are found to be untrue. Emphasise that such doubts can be avoided by rendering an honest and detailed account.

Written

account 2. Encourage applicants to provide a *detailed account*, in chronological order, of their activities. This should be in written form, supplied by the applicant, or by the interviewer if the applicant is illiterate. This can run to several pages to be appended to the questionnaire. This invaluable information will supplement the brief summary of reasons for leaving and not wishing to return to the home country which will appear in the questionnaire itself.

Interview report

3. Make sure that the interview report gives as much detail as possible since it is an essential element in UNHCR's decision-making process. Ask why the applicant does not wish to return to the country of origin, and why any previous activities contribute to this fear. It is not sufficient, for example, to report that Mr. X fears returning to his country of origin because he was involved with a certain political party. He must give specific details on this involvement, a description of his exact duties, the names of other party members, how often they met, the exact address of the meeting place and so on. It is also important to determine how Mr. X travelled from the country of origin to the present location (whether he left legally, how he obtained his passport and where necessary an exit visa, and if he left illegally, by what means).

Encourage claimants to provide as much pertinent detail as possible about the incidents that relate to their claims. Knowing when, where, why, whom, what and how can help distinguish between a credible story and a false one. Establish a time frame, linking dates with location: if contradictions emerge, ask for clarification.

The *interview report* should contain:

1. the account of events given by the applicant in a chronological and understandable manner,
2. a separate assessment of his credibility by the interviewer, which takes into account:
 - the applicant's attitude and behaviour (frankness, spontaneity, hesitation, or reticence);
 - the feasibility of the statements made.(1)

(16)Do not underestimate apparent *minor inconsistencies*. These might be due to:

- cultural and/or linguistic differences between you and the applicant
- the applicant's desire to please you
- the applicant's omission of certain facts for fear of authorities, or of reprisals against family or friends remaining in the country of origin.

Background documents

Handbook on Procedures and Criteria for Determining Refugee Status 1951 Convention relating to the Status of Refugees. and 1967 Protocol

Executive Committee Conclusions No. 8 (Annex 2), 28 (Annex 4), and 30 (Annex 5).

Recommendation No. R (81) 16 of the Council of Europe Committee of Ministers on the Harmonisation of National Procedures Relating to Asylum (Annex 6).

UNHCR Eligibility Questionnaire

Case Studies F-G

Case F

Mrs. X, an asylum-seeker from Ruritania, approached the UNHCR Office in Refugania. She asked to see the Representative, indicating that she feared the authorities would arrest her and send her back to her country of origin.

In the absence of the Representative, Mrs. X was interviewed by the Protection Officer who had been with UNHCR for 6 months. He had a little difficulty understanding her, but after about an hour concluded the interview. Being unfamiliar with the situation in Ruritania, he sent a telex to Headquarters which provided basic data about Mrs. X and summarised her reasons for leaving her country of origin in the following fashion: "IC (Individual Case) belonged to the dissident MMM Party. She was not a leader but simply distributed tracts. She was told by a friend that the authorities had discovered her involvement so she fled".

The case was examined by the relevant Headquarters Officer who advised the Field Office that distributing tracts would not result in persecution and therefore Mrs. X was not a refugee. On being informed of this she wrote a letter to Headquarters, asking that the case be reviewed, but not adding any new elements. The same officer reconsidered the case at Headquarters, but decided that as there were no new facts, the first decision should stand. He so informed Mrs. X.

What are the various procedural issues raised by this case ?

What is your view of each of these issues ?

Analysis of Case F

Case G

The Kingdom of Atlantis acceded to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees in 1973. Shortly after accession, it established a Refugee Determination Board (RDB) and a Refugee Appeals Board (RAB). UNHCR attended all RDB meetings as an observer/adviser. Negative decisions of the RDB were appealed on their merits to the RAB, an independent board of appeal. The RDB heard about 3,000 cases a year.

Last year, the number of asylum-seekers rose to 9,000. The Government is now considering legislation which would change the determination procedure in the Kingdom. The major proposals follow:

- 1) All applications must be made at the border, or at the latest within 48 hours of entering the country. Applications made outside the time limit will not be admissible.
- 2) Likewise, applications will not be admissible if:
 - a) The applicant was previously in a country which respects the principle of non-refoulement, and would not have returned the asylum-seeker to the country of origin
 - b) The application is obviously manifestly unfounded or abusive.
- 3) Decisions on whether cases are admissible will be made by the border police. Persons whose claims are not admissible will be immediately expelled from the country. No appeal against this decision is possible
- 4) If the case is admissible, the applicant will be interviewed by an Immigration Officer, who will send a summary of the interview, along with comments on credibility, to the RDB.
- 5) The RDB will base its decision on the basis of the Immigration Officers interview report. The RAB will be disbanded, and appeals on the merits of the application will be stopped. An appeal on a question of law may be made to the

Administrative Court.

The Government has requested UNHCR's comments on the draft legislation.

What comments would you make on the existing legislation?

Review the proposed changes, and give your opinion on each clause.

Analysis of Case Study G

Chapter Review

1. *How applicable is the burden of proof to application for refugee status?*
Answer
- (17)2. *States which are parties to the 1951 Convention and the 1967 Protocol have not adopted a uniform refugee status determination procedure. Why?*
Answer(18)
3. *What information about procedures for claiming refugee status should immigration or border officers have?* Answer(19)
4. *Under what conditions can a refugee applicant be forcefully removed from the country of asylum?* Answer
- (20)5. *Should a review or appeal of a negative decision for refugee status be made by the same authority as that which made the first decision?* Answer(21)
6. *Are there significant differences between the UNHCR procedure for determination of refugees and those of a national authority?* Answer(22)
7. *What are the main tips for good interviewing techniques?* Answer
- (23)8. *How should an eligibility examiner treat the special case of an unaccompanied minor?* Answer(24)

Analysis of Case Studies

Case A

Chapter 1

Definition of a Refugee

This case raises the following issues: well-founded fear; persecution; and for reason of race, religion, nationality, membership of a particular social group, or political opinion.

Well-founded fear

(Handbook paras. 37-50)

Fear

- This is the subjective element of the definition.
- To assess whether it is present or not, it is important to interview in depth - to obtain all possible information about the applicant's background.
- Do not forget that two persons, in the same "objective" situation, may react differently; for example, the inability to practice ones religion may make life intolerable for one individual, but not for another of the same religion. *(Handbook paras. 40, 42)*

In this case, fear is clearly present.

Well-founded

- Fear alone is not enough. It must be well-founded. This objective element must exist in each case.
- This poses the question: how can we measure whether fear is really well-founded? Does it imply a balance of probabilities (i.e. presentation is more probable than not)? Let's take an example. One-third of the members of a religious minority have been killed by a Government. The chances of being killed on return will therefore be only one in three. This example demonstrates that the probabilities test is not appropriate. All would agree that the fear is well-founded.
- Well-founded therefore means "reasonably likely," or a "serious or reasonable possibility."

In this case, the objective element clearly exists.

Persecution

(Handbook paras. 51-53)

Persecution

- *Persecution is not defined in any international instrument. It is a violation of fundamental human rights. These form a continuum starting with the right to life, right to freedom from torture, right to work, freedom of movement. (see Universal Declaration of Human Rights)*
- Some violations of human rights (e.g. killing or torture) are obvious acts of persecution.
- Others may also amount to persecution, depending on the circumstances. Let us take the example of the right to work: unemployment may not be persecution, whereas preventing a person from working may be persecution.
- Discrimination may, on cumulative grounds, amount to persecution.

In this case, the applicant fears persecution.

Agents of

persecution Persecution may not always come from the Government. If the Government is unwilling or unable to protect its citizens, the action may be considered as persecution, and those who carry it out as agents. *(Handbook para. 65)*

This is the case here.

Possession of valid

passport This is not evidence of absence of persecution valid passport and does not disqualify a person from refugee status. *(see Handbook paras. 47-50)*

For reasons of race, religion, nationality, membership of a particular social group, or political opinion

Handbook paras. 66-86

Reasons • Persecution must relate to one or more reasons given in the definition. *(Handbook*

para. 66)

In this case, there are several reasons.

Race,

nationality • Evident here due to ethnic group.

Particular social

group

- The term "social group" is not defined. It normally comprises persons of similar background, habits or social status.
- The family is a particular social group.

Political

opinion

- Although the applicant does not have a particular political opinion, this reason may still be relevant.
- The fact of not holding a political opinion may in certain circumstances be considered as a political opinion per se as recognised in a recent U.S. case. This is also the case here.
- Being wrongly attributed a political opinion may also lead to persecution. A person may be wrongly suspected of being a dissident, for example.

Case B

Mrs. C was obviously not a refugee when she left her country of origin. Her case now raises two issues:

1. Refugee "*sur place*" (through participation in demonstrations).
2. Penalties for overstaying or illegal departure.

Refugee "Sur place"

(Handbook paras. 94-96)

Assuming that the activities she has engaged in will cause problems on return, should the applicant be disqualified because the events took place after leaving the country, or because she chose to take part in an activity which might place her in danger on return? The answer is no to both.

- There is no requirement in the definition that the event or activities take place before leaving the country (the definition speaks of a well-founded fear of being persecuted, not a well-founded fear of being persecuted before leaving one's country).
- Secondly, a person should not be disqualified on grounds that he or she willingly put him or herself in danger. If one adopted this reasoning, it would follow that willingly expressing a political opinion or joining an opposition group in some countries would lead to disqualification.
- It is true, however, that expressing a political opinion solely for the purpose of obtaining refugee status, when the political belief is not genuinely held, should lead to disqualification. This is frequently very difficult to demonstrate.

Penalties for overstaying or illegal departure

(Handbook, para. 61)

If Mrs. C is in fact liable to severe penalties for having overstayed, her recognition as a refugee is justified if the reasons for leaving or remaining abroad are related to one or more of the five reasons in the

Convention definition. In this case, more information would be needed on this aspect.

In determining the presence of one or more reasons in the definition, some authorities focus less on the individuals reason for leaving, as on the States motives in applying the punishment. The relevant laws are thus considered by some determination bodies as political laws and the applicant is judged to have a well-founded fear for reasons of political opinion. Others see the States action of punishment as a political act against a person perceived as a dissident. Such persons, sometimes described as having "voted with their feet," are therefore considered as meeting the requirements of the definition.

Case C

This case raises the problem of draft evasion.

Draft evasion

(Handbook paras. 167-174)

This issue is one of conflicting rights: the right of the state to conscript versus the right of the individual to religious belief or personal conscience.

- The right of the state is a legitimate one, but must take into account the right of the individual.
- Many states have done this through alternative, non-military service, in which case it is difficult to qualify for refugee status.

Where alternative service is not available, as here, the following issues must be examined:

- Will there be discrimination or persecution within the armed services?
- Will there be disproportionate punishment for draft evasion on the basis of race, religion, etc.?
- Is the military action contrary to genuine political, religious or moral convictions, or to valid reasons of conscience?
- Has the military activity been condemned by the international community?

In this case, additional information is needed on these various aspects.

Case D

This case raises two issues: that of eligibility for refugee status (inclusion) and that of the application of the exclusion clauses.

Inclusion clauses

Always consider these first to get a complete picture of the case, before considering the exclusion elements; if one concludes that the applicant does not qualify, it will not be necessary to examine the exclusion aspects.

In this case, it is clear that the applicant qualifies for refugee status.

(Handbook paras. 140-163, in particular 151-161)

Exclusion clauses

These must always be interpreted *restrictively*.

Ask the following questions:

- Is the crime political or non-political?

- Is it serious?
- Is it a crime?

In this case, the crime is obviously both *non-political* and *serious*.

The next step is to strike a balance between the nature of the offence presumed to have been committed, and the degree of persecution feared. The gravity of the offence must outweigh the persecution feared if there is to be exclusion. In evaluating the offence, one must have regard to all the circumstances, including mitigating and aggravating circumstances.

Here, it appears that the crime was committed in order to escape persecution. With this in mind, and weighing the offence versus the persecution, the exclusion clause probably does not apply. Would it be different if the violence had been gratuitous? (*Handbook paras. 156, 158*)

Case E

This case again raises issues of inclusion and exclusion.

- Inclusion**
- Does he fear persecution or prosecution? (*see Handbook paras. 56-60*)
 - Fifteen years may be considered appropriate punishment for the crime (prosecution) but summary execution may be seen as persecution. In this case the punishment would appear excessive and linked to the applicant's political views. It could be concluded that he has a well-founded fear of persecution and qualifies as a refugee.

The question of illegal departure could also be raised (*see remarks under Case B*).

- Exclusion**
- In general see remarks under Case D.

In this case, the crime could well be classified as political. The exclusion clause would not apply (*see Handbook para. 152*).

- The crime is obviously *serious*. If it were considered to be non-political, one would pass to the next stage which would be the balancing test. On the one hand the character of the applicant and all the relevant factors surrounding the crime would have to be assessed (background, motives, lack of intention to take life, etc.). Against these would be weighed the likely consequences of return (here it is death).
- In this difficult task of balancing the consequences of a return and the nature of the act, the balance may be even. Should such be the case, the *benefit of doubt* must prevail and the applicant should not be excluded from refugee status.

Case F

Chapter 2

Procedures

The case of Mrs. X raises the following questions:

- Whether the Protection Officer was trained in interviewing applicants for refugee status.
- The Protection Officer's level of experience.
- The use and choice of an interpreter. (Remember that it is always preferable, although sometimes very difficult, to have an interpreter who is not a refugee, and is not a national of the applicant's country of origin).
- The adequacy of the Protection Officer's telex. In this case it does not contain

enough information for an informed decision to be reached. More relevant information is needed, listed in chronological order;

- Whether to appeal against a decision. Appeals should not be rejected merely because new facts are not presented. Appeal systems exist because of the serious consequences of wrong decisions. An appeal is in order in Mrs. X's case.
- Who should review an appeal? An appeal should always be reviewed by a person or persons other than the original decision-maker(s).

Case G

The first observation is that the existing procedure in Atlantis is a good one, and provides all the necessary safeguards. Rather than undertaking revisions which will lower those standards considerably, and put bona fide asylum-seekers at risk, the authorities should be encouraged to increase the resources in their system. Experience has shown that an increase in staffing is cost effective when compared with the financial assistance costs of excessively long determination processes.

Comments on specific aspects of the new legislation.

Clause (1) on time limits should be challenged. The Executive Committees Conclusion No.15 (XXX) on Refugees without an Asylum Country states specifically in para (i) that "while asylum-seekers may be required to submit their asylum request within a certain minimum time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration".

Clause (2)

(a) is not complete. Asylum-seekers can only be sent back to a "country of first asylum" in certain circumstances. The fact that the country concerned respects the principle of non-refoulement is not enough. In particular, there must be prior agreement by the authorities to re-admit the person; the applicant should have access to determination procedures; be ensured humanitarian treatment, and be assisted in identifying a suitable long-term solution.

Clause (2)

(b) should define clearly "unfounded or abusive." While it is normal that there should be provisions in case of manifestly unfounded or abusive claims, a clear definition of terms is essential. Executive Committee Conclusion No.30 (XXXIV) (para (d)) states that "unfounded or abusive" means "clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum".

Clause (3)

on decisions on whether cases are admissible should be deleted or amended. Conclusion No.30 clearly states that the decision in these matters is of a substantive character. The decision as to whether a case is manifestly unfounded or abusive should be taken by the authority normally competent to determine refugee status (para. (e)(ii)). Negative decisions should be reviewed before rejection at the frontier or forcible removal from the territory (para. (e)(iii)).

Clause (4)

concerning the role of the Immigration Officer, could create problems for the RDB. According to this clause, the Board will need to make decisions on the basis of his interview report, whereas it would make a better decision if it could ask its own questions, and could judge for itself whether the claimant has presented a credible account. Assessing credibility is very important, and it is best done through a personal interview. Executive Committee Conclusion No.30 (para.(e)(i)) thus states:

"as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status."

Clause (5) on disbanding the Refugee Appeals Board should be deleted. Paragraph (e)(vi) of Conclusion No.8 (XXVIII) on the Determination of Refugee Status states clearly that applicants who are not recognised "should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system". An appeal on the merits of the case, not just on questions of law, is absolutely essential in any refugee determination procedure.

Glossary

Note: The following are terms used throughout this text. Your knowledge of them is essential to learning this subject.

Assistance Material support, including food, shelter, health care, and economic and social services such as the rights to receive travel documents, employment, and public education.

Cessation clauses Clauses in the 1951 Convention that defines the conditions under which a refugee ceases to be a refugee - that is, when international protection is no longer necessary or justified. Examples are persons who have voluntarily returned to their country of origin, or who have acquired a new nationality.

Convention refugee One whose status is recognised by a State that is a party to the 1951 Convention and/or 1967 Protocol.

Exclusion clauses Clauses in the 1951 Convention that define those conditions under which persons otherwise having the characteristics of refugees are excluded from refugee status. Examples are persons already receiving United Nations protection or assistance, persons not considered to be in need of international protection, and persons not deserving of international protection.

Humanitarian status Refugees granted the right of non-refoulement, as they would be in danger if returned to their country of origin due to generalised violence, foreign aggression, internal conflicts, violation of human rights, or other circumstances which have seriously disturbed the public order. Such refugees are not entitled the same economic and social benefits as Convention refugees.

Inclusion clauses Clauses in the 1951 Convention that define the criteria that a person must satisfy in order to be recognised as a refugee.

Mandate

refugee One who is recognised as a refugee by virtue of the statutory authority of the High Commissioner for Refugees, regardless of whether or not the State of asylum is party to the 1951 Convention or 1967 Protocol. Mandate refugees are entitled to basic human rights and protection against refoulement, but are not granted all the same entitlements as Convention refugees.

NGO Non-Government Organization.

Persecution There is no strict definition of persecution, but you can infer that any threat to life or freedom on account of race, religion, nationality, political opinion, or membership in a social group, or other serious violation of human rights, constitutes persecution.

Prima facie refugee
(*Refugee in absence of evidence to the contrary*)

A "group determination" of refugee status, granted in cases when entire groups of people are affected by circumstances serious enough to qualify each individual in that group as a refugee. Prima facie status is granted in cases when there is too little time to consider each individual case.

Protection Recognition of legal civil rights.

Refoulement The expulsion or return of a refugee to the frontiers of territories where his or her life or freedom are threatened on account of race, religion, nationality, political opinion, or membership in a social group.

Refugee A person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership in a particular social group, is outside his or her country of nationality and is unable or unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former residence, is unable, or owing to a well-founded fear is unwilling to return to it. The source of this definition is the Convention relating to the Status of Refugees adopted in 1951, and the Protocol relating to the Status of Refugees, adopted in 1967.

Refugee

"sur place" A person who is not a refugee when he or she left the country of origin, but because of circumstances arising during the person's absence, becomes a refugee at a later date.

UNRWA United Nations Relief and Works Agency for Palestinian Refugees in the Near East.

*Well-founded
fear of*

persecution Fear founded on the applicant's state of mind and subjective response to his or her objective situation; for example, a man might fear for his safety (a subjective response) because of the conditions in his country of nationality (an objective situation.)

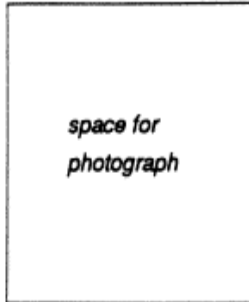
Annexes

Annex 1: UNHCR Eligibility Determination Form

(to be completed by the interviewer)

UNHCR Eligibility Determination Form

(to be completed by interviewer)



Asylum Country (code) _____

Case Number _____

Sequence Number _____

Registration Date _____

Applicant/Family Member

Full Name _____

Recording of Decisions

Decision:	Decision:
Signature & Date	Signature & Date
Decision:	Decision:
Signature & Date	Signature & Date

1. Are you recognized as refugee by local authorities?

Yes No If yes:

Date: _____ Authority: _____ File No. _____

If no: Have you made applications?

Yes No If yes:

Date: _____ Authority: _____ File No. _____

2. Are you recognized as refugee by UNHCR?

Yes No If yes:

Date: _____ Field Office: _____

3. Former countries of asylum

(a) Have you applied for asylum or refugee status in any other country?

Yes No

If so, give details: _____

(b) Was your application decided upon?

Yes No

If not, state reason: _____

(c) Was your application granted? Yes No

4. Are you registered with any other international or national agency: Yes No

If yes, give details: _____

5. Are you registered with Embassy, Consulate or other authority of home country: Yes No

If yes, give details: _____

6. Do you possess any Travel Documents/Identity Papers?

- | | | |
|---|---|--|
| <input type="checkbox"/> National passport | <input type="checkbox"/> Convention Travel Document | <input type="checkbox"/> Certificate of Identity |
| <input type="checkbox"/> Travel Certificate | <input type="checkbox"/> ICRC Travel Document | <input type="checkbox"/> Identity Card |
| <input type="checkbox"/> Driving License | <input type="checkbox"/> No identity or travel papers | <input type="checkbox"/> Other (please specify) |

Please attach photocopy of document(s), and complete details overleaf:

Number	Issued By	Date	Validity

7. On what date did you leave your home country? _____

With the authorization of the authorities? Yes No

Means of transport: _____

Which countries and towns did you transit? _____

Duration of your stay in each place en route: _____

8. Entry into present country of sojourn: _____

(a) Date and place of entry: _____

(b) In what manner did you enter? (Clandestinely, with authorization, did you have a visa or work contract?)
Give details: _____

(c) What kind of document did you travel on? _____

(d) Are you staying legally in the present country of sojourn? Yes No

If yes, specify: (residence permit, tourist visa, refugee status, etc.) _____

Valid until when? _____

9. Why did you leave your home country?

Please explain in detail, describing also any special events and personal experiences, or measures taken against you or members of your family, which caused you to leave your home country. If you have any documentary or other proof, please attach. Use a separate sheet if you need more space.

10. State any political, religious, military, ethnic, or social organization or grouping to which you or any members of your family belong or previously belonged in your home country:

11. Describe *your* (or your family members) activities and responsibilities in any organization mentioned above:

12. Were you ever involved in incident(s) involving physical violence? If so, describe nature of incident(s) and your own involvement: _____

13. Have you ever been arrested or detained?

Yes No

If yes, give reasons date(s) and place(s): _____

14. Have you ever been convicted?

Yes No

If yes:

Period of Imprisonment: _____

Where? _____

Nature of offense and sentence passed: _____

Other details: _____

15. Is military service compulsory in your country?

If yes: Have you been called up for it?

Yes No

Period served: _____ If you were called up, but did not serve, state reason:

16. Do you wish to return to your home country?

Yes No

(a) If not, give reasons: _____

UNHCR Eligibility Determination Form (continued)

(b) Would the authorities of your home country permit you to return there? Yes No

(c) What do you think would happen to you if you were returned to your country and why?

(d) Would you face any particular danger to your physical safety if you were to return? Yes No

If yes, give reasons:

I hereby formally declare that the statements made in this form are, to the best of my knowledge, true, complete and accurate.

Signature of Applicant: _____ Date: _____

police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.

- (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
- (iii) There should be a clearly identified authority - wherever possible a single central authority - with responsibility for examining requests for refugee status and taking a decision in the first instance.
- (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- (v) If the applicant is recognised as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
- (vi) If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
- (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.

(f) *Requested* UNHCR to prepare, after due consideration of the opinions of States parties to the 1951 Convention and the 1967 Protocol, a detailed study on the question of the extra-territorial effect of determination of refugee status in order to enable the Committee to take a considered view on the matter at a subsequent session taking into account the opinion expressed by representatives that the acceptance by a Contracting State of refugee status as determined by other States parties to these instruments would be generally desirable;

(g) *Requested* the Office to consider the possibility of issuing - for the guidance of Governments - a handbook relating to procedures and criteria for determining refugee status and circulating - with due regard to the confidential nature of individual requests and the particular situations involved - significant decisions on the determination of refugee status.

Annex 3: 1979 (Executive Committee - 30th Session)

1979 (Executive Committee - 30th Session)

No. 15 (XXX) REFUGEES WITHOUT AN ASYLUM COUNTRY (*) (26)

The Executive Committee,

Considered that States should be guided by the following considerations:

General principles

(a) States should use their best endeavours to grant asylum to *bona fide* asylum-seekers;

(b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognised principle of non-refoulement;

(c) It is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum;

(d) Decisions by States with regard to the granting of asylum shall be made without discrimination as to race, religion, political opinion, nationality or country of origin;

(e) In the interest of family reunification and for humanitarian reasons, States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted;

Situations involving a large-scale influx of asylum-seekers

(f) In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge. States which because of their geographical situation, or otherwise, are faced with a large-scale influx should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing. Such States should consult with the Office of the United Nations High Commissioner for Refugees as soon as possible to ensure that the persons involved are fully protected, are given emergency assistance, and that durable solutions are sought;

(g) Other States should take appropriate measures individually, jointly or through the Office of the United Nations High Commissioner for Refugees or other international bodies to ensure that the burden of the first asylum country is equitably shared;

Situations involving individual asylum-seekers

(h) An effort should be made to resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria. In elaborating such criteria the following principles should be observed:

(i) The criteria should make it possible to identify in a positive manner the country which is responsible for examining an asylum request and to whose authorities the asylum-seeker should have the possibility of addressing himself;

- (ii) The criteria should be of such a character as to avoid possible disagreement between States as to which of them should be responsible for examining an asylum request and should take into account the duration and nature of any sojourn of the asylum-seeker in other countries;
 - (iii) The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account;
 - (iv) Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connexion or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State;
 - (v) The establishment of criteria should be accompanied by arrangements for regular consultation between concerned Governments for dealing with cases for which no solution has been found and for consultation with the Office of the United Nations High Commissioner for Refugees as appropriate;
 - (vi) Agreements providing for the return by States of persons who have entered their territory from another contracting State in an unlawful manner should be applied in respect of asylum-seekers with due regard to their special situation.
- (i) While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration;
- (j) in line with the recommendation adopted by the Executive Committee at its twenty-eighth session (document A/AC.96/549, paragraph 53(6), (E) (i)), where an asylum-seeker addresses himself in the first instance to a frontier authority the latter should not reject his application without reference to a central authority;
- (k) Where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present asylum country due to fear of persecution or because his physical safety or freedom are endangered, the authorities of the second country should give favourable consideration to his asylum request;
- (l) States should give favourable consideration to accepting, at the request of the Office of the United Nations High Commissioner for Refugees, a limited number of refugees who cannot find asylum in any country;
- (m) States should pay particular attention to the need for avoiding situations in which a refugee loses his right to reside in or to return to his country of asylum without having acquired the possibility of taking up residence in a country other than one where he may have reasons to fear

persecution;

(n) In line with the purpose of paragraphs 6 and 11 of the Schedule to the 1951 Convention, States should continue to extend the validity of or to renew refugee travel documents until the refugee has taken up lawful residence in the territory of another State. A similar practice should as far as possible also be applied in respect of refugees holding a travel document other than that provided for in the 1951 Convention.

Annex 4: 1982 (Executive Committee - 33rd Session)

1982 (Executive Committee - 33rd Session)

No. 28 (XXXIII) FOLLOW-UP ON EARLIER CONCLUSIONS OF THE SUB-COMMITTEE OF THE WHOLE ON INTERNATIONAL PROTECTION ON THE DETERMINATION OF REFUGEE STATUS, INTER ALIA, WITH REFERENCE TO THE ROLE OF UNHCR IN NATIONAL REFUGEE STATUS DETERMINATION PROCEDURES (*) (27)

The Executive Committee,

(a) *Considered* the report of the High Commissioner on the progress made in regard to the determination of refugee status (EC/SCP/22/ Rev.1);

(b) *Noted* with satisfaction that since the twenty-eighth session of the Executive Committee procedures for the determination of refugee status have been established by a further significant number of States Parties to the 1951 Convention and the 1967 Protocol and that these procedures conform to the basic requirements recommended by the Executive Committee at its twenty-eighth session;

(c) *Reiterated* the importance of the establishment of procedures for determining refugee status and urged those States Parties to the 1951 Convention and the 1967 Protocol which had not yet done so to establish such procedures in the near future;

(d) *Recognised* the need for measures to meet the problem of manifestly unfounded or abusive applications for refugee status. A decision that an application is manifestly unfounded or abusive should only be taken by or after reference to the authority competent to determine refugee status. Consideration should be given to the establishment of procedural safeguards to ensure that such decisions are taken only if the application is fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees. In view of its importance, the question of manifestly unfounded or abusive applications for refugee status should be further examined by the Sub-Committee at its next meeting, as a separate item on its agenda and on the basis of a study to be prepared by UNHCR;

(e) *Noted* with satisfaction the participation in various forms of UNHCR in procedures for determining refugee status in a large number of countries and recognised the value of UNHCR thus being given a meaningful role in such procedures.

Annex 5: 1983 (Executive Committee - 34th Session)

1983 (Executive Committee - 34th Session)

No. 30 (XXXIV) THE PROBLEM OF MANIFESTLY UNFOUNDED) OR ABUSIVE APPLICATIONS

FOR REFUGEE STATUS OR ASYLUM (*) (28)

The Executive Committee,

(a) *Recalled* Conclusion No. 8 (XXVIII) adopted at its twenty-eighth session on the Determination of Refugee Status and Conclusion No. 15 (XXX) adopted at its thirtieth session concerning Refugees without an Asylum Country;

(b) *Recalled* Conclusion No. 28 (XXXIII) adopted at its thirty-third session in which the need for measures to meet the problem of manifestly unfounded or abusive applications for refugee status was recognised;

(c) *Noted* that applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria constitute a serious problem in a number of States parties to the 1951 Convention and the 1967 Protocol. Such applications are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees;

(d) *Considered* that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum;

(e) *Recognised* the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees and therefore recommended that:

(i) as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status;

(ii) the manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status; (iii) an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, governments should give favourable consideration to

their establishment. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.(f) *Recognised* that while measures to deal with manifestly unfounded or abusive applications may not resolve the wider problem of large numbers of applications for refugee status, both problems can be mitigated by overall arrangements for speeding up refugee status determination procedures, for example by:

- (i) allocating sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously, and
- (ii) the introduction of measures that would reduce the time required for the completion of the appeals process.

Annex 6: COUNCIL OF EUROPE - Committee of Ministers

RECOMMENDATION No. R (81) 16

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE HARMONISATION OF NATIONAL PROCEDURES RELATING TO ASYLUM

*(Adopted by the Committee of Ministers on 5 November 1981 at the
339th meeting of the Ministers Deputies)*

*The Committee of Ministers, under the terms of Article 15.b of the
Statute of the Council of Europe,*

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Having regard to the Convention relating to the status of refugees of 28 July 1951 and the Protocol relating to the status of refugees of 31 January 1967;

Recalling the liberal and humanitarian attitude of member states of the Council of Europe with regard to asylum seekers and in particular their commitment to the principle of non-refoulement, as evidenced by Resolution (67) 14 on asylum to persons in danger of persecution and the Declaration on Territorial Asylum of 1977;

Having regard to Recommendation 787 (1976) of the Consultative Assembly on harmonisation of eligibility practice;

Bearing in mind the basic requirements on this subject set out by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees;

Taking into consideration also the general principles on the protection of the individual in relation to the acts of administrative authorities set out in Resolution (77) 31;

Desirous to define the guarantees which national procedures for examining asylum requests should offer to applicants and for this purpose to establish common principles,

Recommends the governments of member states to apply the following principles in their law and administrative practice:

1. All asylum requests shall be dealt with objectively and impartially.

2. The decision on an asylum request shall be taken only by a central authority.

3. Clear instructions for dealing with asylum requests with a view to their being forwarded to the central authority shall be given to the authorities responsible for frontier control, as well as to local authorities called upon to deal with such requests. These instructions shall in particular:

- i. draw the attention of the said authorities especially to the obligation to respect the principle of non-refoulement;
- ii. require these authorities to provide the central authority with all possible information with a view to the examination of the request;
- iii. emphasise the need to take into consideration the particular situation in which the asylum seeker finds himself, including, as the case may be, difficulties he might experience in presenting his request.

4. As long as the central authority referred to in paragraph 2 has not taken a decision on the asylum request, the applicant shall be allowed to remain in the territory of the state, unless the competent central authority has established that the request is manifestly based on grounds having no connection with asylum, in particular that it is fraudulent or is related neither to the criteria for the granting of refugee status laid down in Article 1.A(2) of the 1951 Geneva Convention nor to other criteria justifying the granting of asylum.

5. There shall be provision for appeal to a higher administrative authority or to a court of law against the decision on an asylum request. Failing that there shall at least be an effective possibility of having the decision reviewed.

The applicant shall be allowed to remain in the territory while an appeal or review is pending unless facts come to light in the course of the appeal or review procedure which, if they had been known at the time of the initial examination of the request by the central authority, would have led the latter to decide that the request was manifestly based on grounds having no connection with asylum.

6. The applicant shall receive the necessary guidance as to the procedures to be followed and shall be informed of his rights. He shall enjoy the guarantees necessary for presenting his case to the authorities concerned and shall have the right to be heard, when necessary with the assistance of an interpreter; the intervention of a lawyer shall be permitted at an appropriate stage of the procedure, including procedures on an appeal, as well as the possibility to communicate freely with the office of the United Nations High Commissioner for Refugees and to approach a voluntary agency working for refugees.

7. The decision on an asylum request shall be notified to the applicant; in the event of an unfavourable decision, he shall be informed in an appropriate manner of the reasons on which the decision is based and of the possibilities of appeal or review open to him.

8. When the applicant is recognised as a refugee, he shall be issued with documentation certifying his refugee status.

9. The confidential character of the asylum request, of declarations made by the applicant and of the other elements in his file shall be protected.

10. States shall seek through appropriate means to co-operate with the office of the United Nations High Commissioner for Refugees with regard to matters concerning asylum requests.

Endnotes

1. Formulation as contained in the 1984 Cartagena Declaration (Section III, para.3).

- not to be sent back to the country of origin
- other rights set out in the 1951 Convention or 1967 Protocol, or, in countries which have not signed these instruments, rights accorded by general international law
- to benefit from protection and assistance measures if necessary
- to be assisted in finding a durable solution (voluntary repatriation, local integration, or resettlement)

To not return the asylum seeker to the country of origin, or another country where he or she may be in danger.

b. States which become parties to them.

The OAU extends the definition of refugee to every person who has to leave his or her country because of external aggression, foreign domination or occupation, or events which seriously disrupt the public order.

1. directly to the government
2. directly to UNHCR
3. through United Nations Development Programme
4. through a non-government organisation

Generally not; legal experts may be needed for complex questions.

1. well-founded fear
2. persecution
3. reasons of race, religion, nationality, membership of a particular social group or political opinion
4. outside the country of origin

Knowledge of the context of the application is essential to judge the validity of the application.

Persons who leave their country solely to improve their economic situation, and not due to fear of persecution on the basis of the reasons in the definition, are not refugees but economic migrants.

A refugee "sur place" is a person who was not a refugee when leaving the country of origin, but who becomes one due to developments in the country of origin or because of actions while outside the country.

When the stateless person is outside of the country for reasons other than those of the definition.

When the person has voluntarily re-availed himself or herself of the protection of

- the country of nationality, or
- has voluntarily re-acquired his or her nationality after losing it
- has permanently resettled with a new nationality
- has voluntarily repatriated
- can no longer refuse to avail himself or herself of the protection of his or her country because the circumstances which led to being recognized as a refugee no longer exist.

(NOTE: exceptions may be applied to this last rule in the case of persons having suffered severe persecution in the past)

- persons already receiving UN protection or assistance
- persons who have the rights of nationals within the country of asylum
- certain classes of non-political criminals

Yes.

1. Please note that cross-cultural aspects linked to the attitudes and behavior of applicants are analyzed in a separate training module, devoted to interviewing techniques.

If proof cannot be produced, and the applicant's account appears credible, always give the benefit of the doubt.

Administration and judicial system vary from one State to another, making a standard system impossible.

Clear instructions about how to deal with cases that may come within their jurisdiction.

Only when the applicant has been refused refugee status and has exhausted the appeal process.

No, it must be a different person.

No, the guidelines are essentially the same.

- create a climate of confidence
- encourage the applicant to prepare a detailed account
- provide a lot of detail in the interview report

- seek an experts advice on the childs maturity
- appoint a representative for the child in the procedure - obtain the wishes of the parents if possible
- be liberal in the application of the benefit of the doubt

* CONCLUSION ENDORSED BY THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME UPON THE RECOMMENDATION OF THE SUB-COMMITTEE OF THE WHOLE ON INTERNATIONAL PROTECTION OF REFUGEES.

* CONCLUSION ENDORSED BY THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONERS PROGRAMME UPON THE RECOMMENDATION OF THE SUB-COMMITTEE OF THE WHOLE ON INTERNATIONAL PROTECTION OF REFUGEES.

* CONCLUSION ENDORSED BY THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONERS PROGRAMME UPON THE RECOMMENDATION OF THE SUB-COMMITTEE OF THE WHOLE ON INTERNATIONAL PROTECTION OF REFUGEES.

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